Aboriginal Peoples and the Justice System

Royal Commission
on Aboriginal Peoples

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Report of the National Round Table on Aboriginal Justice Issues

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Preface

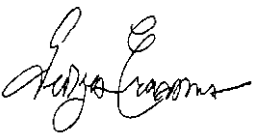
The Royal Commission on Aboriginal Peoples has undertaken to host a series of National Round Tables on selected themes. The Round Tables bring together academics, practitioners, political leaders and community leaders with knowledge and expertise on the selected themes in order to assist the Commission in the preparation of recommendations for the final report.

The National Round Tables all have a similar format. We invite certain experts or leading-edge thinkers to produce papers on a series of questions that we intend to ask participants to consider. (The questions participants were asked to address are set out in the Round Table Program in an appendix to this report.) In the course of panel presentations, round table discussions and plenary sessions, participants have the opportunity to put forward their views and recommendations as they relate to the questions. A rapporteur is asked to write a report based on the proceedings of the round table setting out what was said, along with any recommendations or consensus that may have been reached by participants.

The published proceedings of the National Round Tables will help to inform the general public about the issues addressed there. It is anticipated that publication of the round table proceedings will prompt further consideration of the ideas and debate captured in the reports and encourage Canadians to come forward at the public hearings or to make written submissions with further thoughts and recommendations.

We are deeply indebted to the authors of the discussion papers on justice issues that are a part of this Round Table proceedings report, to participants for their helpful and insightful advice, and to the rapporteur, James C. MacPherson, Dean of Osgoode Hall Law School, whose report synthesizes the proceedings of the National Round Table on Aboriginal Justice Issues and the advice we received from participants.

This report of the proceedings is intended to stimulate further dialogue and positive changes in policy. Your views and recommendations on this important issue are welcome. We invite you to write to us at the address set out elsewhere in this document and to appear before us when we hold public hearings in your area.

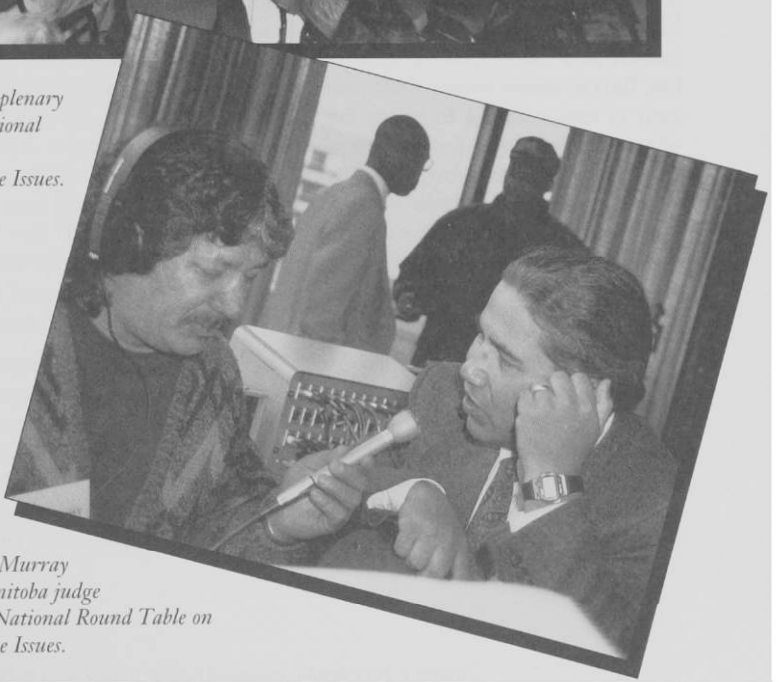


René Dussault, j.c.a.
Co-Chair

Georges Erasmus
Co-Chair

Report from the Round Table Rapporteur

Participants at a plenary session of the National Round Table on Aboriginal Justice Issues.



The Honourable Murray Sinclair, the Manitoba judge who chaired the National Round Table on Aboriginal Justice Issues.

Report from the Round Table Rapporteur

*James C. MacPherson**

I was invited by the Royal Commission on Aboriginal Peoples to attend, and be the Rapporteur for, the National Round Table on Aboriginal Justice Issues held in Ottawa on November 25-27, 1992. The Round Table brought together the seven Commissioners, their senior research staff and more than 100 invited guests to discuss the full range of justice issues as they relate to Canada's Aboriginal peoples. Among the invited guests who actually attended were the Minister of Justice for Canada, two provincial attorneys general, several other politicians, the national leaders of the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada, the Native Women's Association of Canada, and the Métis National Council, and leading judges, lawyers, police officers, professors and others – all with an interest and experience in, and a commitment to, Aboriginal justice issues.

Before attending the Round Table I read or re-read some of the analysis and all of the recommendations contained in many of the earlier federal and provincial commission, inquiry and task force reports on Aboriginal justice matters, including the Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989); the Aboriginal Justice Inquiry of Manitoba (1991); the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (1991); the Reports of the Saskatchewan Indian and Metis Justice

* Dean, Osgoode Hall Law School, York University, North York, Ontario.

Review Committee (1992); the federal Task Force on Federally Sentenced Women (1991); and the Law Reform Commission of Canada's Report on Aboriginal Peoples and Criminal Justice (1991).

In addition to these government studies, I also read all of the papers commissioned for the Round Table by the Royal Commission and reproduced in the next section of this volume.

I attended all the sessions of the Round Table and listened to the authors present their papers, to the various panel presentations on pilot projects, to the participants in the daily round tables, to the major speeches delivered by the Hon. Kim Campbell, Minister of Justice, and Chief Justice Robert Yazzie of the Navajo Nation in the United States, and to the questions and answers and discussion, which were an important feature of most of the sessions of the Round Table and involved most of those attending it.

I was asked to perform two tasks as Rapporteur at the Round Table: first, to identify the major themes of the three days of proceedings; and second, based on these themes, to make suggestions to the Commission on its future research agenda in the justice domain. I attempted to perform these tasks in my oral report at the conclusion of the Round Table on November 27. I will now attempt to perform the first task again in the more formal setting of this written report.

It is not easy to identify a limited number of themes from a conference that lasted three days and included twelve lengthy and scholarly papers, perhaps three dozen formal presentations and literally hundreds of individual oral interventions. Nevertheless, at the risk of omitting some important ones and perhaps misstating others, I would identify nine major themes from all the material I read and the presentations and discussions I heard.

1. Current Justice System a Failure for Aboriginal Peoples

The first theme I would identify was a particularly powerful one. Moreover, it may well be a unanimous one. The current Canadian justice system, especially the criminal justice system, has failed the Aboriginal people of Canada – Indian, Inuit and Métis, on-reserve and off-reserve, urban and rural, in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world view between European Canadians and Aboriginal peoples with respect to such elemental issues as the substantive content of justice and the process for achieving justice. With respect to the former, the European Canadian definition of justice is usually centred on the word 'fairness', whereas the Aboriginal definition usually highlights a different constellation of words like peace, balance and, especially, harmony.

With respect to process, it seems clear from the papers and discussions at the Round Table that the linchpin of the current justice system (criminal and civil),

namely the adversarial system, does not reflect the way Aboriginal people think about or resolve problems. The most vivid demonstration of this difference is found in James Dumont's paper:

Zone of Conflict in the Justice Arena

Aboriginal Response to the Law	Expectations of Legal System
Regular teaching of community values by elders and others respected in the community;	Everyone under obligation to obey set laws as determined by superior state authority;
warning and counselling of particular offenders by leaders or by councils representing the community as a whole;	society reserves the right to protect itself from individual who threatens to harm its members or its property;
mediation and negotiations by elders, community members, by clan leaders, aimed at resolving disputes and reconciling offenders with the victims of the misconduct;	retributive punishment: justice requires that a man should suffer because of, and in proportion to, his moral wrongdoing. Punishment set by legislation; judgement imposed;
payment of compensation by the offenders (or their clan) to their victims or victims' kin, even in cases as serious as murder;	the perpetrator is the object of sentencing; retributive incarceration and rehabilitation are means to deter and punish offenders;
in court, a front that appears silent, uncommunicative, unresponsive and withdrawn – based on a non-interference and learn-by-observation preference in behaviour and maintenance of personal dignity and integrity;	expected behaviour in court is that defendant must give appearance of being willing to confront his/her situation and voice admittance to error and show remorse and willingness to change; must express desired motivation for change;
reluctance to testify for or against others or him/herself based on a general avoidance of confrontation and imposition of opinion or testimony;	obligated to testify and defend oneself in order to get at the facts based on an adversarial mode of dealing with legal challenges;
often pleads guilty on basis of honesty or non-confrontational acquiescence.	expected to plead "not guilty" on the basis that one is "innocent until proven guilty."

2. Current Justice System Structurally Unsound for Aboriginal Peoples

There was a widespread view among participants at the Round Table that the current justice system, especially the criminal justice system, is too centralized, too legalistic, too formal and too removed from the (Aboriginal) communities it is supposed to serve.

An important reason for this perception, according to Leroy Littlebear, Professor of Native American Studies at the University of Lethbridge, is the attitude of Aboriginal people to control mechanisms. He said that every society has mechanisms of social control to resolve its disputes. Aboriginal people have internalized these control mechanisms. Consequently, they have no need for elaborate and complex external control mechanisms, including substantial and highly visible police, judicial and corrections systems.

A second illustration of how Aboriginal people view the link between justice systems and their communities was provided by Joyce Mitchell, a Mohawk who serves as a part-time Justice of the Peace at Kahnawake. When she became a judge there was no prescribed set of courses she could take as there is, for example, for federally appointed judges. Judge Mitchell conducted her own investigations and enroled herself in a variety of courses in Canada and the United States. Some of the courses she chose were counselling, mediation and suicide intervention. This personal educational choice by one Aboriginal judge provides a fascinating contrast with the education that Canadian governments routinely provide for new judicial appointees – e.g., federally appointed judges are provided with courses in, *inter alia*, evidence, procedure, computer use, conduct of a trial and even conduct of a complex trial. It is obvious that Judge Mitchell's instinctive view of her justice system is one that is more personalized and more community-oriented than the prevalent view of most professionals in the mainstream justice system.

The participants in the Round Table also acknowledged that the very different perceptions about the nature and role of the justice system held by Aboriginal and non-Aboriginal people give rise to a great deal of dissatisfaction with the current system on the part of Aboriginal people and communities. In the words of the Hon. Kim Campbell,

> It has not been easy for me to accept that, for some, our laws and our courts are viewed as instruments of oppression, rather than as mechanisms for the preservation of justice... I have come to learn that the administration of justice, despite the good intentions of most of the people who work within it, has often failed to meet the needs of Aboriginal people who, all too frequently, come into contact with our courts as offenders, as victims and as communities... I have learned that Aboriginal people are too often alienated by, and from, the existing justice system, and that many feel powerless even to participate in

> determining what will happen to people from their communities who have found themselves in conflict with the law.

3. Time for Major Reform is Now

There was a powerful and unanimous perception at the Round Table that now is the time for major reforms to be made in the justice system. Although reform in virtually every domain relevant to Canadian Aboriginal people – education, employment, health care, housing, social services – is needed, there was a feeling that reform of the justice system, although not more urgent than reform in these other domains, is certainly more attainable. The reason for this perception is the existence of many extensive and outstanding reports in several jurisdictions dealing with Aboriginal justice issues. These reports contain comprehensive analyses of virtually all aspects of Aboriginal justice. Moreover, they also contain a tremendous number of useful recommendations for reform. To underline this latter point, when I asked Myrtle Bush of the Commission staff to send me just the recommendations of the commissions, inquiries and task forces mentioned earlier in this paper, she faxed me 121 pages of recommendations! I believe that there would be unanimous agreement from participants at the Round Table with Justice Minister Campbell's observation that "The most important insight of all is that the time has come to get beyond talk. We have an obligation to take the things we have learned and to build upon them."

4. No Serious Jurisdictional Impediments to Reform

One of the more promising themes of the Round Table was the absence of potential jurisdictional impediments to reform in the justice area. There are, of course, many potential constitutional issues – the tension between federal jurisdiction under section 91(27) of the *Constitution Act, 1867* to make laws relating to criminal law and procedure and provincial jurisdiction under section 92(14) of the same Act to make laws relating to the administration of justice; the problems that the judicature provisions of the 1867 Act might pose for creative Aboriginal court structures; and some of the constraints on legislative choices and administrative policies that might flow from some of the rights protected in the *Canadian Charter of Rights and Freedoms*.

However, most of the participants at the Round Table appeared to agree with Patrick Macklem's analysis in his paper dealing with the relationship between the current constitutional framework in the justice field and new Aboriginal justice systems. Professor Macklem stated,

> In my view, neither the current distribution of legislative authority nor the judicature provisions pose any serious impediment to the establishment of a separate or parallel system of justice for Aboriginal people, although federal-provincial co-operation may be required to vest Aboriginal courts with jurisdiction over certain subject matters.

I reached a similar conclusion in a paper I wrote a year ago dealing with constitutional authority in the field of Indian education. In my *Report on Tradition and Education: Towards a Vision of our Future* (a comprehensive study prepared by the Assembly of First Nations) I concluded,

> In a federation, constitutional law is never simple, straightforward and clear. Nevertheless, the basic principles of constitutional interpretation in the Canadian federation point, for the most part, in the same direction. The word I use to capture that direction is 'flexibility'. The Canadian courts have been very restrained in exercising their role as umpire of the Canadian federal system. Although the doctrines of exclusivity and colourability have posed some constraints on the federal and provincial governments, these constraints are but an undertow against the dominant tide of judicial interpretation. That tide is moved along by the presumption of constitutionality, the aspect doctrine and the general laws/incidental application doctrine, all of which tend to result in both federal and provincial laws being upheld. Moreover, if there are two laws, one federal and the other provincial, dealing with the same subject matter the very restrained judicial definition of conflict has tended, in almost every case, to permit both laws to survive and operate.
>
> What all of this means for jurisdiction in the domain of Indian education is this: the general principles of interpretation of the Canadian constitution establish a theoretical starting point of broad and substantial jurisdiction for both the federal and provincial governments in the field of Indian education.

It may well be, as the Hon. Jim McCrae, Attorney General of Manitoba, pointed out as a discussant at one of the round tables, that intergovernmental agreements, sometimes involving federal, provincial and Aboriginal governments, will be required to implement certain reforms. However, there seemed to be consensus that there were no serious jurisdictional impediments that would prevent such agreements or other forms of either unilateral or co-operative action.

5. Justice and Gender

One of the strongest themes that emerged in the commissioned papers and in the three days of discussions at the Round Table was concern for the place of women in the current justice system. Whereas much of the discussion about the Aboriginal concept of justice focused on such values as reconciliation, restitution, rehabilitation and, more broadly, on balance, harmony and peace, there was a strong emphasis from some of the Aboriginal women authors and discussants on the values of protection and safety. In the blunt words of Teressa Nahanee in her paper,

> Without equal participation, consultation and funding, Aboriginal women's organizations today would reject the establishment of an

> Aboriginal parallel system of justice. There are three driving forces for this premise. First, women are enraged with the justice pilot projects which allow Aboriginal male sex offenders to roam free of punishment in Aboriginal communities after conviction for violent offences against Aboriginal women and children. Second, Aboriginal women oppose lenient sentencing for Aboriginal male sex offenders whose victims are women and children. Third, Aboriginal women and their organizations have hailed as a victory the unanimous ruling by the Federal Court of Appeal on August 20, 1992, which declared that it was a violation of freedom of expression to consult mainly men on Aboriginal policies affecting all Aboriginal peoples.

This passage not only articulates a perception of the problem – namely, the need for any justice system, including a separate Aboriginal system, to protect women (and children) from male violence; it also argues strongly that the solution to the problem must be rooted in women's knowledge, experience and full participation in the process of developing and implementing appropriate reforms. The assertion that Aboriginal women have in effect a dual role in the justice system – as victims, but also as important designers of solutions – was a consistent refrain throughout the Round Table.

6. Separate Aboriginal Justice Systems

This was perhaps the dominant theme of the presentations and discussions at the Round Table. However, although there were elements of agreement or consensus on some aspects of the topic, on other elements there was no agreement.

What *was* agreed was that if there is to be a separate Aboriginal justice system it will not be a single system like the regimes in place at the federal, provincial and territorial levels at the present time. Rather it will be an individuated and plural system devised and implemented at the local community level. The reasons for this are both historical and contemporary.

The historical reason is the great diversity of the Aboriginal peoples of Canada. In the words of John Giokas in his paper,

> Aboriginal people inhabit all regions of Canada, with 84 per cent living west of Quebec. Aboriginal cultures are often as or more different from each other as those of the countries of Europe are from each other. There are over 50 Aboriginal languages in Canada falling within 11 different linguistic groups. Moreover, Aboriginal peoples have different historical experiences of contact with non-Aboriginal settlers, and have different legal and constitutional relationships with the federal, provincial and territorial governments, depending on that history of contact and their status under Canadian law.

> In short, the notion of Aboriginal 'people' as such appears to be an illusory abstraction, as does the notion of a singular and global 'Aboriginal' solution to problems in an area as broad as justice administration.

The contemporary reason for the conclusion that there would not be a single separate Aboriginal justice system is the simple fact that there are already in Canada a large number of *de facto*, if not *de jure*, separate Aboriginal systems. Consequently, as Tony Mandamin said in his paper,

> Aboriginal justice initiatives have commenced in different communities across Canada. It would be unrealistic and indeed counter productive to expect these community based initiatives to give way to a single Aboriginal justice system....
>
> While community-based Aboriginal systems may be extended to neighbouring communities, it is not feasible to extend a community-based Aboriginal justice system across cultural, geographic and political lines. It is unlikely that a single community-based initiative would extend across Canada to become a single system for all Aboriginal people.

On the crucial question of whether there should be separate Aboriginal justice systems in Canada, there was no consensus at the Round Table. I detected at least three different strands of analysis and argument. The first advocated removing Aboriginal people from the current justice system as much and as quickly as possible, establishing separate and fully independent Aboriginal governments, and allowing these governments to establish their own justice systems. The second view was that there should be radical reform of the current justice system and that the experience of developing and implementing these reforms might (or might not) lead to the introduction of separate Aboriginal justice systems. The third view was that reform should be encouraged in an eclectic way and at a grassroots, profoundly local level, with no preconceptions about where they might lead.

Having said that there did not appear to be consensus on whether there should be separate Aboriginal justice systems, I would also say that there did seem to be widespread agreement that the *theoretical* arguments in favour of such systems were convincing and that the theoretical arguments against them were not convincing. The papers prepared by Mary Ellen Turpel and Jeremy Webber were particularly persuasive on these two points respectively. They pointed out that the Canadian justice system is already filled with diversity, in terms of both substantive law and process. Moreover, diversity flowing from democracy is one of the highest values in a country like Canada that is a federal democracy. The implication of this in the domain of Aboriginal justice was stated clearly by Jeremy Webber in his paper:

> The creation of an Aboriginal justice system would be the result of a community decision, obtained through mechanisms whose legitimacy for Aboriginal people is equivalent to that of non-Aboriginal governmental institutions for non-Aboriginal people. In those circumstances, surely there is no reason for non-Aboriginal Canadians to override the decision.

7. Reserve-Only Reforms Not Appropriate

There was a concern at the Round Table that too much of the Commission's attention might be concentrated on justice reforms for people living on-reserve. This concern is not surprising given that almost all the discussion of reform is grounded in the notion of community and that reserves are the most readily identifiable and, for non-Aboriginals, the most easily comprehended communities. However, many Inuit, Métis and urban and off-reserve Aboriginal people spoke eloquently about their conceptions of community and contended that reform to the current justice system, or the creation of separate Aboriginal justice systems, were consistent with those conceptions. Some examples of reforms along these lines mentioned by participants at the Round Table were territorially based justice systems in Aboriginal communities that are not reserves (e.g., Inuit communities or isolated Métis communities in northern Manitoba) and justice systems not grounded principally in territorial considerations (e.g., minority Aboriginal communities in major urban centres like Vancouver, Regina, Winnipeg and Toronto).

8. Current Initiatives Deserve to be Documented and Analyzed

There was a strong feeling at the Round Table that there have been many good initiatives and developments in the justice domain throughout Canada. Therefore, the Commission does not need to re-invent the wheel or start from first principles. This observation is probably more apposite in the justice domain than in others (education, employment, health, housing, etc.) because there have been so many comprehensive and high-quality reports in so many different jurisdictions in recent years. The consequence of the observation, in the eyes of the participants at the Round Table, is that the Commission should work hard to identify and analyze many of the better initiatives and then assess whether and how they could be developed and implemented on a broader and, especially, more permanent basis. In the words of Frank McKay, President of the First Nations Chiefs of Police Association, "It is time to turn pilot projects into permanent ones."

9. Process of Reform – Consensual

There was clear consensus that reforms relating to justice for Aboriginal peoples within the current system or a new Aboriginal justice system could not be

imposed by governments acting alone, no matter how clear their jurisdiction might be, how benevolent their intentions, and even how laudable their actual reform proposals. Rather the process of reform must be a consensual one. It must come from conversations and negotiations between governments and Aboriginal peoples. In the wise words of Justice Cawsey, who chaired the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, "Everything that has worked for natives has come from natives."

Discussion Papers

Zebedee Nungak (Chairman, Inuit Justice Task Force, vice president of Makivik Corporation) presented a discussion paper on fundamental values, norms and concepts of justice.

Cynthia Desmeules-Bertolin, a Métis lawyer from Alberta who participated in the Round Table.

Aboriginal Justice Inquiries, Task Forces and Commissions: An Update

*Research Directorate, Royal Commission on Aboriginal Peoples**

This paper provides an update on several recent commissions of inquiry into the relationship between Aboriginal people and the Canadian justice system. Each inquiry is discussed briefly in terms of the reasons for which it was established; its objectives; key recommendations and findings; and comments of government and Aboriginal spokespersons on the current status of the recommendations and the extent of their implementation. The paper concludes with an analysis of the factors contributing to the success or failure of attempts by governments and Aboriginal organizations to implement recommendations.

The eight studies reviewed here were initiated by federal and provincial governments, sometimes in conjunction with Aboriginal organizations, in response to a growing recognition that the existing criminal justice system has failed to meet the needs of Aboriginal people. More than thirty government-sponsored justice studies have been undertaken since 1967, when the Canadian Corrections Association released its report entitled *Indians and the Law*.[1] This proliferation of studies has led to numerous recommendations, many of which have not been implemented. The fact that these recommendations have been repeated by several inquiries reinforces an awareness of the inadequacies of the existing system; however it also reveals a need for increased emphasis on implementation.

The scope of each inquiry varied; considered together, however, the recommendations include a broad range of reforms to all components of the justice system.

* This update was prepared by Carole Blackburn.

The majority of these reports concentrate their recommendations on reforms that could be achieved within the existing justice system. Separate Aboriginal justice systems were advocated by the Manitoba Aboriginal Justice Inquiry[2] and the report of the Law Reform Commission on *Aboriginal Peoples and Criminal Justice*.[3]

In some cases the findings of the investigations reviewed here include commentary on the social circumstances that contribute to the disproportionate rate at which Aboriginal people encounter the criminal justice system. All the inquiries concur that Aboriginal people who encounter the justice system are confronted with both overt and systemic discrimination and that this discrimination is one reason why many Aboriginal persons have not received due justice.

The extent to which recommendations have been implemented is a matter for concern; certainly the release of an inquiry report has not necessarily signified the beginning of change and amelioration of the problem. In some cases, implementation has not occurred because of the absence of political will or the difficulties involved in securing agreement among all parties affected, whether government or Aboriginal. In cases where political will has existed, initiatives may have been impeded by lengthy bureaucratic processes and/or funding constraints.[4] Priority seems to have been given to recommendations that were relatively easy to implement and to reforms that did not require extensive restructuring, transfers of control or consensus of all parties. Critics of such reforms point out that Aboriginal peoples' disproportionate contact with the justice system is a product of their marginal socio-economic position in relation to the dominant society. It is argued that these social issues must be addressed before significant change can occur in the justice realm.

Provincial Inquiries, Task Forces and Commissions

Nova Scotia: The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989

Impetus and objectives

On the evening on May 28, 1971, a seventeen-year-old youth, Sandford Seale, was killed in Wentworth Park in Sydney, Nova Scotia. Donald Marshall, Jr., a Micmac, was convicted of Seale's murder and sentenced to life imprisonment. Upon reinvestigation eleven years later it was confirmed that Marshall was in fact innocent. He was released on parole and later acquitted by the Supreme Court of Nova Scotia (Appeal Division) in May 1983. Roy Ebsary was charged with the killing of Seale and convicted of manslaughter following three trials. He was sentenced to three years in prison. In 1986, the Court of Appeal reduced his sentence to one year.[5]

The principal purpose of the Royal Commission on the Donald Marshall, Jr. Prosecution was "to determine why Donald Marshall, Jr. was wrongfully convicted and to make recommendations to ensure that such a miscarriage of justice does not happen again".[6] The scope of the Commission thus encompassed an examination of one specific case within the broader context of the administration of criminal justice within Nova Scotia.

Findings and recommendations

Among the more general findings were the following:

- The criminal justice system failed Donald Marshall, Jr. at every point from his arrest and conviction up to and beyond his acquittal by the Supreme Court of Nova Scotia.
- This miscarriage of justice could have been prevented if those involved had displayed professional and/or competent behaviour in discharging their responsibilities.
- The fact that Marshall was Aboriginal contributed to the miscarriage of justice.

The Commission made 82 recommendations, including the following:

Dealing with the wrongfully convicted

- The federal and provincial governments should establish an independent review mechanism "to facilitate the reinvestigation of alleged cases of wrongful conviction".

Visible minorities in the criminal justice system

- The Departments of the Attorney General and Solicitor General should adopt and publicize a Policy on Race Relations committed to employment equity, the elimination of inequalities based on race, and the reduction of racial tensions between these Departments and the communities with which they interact.

Nova Scotia Micmac and the criminal justice system

- A community-controlled Native Criminal Court, a Native Justice Institute and a tripartite forum should be established to mediate and resolve outstanding issues between the Micmac and the provincial and federal governments.

Administration of criminal justice

- The *Criminal Code* should be amended to require the broadest possible disclosure to the accused of the facts of the case against him/her.

Police and policing

- The Police Commission should "be provided with sufficient resources to enable it to fulfil properly the leadership, training, information and assessment roles that constitute its mandate".

- The RCMP and municipal police departments should recruit more members of visible minority groups.
- Police departments should develop outreach programs and liaison roles to provide members of visible minorities with greater access to and more positive interaction with the police.

Government response/implementation

In its initial response to the report of the Marshall Inquiry, the provincial government indicated that none of the recommendations would be rejected. The government has since accepted all recommendations within its jurisdiction, endorsed those that fall outside its jurisdiction, and accepted the intent of several others that the government believes could be implemented in a manner different than that proposed by the Commissioners.[7] The intent of major recommendations concerning Micmacs and the criminal justice system, such as the Native Criminal Court and the Native Justice Institute, has been accepted, but the government has not indicated how it intends to implement these proposals.

One recommendation that has received much attention is the tripartite forum, which has been recognized by the Nova Scotia government "as the cornerstone for addressing the issues raised by other recommendations dealing with Native Justice Issues".[8] The tripartite forum is composed of representatives from the federal government, the provincial government, and three Aboriginal organizations, the Union of Nova Scotia Indians, the Native Council of Nova Scotia and the Confederacy of Mainland Mi'Kmaqs. The Native Women's Association of Nova Scotia was not originally invited to participate in the forum; although they have sent representatives as observers, the Native Women's Association continues to be largely uninvolved.

The agenda of the tripartite forum is not limited to justice and issues deriving from the Marshall Inquiry. Given the Marshall Inquiry, however, it currently includes sub-committees on Justice, Policing, and Human Rights, which are considering and acting upon recommendations within these subject areas. The Justice Sub-committee has recently approved a preliminary court workers project and the adult diversion project at Shubenacadie, which is now formally under way. It has also approved, in principle, the Community Legal Information Facilitators project. The Community Legal Information Facilitators will serve as an interface between an individual and the appropriate segment of the justice system. Negotiations are also under way concerning the establishment of a Micmac regional police force in Cape Breton.[9]

Aboriginal response

The Marshall Inquiry and the Tripartite Forum have been generally well received by the Aboriginal community. It has been reported that the Marshall Inquiry and its report have forced the provincial and federal governments to consider

Aboriginal justice initiatives. Concerns have been raised, however, with respect to the extent to which the report and initiatives stemming from it address more fundamental issues, such as racism and poverty.[10] It is felt that cosmetic changes to the justice system will not eliminate or redress the socio-economic conditions that bring many Aboriginal people into conflict with that system.[11]

The Confederacy of Mainland Mi'Kmaqs, one of the three Aboriginal organizations invited to participate in the tripartite forum, withdrew from the process. The Confederacy objected to the inclusion of the Native Council of Nova Scotia, which advocates for non-status and registered off-reserve Aboriginal people in Nova Scotia. The Confederacy felt that this inclusion reflected a continuation of the historical assimilationist policies. They returned to the forum after being advised that they would not be able to partake of any of the tripartite initiatives unless they were participants in the forum.[12]

The Native Council of Nova Scotia reported that they are not encouraged by the level of commitment to the tripartite forum demonstrated by the federal government. Their spokesperson indicated that although the federal government promised the involvement of senior ministerial levels of government on the forum, this promise has not been fulfilled. It was also suggested that the federal government has not committed a sum of money to the specific initiatives proposed by the tripartite forum, although it has committed funding to the process itself. Funding initiatives then involves bargaining and seeking funds from various departments, and this creates delays.[13]

Manitoba: Aboriginal Justice Inquiry, 1991

Impetus and objectives

The Aboriginal Justice Inquiry was established by the government of Manitoba on April 13, 1988, in response to two incidents. The first was the 1987 trial of two men for the murder of Helen Betty Osborne, a trial that came a full 16 years after the murder. The second incident involved the death of John Joseph Harper in March 1988. Harper, the executive director of the Island Lake Tribal Council, died following an encounter with a City of Winnipeg police officer. The next day the police department exonerated the officer despite many unanswered questions.

The mandate of the Manitoba Inquiry was "to inquire into, and make findings about, the state of conditions with respect to Aboriginal people in the justice system in Manitoba" and to suggest ways in which these conditions might be improved. The Inquiry was asked to consider all aspects of the J. J. Harper and Helen Betty Osborne cases and to make any additional recommendations that it felt appropriate with respect to those cases. The Commission's scope included all components of the justice system, including policing, courts and correctional services.

Findings and recommendations

The Commissioners of the Aboriginal Justice Inquiry found that the justice system was insensitive and inaccessible and had failed the Aboriginal people of Manitoba on a "massive scale". One of the most important findings of the Inquiry was that incremental changes to the justice system would be insufficient to address the current problems. According to the Commissioners, the establishment of separate Aboriginal justice systems would be the only appropriate response to the systemic problems inherent in the existing system as it relates to Aboriginal communities.

The Inquiry made 293 recommendations in total, including the following:

Aboriginal justice systems

- Federal and provincial governments should recognize the right of Aboriginal people to establish their own justice systems as part of their inherent right of self-government. It was also recommended that these governments assist Aboriginal people to establish Aboriginal justice systems according to the wishes of the communities.

Court reform

- The establishment of proper court facilities in Aboriginal communities and improvements to circuit court services to ensure that all the matters in the docket are dealt with in one visit.

Alternatives to incarceration

- Increased use of sentencing alternatives for Aboriginal people; and
- amendments to the *Criminal Code* to provide that cultural factors be taken into account in sentencing.

Jails

- The provision of education, trades training and counselling programs, especially those dealing with alcohol abuse, family violence and anger management, for Aboriginal inmates in all Manitoba correctional institutions; Aboriginal people should also be guaranteed the right to culturally appropriate spiritual services in correctional institutions.

Aboriginal women

- The establishment by Aboriginal leaders of a local government portfolio for women and children, with responsibility for the development of educational and support programs in the areas of spousal and child abuse; and
- shelters and safe homes for abused women and children in Aboriginal communities and urban centres.

Child welfare

- Development by the province of a Métis child and family service agency with jurisdiction over Métis and non-status children throughout Manitoba, in conjunction with the Manitoba Métis Federation.

Young offenders

- Amendments to the *Young Offenders Act* to allow judges to commit youths to the care of a child and family service agency instead of incarceration or custody; and
- development of crime prevention programs, open custody facilities, and wilderness camps for Aboriginal youths in and near Aboriginal communities throughout the province.

Policing

- An emphasis on a community policing approach in Aboriginal communities;
- establishment of employment equity programs to achieve greater Aboriginal representation; and
- strengthening and review of cross-cultural education programs.

Strategy for Action

- The establishment of an Aboriginal Justice Commission, the mandate of which would include "monitoring and assisting government implementation of the recommendations of this Inquiry".

Government response/implementation[14]

The recommendations of the Aboriginal Justice Inquiry have received no significant implementation. The Manitoba government recently proposed a number of working groups to discuss the possible implementation of those recommendations accepted by the government. The consultation process, as set out by the government, would be headed by the Aboriginal Justice Committee of Cabinet, which is chaired by the Minister of Northern and Native Affairs. The committee would also include the ministers of Justice, Family Services, Natural Resources and Culture and Heritage, as well as a representative of the Native Affairs Secretariat. The Justice department established three working groups dealing separately with courts, corrections and policing issues. Other working groups were established by Northern and Native Affairs, Natural Resources, and Family Services. The Manitoba Metis Federation, the Assembly of Manitoba Chiefs, the Indigenous Women's Collective and the Aboriginal Council of Winnipeg were said to have been invited to participate in and to co-chair these justice working groups. Police representatives from Winnipeg, Brandon, and the RCMP were also invited to participate in the police working group.

Aboriginal response

Aboriginal organizations have expressed dissatisfaction with both the degree of acceptance received by the Aboriginal Justice Inquiry report and the provincial government's current working group strategy. It has been emphasized that the government's invitation to Aboriginal organizations to participate in and co-chair the working groups came only as a result of political action on the part of

Aboriginal organizations after the working group strategy was announced.[15] The initial terms of the invitations would have involved Aboriginal representatives in consultation rather than decision making. Involving Aboriginal people in a consultative capacity only could enable the provincial government to take decisions without full approval or consensus of the Aboriginal organizations. Nor would this arrangement give Aboriginal organizations any opportunity for equal and effective participation. The Manitoba Métis Federation, the Assembly of Manitoba Chiefs, and the Indigenous Women's Collective have indicated to the provincial government that they will participate in the proposed working groups only if they can be assured of an equal footing. Equal footing requires access to resources, information and paid expertise.[16] The three Aboriginal organizations recently submitted a joint proposal to the provincial government, according to which they agreed to participate in the working groups if assisted with funds to establish an Aboriginal Justice Secretariat. This Secretariat would "act as a collective resource for the organizations to use in preparing for and supporting on-going participation in the joint Working Groups with the Province".[17]

Objections were also raised that the working groups would be status-blind; that is, Métis, status, non-status, on- and off-reserve issues would be dealt with in the same context. The Manitoba Métis Federation objected to the working groups because they appeared to be directed only to First Nations and on-reserve concerns, with insufficient attention being paid to issues specific to the Métis.[18] The Assembly of Manitoba Chiefs, which represents Status Indians in the province of Manitoba, fears that discussion of issues of specific importance to its constituency in a non-specific context diminishes the importance of these issues.[19] This does not imply a dispute between these two organizations. It is the opinion of the Assembly of Manitoba Chiefs that the problem lies in the provincial government's "failure to recognize that not all issues are common and that some are most effectively addressed in more direct discussions".[20]

Alberta: The Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, 1991

Impetus and objectives

The Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta was not established as a result of a specific case but in response to more general concerns about the impact of the criminal justice system on Aboriginal peoples. These concerns included the disproportionate number of Aboriginal people in correctional institutions and the delivery of criminal justice services to Aboriginal people by non-Aboriginals. The purpose of the Task Force, according to its own terms of reference, was

> to complete a review of the criminal justice system in Alberta as it relates to Indian and Metis people and to provide a report for the

> Solicitor General of Canada, the Attorney General of Alberta and the Solicitor General of Alberta, which identifies any problems and proposes solutions to ensure the Indian and Metis people receive fair, just and equitable treatment at all stages of the criminal justice process in Alberta.[21]

The scope of the inquiry encompassed the criminal justice system only and its effects upon Indian and Métis people in urban, rural, reserve and isolated areas. The inquiry was also to examine why men and women were affected differentially by the system.

Findings and recommendations

The Task Force found that the criminal justice system in Alberta had become too centralized, too legalistic, and too removed from the communities it is intended to serve. Furthermore, Aboriginal communities are unable to identify with this kind of system, and the system itself cannot achieve its intended objectives. Another broad but significant finding concerned the absence of communication between Aboriginal peoples and all levels of service providers within the justice system; this lack of communication constitutes one of the most serious flaws in the justice system.

The Task Force made a total of 340 recommendations in the areas of policing, legal aid, the courts, judges, prosecutors and lawyers, corrections, and the Native Counselling Services of Alberta. Among the recurring themes in all these areas were the following:

- the need for increased communication/liaison among and between Aboriginal communities or organizations, police agencies and government departments;
- the need for increased and enhanced cross-cultural training for staff within the criminal justice system;
- the need to increase the number of Aboriginal people employed within the criminal justice system;
- the need to develop custodial alternatives and options for remanded Aboriginal accused and sentenced Aboriginal offenders;
- the need to increase elder involvement in the criminal justice system;
- the need to expand the availability of alcohol and drug treatment programs;
- the need to expand Aboriginal community-based resources and Aboriginal community involvement in criminal justice system problem identification and resolution and program development and delivery; and
- the need to increase public education regarding Aboriginal issues and to increase Aboriginal education regarding the criminal justice system.[22]

Government response/implementation

After the Task Force report was tabled in the Alberta legislature, the Steering Committee, which had overseen the Task Force and was still in place, was asked

to provide a report to the Alberta Attorney General and Solicitor General on an implementation strategy for the recommendations. Accordingly, the Alberta government contracted the services of retired RCMP Assistant Commissioner Gordon Greig to undertake consultations with Aboriginal organizations and individuals regarding implementation. A Working Committee was also struck to oversee the consultations and assist in the final report. All Aboriginal organizations or communities that had participated in the original Task Force were advised of the consultations and invited to participate. These consultations began in August 1991. Mr. Greig was accompanied by representatives of the Indian Association of Alberta and the Metis Nation of Alberta on the majority of consultations with their constituencies. A report by Mr. Greig summarizing his consultations was recently completed and transmitted to the provincial and federal Solicitors General, the provincial Attorney General, the federal Minister of Justice and the provincial Minister Responsible for Native Affairs. Official responses to this report are yet to be formulated.

The Solicitor General of Alberta notes that several initiatives were in place prior to the Task Force and its report, and some of these are now in the process of enhancement. Cross-cultural training for personnel within the justice system, particularly in the police forces, is one of these. While initiatives such as this have been or are in the process of being implemented, other recommendations requiring more complicated and systemic alterations are on hold pending governments' responses to the report.[23]

Aboriginal response

The report of the Task Force was well received by the Aboriginal community in Alberta. Current impressions of events since the release of the Task Force are varied. The Indian Association of Alberta reported that because of the lack of adequate financial resources, a proper consultation with the Aboriginal community was not possible. The Indian Association originally submitted a proposal to the Steering Committee to allow for

1. a representative of the Indian Association to accompany Mr. Greig in his consultations with First Nations;
2. an Indian Association representative, with legal and or criminal justice training to attend and participate in all meetings of the Working Group;
3. after the consultations between Mr. Greig and the Aboriginal community, a meeting be conducted among all the First Nations in each of the treaty areas in the province; and
4. an all-Chiefs Assembly of the First Nations of Treaty 6, 7 and 8 to occur after the individual Treaty area meetings had taken place.[24]

This recommended consultation process has not been completed. The Indian Association was represented during the consultation process by an Aboriginal RCMP officer who was seconded to the Association. This officer accompanied

Mr. Greig to meetings within the Aboriginal community and reported to the Association on the results of these meetings. The recommended All-Chiefs Assembly for all First Nations of Treaties 6, 7 and 8 within Alberta has not occurred.

The Metis Nation of Alberta reported that they were satisfied with their own involvement in the consultation process. The Metis Nation has also indicated that they are satisfied with progress made to date in moving toward implementation of recommendations and have expressed confidence that the political will to resolve the Aboriginal criminal justice dilemma does exist.[25]

Saskatchewan: Indian Justice Review Committee and Metis Justice Review Committee, 1992

Impetus and objectives

The Saskatchewan Department of Justice, the Government of Canada and the Federation of Saskatchewan Indian Nations agreed to establish a Saskatchewan Indian Justice Review Committee for the period June 7, 1991 to December 7, 1991. Its objective was not to address past wrongs, but rather "to examine ways to make changes within our present criminal justice system, and to encourage expansion of the positive changes already under way, resulting in a system of justice that is more fair and equitable to Indian people".[26]

The Committee recognized both the increasing number of similar studies and the lack of any significant progress in implementing those studies' recommendations. For these reasons, it adopted a short time frame in which to identify practical solutions and initiatives that could be implemented immediately or within a reasonable period.

The Saskatchewan Metis Justice Review Committee was established to specifically look at the needs of the Métis community in the justice system. The review committee's mandate was to facilitate consultation on the criminal justice system as it relates to Saskatchewan Metis people and communities and to prepare recommendations relating to the delivery of criminal justice services to these communities.[27] More particularly, recommendations were to be directed to the development and operation of practical, community-based initiatives to enhance justice services.

Findings and recommendations

The recommendations made in the two reports were identical, except for three recommendations specifically concerning Indian people. Recommendations were directed primarily to making the criminal justice system more responsive to Indian and Métis people. They included the following:

Youth justice
- Increasing the level of Aboriginal access to and participation in the formulation and delivery of young offender programming, especially mediation/diversion programming; and
- encouraging the participation of elders in young offender program delivery, particularly cultural and spiritual teaching and counselling.

Policing
- That police services implement employment equity programs to achieve Aboriginal participation equivalent to the Aboriginal proportion of the population; and
- the establishment of an Aboriginal liaison/cultural relations officer position within the Saskatchewan Police Commission.

Legal representation
- The establishment by federal and provincial government departments, in collaboration with Indian and Métis organizations, of a province-wide Aboriginal court worker program.

Sentencing alternatives
- The establishment of culturally appropriate mediation/diversion/reconciliation programs that embody a holistic approach to offender rehabilitation.

Court services
- That greater use be made of Aboriginal justices of the peace, especially in the North, to hear matters like bail applications, motor vehicle offences and minor criminal offences.

Corrections
- Introductory and continuing cross-cultural and race relations sensitivity training for federal and provincial corrections employees; and
- that federally sentenced Aboriginal women no longer serve their sentences at the Prison for Women in Kingston.

Government response/implementation

The Saskatchewan Department of Justice has indicated that they have and continue to support the recommendations of the Indian and Metis Justice Review Committee reports.[28] Recommendations are being addressed through several internal and external bilateral and tripartite processes.

Tripartite discussions have taken place between the Saskatchewan Department of Justice, the federal Justice department, and the Metis Society of Saskatchewan on a Metis Society proposal to establish the recommended Peacemaker Circles in communities where Métis are in the majority. These Circles are intended to assure Métis communities an active voice in judicial decision making. Tripartite negotiations are also continuing between the province, the federal Justice

department and Solicitor General, and the Federation of Saskatchewan Indian Nations. Discussions are focusing mainly on Indian policing options, cross-cultural training and employment equity, and an Indian Justice of the Peace pilot project proposal by the Meadow Lake Tribal Council. Bilateral consultations between the province and the Metis Society of Saskatchewan are also under way. These discussions are concerned primarily with the creation of a non-profit public authority, affiliated with the Metis Society, to deliver youth, family and justice services.

Several recommendations have been implemented. A data collection system has been introduced to provide information comparing Aboriginal and non-Aboriginal contact with the justice system. The Regina Police Service has implemented a comprehensive employment equity plan to increase the representation of Aboriginal people on its civilian and non-civilian staff. Revised cross-cultural training for provincial government social services staff was launched in September 1992. The Pine Grove Correctional Centre for Women, in consultation with Aboriginal service providers and agencies, has developed new programs for female offenders, including the Women's Healing Circle program on physical, sexual and substance abuse; educational upgrading and job training; and work initiatives. The recommended review of the effectiveness of legal aid services has begun, as has the recommended investigation into allegations of racism in provincial correctional centres. La Ronge has been established as a Queen's Bench Circuit point for the purpose of hearing criminal trials.

Other initiatives are reportedly in progress, including a feasibility study on the reinstatement of a province-wide Aboriginal court worker program, with an emphasis on meeting the needs of Aboriginal communities.[79] Community-based policing services in urban, rural, northern and reserve contexts are in the process of enhancement. Progress is also being made on the North Battleford mediation/diversion pilot project for adult offenders, and the province has begun a review of eligibility criteria for access to mediation and diversion programs. A review of the Provincial Court in the north of the province is also under way; its purpose is to alleviate the time pressures experienced in northern settings.

Aboriginal response

The Federation of Saskatchewan Indian Nations (FSIN) has reported satisfaction with the report of the Indian Justice Review Committee, given its limited scope in dealing only with Treaty people in conflict with the present justice system.[80] The spokesperson for the FSIN pointed out that recommendations "fall far short of the FSIN Justice Commission's stated objective of a First Nations controlled justice system. Such a system would include First Nations law-making powers in our jurisdiction, on-reserve First Nations controlled services, on-reserve Tribal Courts, and a First Nations controlled system of sanc-

tions (i.e., corrections facilities)". Although the FSIN is optimistic about the future, they do not expect large-scale, immediate changes as a result of this report. Recommendations and initiatives are currently being addressed as they occur and not according to an implementation strategy. The FSIN would like to see such a strategy in place that would include the governing bodies of Treaty peoples in Saskatchewan. FSIN reports that they currently lack the resources to participate effectively in the planning and implementation process. This process would ultimately involve a negotiated transfer of control over the administration of justice.

A positive result of the Indian Justice Review Committee has been the establishment of a working relationship between the three levels of government. The governments are committed to change and are treating the report as offering viable options for change.

The Metis Society of Saskatchewan (MSS) is in the process of determining how the report of the Metis Justice Review Committee can best serve the Métis." At their annual meeting in October 1992, the MSS held a one-day justice conference at which they solicited feedback from participants on how they thought the report could be best implemented in their communities and how people could take ownership of the problems in their communities, including responsibility for solving them. The justice conference was also attended by the provincial Minister of Justice, who affirmed the provincial government's commitment to Aboriginal justice issues. Although this commitment is positive and encouraging, many initiatives and recommendations have been delayed because of lack of resources on the part of the province. It is expected that these delays will continue.

One initiative implemented as a result of the Metis Justice Review Committee report is the Sentencing Circles. Two Circles have been established in northern Métis communities, and more are projected. The Circles are intended to make the judgement process more sensitive to the needs of the community. The Circles sit with the Circuit Court Judge for Northern Saskatchewan and are composed of elders and other respected members of the communities. Because the Circles involve community members sitting in judgement on other community members, they are expected to deter criminal behaviour more effectively than externally imposed sanctions.

Federal Inquiries, Task Forces and Commissions

Indian and Northern Affairs Canada: Indian Policing Policy Review, 1990

Impetus and objectives

The Indian Policing Policy Review Task Force was established in 1986 in response to several concerns. A rapid increase in the level of crime in Aboriginal communities had caused considerable concern among Aboriginal leaders and community members, who questioned the adequacy and sensitivity of existing policing services. Federal, provincial and territorial governments were concerned as well with the increasing costs associated with policing on reserves. Finally, the lack of a co-ordinated policy framework in the area of on-reserve policing made it difficult to respond to these problems. The purpose of the Task Force was

- to develop a clear statement of federal policy objectives in relation to on-reserve Indian policing;
- to clarify the obligations of various federal departments and agencies;
- to examine the issue of the future responsibilities of federal, provincial, territorial and Indian governments; and
- to make recommendations regarding
  (a) resources,
  (b) standards of service, and
  (c) delivery systems for policing services to Indian people living on reserves.[32]

Findings

In the area of programs and needs, the Task Force concluded that consultation and negotiation were required on

- access to general policing services;
- access to culturally sensitive policing services;
- provision of services meeting mutually acceptable regional standards; and
- the jurisdiction of constables, in terms of both location and authority.

In the area of Indian participation, the Task Force found that

- greater participation of Indian communities in the governing structures for on-reserve policing should be ensured; and
- policing and the administration of justice should be included in self-government negotiations;

With respect to government roles and responsibilities, the Task Force concluded that

- federal financial support for on-reserve policing services that meet mutually agreed criteria should continue;
- the federal government should be consistent in its level of financial participation when applying the new policy; and
- the new federal policy should be introduced and implemented in phases.

Government response

The federal government responded to the Task Force report by establishing a new First Nations Policing Policy, which is to be administered by the newly initiated Aboriginal Policing Directorate. Responsibility for the First Nations Policing Program was transferred from Indian Affairs and Northern Development to the Solicitor General as of April 1, 1992.[33]

The new policy is intended to improve the level and quality of policing services for Aboriginal communities through the establishment of tripartite policing agreements worked out between the Aboriginal community, the provincial or territorial government involved, and the federal government. The agreements are to be designed according to the needs of the Aboriginal communities and may include such elements as purpose, legal and constitutional guarantees, mandate of police service, police governance authority, management of the police service, staffing and training, supplies and equipment, finance and administration, term of agreement, and provisions for the amendment or termination of the agreement. Aboriginal communities must initiate these negotiations by submitting a proposal to the federal Solicitor General and the provincial Attorney General and Solicitor General.

The policy is accompanied by a federal budget of $116.8 million over five years. The federal government will assume 52 per cent of the government contribution to policing initiatives, while the provincial and territorial governments will be expected to contribute 48 per cent. The ability of the Aboriginal community to contribute to the financing of the policing service will be discussed during the tripartite negotiations.

The newness of this policy makes it impossible to comment on the success or failure of its implementation. The current situation in Manitoba, however, illustrates how the policy and the opportunities it provides may fail to be realized in cases where dialogue between the three parties is impeded. According to a spokesperson for the Assembly of Manitoba Chiefs (AMC), the provincial government has suggested that it will not participate in the First Nations Policing Policy program unless the AMC agrees to participate in the working groups described earlier.[34] Obviously policing initiatives can be supported by the new policy only with the full co-operation of each party.

Correctional Service Canada: Task Force on Federally Sentenced Women, 1991

Impetus and objectives

The Task Force on Federally Sentenced Women was established in March 1989 by the Commissioner of Correctional Service Canada, in collaboration with the Canadian Association of Elizabeth Fry Societies. The report cites several factors that contributed to the need for the Task Force: feminist analyses of the problems of federally sentenced women had gained credibility; Aboriginal people were demanding more control over justice for their people; a series of Charter challenges related to the inequality of services for male and female inmates; recommendations by the Daubney Committee to close the Prison for Women at Kingston; the adoption of the mission of Correctional Service Canada, which embodies a commitment to ensuring that the needs of federally sentenced women are met; the Task Force on Community and Institutional Programs, which called for improved programming for federally sentenced women; and recent tragedies at the Prison for Women, including suicides and other manifestations of general unrest.[35]

The mandate of the Task Force required members to examine the correctional management of federally sentenced women, from the commencement of sentence to the date of warrant expiry, and to develop a policy and a plan to guide and direct this process in a manner that is responsive to the unique and special needs of this group.

Findings and recommendations

The Task Force found that the needs of Aboriginal women are not being met by the Prison for Women. Culturally appropriate programs for Aboriginal women are limited; access to elders and shamans is difficult because these individuals are not given the same status as chaplains; existing medical and psychological services are delivered mainly by white males; and for most Aboriginal women incarceration in the Prison for Women entails long distance separation from home communities.

The Task Force's recommendations included the following:

- the establishment of five regional women's facilities across Canada;
- the creation of an Aboriginal Healing Lodge, in a prairie location, where federally sentenced Aboriginal women would serve all or part of their sentences; and
- a Community Release Strategy, whereby there would be more community release centres for women across Canada.

Government response/implementation

The recommendation concerning the Aboriginal Women's Healing Lodge has been accepted and implementation is under way.[16] The site selected for the lodge is on the Nekaneet reserve, at Maple Creek, Saskatchewan. The Healing Lodge Planning Committee is composed of 17 individuals representing government and non-government partners, including Aboriginal women's groups, Nekaneet Band members, citizens/officials from the Town of Maple Creek, and staff from Correctional Service Canada. The majority of Committee members are Aboriginal. A Circle of eight elders, including five women and the Chief of the Nekaneet Band, provides spiritual support to the group. All meetings are opened and closed with prayers and Aboriginal ceremonies, and evening teachings by the elders ensure that the process remains culturally sensitive. The Committee has engaged actively in public education within the communities of Maple Creek and Nekaneet, including meetings with local agencies, band members, service clubs, and public officials, and local support is reported to be very positive.

Elders from the Healing Lodge Committee and the Nekaneet reserve have chosen the specific location for the Lodge; this location is now undergoing technical assessment. At present the primary objective of the Healing Lodge Committee is the development and completion of the operational plan. Proposed in the plan will be a dual accountability management model, according to which the Healing Lodge will have an equal relationship to Correctional Service Canada and to a body representative of the Aboriginal community. The process of recruiting a designer for the Lodge is under way. The designer or design firm must be willing to work with the Healing Lodge Committee, must possess good knowledge of Aboriginal culture and spiritual traditions and be willing to enhance this knowledge by participating in ceremonies as required, and must have experience in working with Aboriginal Peoples and women's groups and expertise in developing culturally sensitive Aboriginal structures. Other work being completed by the Committee includes developing a unique and culturally sensitive recruitment process and job description for the individuals who will operate the Healing Lodge. The Committee is also consulting actively with Aboriginal women in prison to ensure that their viewpoints are reflected in the plans. Overall, implementation of the Healing Lodge is reported to be achieving a balance between speed and attention to Aboriginal concerns.

Aboriginal response

The Native Women's Association of Canada (NWAC) has been closely involved in the Healing Lodge initiative since its inception and report that they are satisfied with progress to date on its implementation. Correctional Service Canada initially invited the Native Women's Association to participate on the Task Force in an advisory capacity, as recommended by the Task Force on

Federally Sentenced Women. The Native Women's Association insisted, however, that they be involved at a decision-making level. These initial negotiations also resulted in the commitment to establish a Healing Lodge Committee over which Aboriginal women could have major influence.[37] Members of the NWAC are currently involved in work on the operational plan, including establishing design criteria, advertising for an architect, and operational planning for staffing and programming. The projected completion date for the Healing Lodge is September 1994, and the project is reported to be on track.[38]

Law Reform Commission of Canada: Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice, 1991

Impetus and objectives

The Law Reform Commission's study was initiated in June 1990, when the Minister of Justice asked the Commission to study the *Criminal Code* and related statutes and "to examine the extent to which those laws ensure that Aboriginal persons and persons who are members of cultural or religious minorities have equal access to justice and are treated equitably and with respect".[39] The Commission divided the work into an Aboriginal justice review component and a cultural or religious minorities justice review component. One of the goals of the study was to propose reforms that would secure formal equality in access to justice; at the same time, however, the Commission attempted to identify when equal treatment before the law necessitated recognition and incorporation of cultural distinctiveness within the criminal justice system.

Findings and recommendations

The Commission found that the present system fails Aboriginal people and contributes to their difficulties. The system is seen as remote, both in terms of physical separation and in terms of conceptual and cultural distance. The Commission proposed two parallel paths to reform. The first is short-term and does not address the more fundamental issues; it is directed to reforming the current system. The second is long-term and envisions Aboriginal communities opting for the creation of a variety of justice systems, all of which may be described as Aboriginal justice systems. Specific recommendations included the following:

Aboriginal justice systems

- Aboriginal communities that are willing and able should have the authority to establish Aboriginal justice systems.

Criminal justice system recruitment and training

- The establishment of programs intended to bring more Aboriginal persons into all aspects of the criminal justice system, including police, lawyers, judges, probation officers and correctional officials.

Overcoming language difficulties and cultural barriers
- Recognition of the right of Aboriginal people to use their own languages in all court proceedings, as well as supporting legislation to ensure that interpreters are provided to any suspect needing assistance.

Increasing community involvement with the justice system
- Consideration of the establishment of 'peacemakers' as a formal aspect of the justice system to mediate disputes.

Assessing treaty rights in criminal courts
- The development of "clear and public policies concerning the preferred methods for determining Aboriginal and treaty rights".

The police
- The police should be "more involved in and accountable to the communities they serve"; and
- community-based external policing or autonomous Aboriginal police forces should be facilitated wherever they are desired.

Sentencing
- The use of alternatives to imprisonment whenever possible.

Corrections
- Equal recognition of Aboriginal spirituality within correctional institutions should be secured by legislation, including granting Aboriginal elders status and freedom equal to that granted to prison chaplains.

Ensuring progress
- The establishment of an Aboriginal Justice Institute with "a broad mandate to deal with any matters relating to Aboriginal persons in the criminal justice system".

Government response/implementation

There has been no direct implementation of any of the recommendations made in the Law Reform Commission Report. The Law Reform Commission itself was dissolved after the last federal budget. Recent federal initiatives in Aboriginal justice do include the Aboriginal Justice Directorate, which was established as of April 1, 1992. The Directorate has been described as an indirect response to the Law Reform Commission report and will work in conjunction with the Solicitor General of Canada and the Secretary of State.[30]

The Directorate administers a discretionary contribution fund called the Aboriginal Justice Fund. This fund will provide money for the "development of programs and services, training and public legal education projects, the establishment of a resource centre function, cross-cultural training, consultations undertaken by national Aboriginal organizations, as well as research studies

related to Aboriginal justice issues".[41] Proposals for pilot projects must be submitted by the Aboriginal communities to the Directorate, where they will undergo a departmental review before they can be approved. Projects must "fall within the existing constitutional framework and the justice system as a whole and must support stated federal policy objectives" in order to be considered. The program has been initiated only recently, and no projects are under way.

Conclusion

The information presented in the body of this paper is organized according to individual inquiries and the circumstances surrounding the implementation of their recommendations. A comparison of the relative progress made in each case reveals several common themes with respect to recommendations that are most likely to be implemented successfully, as well as those that are likely to encounter difficulties in implementation. It is important to understand the nature of the progress that has occurred, as this contributes to a greater appreciation of why many other recommendations have not been implemented. The following list provides a general summary of recommendations that have been implemented or whose implementation is under way:

- cross-cultural and race-relations training programs;
- affirmative action and employment equity programs;
- service reviews, e.g., the review of legal aid and the northern provincial courts in Saskatchewan;
- feasibility studies, e.g., the court worker feasibility study in Saskatchewan;
- Aboriginal liaison services in police forces;
- culturally appropriate programs for Aboriginal inmates;
- community pilot projects, e.g., the Adult Diversion project at Shubenacadie in Nova Scotia and the Sentencing Circles in Northern Saskatchewan; and
- the Healing Lodge for federally sentenced Aboriginal women.

With the exception of the Healing Lodge, these initiatives reflect an 'evolutionary' or incremental approach to change; that is, they are directed to reforming aspects of the existing system while leaving the structure of that system intact.[42] Cross-cultural training and affirmative action programs are internal reforms that can be undertaken independently by government departments or law enforcement agencies. The same can be said for feasibility studies and program reviews, which are not, in fact, reforms in themselves. The police have been the focus of the majority of recommendations made in these and other inquiries[43] and have responded by being particularly active in the initiation of cross-cultural training initiatives, affirmative action programs designed to increase Aboriginal recruitment, and Aboriginal liaison committees or positions. These initiatives promote awareness of Aboriginal issues and allow for greater Aboriginal input but do not change the structure of police forces. It should be noted that in some

cases race relations training courses have been in existence for several years but have been enhanced or intensified following the release of an inquiry report. The fact that some programs existed before inquiries recommended their establishment raises doubts about their effectiveness.

Community pilot projects, such as the Adult Diversion project at Shubenacadie, Nova Scotia, and the Sentencing Circles in Saskatchewan are also meeting with some success. These are more extensive reforms; their implementation requires a degree of political will and an established dialogue between governments and Aboriginal communities. These initiatives reflect a measure of shared control and administration in the application of Aboriginal concepts of justice; they are also easily administered, small-scale projects, however, whose continued existence may depend on external funding with externally established criteria. Proposals for community projects submitted to the Aboriginal Justice Fund, for example, will be judged according to standards set by the federal government and must be consistent with federal policy objectives.[44]

Effectiveness of Reform

Although reforms aimed at improving existing conditions are worthwhile and indicative of a degree of goodwill, they are not unanimously accepted as the long-term solution. Aboriginal people are frequently critical of the utility of moderate reforms, particularly when they result only in superficial change to existing systems. Much of the progress to date in implementing recommendations has been geared toward indigenization of the existing justice system; that is, increasing the involvement of Aboriginal people as employees, administrators and advisers within a relatively unchanged structure. Reforms have also been directed to creating services, such as Native court workers, to assist Aboriginal people when they encounter and pass through the system.[45] It has been argued, however, that this approach will not prevent Aboriginal people from coming into conflict with the justice system at the current disproportionate rate because it does not address the underlying causes of this situation. The current system treats crime and the administration of justice in isolation from other issues; in this respect it conflicts with the more holistic world view of Aboriginal peoples. Many believe that major social and economic reforms are necessary before significant change can occur in Aboriginal peoples' experience with the justice system.

These arguments underlie the dissatisfaction expressed by the Manitoba Metis Federation about current inaction on the recommendations of the Aboriginal Justice Inquiry concerning the establishment of a Métis Child and Family Service Agency.[46] The Metis Federation believes that this is one of the Inquiry's most important recommendations because it is preventive in intent. Provincially managed child welfare programs have too often been part of the life experience of many individuals who are incarcerated as adults. The Metis Federation believes that Métis control over child welfare is one of the most effective steps

that can be taken to reduce the number of individuals who will ultimately come into conflict with the law because it addresses one of the underlying causes of this conflict. This initiative would address the low self-esteem and experiences of alienation frequently reported by individuals represented in criminal proceedings and ultimately in the population of the province's penal institutions.

Aboriginal women's groups have also expressed concern about both the effectiveness and the validity of community reforms. They feel that the current process for discussing initiatives and planning reform is insufficiently democratic because it does not include women's organizations as equal participants in defining and directing reform. It is also their concern that some reforms favoured by both Aboriginal and non-Aboriginal leaders will actually worsen conditions now facing many Aboriginal women and children in their communities.[47]

Obstacles to Implementation: Process and Participation

The fact remains that apart from the modest reforms summarized above, most recommendations made by these inquiries have not been addressed. Implementation of recommendations may be impeded for a number of reasons, none of which are mutually exclusive. Implementation is notably absent in the case of recommendations that would require significant restructuring, transfers of control, and agreement by three levels of government. Certainly, recommendations that are structurally complex and comprehensive require time and resources and in these respects will be difficult to implement. In other cases, initiatives may be accepted in principle by all parties but are delayed at the level of intergovernmental negotiations. Implementation of recommendations that involve significant relinquishment of control by governments will be particularly difficult, if not impossible, to achieve in the absence of political will. Although political will is a key consideration, however, the expression of this will must be accompanied by effective implementation strategies if even moderate reforms are to be realized.

One of the most important conclusions to be drawn from this paper is that successful implementation will not be achieved in the absence of an equal and effective negotiating structure. In cases where a political commitment to act is made, successful implementation depends upon effective communication between the parties involved and equal participation by Aboriginal people in the process. It is evident that Aboriginal organizations often feel excluded from the implementation process[48] or vulnerable in terms of negotiating priorities because they do not possess the resources to participate in the negotiating processes on an equal footing with governments.[49] The balance of power remains one in which Aboriginal organizations are dependent upon government funding and resources to support change. Governments are able to control the agendas and the distribution of resources, while Aboriginal organizations may be forced to choose between participating on one level or forfeiting whatever process is in place. This control does not necessarily reflect an absence of goodwill or resist-

ance to reform on the part of governments; it does, however, reflect a relationship, previously taken for granted, that will exert itself in the absence of explicit efforts to overcome it.

Progress to date in implementing the Aboriginal Women's Healing Lodge in Saskatchewan is attributable at least in part to the ability of all parties to participate effectively. The Native Women's Association of Canada successfully negotiated equal and effective participation in this initiative, as well as on the Task Force on Federally Sentenced Women itself, and reported a level of satisfaction with the initiative and their involvement in it that was beyond that reported by any other Aboriginal organization. The Healing Lodge initiative has the potential to set an international example, and its future success will continue to depend upon an equal and mutually respectful partnership between the Aboriginal community and Correctional Service Canada.[50]

Looking Ahead

The recent constitutional negotiations have delayed progress in justice initiatives by diverting time and resources; in addition, governments and Aboriginal organizations were aware that the outcome of these negotiations could alter how many recommendations could be interpreted and implemented. A constitutionally recognized inherent right of self-government would have had a significant impact on the structure and implementation of community justice initiatives – setting the stage for the development of parallel Aboriginal justice systems. It is possible that the climate of uncertainty created by the defeat of the Charlottetown Accord will lead to continued delays in implementing Aboriginal justice initiatives. For the present, however, outstanding recommendations can and must be addressed within the scope of the current constitutional framework. Implementation will require continued research and policy development; this must be accompanied by effective strategies for action to translate political will into concrete change. It is evident that the problem does not need further study. Solutions have been identified and are within reach; it is now time for these solutions to be put into place.

Notes

1. Marianne O. Nielsen, "Introduction", in *Aboriginal Peoples and Canadian Criminal Justice*, ed. Robert A. Silverman and Marianne O. Nielsen (Toronto and Vancouver: Butterworths, 1992), p. 3 (cited hereafter as *Aboriginal Peoples and Canadian Criminal Justice*).
2. *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991), p. 266 (cited hereafter as Aboriginal Justice Inquiry).
3. Law Reform Commission of Canada, *Minister's Reference: Aboriginal Peoples and Criminal Justice* (Ottawa: Law Reform Commission of Canada, 1991), pp. 13-23 (cited hereafter as Law Reform Commission Report).

4. Telephone conversation, Roger Hunka, Native Council of Nova Scotia, October 14, 1992.
5. Royal Commission on the Donald Marshall, Jr., Prosecution, *Findings and Recommendations*, vol. 1 (Province of Nova Scotia, 1989), p. 1. (cited hereafter as Marshall Inquiry).
6. *Ibid.*
7. Attorney and Solicitor General of Nova Scotia, *Marshall Update/Justice Reform Review* (1992).
8. *Ibid.*, p. 18.
9. Telephone conversation, Roger Hunka, Native Council of Nova Scotia, September 17, 1992.
10. Telephone conversation, Danny Paul, Confederacy of Mainland Mi'Kmaqs, September 21, 1992.
11. Telephone conversation, Roger Hunka, Native Council of Nova Scotia, September 17, 1992.
12. Telephone conversation, Danny Paul, Confederacy of Mainland Mi'Kmaqs, September 21, 1992.
13. Telephone conversation, Roger Hunka, Native Council of Nova Scotia, September 17, 1992.
14. Information on the government response provided in written communication, Manitoba Department of Justice, September 22, 1992.
15. Written communication, Assembly of Manitoba Chiefs, November 10, 1992.
16. Telephone conversation, Dave Chartrand, Manitoba Métis Federation, October 19, 1992.
17. The Secretariat would consist of a small technical staff, secretarial assistance and computer facilities, and would

    > assist the organizations in the development of analysis and briefing notes on all recommendations to be dealt with by the Working Groups; develop options from the Aboriginal perspective on implementation initiatives consistent with the recommendations; prepare background material on Aboriginal Justice programs in other jurisdictions that may be applicable to Manitoba; and facilitate consultation with the Aboriginal community on initiatives being considered by the Working Group.

    Written communication, Assembly of Manitoba Chiefs, November 10, 1992.
18. *Ibid.*
19. Telephone conversation, Assembly of Manitoba Chiefs, September 15, 1992.
20. Written communication, Assembly of Manitoba Chiefs, November 10, 1992.
21. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, vol. 1 (Edmonton: Government of Alberta, 1991), p. 1-1 (cited hereafter as Alberta Task Force).
22. Written communication, Solicitor General of Alberta, October 19, 1992.
23. Written communication, Cynthia Bertolin, Metis Nation of Alberta, October 8, 1992.
24. Written communication, Indian Association of Alberta, October 28, 1992.
25. Written communication, Cynthia Bertolin, Metis Nation of Alberta, October 8, 1992.
26. *Report of the Saskatchewan Indian Justice Review Committee* (1992), p. 4 (cited hereafter as IJRC Report).
27. *Report of the Saskatchewan Metis Justice Review Committee* (1992), p. 1 (cited hereafter as MJRC Report).

28. Information on the government response provided by written communication, Saskatchewan Department of Justice, October 16, 1992.

29. The original court worker program began in the early 1970s and was terminated in 1987 when the provincial government withdrew from the program.

30. All comments on the FSIN response provided in personal communication by Vice-Chief Bellegarde, Federation of Saskatchewan Indian Nations, October 23, 1992 and November 6, 1992.

31. All comments on the response of the Metis Society of Saskatchewan provided in telephone conversation with Isabelle Impey, Metis Society of Saskatchewan representative on the Justice Review Committee, October 23, 1992.

32. Indian and Northern Affairs Canada, *Indian Policing Policy Review: Task Force Report* (1990), p. 1.

33. Solicitor General of Canada, *First Nations Policing Policy* (1992).

34. Telephone conversation, Assembly of Manitoba Chiefs, September 15, 1992.

35. *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (Ottawa: Correctional Service Canada, 1990), pp. 68-71 (cited hereafter as *Creating Choices*).

36. All information on the government response and implementation of the Healing Lodge provided by Jane Miller Ashton of Correctional Service Canada, in telephone conversation of October 13, 1992, and in written communication, November 6, 1992. Ms. Ashton provided her comments in consultation with Sharon McIvor of the Native Women's Association of Canada.

37. Only four of the 17 Committee members are government representatives.

38. Telephone conversation, Native Women's Association of Canada, October 6, 1992.

39. *Law Reform Commission Report*, p. 1.

40. Telephone conversation, Aboriginal Justice Directorate, August 28, 1992.

41. Aboriginal Justice Fund, *Guide for Submissions: Requesting Financial Support*, (Ottawa: Department of Justice Canada, 1992), p. 1 (cited hereafter as *Aboriginal Justice Fund*).

42. Len Sawatsky, "Self-Determination and the Criminal Justice System", in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, ed. Diane Engelstad and John Bird (Concord: Anansi Press, 1992), p. 90.

43. *Alberta Task Force*, vol. 3, pp. 4-7.

44. *Aboriginal Justice Fund*, p. 4.

45. *Aboriginal Peoples and Canadian Criminal Justice*, p. 7.

46. Telephone conversation, Dave Chartrand, Manitoba Metis Federation, September 11, 1992.

47. Scott Clark, "Crime and Community: Issues and Directions in Aboriginal Justice", *Canadian Journal of Criminology* 34/3-4, p. 514.

48. Telephone conversation, Assembly of Manitoba Chiefs, September 15, 1992.

49. Personal communication, Vice-Chief Bellegarde, Federation of Saskatchewan Indian Nations, October 23, 1992.

50. Patricia A. Monture-OKanee, *"Aboriginal Women and the Justice System", research paper prepared for the Royal Commission on Aboriginal Peoples* (1992), p. 59.

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Justice and Aboriginal People

*James Dumont**

Cultural Emergence of Two Distinct Justice Systems: Hierarchical Authority versus Co-operative Autonomy and Customary Law

Menno Boldt and T. Anthony Long, in their discussion of the fundamentally different concepts of sovereignty in European-Western development and Aboriginal North American tradition, identify such concepts as authority, hierarchy, and ruling entity in Western thought, as opposed to spiritual compact, tribal will, and custom/tradition in the Aboriginal world view. (Boldt and Long, 1984:537-547) Menno Boldt and Anthony Long point out that the Euro-Western concept of authority stems from a background of belief in the inherent inequality of men and the European system of feudalism. Where individual autonomy was regarded as the key to the successful acquisition of private property and for achievement in competitive pursuit, authority was deemed necessary to protect society against rampant individual self-interest. (Boldt and Long, 1984:541) The sovereign authority vested in a person (e.g., a monarch) or an impersonal entity (a constitution or government) serves to guarantee efficient distribution of wealth, property, and (with enlightenment) the equal benefit of accumulation of wealth and the exercise of power along with the development of more egalitarian and humane political structures. Authoritative power is essential to maintain the integrity of a sovereign society

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from within, and, its hierarchical power arrangements are necessary to ensure the distribution of privileges and the maintenance of order in society from the most authoritative to the most powerless.

The evolution of authority, hierarchy and the concept of a ruling power is fundamentally different from either the Aboriginal concept of sovereignty or the Aboriginal experience of the emergence of responsible and egalitarian government. Boldt and Long note that, in Aboriginal society, self-interest was inextricably intertwined with the tribal interest; that is, the general good and the individual good were taken to be virtually identical. (Boldt and Long, 1984:541) In Western-European society the ideal of a social contract evolved as a result of a more enlightened concept of how authorities might more humanely exercise the right to govern others and devise egalitarian methods of extending authoritative rule from the ruler to the ruled. In Aboriginal society, it was recognized as inherent that no human being was deemed to have control over the life of another. (Boldt and Long, 1984:543)

In the Aboriginal belief good government was viewed as a "spiritual compact" (541), "equality was derived from the Creator's founding prescription" (542), and, the good order that promoted harmony had a "source and sanction outside the individual and the tribe. It was the handiwork of the Creator". In the Aboriginal experience "the organizing and regulating force for group order and endeavour...was custom and tradition." "Customs were derived from the Creator", and because they were spiritually endowed and through history had withstood the test of time, they "represented the Creator's sacred blueprint for the survival of the tribe". (Boldt and Long, 1984:543)

Personal authority, hierarchical relationship, and the concept of a separate ruling entity is based in European thought and evolved from Western-European experience, then applied to the North American political and legal landscape. The absence of these prerequisites which evoke an allegiance to Western authoritative law and order, has profound implications for the relationship of Aboriginal people to the present justice system imposed upon them. Equally, the evolution of a unique and fundamentally different mode of government and style of decision making in the North American experience, has important ramifications for the development of culturally meaningful justice systems and the creation of appropriate mechanisms of litigation and enforcement.

Boldt and Long point out that "key ideas contained in the European-Western doctrine of sovereignty are incompatible with core values comprising traditional Indian culture". (540) Further, if, psychologically, these core values have a sufficient degree of persistence (as studies continue to affirm), and if cultural beliefs and structures are highly resistant to change over time (as both history and research bear out), then the approach to the most appropriate development of constructs and mechanisms of justice among Aboriginal people would appear to be best derived from a culture-based approach. Such a development of

Aboriginal-appropriate, culture-based approaches would hinge upon a thorough knowledge of traditional culture and a proper understanding of the core values. The purpose of this present paper is to identify these core values, follow their persistence capacity over time and compare them with the same evolution of the dominant Western contemporary behavioral orientations from Western-European core values. Such a study would be foundational for any consideration of the development of appropriate contemporary but Aboriginally based approaches to justice as well as for assessing Aboriginal peoples' response to the justice system.

The Principal Traditional Values of the Aboriginal People

The intention of this section of the paper is to establish, to the extent that is possible, the principal traditional values of the Aboriginal people. An underlying premise of this document, at the outset, is the basic assumption that there is a degree to which certain key Aboriginal values can be universalized to be representative of most Aboriginal cultures in North America. Another assumption is that these values that are most representative of Aboriginal people are sufficiently resistant to acculturation so as to persist over time and through various assimilative forces that have been at work since the time of contact (i.e., about 500 years). These assumptions, considered basic to this study, have been previously argued for by A. Irving Hallowell (1955), George and Louise Spindler (1957, 1971), D'Arcy McNickle (1973) and Basso (1979).

The discussion of values begins with seven traditional values of the Ojibwa people, and the four directional principles of life, as given through the Sacred Teachings of the Midewiwin Spiritual Way. These will also be considered foundational for presenting the traditional values of Aboriginal people as being suitably representative of universally held Aboriginal values.

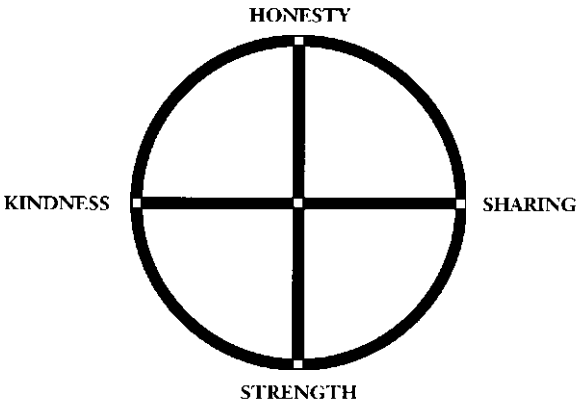
From here this study goes on to examine various investigations of the traditional values and premises of different cultural groups in North America. Particular attention is given to the Siouan, Cheyenne, Ojibwa, Navajo, and Apache traditional values. Along with these, a number of other studies are surveyed which have examined Aboriginal values in a more general way. From these studies it soon becomes obvious that there emerge certain prevalent values that are consistent across various Aboriginal cultures. These are arranged under headings that seem best to encapsulate the basic generalized values being described.

Taking the initial value constellation for the First Nations as conceptualized by the Ojibwa Midewiwin, these fundamental values are presented in an Aboriginal paradigm of values. This original conceptualization of the Aboriginal core of values will become the basic psychological foundation from which Aboriginal persons' derivations of traditional forms of justice and relationship to present day legal systems will be studied.

Traditional values of the Ojibwa Anishinabe are expressed as the original Seven Gifts given by the Grandfathers:

- to cherish knowledge is to know **wisdom**;
- to know **love** is to know peace;
- to honour all of the creation is to have **respect**;
- **bravery** is to face the foe with integrity;
- **honesty** in facing a situation is to be brave;
- **humility** is to know yourself as a sacred part of the creation, and
- **truth** is to know all these things. (Banai, *Mishomis Book*, 1979:64)

Likewise from the Ojibwa tradition, the fundamental values of the Anishinabe people are expressed in terms of the four directions:



Four principal values can also be derive from Hallowell's study of the Ojibwa people (1955). Hallowell worked with Ojibwa people in Manitoba and Wisconsin to determine what he called the Ojibwa personality constellation. He found that this core aboriginal personality persisted through all degrees of acculturation and therefore concluded that the basic character structure of the Ojibwa person was highly resistant to radical change. Hallowell's list of Ojibwa traits betrays a bias toward a western interpretation which is imposed on a fundamentally different cultural behaviour pattern, in that it deems the basic personality constellation to be a "suffusion of anxiety". If presented from within the culture, of course, this view of the personality picture would not be expressed as a pathological pattern. When one translates these characteristics into more positive value postulates, they appear to indicate a basic pattern of Aboriginal behaviour from which certain traditional values can be derived. Below is listed Hallowell's characterizations of the Ojibwa personality (left) which are translatable as traditional Ojibwa values (right):

Hallowell's Ojibwa Behaviour	Ojibwa Values
Emotional restraint Stoicism Fortitude under stress	Strength of character/bravery
Inhibition of Expression of aggression in interpersonal relations	Non-interference/respect
Culturally demanded amiability and mildness when provoked to anger	Desire for harmony in interpersonal relations
Suppression of all open criticism of one's fellows	Respect for freedom and autonomy of oneself and of others

Although tied to the limitations of a western psychological model that required him to regard this kind of personality structure as "suffusion of anxiety", Hallowell's characterization of the Ojibwa person does seem to point to a persisting "Ojibwa personality constellation." From this can be derived the basic values of strength of character (bravery), non-interference disposition (respect/humility), desire for harmony in interpersonal relations, and respect for freedom and autonomy of oneself and of others.

John F. Bryde (1971), in his work on Siouan psychological, behavioral patterns isolated five central values of the Sioux people, these values being Aboriginal as well as persisting in contemporary Siouan behaviour. He contrasts Aboriginal and non-Aboriginal traits as:

Aboriginal	Non-Aboriginal
• Get along with the group or conformity with the group.	• Get ahead, or on top of the group.
• Get ahead for the group.	• Get ahead for one's self.
• Concentrates on and enjoys the now, or the present.	• Concentrates on the future.
• Decides for himself by following advice.	• Others decide for him and force him.
• Faces hard things (such as embarrassing incidents, etc.) without showing fear.	• Faces hard things, but not always with impassive face.
• Uses nature, without losing reverence for nature.	• Uses nature for personal benefit.

Aboriginal	Non-Aboriginal
• Constantly aware of God, and acts of religion are spontaneous and at any time.	• Awareness of god "underneath" and periodic. Religion is compartmentalized and acts of religion restricted to certain times (e.g., Sunday).

From such a behavioural and attitudinal constellation, Bryde draws the following traditional Siouan values:

- activity to adjustment to nature
- good advice from Indian wisdom
- bravery
- sharing and generosity
- individual autonomy
- individual freedom

In an earlier classic study, Walker, in giving the traditional values of the Oglala Sioux from the Sun Dance teachings as "the four great virtues": bravery, generosity, fortitude, and integrity, lends credibility to Bryde's more contemporary conclusions. (J.R. Walker, 1917:62)

Apache beliefs and values about appropriate behaviour can be derived from a study of their reactions to what the Apache regard as inappropriate behaviour on the part of the "white man". James S. Chisholm, in his study of child development (1983) refers to an earlier study by Basso (1970) of Western Apache "beliefs and values about appropriate behaviour". Below is an excerpt from Basso's observations referred to by Chisholm in his study:

> ...they are forcefully struck by the speech of Anglo-Americans, which is regularly described as being too fast, too loud and too "tense" (ndoo; a commonly drawn analogy as with a muscle stretched to a point of pain.
>
> [quoting an Apache] Whitemen make lots of noise. With some who talk like that (loud and tight) it sounds too much like they are mad at you. With some, you just can't be sure about it, so you just got to be careful with them all the time.
>
> [quoting an Apache] Even if it's something little – like they want you to close the door – even for something like that, some Whitemen talk like they bossing you around. It's like shooting rabbits with a .30-.30.
>
> Apaches agree that Anglo-Americans are inclined to ask too many questions and to repeat the same questions (or minor variants of it) too many times. This gives them the appearance of being in a state of extreme hurry and aggravated agitation, which, besides being distinctly unattractive, sometimes causes them to lose sight of what Apaches take to be an obvious and important truth: carefully considered replies to questions are invariably more reliable (because less likely to be retracted or modified) than replies that have been rushed.

> To insist that a visitor come inside, to command him, is to overrule his right to do as he chooses thereby implying that he is a person of little account whose wishes can be safely ignored. "When you talk to people like this", one of my consultants said, "you run over them. You make them feel small." To avoid such displays of disrespect, Apaches either refrain from issuing directives or construct them in ways so circumlocutional and oblique that they carry the force of observations rather than orders.
>
> Backslapping and vigorous handshaking are regarded as direct and unwarranted encroachments upon the private territory of the self. Prolonged eye contact especially at close quarters is typically interpreted as an act of aggression, a display of challenge and defiance...By Apache standards, Whitemen are entirely too probing with their eyes and hands, a distasteful tendency that Apaches take to be indicative of a weakly developed capacity for self-restraint and an insolent disregard for the physical integrity of others...
>
> Whitemen lack self-awareness, a form of ignorance that blinds them to the effects their actions may have on other people.
>
> Whitemen lack circumspection and restraint, a shortcoming that leads them to behave with a kind of reckless self-centredness that implies a basic disregard for the worth of other people.
>
> Whitemen lack tolerance and equanimity, a deficiency that causes them to make harsh and precipitous judgements about other people.
>
> Whitemen lack modesty and humility, a characteristic that causes them to adopt an attitude of imperiousness and condescension when dealing with other people.
>
> Whitemen lack an understanding of inadequacies inherent in their own forms of reasoning, a failing that leads them to assume that they know what's best for other people. In acting upon this assumption, they insult the intelligence of those they presume to advise.
>
> Whitemen fail to appreciate the encompassing virtue of actions that affirm the dignity of other people... (Basso, 1970:213-230)

Chisholm (1983) concludes that this study of the Apache is comparable to Navajo beliefs and values about appropriate behaviour. The values statements that he draws from this study are:

- that co-operation and interdependence are simply and fundamentally necessary and good;
- that there is an inviolability and inherent dignity of the individual (autonomy);
- that there is a basic value of non-interference in interrelationship;
- that desirable behaviour emphasizes co-operation, reserve, quietness and non-intrusiveness; and

- that there is an integral, beneficial cultural connection between co-operation (joint action) and survival and the right of the individual to freedom of action that leads to well-being.

Simply presented as values, these can be stated as:

- respect for the autonomy of the individual;
- non-interference;
- desire for harmony in interpersonal relations;
- respect for individual freedom;
- co-operation and sharing.

E. Adamson Hoebel (1960), in his study of the Cheyenne, discerns what he believes are the major basic 'postulates' underlying Cheyenne culture, which "are therefore dominant in the control of Cheyenne behaviour". I have listed these below, paraphrasing some of them without changing the original meaning, and have drawn from these the basic traditional values of the Cheyenne people:

- The universe is fundamentally a closed system which progressively diminishes as it is expended, but, it is rechargeable through personal and ceremonial participation in its cycles of change and renewal.
- Man is subject to and directly influenced by supernatural forces and spirit beings who are benevolently inclined toward him.
- The people's harmony and well-being is fragile and threatened by aggressive tendencies. Tribal well-being is foremost and individual behaviour must be such that it contributes to it.
- Spiritual and spirit forces are superior and must be related to properly and personally for peace, harmony and good order.
- Bravery is necessary in the protection of the community; mastery and self-control of basic impulses are essential for social harmony and the exercise of individual self-expression.
- Children are accorded the same individualism and autonomy as adults.
- No one owns the land, sacred space and place. Where personal property is granted private ownership, it is done with the understanding that it be generously shared with others.
- The individual personality is important. That is, the individual must be permitted and encouraged to express his potentiality with the greatest possible freedom, compatible with group existence.

Elsewhere, Hoebel says of the Cheyenne personality: "Reserved and dignified, the adult Cheyenne moves with a quiet sense of self-assurance. He speaks fluently, but never carelessly. He is careful of the sensibilities of others and is kindly and generous. He is slow to anger and strives to suppress his feelings if aggravated". From the above study we can draw out the essential Cheyenne values:

- respect for the mysterious and the primacy of spiritual influences;
- desire for harmony and well-being in interpersonal relationships;

- desire for harmony and balance with nature and with spiritual forces, all of which bear a benevolent and personal relationship to human beings;
- bravery and mastery of self contributes to the common good;
- generosity and sharing and co-operation;
- individual freedom and autonomy within the framework of co-operation and collective well-being;
- humility and respect in all relationships (non-interference, non-intrusive, sensitivity to others, marked by avoidance of hostile, coercive and aggressive tendencies).

After having examined some studies of the traditional values of various tribes from the Great Lakes, the Plains and the American Southwest, we will also consider some more recent studies done by researchers who have tried to determine some of the fundamental or core values that seem to apply to Aboriginal people in a general sense. First of all, Joseph Epes Brown, in his study of the "Roots of Renewal" of the Aboriginal people of North America (1982), determines what he considers some of the key persisting values:

- Time is cyclically and rhythmically oriented rather than "progress-oriented". Aboriginal people acknowledge the perennial reality of the now.
- Aboriginal people have roots which are deep and long within this land. Aboriginal people bear a special and sacred relationship with the land. Not only is this a persistent Aboriginal value but it has appealed also to "the mind and conscience of the non-Indian".
- For Aboriginal people nothing existed in isolation. In terms of relationship, belonging and identity, the Aboriginal person affirms the mysterious and comprehensive interrelatedness of all that is.
- There is respect for the mysterious and the primacy of the sacred.
- All of life is integrally interconnected and interrelated within an inseparable wholeness.

Hendry, in his Report to the Anglican Church, *Beyond Traplines*, (1969:31-37) presents the following as the "Dominant Value Orientation of Indian-Eskimo Culture":

- in harmony with nature (a sense of wholeness);
- past and present oriented;
- being-in-becoming (i.e., the essence of human nature was such that the ego-self was displaced or surrendered to a wiser more powerful spirit realized through vision experience – as opposed to a demand for action and accomplishment or application of external controls to achieve perfectibility);
- co-operation – collaborative relations, collateral and tribal living, communal lifestyle;
- sharing – generous, community concept of possessions, communistic in the non-political sense;
- interdependence; and

- respect for others and for one's own personal integrity, engendering an attitude of friendliness and trust.

Hendry points out that he is attempting to find the generalized meanings or values, recognizing "that a wide range of individuals exist within each culture" and between Aboriginal groups. It must also be understood that there may be differentiation because of "the accommodation patterns that result in general exposure of the Indian-Eskimo culture to the white culture, and the Indian-Eskimo living in an urban or rural setting." (1969:32)

D'Arcy McNickle, in discussing the dynamics of "Indian Survivals and Renewals" (1973), presents various arguments on the persistence of patterns of behaviour. McNickle appears to favour the school of thought that puts forward the concept of universal Aboriginal psychological traits which persist in spite of acculturation, time and change. He draws on the work of George and Louise Spindler who, "using the latest psycho-cultural studies, individual biographies, and direct observation describe certain widely shared psychological traits which, in their view, characterize in a very general sense limited aspects of the aboriginal personalities of American Indians and possibly characterize the pan-Indian psychological core of the least acculturated segments of contemporary tribes." (1973:10,11) McNickle presents the Spindler's generalized Aboriginal psychological inventory as:

- restrained and non-demonstrative emotional bearings coupled with a high degree of control over aggressive acts within the group and a concern for the safety of the group;
- generosity expressed in varying patterns of formalized giving or sharing;
- autonomy of the individual in societies that were largely free of classes or hierarchies;
- acceptance without voicing complaint of pain, hardship, hunger, and frustration;
- high regard for courage and bravery;
- joking relationships with certain kinsmen as a device for relieving pressures within the group (i.e., humour, joking, teasing as a means of maintaining harmony in interpersonal relationships);
- detailed, practical, and immediate concern in problem situations rather than advance planning to avoid difficulties (i.e., now-oriented); and
- dependence upon supernatural power invoked through dreams or ritual, as a means to the good life; i.e., dependence on the primacy of the sacred.

In an unpublished paper entitled "Native Values and Attitudes", George Miller (1979) examines persistent Aboriginal values. He points out that "values an individual has is his cognitive map", that "it impinges upon the way he perceives the external world and how he interprets that world", and that they are "reflected in behaviour both in dealing with the natural environment and with other human beings....Values mould personality". (1979:10) Miller suggests that "North American Indians have values which, in spite of four hundred years of contact

with Europeans, are still distinctive from those of the dominant society". (1979:5) Synthesizing the work of Bryde (1971), Zintz, Hallowell (1955), and Benedict (1934), he put together a picture of Aboriginal dominant values that looks like the following:

- time – is always relative and "always with us"
  – is present oriented, i.e., work to satisfy present need;
- shaming complex as opposed to guilt orientation;
- consider relationship with others as one of kinship (extended family, clan relatives, etc.);
- desire for harmony in interpersonal relations;
- egalitarian/respect for dignity and freedom of others;
- co-operation, and the sharing ethic;
- humility (anonymity/submissive, passive-behaviour/modest, and sensitivity toward others);
- strength of character (individuals functioned in terms of a highly internalized conscience);
- patience is a strength and a virtue;
- respect for wisdom and the value of knowledge that comes with long experience (respect for elders and the past);
- harmony and balance with nature; and
- sacred traditions are foundational and the basic external and internal motivation is spiritual: respect for the mysterious.

Finally, Dr. Joseph Couture, in determining the factors affecting the education and learning of Aboriginal people, studied the key differences between the psychology of the Aboriginal person and those of the western culture. Couture speaks in terms of the high human development potential existing within Aboriginal people. The fundamental principles of the kind of life-way that makes this so can be determined by an examination of the elders who are the embodiment of these principles. By "peeling away what is peculiar to each tribe and region", Dr. Couture believes, we can "begin to discern some common traits", or what we in this paper have called values. (Couture, 1978:129) Couture identifies these as:

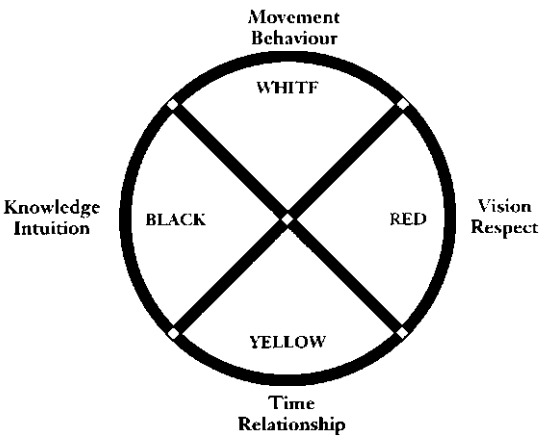
- personalism: Life is personalistic. It is holistic, humanistic and existential. Aboriginal philosophy is person-centred, where person is subject, and in a dynamic state of being-becoming ("the whole man in his whole environment for the whole of life").
- closeness to nature: This is a profound relationship that is cosmic in quality. Aboriginal understanding of natural and cosmic order made for his capacity to live in total relationship with nature at the deepest and most intimate level.
- respect for, and relationship with, the Land as a living, organic whole to whom one is personally related and ethically responsible. The sense of land is a central determining experience.

- respect for wisdom and knowledge: Respect for the wisdom and intellectual and discursive quality of elders and their self-actualizing ability in developing the highest human potential.
- capacity for caring, or kindness.
- capacity for total vision. The capacity to see the world in holistic terms;
- interconnectedness: "Native ways of life are rooted in a perception of the interconnectedness amongst all natural things, and all forms of life".
- a collective or communal consciousness: A sense of community in its widest parameters and broadest meaning.
- individual autonomy and individual strength of character: A fostered inner strength, spirit of freedom, dignity and responsibility.
- non-manipulative relatedness, or posture of non-interference.

Framework for Consideration of Generalized Primary Aboriginal Values

From this consideration of the persistent values as they have been discerned from various cultures of North America can be generalized certain traditionally-based Aboriginal values that appear to be consistent across cultures and across time changes. To view these we will go back to the Ojibwa Anishinabe values initially presented in order to consider these persistent general and primary values in that framework.

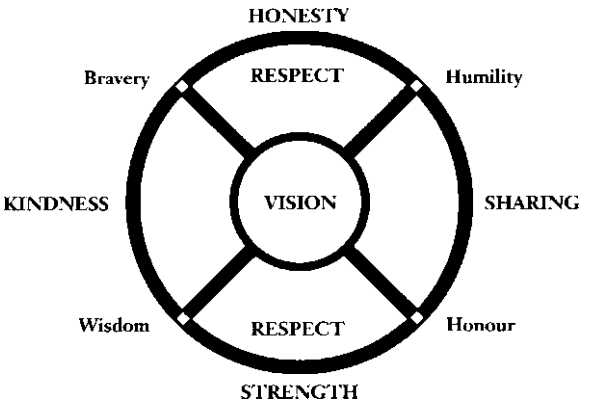
First, let us look at the original design of the four colours of man:



From this original placement of the four colours of man, the Red Man (Anishinabe) or Aboriginal person is gifted with the unique quality of vision. This is both his special way of seeing the world as an Aboriginal person, and, the capacity for holistic or total vision. With this ability to see beyond the boundaries of the physical and the capacity for all-around, circular vision comes respect:

respect for creation, respect for knowledge and wisdom, respect for the dignity and freedom of others, respect for the quality of life and spirit in all things, respect for the mysterious.

Now, when the foundational four directional principles and the seven values are placed around this central capacity for vision, the design looks something like this:



Vision, in this design, is the primary generator of the Ojibwa value system. Vision is wholeness; it recognizes the interconnectedness of all things and the totality of its interrelatedness. Because of this, vision generates respect. Respect conditions all other values, thus engendering a unique value system with a unique interpretation and prioritizing of each value. Values such as wisdom, honesty, humility, kindness and strength, may be claimed equally by other peoples and cultures. However, what makes for the uniqueness of Aboriginal values is the perception and understanding of these values because of the primal gift of vision/wholeness and the primary motivator, respect.

We will now take the primary value statements presented by each writer above, and align each with their respective value-category:

Vision/Wholeness and Spirit-Centredness

- truth (Banai);
- constantly aware of God (Bryde);
- respect for the mysterious and primacy of spiritual influences (Hoebel);
- primacy of the sacred (Brown);
- interrelatedness of all that is (Brown);
- wholeness (Brown);
- interdependence/wholeness (Hendry);
- reliance on the primacy of sacred (McNickle);

- basic external/internal motivation is spiritual; the sacred is foundational (Miller);
- total vision/interconnectedness (Couture).

Respect and Harmony

- respect/honour of all creation (Banai);
- harmony and balance with nature/personal relationship with all life and forces (Hoebel);
- personally related to all beings and all forces (Hallowell);
- sacred relationship with the land (Brown);
- adjustment to nature (Bryde);
- in harmony with nature (Hendry);
- harmony and balance with nature (Miller);
- respect for the relationship with the land/closeness to nature (total and profound relationship with nature) (Couture).

Kindness

- love/peace (Banai);
- desire for harmony in interpersonal relations (Hallowell);
- harmony in interpersonal relations (Chisholm);
- desire for harmony and well-being in interpersonal relationships (Hoebel);
- desire of peace, harmony, kindness in personal and spiritual life (Hoebel);
- harmony in interpersonal relating (McNickle);
- harmony in interpersonal relations (Miller);
- capacity for caring (Couture).

Honesty and Integrity

- honesty/integrity (Banai);
- integrity (Walker);
- respect for freedom and autonomy of oneself and others (Hallowell);
- individual autonomy/freedom (Bryde);
- inviolability and inherent dignity of the individual; autonomy/right of individual to freedom of action (Chisholm);
- individual freedom and autonomy (Hoebel);
- respect for other's and for one's own personal integrity (Hendry);
- autonomy of the individual (McNickle);
- respect for the dignity and freedom of others (Miller);
- individual autonomy, spirit of freedom, dignity and responsibility (Couture).

Sharing

- generosity (Walker);
- sharing or generosity (Bryde);

- co-operation and sharing (Chisholm);
- generosity/sharing/co-operation (Hoebel);
- sharing/co-operation/communal/collateral/collaborative (Hendry);
- generosity/giving/sharing (McNickle);
- co-operation/sharing ethic (Miller);
- collective/communal consciousness (Couture).

Strength

- strength of character/fortitude (Hallowell);
- fortitude (Walker);
- mastery of self/self-control/quiet sense of self-assurance (Hoebel);
- displacing of ego-self for wiser, more powerful spiritual influence (Hendry);
- restrained and non-demonstrative emotional bearings/high degree of control (McNickle);
- acceptance of pain, hardship, hunger, frustration without complaint (McNickle);
- strength of character/highly internalized conscience (Miller);
- individual strength of character/dignity, inner strength, and responsibility (Couture).

Bravery and Courage

- bravery/integrity/honesty (Banai);
- bravery (Walker);
- bravery/fortitude/stoicism (Hallowell);
- bravery/courage/show no fear (Bryde);
- bravery/mastery and self-control of emotion and basic impulses (Hoebel);
- high regard for courage and bravery (McNickle).

Wisdom

- respect for knowledge/wisdom (Banai);
- good advice from Indian wisdom (Bryde);
- respect for the past/wisdom (Hoebel);
- past and present oriented (Hendry);
- respect of wisdom and the value of knowledge that comes with long experience/respect for elders and the past (Miller);
- respect for wisdom and knowledge/respect for intellectual and discursive quality and self-actualizing ability of elders (Couture).

Respect and Humility

- honour/respect/humility (Banai);
- non-interference/respect (Hallowell);
- non-interference in interrelating (Chisholm);

- non-interference/non-intrusiveness/sensitivity to others, avoidance of aggressive and hostile, coercive behaviour/respect (Hoebel);
- respect one's own personal integrity/trust that of others (Hendry);
- non-interference/non-manipulative relatedness (Couture).

From the total vision that was given to Aboriginal people and from the spiritual knowing that is at the core of Aboriginal life-ways and understanding, there is engendered in all Aboriginal behaviour a profound respect for all of life and a quality of relationship that is spiritual, reciprocal and interpersonal. The vision of wholeness that generates a sense of the interconnectedness and interrelatedness of all that is is a spiritual centre that imbues all life with a quality that is not only deserving of respect but itself motivates a respectful relationship.

Vision/wholeness is the spiritual core surrounded by respect.

Respect is understood as an honouring of the harmonious interconnectedness of all of life which is a relationship that is reciprocal and interpersonal.

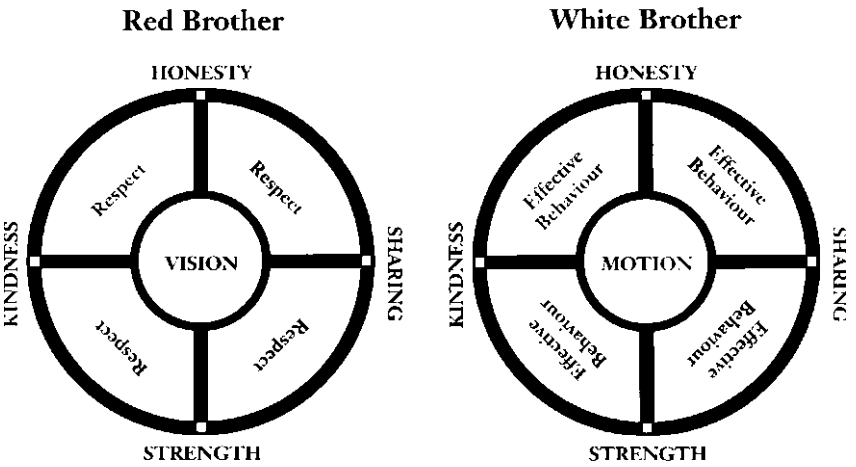
The primary Aboriginal values influenced from this core vision and attitude of respect can be interpreted as:

- Kindness: The capacity for caring and the desire for harmony and well-being in interpersonal relations.
- Honesty: To act with the utmost honesty and integrity in all relationships recognizing the inviolable and inherent autonomy, dignity and freedom of oneself and others.
- Sharing: Recognizing interdependence and interrelatedness of all of life, to relate with one another with an ethic of sharing, generosity, and collective/communal consciousness and co-operation.
- Strength: Conscious of the need for kindness and respecting the integrity of oneself and others, to exercise strength of character, fortitude and self-mastery in order to generate and maintain peace, harmony and well-being within oneself and in the total collective community.
- Bravery: The exercise of courage and bravery on the part of the individual so that the quality of life and inherent autonomy of oneself and others can be exercised in an atmosphere of security, peace, dignity and freedom.
- Wisdom: The respect for that quality of knowing and gift of vision in others (striving for the same within oneself) that encompasses the holistic view, possesses spiritual quality, and is expressed in the experiential breadth and depth of life. A person who embodies these qualities and actualizes them in others deserves respect as an elder.
- Humility: The recognition of yourself as a sacred and equal part of the Creation, and the honouring of all of life which is endowed with the same inherent autonomy, dignity, freedom, and equality. This leads to a sensitivity toward others, a posture of non-interference and a desire for good relations and balance with all of life.

These values, defined by the primary motivators of the native personality (the capacity for vision and the quality of respect), can be presented as the original traditional Aboriginal values. They appear to be characteristic of native people generally and seem to have persisted into the present time where they act as foundational to the patterns of behaviour of the contemporary Aboriginal person.

Aboriginal Values in an Alien Social, Cultural Environment

Where the "Redman" is governed in all things by the primary motivators of vision and respect, the "Whiteman's" primary motivators are movement and behaviour. Because of this, the "White Brother" will interpret and rank major values differently from the Aboriginal person. This will, in turn, make a difference in how each one will function in the community and how each will generate institutions, structures or codes to foster and maintain harmony and well-being.



In the most positive view of the dominant society's fundamental values, it can be said that this society believes in permitting the maximum freedom in active person pursuit, while guaranteeing the greatest good to the greatest number. In order to regulate this primary goal, society must institute laws or rules so that men and women are able to achieve the greatest personal success while assuring the collective well-being. By these rules society must seek the most generalized norm to which all must be encouraged to conform. Rules or laws are made therefore to guarantee individual freedom of pursuit (protecting the individual's right to the benefits of personal achievement), and to ensure the greatest good for the greatest number.

Being motivated by a primary drive of movement and behavioral activity, the white person understands the values of autonomy and freedom of the person as

the freedom of active personal pursuit and sharing as the equal right to well-being. However, he must ensure these are acted upon; so, rules or laws are established whereby benefits gained through freedom of active personal pursuit will also accrue to those not fortunate to excel in personal pursuit. Usually the surplus goes to be shared with those less fortunate, or systems of taxation are implemented in order to fulfil the obligation of equal opportunity or right to well-being of the greatest number.

Aboriginal society believes, however, that while the individual must be permitted and encouraged to express his/her potentiality with the greatest possible freedom and autonomy, the freedom and autonomy of others must also be respected. It was not by imposing rules and laws to guarantee the personal freedom and autonomy of the individual, but rather the value of respect was engendered (inculcated) in the individual person from birth and reinforced throughout individual and community life. Thus, by the building of an individually internalized conscience (or internalized law of desirable behaviour) the person can exercise personal freedom of pursuit of development, while respecting the same in others – leading to the greatest harmony in interpersonal relations and socialization and to the building of the collective or common good. Personal autonomy and freedom and individual pursuit of achievement and success are always conditioned by respect.

By understanding the values of Aboriginal and non-Aboriginal people in terms of the core or primary motivators, we can see that there are fundamental differences in the way each expresses commonly held values.

Contrasting Values

Contemporary Aboriginal behaviour is rooted in traditional perceptions of reality, Aboriginal values, and a belief system that is grounded in prolonged cultural practice and centuries of Aboriginal experience. This Aboriginal perceptual, psychological and epistemological rootedness is the foundation that the contemporary Aboriginal personality is built upon, and thus in an essential way, influences modern behaviour as well as conditions present day adaptive behaviour. Often these values and resulting behavioral preferences contrast or conflict in fundamental ways with the values and behavioral tendencies of the non-Aboriginal dominant society.

The following table compares and contrasts some of the essential values and behavioral patterns of Aboriginal and non-Aboriginal people. Table I on value comparison takes similar value-categories and contrasts the different ways that each of the values are expressed in the two different societies. Table II shows how the contemporary expression of the original values of each group leads to a zone of conflict where the two come together in the modern experience.

TABLE I

Aboriginal	Non-Aboriginal
Fostering of individual autonomy by providing foundations for the individual's responsibility for survival; inculcating attitude of individual responsibility and respect; providing a knowledge base in terms of information and awareness of process for decision making.	Motivating individual autonomy by fostering assertiveness, by engendering competitiveness, by providing education base for future work; by training person in attitudes of persistence, individual creativity; success through punishment and reward method by demanding adherence to rules and acceptable goals.
Sharing as generosity which respects the personhood of all living beings who contribute cooperatively to the well-being of life; striving to bring about the greatest harmony and collective good while honouring the freedom and autonomy of oneself and others.	Sharing as an obligation, to guarantee the right to well-being of all and the right to equal opportunity, while maximizing individual achievement and success in active personal pursuit.
Wholeness as the perception of the undivided entirety of things and the visioning of the interconnectedness of all things.	Totality as the summation of all the parts that make up the whole and the quantifying and objectifying of parts to calculate the connections leading to the total picture.
Kindness, as the desire for harmony and a preference for amiability in all inter-personal relations, human and other-than-human.	Charity as an admonition to exercise compassion and benevolence in acceptance of the common humanity of all, acknowledging a primary motivation of personal pursuit of individual development, success and private gain.
Honour as an essential attitude of respect for the freedom and autonomy of other persons, towards other-than-human persons, for elders, for wisdom, and for the kinship with nature and the forces of life, both known and unknown.	Consideration as courtesy and fair play toward peers and equal achievers, and stewardship toward the less fortunate and the things upon which survival and well-being depend, e.g. good order, law and nature.

Aboriginal	Non-Aboriginal
Respect for the freedom and autonomy of oneself and others and for the inherent dignity of the human person as well as for the maintenance of the collective harmony and well-being.	Respect for the personal and private property of others and oneself, along with the right to pursue private enterprise, personal achievement and gain, concurrent with a moral duty to recognize the equality of human persons.
Bravery as strength of character that requires great inner strength and fortitude in situations of great difficulty or personal danger, while maintaining self-mastery, control, and the rightful dignity of others.	Bravery as courage and valour, that requires one to place, even over one's own life and principles, a nobler cause or ideal or higher authority – even if this infringes upon others' rights and freedoms.
Honesty as truthfulness and integrity, i.e., to act with the utmost honesty and integrity in all relationships recognizing the inviolable and inherent autonomy, dignity and freedom of oneself and others.	Honesty as truthfulness and respectability; i.e., acting in accordance with defined laws and principles in an upright and creditable manner, with the expectation of the same from others.

Table II, which follows, begins from the original values as they are expressed in each of the Euro-Western original culture and the North American Aboriginal culture. As the reader moves from the primary aboriginal value expression (Aboriginal – far left, and Euro-Western – far right) toward the centre of the Table, these value expressions change as they adapt to changing environments and historical circumstances. Though, as can be seen, these values are still expressions of the original values in their Aboriginal intent, nevertheless, they become modified by time and the context of expression. As these values approach their contemporary mode of behavioral expression, it becomes much more apparent that persons operating from their own cultural position, being motivated by their own value expressions, will come into conflict with one another in situations where they must relate to each other in achieving common ends.

The following pages present Table II which shows value differences leading to contemporary conflict.

TABLE II

Table of Value Differences Leading to Contemporary Conflict

Aboriginal Values and Behaviour

Value	Meaning	Resulting behaviour	Modern behaviour
Wholeness	Perception of the undivided entirety of things. A vision of the interconnectedness, and interdependence within life.	Prefers to see the whole picture before acting. Has a capacity for seeing totality of things. Reflective, careful, considering all sides before deciding to move on something.	Exhibits behavioural preference for what can be termed "motionless alertness"; i.e., will wait until she/he feels confident, knowledgeable or adept before speaking, making decisions, or acting on it. Considerate of other side and the sensitivities and rights of others when facing a difficult situation. Time is relative and judgement flexible and qualified by respect and circumstances. The part is only understood in relation to the whole.
Respect	Regard for autonomy and the freedom of oneself and of others, as well as the inherent dignity of the human person and of the collective.	Respect of others and for one's own personal integrity, which engenders an attitude of friendliness and trust; characterized by a perference for anonymity modesty and sensitivity toward others; predisposed toward a posture of non interference.	A sensitivity toward others; tendency toward non-interference and non-intrusiveness in interrelating; a non-manipulative behaviour; a tendency toward compliance; shows patience and self-restraint.

TABLE II (continued)

Table of Value Differences Leading to Contemporary Conflict

Euro-Canadian Values and Behaviour

CONFLICT

Modern Behaviour	Resulting Behaviour	Meaning	Value
Active experimenting disposition; objective, analytical approach in problem solving; assertive and manipulative behaviour in acting on it; must act on a situation from its beginning point to reach successful conclusion; achievement and goal oriented; order is externally maintained and the truth of any situation depends on objective analysis of the facts and detached judgement of its verifiability and its credibility.	The objectifying, the quantifying and analyzing of things to determine interconnections that make up the total picture; assertive and persistent in moving from the beginning to successful completion; proven and defined fundamental components leads to understanding the interconnections which sum up the total picture – a fundamentally linear approach that is analytical and critical.	Perception of wholeness as a totality where the sum of all the parts make the total picture; must determine and define parts to build the total picture. Must create the total picture by manipulating the parts.	**Movement**
Activity oriented; assertive, persistent task oriented - if at first you don't succeed try and try again; tendency toward coercive and intrusive behaviour with preference for confrontational approach to problem solving; employing a forward, direct strategy in social and interpersonal relations; expectation of self-assurance, assertiveness in others.	Assertion of the right to pursuit of private enterprise, acquisition of personal achievement, and individual gain; success, personal attainment and progress are seen as measures of personal integrity and acceptance; posture of confrontational, intrusive behaviour, with predisposition toward disciplined, conscientious, and forceful behaviour.	Movement, being the primary motivating pre-disposition, governs all behaviour and causes it to be active and intense. Active behaviour is fundamental and dominant trait.	**Behaviour**

TABLE II (continued)

Table of Value Differences Leading to Contemporary Conflicts

Aboriginal Values and Behaviour

Value	Meaning	Resulting Behaviour	Modern Behaviour
Kindness	Harmony in interpersonal relations, and the capacity for caring.	Friendship, caring, amiability, mildness, compliance and acquiescence. Prefers peaceful resolution rather than confrontation.	One's actions and expressions must affirm the dignity and self-worth of others; desires amiable and peaceful interactions; avoids confrontation.
Honesty	Truthfulness and integrity. Honesty conditioned by respect.	Tolerance and equanimity; respect for the inviolable and inherent dignity of the individual; a highly internalized conscience and trustworthiness; honourable and loyal.	Careful, considered responses are more reliable and more truthful. After reflection, answers with honesty and candour rather than carefully worded responses to avoid incrimination.
Sharing	Generosity, cooperativeness, desiring harmony and collective well-being.	Assertion of one's freedom and autonomy is balanced by responsibility to assure harmony and collective well-being; i.e., sharing of wealth acquired through individual pursuit for the collective good and general well-being.	Generosity engenders respect. Frugality is more like avarice than a virtue. Care/co-operation are preferred behaviours. Sense of responsibility/respect for others' well-being. Won't demand reciprocation but feel the need to share.
Strength	Strength of character, fortitude, self-mastery – for peace, harmony and well-being in oneself and others.	Bravery is thus defined as fortitude and inner strength required for difficult situations; maintaining self-mastery and control, while respecting the inherent dignity of others.	Prefers self-discipline over restraint imposed from without; favours self-control and guidance over adherence to impersonal goals or authority; shows quiet self-assurance.

ZONE OF

TABLE II (continued)

Table of Value Differences Leading to Contemporary Conflicts

Euro-Canadian Values and Behaviour

C	Modern Behaviour	Resulting Behaviour	Meaning	Value
O	While favouring the competitive spirit and the right to pursue private gain, benevolence and compassion are to be shown to the meek by correcting inequality.	Compassion/sympathy for less fortunate and those unable to succeed. Confronts inequality by applying charitable and remedial solution.	Kindness as charity as it is shown especially to the unfortunate and the helpless.	**Kindness**
N F L I C T	Makes hasty, precipitous judgements based on assumption of knowing what's best for other people.Obedience to law prevails over tolerance, fairness and respect for others.	Respectability, uprightness and obedience to defined law and norms of society. External restraint and modification of behaviour and freedom are sanctioned when law is contravened.	Truthfulness and respectability. Abiding by defined laws in an upright and creditable manner.	**Honesty**
	Sharing as charitable act ensures equal opportunity and as obligation secures equitable distribution of wealth and benefits. Otherwise, attainment is the worthy goal and frugality the greater virtue. Individual competitive spirit vs the collective.	While maximizing individual achievement and success in active personal pursuit, the successful individual is obliged to share fruits of success to guarantee the welfare of the general masses and the underprivileged.	Sharing as an obligation rather than unconditional generosity. Obligation to share for the well-being of all.	**Sharing**
	Rugged individualism; aggressive and competitive behaviour upheld; superiority of the person based on keenness to get ahead; individual rights along with obedience to higher authority.	Strength is ability to place ideal over sentiment or compassion, for a nobler cause or higher authority. Mastery and control are determined by dispassionate use of power and forthrightness.	Control, confidence, determination, persistence and forthrightness are all needed to gain mastery of a situation.	**Strength**

Zone of Conflict in the Justice Arena

Aboriginal Response to the Law	Expectation of Legal System
• regular teaching of community values by elders and others who are respected in the community;	• everyone under obligation to obey set laws as determined by superior state authorities;
• warning and counselling of particular offenders by leaders or by councils representing the community as whole;	• society reserves the right to protect itself from individual who threatens to harm its members or its property;
• mediation and negotiation by elders, community members, by clan leaders, aimed at resolving disputes and reconciling offenders with the victims of the misconduct;	• retributive punishment: justice requires that a man should suffer because of and in proportion to, his moral wrong-doing. Punishment is set by legislation; judgement is imposed;
• payment of compensation by the offenders (of their clan) to their victims or victims' kin, even in cases as serious as murder;	• the perpetrator is the object of sentencing; retributive incarceration and rehabilitation are means to deter and punish offenders;
• in court, a front that appears silent, uncommunicative, unresponsive and withdrawn – based on non-interference and learn-by-observation preference of behaviour and on desire to maintain personal dignity and integrity;	• expected behaviour in court: defendant must give appearance of being willing to confront his/her situation and voice admittance to error and show remorse and willingness to change; must express desired motivation for change;
• reluctance to testify for or against others or him/herself, based on a general avoidance of confrontation and imposition of opinion or testimony;	• obligated to testify and defend oneself in order to get at the facts based on an adversarial mode of dealing with legal challenges;
• often pleads guilty on the basis of honesty or non-confrontational acquiescence.	• expected to plead not guilty on the basis that one is innocent until proven guilty.

The Aboriginal Person in the Justice System

There is a different dynamic in the relationship of the Aboriginal accused with the court from the non-Aboriginal accused in the same situation. The court has certain rules and standards which hold certain expectations of the accused – expectations that are culture-bound. The Aboriginal person, when she or he doesn't respond appropriately, is often already pre-judged by observations of his/her demeanour before judgement or prior to sentencing. Rupert Ross, in his article in the *Canadian Native Law Reporter*, notes that if there can be a generalized picture of an Aboriginal accused, it is of a silent person, someone who says little or nothing to me, to psychiatrists, to custodians, to the court or to anyone. (1989:3) From this disposition and demeanour in relations with the court, the Aboriginal person, elicits from court officers, legal practitioners, judges and court observers varying degrees of these same descriptive words and phrases: uncommunicative, unresponsive, unable to offer insights into his actions, unwilling to confront his past, unwilling to explore his feelings toward himself or his victim or his surroundings. (1989:3) The court then must assume, says Ross, that, if he won't even explore why he did what he did, if he won't confront his personal demons or open up his feelings or acknowledge the sources of his anger, we assume that he is not interested in rehabilitation, not motivated towards helping himself. We then assume we are left with sentencing options that concentrate instead upon deterrence. (1989:3)

In terms of testifying, Ross notes that in his observations and experience a different ethic is also at work here. Refusal or reluctance to testify or, when testifying, to give anything but the barest and most emotionless recital of events, must be the result of an underlying cultural behaviour which Ross theorizes is the kind of behaviour where giving testimony face to face with the accused is simply wrong...[and] where in fact every effort seems to have been made to avoid such direct confrontation. (1989:5) Where this seems to work with members of the dominant culture and where the courts can expect appropriate responses to these cultural expectations, with Aboriginal people it appears culturally and ethically foreign and imposing. Ross attempts to illustrate the conflicting cultural and ethical values as they come to the fore in the courtroom:

> I suspect that it is perceived as ethically wrong to say hostile, critical, implicitly angry things about someone in their presence, precisely what our adversarial trial rules have required....In fact, we have taken this legal challenge into our daily lives, exhorting each person to open up with the other, to be honest and up front, to get things off our chests, etc. all of which are, to traditional native eyes offensive in the extreme. When they refuse to follow the exhortations or our rules, we judge them as deficient in rule-obedience or, worse still, rule-less. In our ignorance we have failed to admit the possibility that there might be rules other than ours to which they regularly display allegiance, an allegiance all the more striking because it is exercised in defiance of our insistent pressures to the contrary. (1989:6)

The court's all too prevalent disposition here is to assume that the Aboriginal accused is not genuinely motivated toward rehabilitation, does not demonstrate true repentence. Though, in Ross's view it should not be so, the court's tendency is automatically to conclude from this behaviour that they are remorseless individuals with no desire for rehabilitation. (1989:6) The desire of Aboriginal people, though not manifest in their response to the court's expected behaviour, may just as strongly be for justice to be fulfilled and for modification of behaviour away from what is illegal and anti-social. The apparent refusal to meet the court's expectations in behaviour and response may actually be the result of a deep cultural allegiance to a different set of behavioral preferences. It seems that there is not only an indication here of a need for an appreciation of different cultural responses, requiring a need for sensitivity to the difficulties arising from acting inappropriately in a foreign cultural and ethical context. There also appears to be a definite call for a reconsideration of the nature of the context itself.

Further, the making of a plea in the judicial context seems also to be fraught with conflicting ethical and cultural differences. Here again, Ross points out the nature of the differing approaches to the value of honesty as it is manifested in the experiences of the courtroom:

> Pleading "not guilty" is, to them, a lie because it means a denial of the truth of the allegation. For us [Whites], of course, a not guilty plea does not mean "I didn't do it", it means instead that we require the Crown to prove it, as is our right. It is little wonder that there are so many guilty pleas from native accused, for it is likely that the offence with which they are charged is less serious to them than lying about their involvement in it, precisely what a "not guilty" plea would represent for them...They do not understand the thinking behind our right to enter a plea of "not guilty", do not understand how it can co-exist with our Christian rule that requires confession and acknowledgement before there is the possibility of forgiveness and redemption. (1989:10)

Differences in value orientation causes significant differences in behaviour, and, where Aboriginal people come into the legal context of the dominant society, the situation appears to foster behavioral conflicts within the courtroom as well as with enforcers of the law.

Besides the particular differences in behavioral preferences, there does appear to be an overall difference in the approach to determining a just solution to acts of deviance or anti-social behaviour. For the Aboriginal community and for the individual, the over-riding motivation for achieving justice in situations of conflict or deviance was that of restoring the peace and equilibrium within the community and reconciling the accused with his/her own conscience and with the individual family that is wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in resolution of conflict, reconciliation and maintaining community harmony and good order.

A justice system that is based in Aboriginal culture would presumably speak more appropriately to Aboriginal people and be responsive to culture-based values and behaviour. Further, such an Aboriginal justice system would restore the integrity of the Aboriginal community and reduce the conflict Aboriginal persons and communities have with the shortcomings and unsuitability of the present justice system in dealing with the Aboriginal people.

Gwaik/minodjiwi/dibaakonagewin

The Anishinabe way of expressing the concept of justice is *gwaik/minodjiwi/dibaakonagewin* (literally, "right/and respectful/judgement"). On the one side hovers the forever, unchanging and always-truth of the Creator, governed by the guardian of the Creator's law – who is strict and unbending. On the other side is the ever-changing, moving and unfolding truth of the human reality within the creation, which is governed by a guardian who is kind, compassionate and forgiving. In between these two is the law of balance and harmony toward which humankind must strive: this quest is governed by integrity, humility and respect. Justice is the pursuit of a true judgement required to re-establish equilibrium and harmony in relationship, family and society – a judgement which is gwaik: straight and honest, while at the same time being minodjiwin: respectful of the integrity of all persons, both the wronged and the wrong-doer.

The Anishinabe justice system is one that leans toward wise counsel, compensation, restitution, rehabilitation, reconciliation and balance, rather than obligatory correction, retribution, punishment, penance and confinement. As a people whose spirit and psyche revolves around a core of vision and wholeness that is governed by respect, it is natural that a system of justice be evolved that, in desiring to promote and effect right behaviour, not only attends to balance and reconciliation of the whole, but does so by honouring and respecting the inherent dignity of the individual.

Recently an elder from Akwesasne related an account of an aboriginal style of justice in the traditions of the Mohawks. He told of a rather serious vandalization case involving some young adolescent boys in the community. They were brought before the Council and there they were acquainted with the reports of their misdemeanours. When asked of the truth of these allegations they readily admitted their wrongdoing. They were then asked why they had become involved in this episode, and their answer was simply that they had nothing else to do that night. The elders and the leaders then noted that this one night's vandalism had caused much heartache and loss on the part of the people affected by it. The youth, having gone through an account of their part in it, accepted that indeed they had caused much trouble for others, though at the time it was only done "to have a good time". The elders then asked them, that if they thought about it, could they think of things where their time and energy could be spent

where it could be of help, since they were "looking for something to do". One related how his grandparents had a rather large garden plot where his help would be most welcomed and needed. Another thought of how the time and effort required for this particular night of vandalism could have been used to do some work around his parents' home. And so on. When all the youth had so responded, the elders pointed out that this only accounted for one night, but what about the other six nights of the week where there would potentially be "nothing to do"? Could they think of other work or productive ways of occupying their time so that they would have something to do each night of the week? They responded with a number of other suggestions that filled up the week for each of them. The elders went on to lead the boys to think about the weeks ahead as well. When they had finished the Council meeting, the boys had acknowledged their crime, designed their own modification in behaviour and even found ways to reconcile the victims of their vandalism by busying themselves at rebuilding the various properties destroyed, as well as doing work for the parties who had suffered loss.

The interesting features about this example is that there was no police enforcement or incarceration, no pronouncement of guilt, and no authoritative punishment meted out. The dignity of the youth was maintained, and they participated in devising not only the solution to reconciling the victims of their bad behaviour but also in diminishing the potential for recurrence of future misbehaviour.

Ross also gives two accounts of dispute-resolving mechanisms described to him. The first comes from an Inuit community:

> The practice in one Inuit village was to call the entire village together, and to put the actual event forward as a hypothetical event, which might happen some time in the future. All people, including the miscreant and his victim, were required to put forward their views as to how things might be handled peacefully and properly were the situation ever to arise. There was no blaming, no pointing of fingers, no requirement of explanation, nor was their ever any discussion, much less imposition, of either punitive or restitutionary response. (1989:5)

The second example comes from an Ojibwa Reserve in his district of jurisdiction as an Assistant Crown Attorney:

> While the miscreant and his victim were summoned before an Elders Panel, there was never any discussion of what had happened and why, of how each party felt about the other or of what might be done by way of compensation. Nor was their any imposition of punishment. Each party was instead provided with a counselling Elder who worked privately to "cleanse his spirit" When both counselling Elders so signified by touching the peace pipe, it would be lit and passed to all. It was a signal that both had been "restored to themselves and to the community." If they privately arranged recompense of some sort, that

> was their affair. As far as the community was concerned, the matter was over. While I have not learned what the private counselling did consist of, I have been told that it did not involve retrieval and re-examination of the past of either its factual or emotional facets. It concentrated upon the future, and its spiritual component was central. (1989:5)

Michael Coyle, in a paper prepared for the Indian Commission of Ontario, draws from a number of researchers on Cree and Ojibwa society who have described mechanisms of maintaining community harmony. They all point to certain common characteristics, says Coyle:

> ...the teaching of wisdom by elders and leading members of the community both by example and by their discourse at feasts and ceremonies; mediation by leaders and elders in an effort to resolve disputes; the public or private warning of offenders by leaders or "shamans" that their conduct must not be repeated; the fear of supernatural retribution for wrongdoing; and the fear of public disgrace occasioned by unworthy conduct. (1986:625)

Coyle suggests that the chief methods of social control adopted by Ontario Indian peoples were similar, and that this was so because of commonly held underlying values that inspired those methods. These he presents as values that emphasize

> first, restraint by the community in the application of force to prevent wrongdoing; second, the avoidance of numerous prescribed penalties for particular offenses in favour of a more flexible response to an offender's misconduct; and third, reliance on the local community (where possible) and not on some higher or specialized body to determine an appropriate response to the misconduct of one of its members. (1986:625)

In all these examples it is clear that the values that are foundational to the culture of the Aboriginal people motivate their unique approach to determining the appropriate dispute-resolution mechanisms for their communities and for apportioning of justice that is right and respectful judgement.

Approaches to an Aboriginal Justice System

On the Canadian legal landscape, as in the experiences of other countries' dealings with Aboriginal peoples, various forms of indigenization of the justice system have been experimented with. On the whole these have produced models that use the process of indigenization as ways of injecting Aboriginally appropriate concepts and mechanisms into (or more likely adhering Aboriginal adjudicative mechanisms onto) the existing legal concepts and the prevailing justice system. Though some of these have been an improvement on the basically ethnocentric approach previously administered by the Canadian justice system, they have not

addressed the problems Aboriginal people face in their disproportionate representation in prison. Nor have they responded to the foundational distinctiveness of Aboriginal culture, ways of law or social institutions.

After reviewing the approaches taken in the United States, Australia and in Canada, Professor Michael Jackson concludes that, though these are an improvement on what was there before, and though such efforts should be encouraged, they do not go far enough. We must look for more far reaching models, he asserts. This is what the present situation calls for, and is indeed what Aboriginal people themselves seek:

> As we have seen from a review of the experience with tribal and Aboriginal courts in the United States and Australia and Canada, the development of native justice systems has been one directional in the sense that these systems have been an adaptation of our common law concept or a court applying our law and our sanctions. What is now being sought by native people is the right to revitalize their indigenous institutions and develop and adapt them to respond to the contemporary problems which their communities face. (1988:43)

The attitudes of the Canadian people in general, and of the Canadian establishment in particular, until they become more educated and more aware of the concepts, rights and foundations of First Nations' aboriginality, may not yet be flexible enough to think beyond the ethnocentrism of the Euro-Canadian single source of law or the universal application of their law concepts and law systems. At the same time, there seems to be a political advocacy and pledge to pluralism in this country that can be accommodating to the move toward development of parallel justice systems. This, for Aboriginal people, appears to be the most productive and most hopeful route. Further, the development of an indigenous or aboriginally-based justice system would respond most appropriately and most completely to the distinctive value system and value orientation of the people and culture it emerges from and answers back to. Of significance too, in establishing the nature of the development of an indigenous justice system is that in all countries where such initiatives are emerging, it seems to go hand in hand with the move toward Aboriginal peoples' claim for Aboriginal title, Aboriginal rights and Aboriginal government.

Prof. Jackson points to these same factors in his reference to M.B. Hooker's work on Legal Pluralism. Pluralism, Hooker says, provides the ideal atmosphere and framework for the development of a legal pluralism. In New Zealand, Australia, the United States, and in Canada there is already a growing acceptance of the concept of a plurality of law, where

> the courts are dealing with a spate of claims by the native minorities to land rights and for recognition of their own laws. One must seriously question whether policies aimed at specifying a single source of law are really necessary; perhaps indigenous laws are more suitable as expressing cultural values. (1988:47)

Perhaps one of the clearest and most developed of the Aboriginal responses to the need for Aboriginal approaches to the Anglo-Canadian justice system, is the Gitskan and Wet'suwet'en revitalization of the potlatch or feast system. The significance of this development points to the potential within other First Nations that there also exist well-developed and complex traditional decision-making structures which can serve as alternatives to our concepts of a court. (1988:44) Here again, this development is ultimately tied to the declarations of aboriginal title and jurisdiction over traditional territory. In this Aboriginal complex is also evidenced the holistic nature of the Aboriginal approach to social, economic, political, judicial and spiritual reciprocity and well-being of the nation and internation relations. In a statement to Chief Justice McEachern, the Gitskan and Wet'suwet'en explained:

> When today, as in the past, the hereditary chiefs of the Gitskan and Wet'suwet'en Houses gather in the Feast Hall, the events that unfold are at one and the same time political, legal, economic, social, spiritual, ceremonial and educational. The logistics of accumulating and borrowing to make ready for a Feast, and the process of paying debts in the course of the feast have many dimensions; they are economic in that the feast is the nexus of the management of credit and debt; they are social in that the Feast gives impetus to the ongoing network of reciprocity, and renews social contracts and alliances between kinship groups. The Feast is a legal forum of the witnessing of the transmission of chiefs' names, the public delineation of territorial and fishing sites and the confirmation of those territories and sites with the names of the hereditary chiefs. The public recognition of title and authority before an assembly of other chiefs affirms in the minds of all, the legitimacy of succession of the name and transmission of property rights. The Feast can also operate as a dispute resolution process and orders peaceful relationships both nationally, that is, within and between Houses, and internationally with other neighbouring peoples. (1988:44,45)

Professor Jackson adds that "there is here the nucleus of a native justice system which, while it does not mirror the normal Canadian model of adjudication, may hold far more promise in responding to problems facing members of the Gitskan and Wet'suwet'en Nations". (1988:45)

On these same grounds the Anishinabe Clan System holds within its total response to the social, political, cultural and spiritual needs of the people, an Aboriginal justice system that will not only provide a culturally appropriate response, but also one that answers meaningfully to the fundamental values of the Anishinabe people.

The Ojibwa-Anishinabe Clan System

In a research document prepared for the Roseau River Tribal Government, a constitution was proposed having as its very foundation: belief in the Anishinabe way of life, along with the values and principles that that way of life avows and proclaims. Continuous with this primary belief is the ensuing understanding that the process leading to and assuring self-determination, self-development and well-being can only be meaningfully derived from the knowledge, values and principles of that Anishinabe Life Way. (Dumont, 1985:1)

Along with the empowerment of the people as a sovereign First Nation, proclaiming the Aboriginal rights and entitlement with its accompanying rights to self-government, self-determination and self-development, the document goes on to affirm that the traditional and Aboriginal Clan System was the originally given and presently appropriate means of enacting this sovereignty, self-determination and government of the community and the Nation. Such an Aboriginally based system would be able meaningfully and appropriately to respond to all levels of need and aspiration: i.e., to control and exercise and develop the institutions and structures of administration and enforcement, social services, community development, justice, property and civil rights, constitutional matters, custom law, health services and cultural/education programs that reflect our values and ways and that will promote the well-being of the people. (1985:4)

The Anishinabe Clan System is described both as a Great Law and a form of social and political government. The original Clan System was spiritually endowed as a Great Law. It became an effective system of social order and structure of government. Its spiritual importance was never lessened throughout its institution and operation for the social, political and governing good of the people. For this reason it continued to function for the whole of the people and wholly for their needs and pursuits. Through changing times the Clan System remained strong and was a key to the strength of the people, their collective identity and their unity, while at the same time, maintaining the dignity, integrity and personal identity of the individual.

To appreciate the working of the Ojibwa Clan System as a framework of government and system of social order, we must be able to see how the system functioned in its inner dynamics – guaranteeing effective leadership and yet affirming the direct involvement of all the people in the life and concerns of their community and with the decisions that would affect their lives.

Each clan had a place within society and each had a designated function to serve. From time to time, as the need arose or according to the ritual and seasonal ordering of the particular clan, each clan would gather to meet, give teachings of the clan origin, instruct of its role and prerogatives, attend to clan needs and discuss the concerns and issues that were its special responsibilities. Again, at certain times, the individual clans having met separately, a Clan Feast would be

called which would bring all seven clans together to rehearse the teachings of the origins of clans, demonstrate ceremonially the placement of clans within the clan system, share the gifts of knowledge and experience peculiar to each clan, and field the concerns, recommendations and decisions of each clan through its clan leader.

Each clan had its own elected or appointed clan chief who was the spokesperson for the clan. Two of these clans were vested with the special function of leadership for the whole of the tribe. It is important to recognize here that the role of leadership is not one that is authoritarian or dictative but is a role that is given because of the qualities of one's capabilities as spokesperson for the whole of the clan, of one's ability to communicate effectively with all of the clan and one's dedication to the work of the clan as determined by the clan membership.

Neither is this the kind of representative government where leaders are selected to represent a group of people and make decisions on their behalf. Rather, it is a truly democratic governing system where the spokesperson (leader/chief) of each clan speaks for the clan membership, being knowledgeable of their wishes and directives through clan meetings and through continual direct contact and communication with individuals and families of the clan.

In the traditional societal framework, since a clan member could not marry within his/her own clan, in each family there were at least two clans represented. With this same requirement, when children married they would introduce other clans into the extended family. People, held together by close family ties, then, promoted the co-operative and integrative working of the clan system, as a number of clans spoke for the composition of each extended family. In this same sense, the governing body that is the overall family of clans could not, by its very nature and inner dynamics, do other than function in a democratic, integrated and interdependent fashion. Traditional society, then, where family and community lived within the clan system and which was governed by the system of clans, was a strong, unified, ordered and democratic society. A contemporary Aboriginal society, wishing to re-claim the clan system governing structure, would also need to revitalize the clan system among the people at a personal, family and social level in order for traditional government to function at its optimum. A move toward the clan structure of governing must go hand-in-hand with an overall educational/awareness program acquainting the people with the workings of such a system and encouraging the redevelopment of the clan system in their own lives.

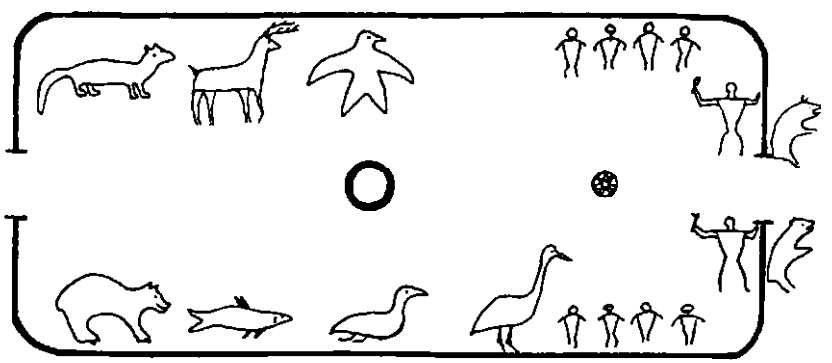
To appreciate the translation into a contemporary clan-based system of government and its implications for an aboriginally based justice system, it is important to look back to the traditional origins and structure of the clan system. The following diagram and descriptive notes are (1) a scroll representation of the Aboriginal arrangement of clans, and (2) excerpts from the original teaching of clan origins and purpose:

The Creator gave to Earth's Original People, through the great prophet and teacher In.Do.Daim, the O.do.i.daym.i.wan (the Clan System).

The Law of Clans had been given to The People as a way of sacred knowledge and order – a system that became a government framework for the unity, strength and social order of the Nation. This clan system became the way in which people could and did maintain individual and collective identity without separation from the village, tribe or the Nation.

The clan system was a complete democracy in its purpose, intent and meaning. Through the clans was given the right and voice to all the People. In the clan system was the right and the voice for women, children, young and old, and the unborn. As many duties and responsibilities as may be embraced might produce a leader – man or woman. These persons were called Ogimaw, leader, and later "chief"

In the clan system, with its leadership and representation of all the people, lay the basis of Anishinabe democracy, law, truth, peace, brotherhood, honour, strength, unity and social order. (Banai)



There were Seven Original Clans, and for each clan there was given a place and a function to serve for the people:

AU-JI-JAWK (Crane)	Chieftainship
MAHNG (Loon)	Chieftainship
GIGOON (Fish)	Philosophers and mediators
MA-KWA (Bear)	Guardians and healers
WA-BI-ZHA-SHI (Marten)	Warriors, hunters, providers
WA-WASH-KESH-SHI (Deer)	Dancers, singers, peaceful people
BA-NAIS (Bird)	Spiritualists, pursuers of knowledge

From here, we must attempt to show how this ancient ordering of clans can be translated into a contemporary framework, while still being in keeping with traditional Aboriginal beliefs, principles and original function of the clans.

By assembling the seven clans around the seven-pointed star, we can demonstrate their relationship to one another for the purpose of describing a traditionally-based contemporary Anishinabe governing system. (The seven-pointed star is a traditional design that shows how all the great principles that make up the whole are joined together in a totally interconnected and integrated way.) It will serve to show an effective governing system that can guarantee participation of all the people in all those matters that affect their lives and their community. (See top diagram on page 78.)

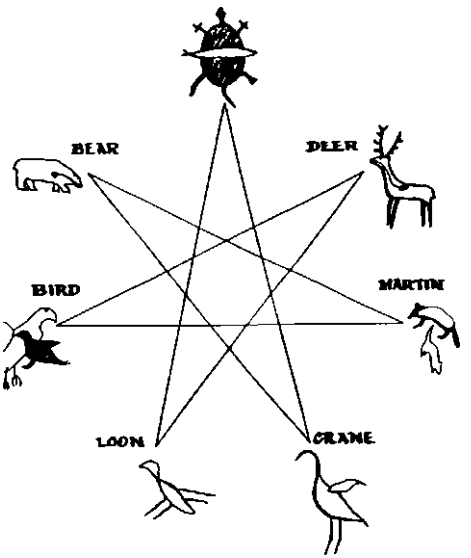
When these original clan designations and clan responsibilities are translated into contemporary designations of responsibility, the seven clans would be represented as:

Crane – chief of external affairs;
Loon – chief of internal affairs;
Fish – planning, design and integrated development;
Bear – constitutional matters, judicial and justice council;
Hoof – community and social development;
Marten – land, resource and economic development and strategy; and,
Bird – spiritual, cultural and educational development.

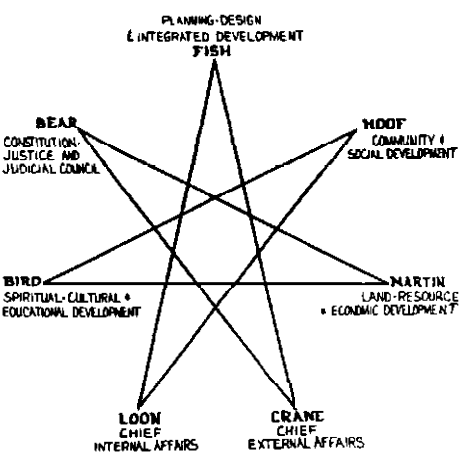
See bottom diagram on page 78.

It is essential for effective Aboriginal Government that the people (individual, family and clan) be involved in all important aspects of expression of concerns and decision making that will directly or indirectly affect their lives and livelihood. Community Councils, composed of the people bringing their ideas and concerns to their leaders and central council members and related staff will serve to guarantee that the people always have access to the decision-making body and can participate in a real and effective way to those areas that concern themselves, their families and community. On the other hand, the mandate to govern and to speak the words of the people is entrusted to the councillors and chiefs by virtue of their ability to be their voice and to give expression to the will of the people.

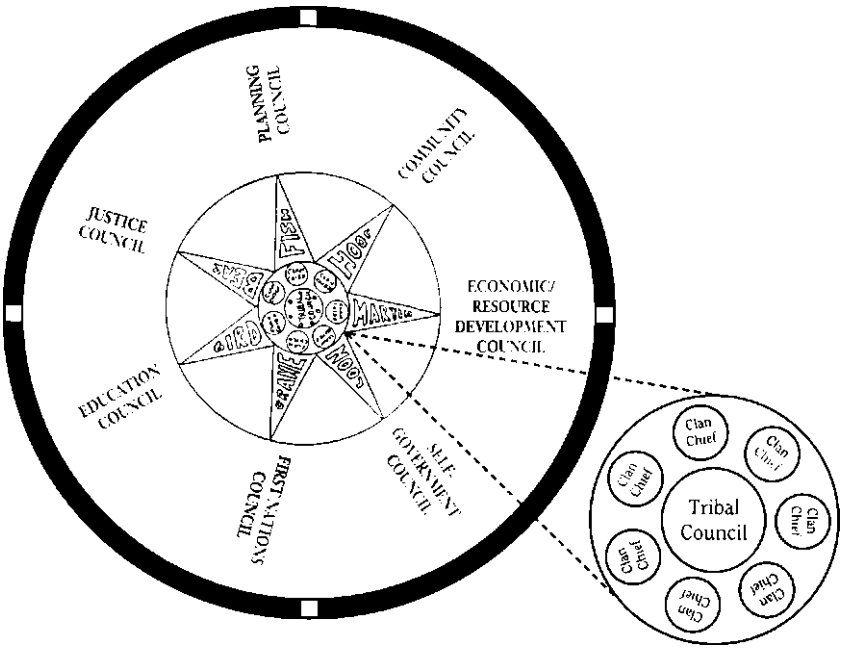
Relationship of the Seven Clans



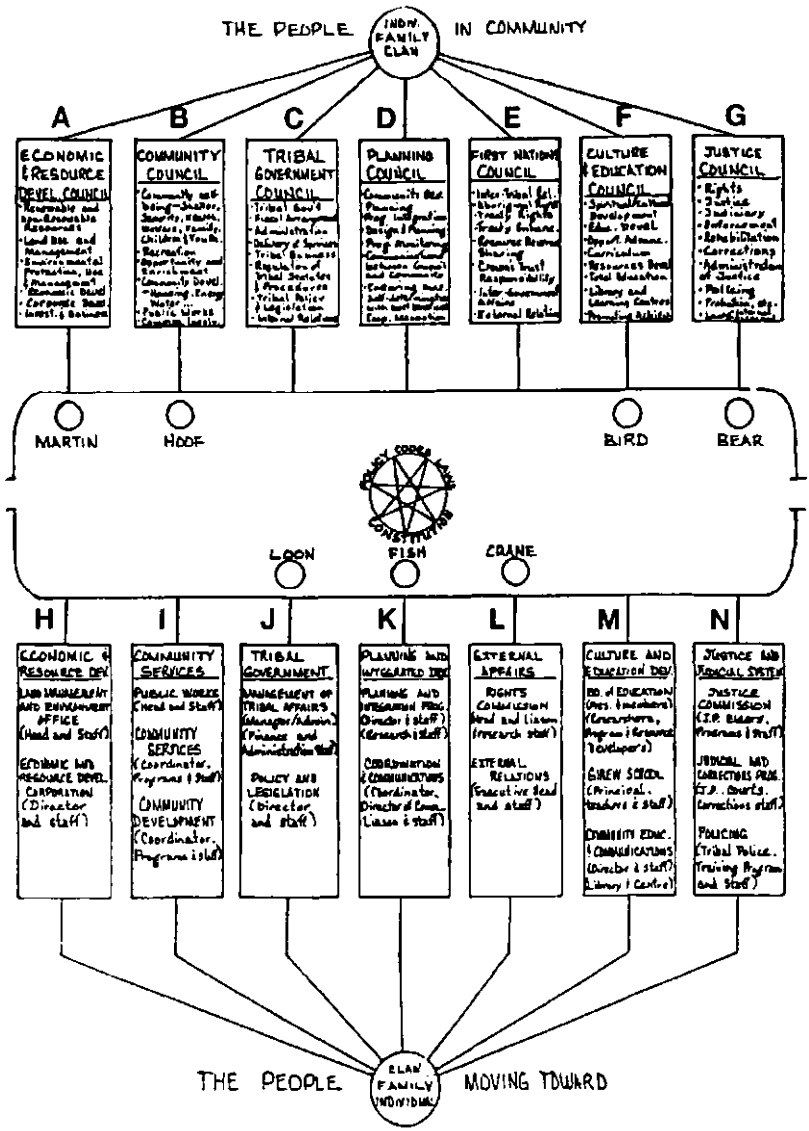
Contemporary Clan Designations



The diagram below is the design for the shape that this form of traditional Anishinabe government would take. The people, through the Councils, gain direct access to the clan chief and clan-designated councillor of the Central Council, thus ensuring the peoples' ideas, concerns and directives are heard. The Central Council, in the same manner, has direct communication with the people through each clan-designated councillor to the appropriate, established working Council.



The following diagram shows how this aboriginal form of government moves from the people through a governing structure based on the clan system where the people input their concerns to designated areas of planning, development, government, justice and education. These Councils have primary advisory and directive input to the central governing council. Considerations of this input, planning and action are carried out by the central governing council according to clan relationship and co-operative decision making. From here the Council can affect appropriate action through the heads, staff and programs that come under the portfolio of the clan-designated positions of governing responsibility and under the purview of clan-designated Community Councils. In this way, the doers of decided action can most appropriately and more reliably respond to the expressed and discerned needs of the people, and greater order and integration can be given to actions taken by the tribal council for the people.


THE PEOPLE
INDIV. FAMILY CLAN
IN COMMUNITY
A
B
C
D
E
F
G
ECONOMIC & RESOURCE DEVEL. COUNCIL
COMMUNITY COUNCIL
TRIBAL GOVERNMENT COUNCIL
PLANNING COUNCIL
FIRST NATIONS COUNCIL
CULTURE & EDUCATION COUNCIL
JUSTICE COUNCIL
MARTIN
HOOF
BIRD
BEAR
POLICY
CODES
LAWS
CONSTITUTION
LOON
FISH
CRANE
H
I
J
K
L
M
N
ECONOMIC & RESOURCE DEV.
COMMUNITY SERVICES
TRIBAL GOVERNMENT
PLANNING AND INTEGRATED DEV.
EXTERNAL AFFAIRS
CULTURE AND EDUCATION DEV.
JUSTICE AND JUDICIAL SYSTEM
THE PEOPLE
CLAN FAMILY INDIVIDUAL
MOVING TOWARD
GREATER QUALITY OF HUMAN LIFE .

A

Economic & Resource Devel. Council

- Renewable and non-renewable resources
- Land use and management
- Environmental protection, use & management
- Economic development
- Corporate development
- Investment

B

Community Council

- Community well-being – shelter, security, health, welfare, family, children, youth
- Recreation
- Opportunity & enrichment
- Community development – housing, energy, water ..
- Public works
- Community involvement

C

Tribal Government Council

- Tribal government
- Fiscal arrangements
- Administration
- Delivery of services
- Tribal business
- Regulation of tribal statutes & procedures
- Tribal policy & legislation
- Internal relations

D

Planning Council

- Community development planning
- Program integration
- Design & planning
- Program monitoring
- Communications between council and community
- Ensuring maximum self-determination with most beneficial co-operative associations

E

First Nations Council

- Inter-tribal relations
- Aboriginal rights
- Treaty enhancement
- Resource revenue sharing
- Crown's trust responsibility
- Intergovernmental affairs
- External relations

F

Culture & Education Council

- Spiritual/cultural development
- Educational development
- Opportunities advancement
- Curriculum
- Resources development
- Total education
- Library and learning centres

G

Justice Council

- Rights
- Justice
- Judiciary
- Enforcement
- Rehabilitation
- Corrections
- Administration of justice
- Policing
- Probation, etc.
- Internal and relational laws

H

Economic & Resource Development

- **Land management and enhancement office** (head, staff)
- **Economic and resource development corporation** (director, staff)

I

Community Services

- **Public works** (head, staff)
- **Community services** (co-ordinator, programs, staff)
- **Community development** (co-ordinator, programs, staff)

J

Tribal Government

- **Management of tribal *affairs*** (manager/administrator, finance and administration staff)
- **Policy and legislation** (director, staff)

K

Planning & Integrated Development

- **Planning and integration program** (director and staff, research director and staff)
- **Co-ordination and communications** (co-ordinator, director of communications, liaison, staff)

L

External *Affairs*

- **Rights commission** (head, liaison/research staff)
- **External relations** (executive head, staff)

M

Culture & Education *Development*

- **Board of education** (president & members, researchers, program and resource developers)
- **Ginew School** (principal, teachers and staff)
- **Community education & communications** (director and staff, library, learning centre)

N

Justice & Judicial System

- **Justice commission** (justices of the peace, courts, corrections staff)
- **Judicial and corrections program** (justices of the peace, *courts, corrections staff*)
- **Policing** (tribal police, training program, staff)

The end result of this process then leads back to the people and ideally brings about a greater quality of human life that has been initiated by the people, decided upon by their elected government and carried out by the people most capable of responding to the needs of the people. Each Community Council, working through its spokesperson, exercises direct input and supervision of its designated area of responsibility. It is within this same pattern that the responsibility of justice is upheld by the people themselves and carried out for the greatest benefit of the people by the systems put in place within and as a product of the Aboriginal government.

The Justice Council

The Justice Council, one of the seven community councils of the clan system, holds as its responsibility all branches of rights, judiciary, enforcement, rehabilitation, corrections, policing, probation, constitutional matters, custom law, internal and inter-relational legal concerns, and the determination and administration of justice. Through the proposed system of government, these concerns of justice become, in a fundamental way, the concern of the elders, extended family, clan and community members at the community level. Where each clan holds as its responsibility the behaviour and good order of its own clan members, when such behaviour cannot be managed within the clans themselves, it becomes the particular responsibility of the Guardian Clan – in the clan system this responsibility falls to the Bear Clan. In the contemporary Aboriginal government design this is the Justice Council.

The responsibility of the Bear Clan/Justice Council is that of constitutional rights, assurance of justice, and the judicial administration and enforcement of tribal justice. This Clan Council must establish the constitution and guarantee the constitutional rights of the Tribal Community, both with respect to self-government and in the negotiation of relationships with the other governing bodies. The Bear Clan is also responsible for the creation of an indigenous justice system for the people of the tribal community – from the principles of traditional beliefs and from the knowledge and experience of tribal customs.

From this system, this Clan must ensure the maintenance and administration of justice for the community. The Bear Clan must, as well, institute and maintain a judicial system to mete out justice, to police, and to encourage rehabilitation and make decisions on matters of referral, probation, restitution, reconciliation, reparation and diversion.

The Clan's responsibility will also include the maximizing of tribal members' participation in all levels of the justice system, both indigenous and external; ensuring the availability of community resources, personnel and programs for the administration of justice; raising the consciousness of tribal members regarding constitutional rights and tribal justice; and providing of leadership in matters of institutions of justice.

The Bear Clan/Justice Council will establish a genuine self-governing people and community by affirming and instituting its constitution, its rights and its own indigenous and parallel justice system, its own laws and means of enforcement.

The purpose for presenting the outline of the clan system of government here is to demonstrate that there is a key place for an Aboriginal justice system within the indigenous governing system. The presentation also serves to illustrate how justice is interrelated with all other facets of government and social order, harmony and well-being.

Gwaik/minodjiwi/dibaakonagewin, Aboriginal justice, finds its most meaningful placement and most productive capacity within a framework of Aboriginal government. Here, the determination of the most appropriate justice system can be worked out within a setting that honours the cultural distinctiveness of the people and is responsive to the behavioural bases and the foundational values of the Aboriginal people themselves. Various improvements can be made to make the prevailing system more responsive to Aboriginal distinctiveness; however, there are too many significant disparities between the two cultural ways. Doctoring the Anglo-Canadian system does not seem to answer completely to some of those most central differences. Further, the unique forms of Aboriginal justice seem to call for its being situated in a comprehensive scheme of culture – a scheme that integrates the concerns of Aboriginal justice with all the other facets of family, social and community development and well-being.

The uniqueness of this approach also allows justice matters to be situated solidly with the people, and brings the perpetrator and the victim together with the community, along with the highest council of elders and leaders for the rightful restoration of harmony and reconciliation. This kind of framework allows for the development of the most appropriate culture-based procedures for determination of just resolutions as well as the re-establishment of clan, tribal and customary law ways.

Further, traditional Aboriginal responses to the law, such as, regular teaching of community values by elders and other respected persons in the community; warning and counselling of particular offenders by leaders or by councils representing the community as a whole; using ridicule or ostracism by the community at large to shame offenders and denounce particular wrongs; mediation and negotiations by elders, community members, clan leaders, aimed at resolving particular disputes and reconciling offenders with the victims of the misconduct; payment of compensation by the offenders (or their clan) to their victims or victim's kin; and so on, can take a meaningful and useful place within such a system. In the present justice system these approaches tend to be culturally incompatible, being guided by such expectations as obedience to superior state authority; retributive punishment; authoritative judgement; institutional confinement; incarceration as protection and deterrence, etc.

The nucleus of an Aboriginal justice system can be found within the traditional expressions of Aboriginal ways of governing and of maintaining social order. That this is still vital in the Aboriginal psyche and social conceptualization is evidenced in its emergence in various tribal initiatives in recent time. With such a comprehensive basis for the development of culturally appropriate justice systems, it is not unrealistic to recommend the development of Aboriginal parallel justice systems within the Canadian context.

Conclusion

The Euro-Canadian justice system that has been applied to the Aboriginal people of Canada is one that has evolved out of a context and history that is very different than the cultural and historical context of North American Aboriginal people. Euro-Western concepts of sovereignty, authority, hierarchy and ruling entity appears diametrically opposed to the concepts of spiritual compact, tribal will, custom/tradition, and respect for the inherent equality and integrity of the individual of the Aboriginal worldview. Where it has almost universally been applied to Aboriginal people, it has been a system imposed upon them and found to be basically incompatible with the concepts and values of persisting Aboriginal culture and world view.

Psychologically, the core values of Aboriginal people, as well as the cultural beliefs and structures, have been highly resistant to change. The values and the behaviour generated by these values have persisted through time and acculturational forces. This being so, the difficulties arising from an imposed system of justice which is based on a very different value system and core principles would still persist in the courtrooms of today. A study of these core values, with their ensuing behaviours, comparing them with that of the Euro-Canadian culture, shows that continuing difficulties for Aboriginal people in conflict with the law and in relating to the justice system can be directly traced to the unsuccessful meeting of two distinctive cultures and traditions.

Within the Aboriginal concept of justice (*gwaik/minodjiwi/dibaakonagewin*) is an embodiment of both the honesty and straightness of good judgement, uniquely harmonized with the ever important value of respect. Although it seems important to make the present justice system better, as it applies to Aboriginal people, in whatever meaningful ways we can, there appears to be in the Aboriginal traditions and structures themselves the nucleus of an Aboriginal Justice System that is emerging and can be developed as a parallel justice system within Canadian society. In Anishinabe country the Ojibwa-Anishinabe Clan System of Aboriginal government embraces a justice system that is responsive to Aboriginal core values and answers to the highest principles and the cultural distinctiveness of the Aboriginal individual, family, community and nation.

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Fundamental Values, Norms, and Concepts of Justice – Inuit of Nunavik

*Zebedee Nungak**

The radical transformation of Inuit life in the Arctic which has transpired in the past forty years can lead the uninformed to the erroneous conclusion that Inuit did not possess any semblance of a justice system before contact with European civilization. That our people lead a nomadic existence in a harsh unforgiving Arctic environment may lead Qallunaat or others to conclude that Inuit did not have a sense of order, a sense of right and wrong and a way to deal with wrongdoers in their society. Inuit did possess this sense or order and right and wrong. The way it was practised and implemented may never have been compatible with European civilization's concepts of justice, but what worked for Inuit society in their environment was no less designed for conditions of life in the Arctic than that of Qallunaat was for conditions of their life.

In the pre-contact period, Inuit lived in camps dictated according to seasons and availability of life-sustaining wildlife. Their leadership consisted of Elders of the camp, as well as hunters who were the best providers and were followed for their ability to decide for the clan or group where the best areas were to spend the seasons. The overriding concern was the sustenance of the collective. Any dispute among the people was settled by the Elders and/or leaders, who always had the respect and high regard of the group. The decisions of these people, who were the wise and experienced of the clan, were always respected and abided by.

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In the rare cases where this was not the case, (where an offender refused to obey the sanctions imposed by the leadership), extreme measures were taken. If the offence was serious enough to disrupt the constant struggle for life, and the person who was the cause of that disruption made clear his refusal to obey what was imposed on him, the leadership often resolved to kill the offender. Our oral traditions are rich with stories of such episodes where somebody was killed by sanction of the leadership. It should be said immediately that such cases were the exception and not the rule. Then again, everything humanly possible was done to advise the culprit to mend his ways or to follow the decision of the leadership before such a radical measure was carried out.

The bulk of disputes handled by the traditional ways pre-contact mostly involved provision of practical advice and persuasive exhortation for a correct and proper behaviour, which were generally accepted and abided by. In more serious cases, offenders were ostracized or banished from the clan or group. In these cases, the ostracized or banished individuals were given no choice except to leave the security and company of the group which imposed this sentence. The social stigma of having such a sentence imposed was often enough to reform or alter the behaviour which was the original cause of this measure, and people who suffered this indignity once often became useful members of society, albeit with another clan in another camp. Our oral traditions also abound with stories of such people who went on to lead lives useful to their fellow Inuit as providers, and in some cases, leaders of their own groups or clans. It can be said that Inuit were completely self-sufficient in this aspect of their lives, as they were in every other respect, prior to the arrival of other peoples in their homeland. This was the practice when Inuit culture was still untouched by outside influences, and the culture and language was strong. Inuit possessed a very strong sense of adequacy which was honed by the constant struggle for survival in the most unforgiving and harsh climate on earth. Survival and sustenance of the collective was the primary factor which dictated the decisions of a justice and dispute resolution nature. There was, moreover, no question about who had the responsibility to make such decisions. The Elders and the most able providers were the undisputed leaders and arbiters of resolving conflict when it arose in the traditional life of the Inuit.

Displacement of Inuit Traditions – Contact with "Civilization"

When authorities of the Government of Canada, represented by the Royal Canadian Mounted Police, became the chief arbiters of justice among the Inuit, traditional methods and customs of dispensing justice were immediately and completely displaced by the new order. The King's (or Queen's) authority, represented by the police and courts, became the only system of justice. There was

no place for Inuit traditions, and neither was there any regard for how things were done before. An utterly foreign system of justice was imposed upon the Inuit, and the role of the Elders and leaders was rendered useless. The new representatives of British justice totally ignored the values, traditions and customs of the Inuit in their determination to have their laws abided by. Crown law, vaguely and not at all understood by Inuit (Wishes of the Great White Monarch for His Subjects), became supreme. The case of Sinnisiak and Uluksak, chronicled in the book, *British Law and Arctic Men*, is a case in point.

The formality and circumstance surrounding the administration of British justice in the Arctic clashed violently with the traditional concepts of the Inuit notion of justice. Whereas dispute resolution was based on the well-being of the collective, and was dispensed by those who were morally, if not legally, well regarded by their society, it was now handled by foreigners, strangers who spoke a strange language. The roles of the judge, jury, prosecutor and defence were for a long time beyond the comprehension of subjects who lived in the Arctic, the Inuit. Interpreters, even if they were competent, struggled mightily with concepts such as due process, individual rights, juries, appeals, and such untranslatables as "guilty" and "not guilty". Moreover, Inuit as a nation, or a distinct collective of people had absolutely no role in the formulation of the laws which they were expected to live under as Canadian citizens. These laws were made by people sitting in a far away legislature who were just as ignorant of Inuit society as we were of Qallunaat society.

The loss of enablement and sense of adequacy was made more complete by the fact that justice was now dispensed by people who showed up so infrequently that it was difficult to maintain a sense of who these remote authorities really were.

Participation on the Fringes – Inuit in the Justice System

With the passage of time and the advent of education among our people, Inuit eventually became involved in the outer periphery of the British (Canadian) legal system. Other than being the accused, many became policemen, interpreters and, in later years, court workers and corrections officers. This has taken place without the legal system being "aboriginalized", that is, without all levels of the system, foreign as it is to Inuit, being deliberately programmed to be manned by Inuit. It is still essentially a system completely foreign to Inuit values.

But with its inherent inadequacies and all, Inuit have made small inroads as participants on the fringes of the justice system. In the fields where they are present, Inuit personnel have proven themselves competent, and in many cases indispensable to the justice system. Their facility in the language and culture of their people have made their necessities of life vital to the function and integrity

of the legal system. As policemen, they are preferred by far over non-Inuit as they are as interpreters and court workers.

Lack of Inuit Control – A Fundamental Flaw

It hardly needs to be restated that pre-contact self-sufficiency was ripped out and replaced with a system that neither integrated nor took into consideration the pre-existing values, norms and concepts of justice of the Inuit. Before any serious attempt is made to examine what those norms and concepts were, the question of lack of control by Inuit of the justice system has first to be addressed. What is the use of studying values that were discarded, ignored as irrelevant, and otherwise completely swamped by the imposition of a totally foreign justice system if that system will continue to operate and exist under the complete and total control of the dominant society? Why go through the agony of enumerating these values if the dominant authorities will be the only ones picking and choosing which ones are compatible and which ones are not? To spare us the futility of such an exercise, we first have to be provided with an answer to this fundamental question: To what degree will Inuit have control over the justice system in their ancestral homeland? How much self-government will be accorded to facilitate this dream?

Once this question is adequately answered, it would take a thorough series of in-depth ethnological and anthropological studies to do justice to the fundamental values, norms and concepts which the present system presumes to want to know about. But until then, we have to be wary and genuinely skeptical about getting drawn into an exercise which will come to naught if the administration and implementation of the system remains firmly in the hands of foreigners who will never have an adequate appreciation and respect for these values.

Fundamental Reform versus Tinkering

Upon closer examination of this issue, there will certainly be a finding that many cultural differences exist between Inuit and western society. Because some will certainly appear to be irreconcilable differences, a question will arise about whether Inuit traditional law can be applied or desired in the modern contemporary world. There will be a question of whether Inuit should have a completely separate justice system, or whether our values can be integrated and adapted as amendments to the existing system of laws.

Is the present system flexible enough to allow accommodation of what can appear to be cultural incompatibilities? Will the system endure encroachment upon its well established traditions to integrate aspects of a culture, language and lifestyle foreign to itself? At what point would acceptable tinkering become

the rules of natural justice and respect the principles in the *Charter of Rights and Freedoms* of the *Constitution Act, 1982* and the *Quebec Charter of Human Rights and Freedoms*. Fundamental to the decision making that takes place in a court is the assumption that the best way to find the truth in a particular case is through an adversarial system. That is, that both parties to an issue are seen as adversaries and come to court to "battle" in front of a judge according to certain procedural and evidentiary rules. Within this narrow set of rules, all the players in the court, namely the plaintiff and the defendant, must operate in a combative manner in front of the judge (or judge and jury). Each party is fighting against the other in an effort to make "proof" of his case. (In a criminal case, the prosecution must prove its case "beyond a reasonable doubt". In a civil case, the plaintiff, to succeed, must prove its case on the "balance of probabilities.")

Though the current court system is a necessary and integral part of the administration of justice, it has a number of shortcomings in so far as the communities of Nunavik are concerned.

These shortcomings include the following:

- it forces individuals into an adversarial, combative contest wherein someone has to win and one party has to lose;
- it is not community-based but instead comes from outside the communities;
- it has inherent long delays;
- it is an extremely costly process both for government and participants (i.e., lawyers, travel, etc.);
- reliance must necessarily be made by all parties on lawyers because they are the only ones who are trained to know the detailed procedural and other rules.

There are several types of alternative dispute mechanisms including various models based on negotiation, conciliation, mediation, arbitration and diversion.

All of these alternative dispute resolution models have the following common traits:

- parties have voluntarily to agree to submit to them;
- all are designed to be impartial processes;
- all are designed to encourage fairness and equity;
- all are designed to be efficient and cost-effective;
- all are designed to be open and accountable processes;
- all are designed to produce a decision or result to resolve the conflict or problem;
- all are less costly than a judicial decision-making process (i.e., a court);
- all allow more flexibility than a court in the hearing of evidence (i.e., less rigid procedural rules);
- all allow for a greater role of ordinary people (i.e., non-lawyers).

The Task Force, after extensive research and discussion, decided to present three possible alternative dispute resolution models to the Inuit communities for consideration and discussion. These models were the specific subject matter of a discussion paper prepared and circulated by the Task Force in October 1991 to all the communities. These models are the following:

Model 1: Local Native Judge

Under this model the community chooses one or more community members to act as local judges. These judges could be appointed either on a full-time or on a part-time basis. These local judges would have to receive appropriate training. Funding for this local judge model would be provided by Quebec. Subject to negotiations with Quebec, these local judges could have jurisdiction over:

(a) all criminal offences; or
(b) less serious criminal offences only; or
(c) only the less serious criminal offences for which the offender admits to guilt. The local judges would have jurisdiction over both Inuit and non-Inuit offenders within Category I and II lands of a particular community.

Model 2: Council of Elders

Under this model, the community would choose or elect a Council of three to five Elders and provide them with the responsibility to preside over community hearings concerning dispute and crimes that transpire in the community (i.e., Category I and II lands).

The proposed Council of Elders could have jurisdiction to resolve:

(a) all disputes that arise in the community, including serious criminal offences; or
(b) less serious criminal offences only.

The Council of Elders would have the power to resolve disputes according to Inuit customs and traditions subject to respecting the basic legal rights guaranteed by the Quebec and Canadian Charters, such as the right of an accused to a fair hearing. Depending on discussions with Quebec, the Council's decision could be passed on to the regular court judge who would either:

(a) impose it on the offender as his official sentence; or
(b) consider it as a recommendation to help him make his own decision.

Model 3: Council of Elders and Youth

Under this model the community would choose or elect a Council of four to six individuals including Elders and youth and provide them with the responsibility to preside over hearings concerning disputes and crimes occurring in that

community (i.e., Category I and II lands). The Elders' presence would ensure that customs and traditions are maintained and the youth's presence would reflect the needs and concerns of the younger generation. Jurisdiction of this Council would be similar to that of the Council of Elders discussed above.

Similarly and subject to discussions with Quebec, the decisions of the Council of Elders and Youths could be passed on to the regular court judge who would either:

(a) impose it on the offender as his official sentence; or
(b) consider it as a recommendation before he makes his own decision.

Based on the Task Force consultations on the issue of alternative dispute resolution mechanisms and in particular the three models mentioned above, the communities of Nunavik provide the following insights:

- each community should have a local court presided over by a lay Inuk judge;
- these lay Inuk judges must receive appropriate training in law and procedure and the general administration of a court;
- these local courts should deal with lesser criminal offences because delays in the present court system are much too lengthy and unjustified;
- in regard to the structure of the local courts, each local court would rely on a panel of Elders drawn from each particular community for recommendations with respect to sanctions;
- a regional itinerant court for just the Nunavik region is required with jurisdiction over the more serious criminal offences (i.e., murder, assaults, etc.);
- the regional itinerant court would have two branches: one for the Ungava Coast and one for the Hudson Bay Coast with a base office in Kuujjuaq and Kuujjuarapik, respectively; that is, each coast would have an itinerant court;
- the judge positions for the regional itinerant court would initially be non-Aboriginal but ultimately would be filled by Inuit properly trained for these positions;
- both branches of the regional itinerant court should be supervised by a Chief Justice whose role it would be to provide advice and direction to the itinerant court judge, be available for special problem cases, and oversee the general quality of services of the court;
- sanctions employed by both the local and regional itinerant courts must be adjusted to meet Inuit traditions, customs, values and needs; in this regard, generally any offences involving violence or weapons require much harsher sanctions than are now applied;
- generally harsher sanctions are required for certain offences, in particular, those involving violence or weapons;
- with respect to what behaviour constitutes an offence, certain behaviour now not considered "criminal offences" have become such serious social and legal problems that they should be criminalized; solvent-abuse is one such

behaviour; short of complete prohibition of these solvents, ways have to be found to deter their abuse;

- the long-term goal should be for the local court (with its lay Inuk judge) and the regional itinerant court to replace completely the current regular court system subject to adequate training of personnel and resourcing; until such time, the current court system should continue but should be amended and improved to address the known deficiencies and problems of the current court system;
- with respect to the substantive law to be applied by the local and regional itinerant courts of Nunavik, a long-term goal should be to have an Inuit Criminal Code apply. This Inuit Criminal Code must be drafted so as to reflect Inuit customs, traditions, usages and needs. Such an undertaking will obviously take time; in the interim the Canadian *Criminal Code* must continue to apply to Inuit of Nunavik subject to the necessary amendments to take into account Inuit customs, traditions, usages and needs.

Appendix B

Justice Task Force Report by Zebedee Nungak

Our consultations with our fellow Inuit during the mandate of the Inuit Justice Task Force has impressed me foremost with this thought: Inuit hunger for the opportunity to operate and control the justice system in Nunavik. Our people have a very strong desire to regain the sense of adequacy which was our tradition and foundation in being capable to deal with the problems of our society ourselves. It is time for justice authorities, federal and provincial, to listen to and act upon the wishes of the people of Nunavik. Fundamental reforms are required to create a better, more responsive, more relevant, culturally sensitive and boldly innovative approach to the staggering problems made obvious by the words of the people themselves.

We have cried with our people as they relate to us the pathetic state of "lacks" that exist in police services, the remote and sorely inadequate itinerant court, the distant and foreign detention centres. We have empathized with those who describe the severe culture shock of being administered by people who do not speak the language and do not possess a semblance of understanding Inuit culture and society.

We have shared our people's agony as they plead for services taken for granted by other citizens. These are not available to us because we live in a remote Arctic environment and do not share the language and culture of the dominant

society. Our people have demanded, loudly and clearly, that we share, on our terms, the benefits accorded other citizens in such matters as family crises services, addiction healing facilities, and access to legal representation without having to travel vast, expensive distances. Our people have told us rightly that such services should not be luxuries available only to those who happen to live in the right geographical areas.

The opinions of people in our communities quoted in our report demonstrate that it is high time for Nunavik to have its own police force, adequate and competent in personnel training, equipment, and working conditions. It is long past due to establish a system of local and regional courts with offices in the region, accessible to those they serve. Our people want corrections and detention centres located in the territory, and operated on principles relevant to Inuit language, culture, and geographic environment. Furthermore, all the above have eventually to be administered by our own people, trained and made competent with our special circumstances in mind.

The stress and hurt felt by our youth ensnared in the justice system has been driven home to us by the youth themselves, as well as by their parents and families. The disproportionate youth population in jails and detention centres is painfully alarming in its implications for the future of our society. There is something very wrong about the high incidence of repeat offenders, solvent abuse, the general decay of the family unit, and the tragic epidemic of suicide. What is happening to the assets of our future, our young people, drives even the strongest of us close to despair. Their cry for help and attention is especially acute and should provide an urgent sense of mission for reforms and restructuring needed to overhaul the justice system.

Solutions to these problems are not going to be cheap, monetarily or otherwise. We are going to have to spend a healthy sum of money to establish adequate and functional infrastructure and facilities, on the ground, in our villages. We will have to invest time, money, and energy to launch a wide-ranging program to train and equip our people to take on the responsibilities contained in the recommendations of this report. These are absolute necessities to blaze the trail to a model system which we are certain will be cost-effective, accessible and responsive, and culturally relevant to the people of Nunavik.

As Chairman of the Inuit Justice Task Force, I characterize this report as an urgent wake up call, and a challenge to action. I cannot emphasize enough the immediacy of priority which is required by all concerned to build a new and creative system of justice for Nunavik.

Let us work together and immediately start the gears of machinery that will ensure a better tomorrow and place a vital element of self-government in the hands of our people. In the end, we may not do better than what is in place right now, but I am certain that we cannot do any worse.

Appendix C

Task Force Visit to Iqaluit Correctional Centres: Legal Air Services, and Justices of the Peace

On August 25-26, 1992, the Task Force flew to Iqaluit, N.W.T., in order to examine the nature and quality of correctional facilities and services; the local court system (justices of the peace); and legal aid services in order to compare them with what Inuit of Nunavik presently have available to them. Tours were arranged by the legal aid clinic for the Task Force to visit three types of correctional facilities, the regional legal aid clinic known as Maliganik Tukisiiniakvik, and to meet with some justices of the peace.

Correctional Facilities

Tours were conducted of the Baffin Correctional Centre (BCC) and the Warden, Len Davies, made himself available to answer any questions of the Task Force members. The tour was also conducted of Issumaqsunngittuq (Secure Youth Facility) and the Warden, Bob Cooke, made himself available for questions of the Task Force members during that tour. In addition, the Task Force conducted a tour of Open Custody (Building 685) and the Director of that unit, Akeshoo Joamie, made himself available for questions of the Task Force members.

Baffin Correctional Centre (BCC)

In examining the BCC, the Task Force learned that there are three such prisons in the N.W.T. These prisons are for adult males, and there is one prison located in Iqaluit with a capacity of 48 inmates; there is another facility in Yellowknife with a capacity of 132 inmates; and there is another unit in South Mackenzie with a capacity of 52 inmates. These prisons are normally for inmates serving sentences of less than two years, but they also hold inmates who are serving sentencing for over two years (ratio of 90% to 10%). These prisons can hold offenders for more than two years only by special agreement with the federal penitentiary services since normally such offenders must be sent south to federal penitentiaries. There is also an additional prison in the N.W.T. for female adult offenders in Fort Smith with a capacity of 10 inmates.

The Task Force learned that the BCC has a staff of 35 of which 70% are Inuit. For the purposes of counselling inmates, the BCC relies on outside groups such as the Elders and Alcoholics Anonymous. Also available for counselling there is a nurse on staff, a classification officer and a psychologist spending approximately four to five days per month at the institution. There is also a position for a teacher for the institution that has not yet been filled.

There are plans to build a federal penitentiary in the N.W.T. for inmates (serving more than two years) who are now serving time in southern institutions. However, this is still in the planning stage. These plans are attempting to respond to the concerns in the *Canadian Charter of Rights and Freedoms* that inmates having to serve time far from home may in fact be undergoing "cruel and unusual punishment".

The Task Force learned that the BCC is used both for inmates serving sentences and those waiting trial or sentencing. It cost $5 million to build this facility in 1985, and the operational budget of this facility is approximately $2.8 million per annum.

In terms of programming, the Task Force learned that the BCC has a variety of programs including community service, work-release program, and a land program. The community service program involves inmates working on projects which are labour intensive such as community clean-up, barrel gathering and crushing, etc. In regard to the work-release program, certain companies in Iqaluit pay inmates to work, and such work may also be included in the release plans devised by the inmate himself. In regard to the land program, the BCC is the only penal facility in Canada where inmates are allowed to use guns (to hunt under controlled conditions).

The Task Force learned that the benefits of the land program include gaining survival and hunting skills as well as traditional skills; learning of teamwork; and the community benefits by getting the catch of the hunting which can be used for the Elders, widows, etc.

In addition, under supervision, inmates of the BCC may use the recreational facilities in town (skating rink, swimming pool, gymnasium).

Ullivik Youth Centre Open Custody (Building #685)

The Ullivik Youth Centre, otherwise known as an "Open Custody" facility or "Halfway House" facility, is administered by Akeshoo Joamie and Joanassie Noah. These two administrators provided responses to all the questions of the Task Force members. This Centre is operated completely by Inuit except for an outside management contract for financial matters. This Centre is only for youth (i.e., less than 18 years old) and has a capacity for six clients who may come from all over the N.W.T. Basically, this facility operates in a converted housing unit and costs approximately $300,000 per annum to operate. Other similar facilities exist in the G.N.W.T in communities of Hay River, Coppermine, Pond Inlet and Yellowknife. This facility which has been operating since 1988, draws its clients from either the prisons as a form of release or directly from the court system. The facility is run by nine full-time staff (child care workers and administrators) and the average stay of a client is approximately one

year. The average age of clients is 14 to 15 years old. The facility is run as a non-profit corporation, and the Task Force members remarked that there is a similar facility in Kuujjuaq which is run by the Social Services section of the Ungava Bay Hospital and is paid for out of the hospital budget.

With respect to programming, this youth facility makes use of community facilities for schooling and also has a land program for one week out of every month. Clients are allowed to attend high school in the community and also have duties to perform within the facility. Instead of having a couple living in the facility, there are two shifts of staff that run the facility. In addition, there is a mental health community worker who visits the facility once a month. However, the Task Force learned that there are no psychiatric or psychological services available in this facility despite the fact that a court may order such treatment as part of its decision in releasing one of the clients of this facility. The Task Force noted that this may be a shortcoming in this system.

Issumaqsunngittuq Youth Facility (Secure Custody Facility)

The Task Force visited this Secure Custody Facility (i.e., locked doors and residential care) for youth (less than 18 years old). This facility is mandated under the federal *Young Offenders Act* and can hold approximately 12 individuals. Normally, it is for youth under the age of 18 (12-18 years old), but it can hold individuals over the age of 18 if they committed their offence while they were less than 18 years of age. The average age of the offender held in this facility is 17 years old, and the average period of stay is 9 to 12 months.

The Task Force learned that this type of Secure Custody Facility is a new concept for the G.N.W.T. which seems to be working. There are presently three such facilities in the G.N.W.T. as follows: Hay River (20 beds); Fort Smith (14 beds); and Iqaluit (12 beds).

Staff in this facility visited is 60-65% Inuit. With respect to programming, these activities occupy 100% of the time of the offenders and include community-based skills; land-based skills; and educational skills. There appears to be a 45% recidivist rate from this facility.

Operationally, there are 18 staff members in this facility with an annual operating budget of approximately $1.3 million. The original capital cost in 1989 to construct this facility was $2.5 million.

Justices of the Peace

The Task Force met with two Justices of the Peace (Bill Riddell and Peter Baril) who explained that the administration of justice seems to work well in the G.N.W.T., not so much because the system is based on Aboriginal customs and traditions as because the system is locally based. That is, they explained that local matters are dealt with on a local basis and with local understanding. What

these two Justices of the Peace suggested is that in the North there is a need for locally based problem solving rather than externally based problem solving, simply because things and problems are better understood on a local basis.

The Task Force noted that the Justice of the Peace program in the N.W.T. is a program under the Criminal Code and as such the Justices of the Peace have as many hours as Provincial Court Judges. In contrast to northern Quebec, there is no significant Justice of the Peace program since any Justice of the Peace in Quebec is appointed by way of the Quebec *Judges Act* and not by way of the *Criminal Code*. Consequently, the powers of such Justices of the Peace in Quebec, in contrast to the G.N.W.T., are of a very limited nature.

The Task Force also learned from these two Justices of the Peace that:

- the G.N.W.T. has a specific Justice of the Peace training program;
- the Justices of the Peace in G.N.W.T. are able to use innovative sentencing approaches;
- the Justices of the Peace in G.N.W.T. are seen by the communities as problem-solvers and not as part of the court/police legal system as is the case with the Itinerant Court; and
- the Justices of the Peace in the G.N.W.T. do not receive salaries, but instead receive a token payment of $200.00 per year.

However, present Justices of the Peace in G.N.W.T. and others are now recommending that Justices of the Peace receive salaries for their work.

The two Justices of the Peace interviewed by the Task Force indicated that in their view, Elders must be involved in decisions of the courts. They pointed out that the existing Criminal Code provides a lot of flexibility to allow judges to provide for community involvement in the decisions of the court including sentencing. Using this flexibility has proven to be a benefit in involving Elders and in determining sentences which are not ordinarily made by regular courts.

The Task Force learned that the Justices of the Peace of the G.N.W.T. have all the powers of Provincial Court Judges and can hear almost every type of case except indictable offences. Moreover, in the smaller communities of the G.N.W.T., the Justices of the Peace are all Inuit.

Access to Legal Services in Nunavik: Legal Aid Services

Legal representation is an integral part of the present justice system. Legal counsel is trained to provide an individual with information with respect to his or her legal rights in any particular situation and to recommend appropriate action. Proper, timely and effective legal representation is fundamental to the fair functioning of the justice system. In fact, so important is timely access to legal representation that section 10 of the *Canadian Charter of Rights and Freedoms* guarantees every citizen the right on arrest or detention by police to

retain and instruct legal counsel without delay and to be informed of that right. Section 34 of the *Quebec Charter of Human Rights and Freedoms* guarantees every citizen the right to be represented by a lawyer or to be assisted by a lawyer before any tribunal.

Despite the importance of legal counsel to the operation of the justice system, there are at present no lawyers permanently based within Nunavik except for the lawyers of the Kativik Regional Government based in Kuujjuaq. However, like the lawyers of Makivik, those of the Kativik Regional Government have a mandate to represent collective entities and not individuals. The closest legal counsel available for individuals in Nunavik are legal aid lawyers in Val d'Or. However, it is extremely costly and difficult for residents of Nunavik who qualify for legal aid services to meet with legal aid lawyers for consultation or case preparation prior to the actual court hearing.

The Task Force noted that subsection 20.0.19 of the James Bay and Northern Quebec Agreement (JBNQA) provides that all residents of Nunavik be entitled to receive Quebec legal aid services in all criminal and civil matters. Subsection 20.0.19 of the JBNQA provides as follows:

> All residents of the judicial district of Abitibi shall be entitled as of right to receive Legal Aid services in all matters, provided they qualify in accordance with the criteria of the Quebec Legal Services Commission which shall be modified for this district in so far as this may be necessary, to take into consideration the cost of living, the distances involved and other factors particular to the said district.

In contrast to Nunavik, the Task Force visit to Maliganik Tukisiiniakvik (regional legal aid clinic) in Iqaluit in August, 1992 underlined the far superior legal aid services available to G.N.W.T. residents. More particularly, the Task Force met with both the Board of Directors and Neil Sharkey, the Regional Director of Maliganik Tukisiiniakvik, and learned that this legal aid clinic has 2 full-time legal aid lawyers servicing 14 eastern Arctic communities with an area and population similar to that of Nunavik's fourteen communities. One lawyer is based in Iqaluit and the other in Pond Inlet. Maliganik operates on a $500,000 annual budget and has the power to bring in extra lawyers from Yellowknife when the workload becomes too heavy. Because these two full-time legal aid lawyers are based within the eastern Arctic region, they are able easily to travel to the communities, and the population has easier access to them. Again, this is in sharp contrast to Nunavik where there are no legal offices within the Nunavik region and instead such services are provided out of Val d'Or with all the associated delays and costs.

Some Board members of Maliganik explained to the Task Force the history of Maliganik. The G.N.W.T. legal aid program began in August of 1971 when the G.N.W.T. and Canada signed a cost-sharing agreement for legal aid. This agreement established a three-member committee which administered the program.

Under this program, legal aid services were delivered by a panel of members of the private bar who were assigned by this Committee to handle criminal or civil matters involving persons eligible for legal aid. Legal aid was available for most civil matters except for certain areas that were specifically excluded. Although legal aid has always been available for civil cases, it has in practice been almost exclusively used to defend individuals charged with criminal offences.

In 1975, the G.N.W.T. and Federal Minister of Justice conducted a review to the G.N.W.T. legal aid program (Cowie Task Force) and basically recommended the manner in which legal aid should be delivered in the various regions of the G.N.W.T. Basically, this review recommended a regionalization of legal aid services in the N.W.T. by way of regional legal aid clinics (legal aid lawyers) and legal services centres (lawyers and courtworkers.). As a result of this review, the G.N.W.T. adopted the *Legal Services Act* which established the Legal Services Board to operate independently of government and to administer the legal aid program. Its members represent the Government of Canada and the N.W.T., the private bar, regional legal services committees and the public. Pursuant to this Act, legal aid clinics have been established in:

- Tuktoyaktuk in 1987 (to serve the "Arctic Rim" communities of Tuktoyaktuk, Paulatuk, Sachs Harbour and Holman);
- Rankin Inlet in 1990 (to serve the Keewatin communities of Rankin Inlet, Baker Lake, Coral Harbour, Chesterfield Inlet, Repulse Bay, Arviat and Whale Cove);
- Iqaluit (Maliganik Tukisiniakvik) was established in 1975 originally as a legal services centre to serve the Baffin Region. At that time, its lawyers were not allowed to act in civil and criminal cases, but instead were to supervise and train courtworkers and perform public legal education. This situation changed after the review and was thereafter funded and mandated to deliver legal aid services to the Baffin Region. It began with one full-time lawyer and a second one was added in 1988 to be based in Pond Inlet.

The *Legal Services Act* provides that the Legal Services Board may recognize regional committees to deliver legal aid services in the regions of the N.W.T. Certain requirements must be met before a committee can be recognized under the law as a "regional committee". Each regional clinic is established as a society and governed by a Board of Directors which is drawn from the region served by the clinic. Each society has a contract with the Legal Services Board to provide legal aid services in the region. There are presently legal aid clinics only in three regions of the N.W.T.: Baffin, Keewatin, and Beaufort ("Arctic Rim") regions.

The Task Force recommends a comprehensive review by Quebec of the present legal aid services available to Nunavik residents with a view to improving those services by establishing legal aid services within the region, in particular in Kuujjuaq and possibly other communities in Nunavik. Moreover, the Task Force

recommends that the eligibility criteria for legal aid for Nunavik residents be reviewed by Quebec with a view of increasing access to such services by Nunavik residents taking into account the cost of travel related to Nunavik justice.

Appendix D

Task Force Participation in Quebec Government Justice Training Course

On August 18-20, 1992, the Task Force took part in lecture sessions on the usages and customs of Inuit. These lectures were part of a training course for justice personnel in Rouyn, Noranda. More particularly, the Task Force was invited by the Quebec Department of Justice which organized this training course, to participate as resource persons during these lectures given on usages and customs of Inuit for the benefit of justice personnel working in the Nunavik region and with Inuit communities and Inuit individuals involved in the judicial process. Approximately 50 individuals attended who were involved in the delivery of justice to Inuit at various stages of the judicial process from the commission of the offence to the execution of the sentence. All these individuals who participated in the training session are aware and concerned with the inadequacies of the present judicial system with respect to Aboriginal peoples, and they are all interested in finding ways to improve the system. The participants included Crown prosecutors, defence attorneys, judges, probation officers, parole officers, correctional services officers.

Individuals invited by the Quebec Justice Department to participate in these lectures were Taamusi Qumaq and Zebedee Nungak of the Inuit Justice Task Force and Sheila Cloutier and Paul Bussières. Talasia Tulugak provided translation from Inuktituut into French and English.

Some of the questions addressed by the Inuit participants in their presentations included the following:

- What are the main cultural differences between Inuit and western society?
- Is traditional law still applicable in our modern world?
- Is it desirable that customary laws of Inuit people continue to apply to the actual Inuit society?
- What was the traditional way of dealing with violence in general, spousal violence, sexual assault, rape, incest and can the same approach be followed today?
- What norms should apply in the modern Inuit society?

- Should Inuit have a complete separate system of social control?
- Are there some traditional norms that should be integrated into the Canadian and Québecois systems of law?
- Are some of the ancient methods of social control like withdrawal, gossip, shaming, ridicule, social ostracism, physical ostracism, as well as more formalized means like fist-fights, wrestling and song duels still used today?
- Should some of these methods be revised or should we forget them or find new ways to apply them?
- Can some of them be adapted to the current system of law?
- What are the expectations of the Inuit from the current justice system?
- What about child discipline?
- Is the practice of non-interference a concept that should be revised in light of the tremendous changes that are occurring in Inuit society?
- On the contrary, should there be more interference by some Inuit controlling bodies such as the Municipal Council, Justices of the Peace, group of Elders, etc.?

The Training Course organizers circulated interesting documentation prior to preparation for the meeting. This documentation included the recent January 9,1992 Reasons for Sentencing in the Territorial Court of Yukon Case, *Regina* v. *Philip Moses*, in which Territorial Court Judge, Barry Stuart, uses a new process (community circle) to involve an entire community in the sentencing of an offender. The documentation also included "The Inuit Way: A Guide to Inuit Culture", prepared by the Inuit Women's Association of Canada (1991). These documents as well as others circulated for participants in the training course are all required reading for any justice personnel working with Aboriginal peoples.'

Participation of the Task Force and other Makivik personnel in this training course for justice personnel represents an important exchange between the Task Force and the current justice system. This represents one of the many necessary steps in sensitizing justice personnel to the needs and problems of Inuit and the Nunavik region as a whole. More exchanges like this are important.

It should be remembered, that such courses are called for under the JBNQA (subsections 20.0.8; 20.0.12; 20.0.16; 20.0.18; 20.0.20; 20.0.23; 20.0.24). The Task Force made representations at the February 19-20, 1992 *Sommet sur la Justice* in Quebec City in this regard and it is partly because of these representations as well as those of other Aboriginal groups that Aboriginal persons are now being asked to participate in these types of training courses for justice personnel.

Notes

1 Other documents circulated are the following: Rupert Ross, "Leaving our White Eyes Behind: the Sentencing of Native Accused" (1989) 3 C.N.L.R. 1; Associate Chief Justice Murray Sinclair, "Dealing with the Aboriginal Offender" (April 5, 1990 CAPCJ Presentation); Patti Flather, "Completing the Circle: Community-based Justice has Meant a New Beginning for the People of Teslin" in January/February 1992, *Arctic Circle*, page 39; Judge J.P. Little "Special Types of Offenders: Indian Young Offenders" (December 2, 1988) Advance Judicial Seminar, Montréal; Clare Brant, Native Ethics and Rules of Behaviour"(August 1990) *Canadian Journal of Psychiatry*, Page 534; GCCQ and CRA, Justice pour les Crés: Les Croyances et les pratiques traditionnels (R. McDonnell, January 1992).

Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s

*Patricia A. Monture-OKanee**

Locating Aboriginal Thought in Mainstream Academia

Storytelling is the way knowledge is shared in traditional Aboriginal relations. I wish to begin this conversation on justice by sharing my story as a Mohawk woman, mother and wife who accommodates academia on a daily basis as the way I support myself and my familial obligations. Often we hear the elders[1] tell us, this is how "I have come to understand it". Through my experiences, this is what I have come to understand about justice[2] from the perspective of one Aboriginal woman.[3]

Speaking to the Manitoba Aboriginal Justice Inquiry, Elijah Harper said:

> With so much discrimination occurring against our people, it is often amazing how accepting we are of our situation. We know that without

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It would be impossible for me to thank each of the individuals who have assisted me on my walk and influenced my thinking on the issue of justice and the responsibilities of women. The first traditional teacher and prison activist who took me under his wing was Dr. Art Solomon. These thoughts are my tribute to him and the teachings he has shared with me.

I am, again, also indebted to the traditional wisdom of Ms. Shirley O'Connor and her willingness to trust me with her perspective and words. My prayer is that I have been able to do tribute to her understanding.

Much of the information in this paper has been entrusted to me by traditional people. Any error in understanding or interpretation is my own.

> tolerance there can be no justice. Without understanding there cannot be justice. Without equality there can be no justice. With justice we can begin to understand each other. With justice we can work and live with each other. Aboriginal people want a judicial system that recognizes the native way of life, our own values and beliefs, and not the white man's way of life.[4]

These words summarize, shape, and conclude my own thoughts on the matter of Aboriginal justice systems. The concepts of justice, truth, tolerance, understanding, and equality are the themes that weave in and out of my thoughts as I consider what justice would have been traditionally to Aboriginal women. These are the concepts that we must recapture in our search for healing.

A fundamental difference between Aboriginal and non-Aboriginal societies is the way truth is located. Truth in non-Aboriginal terms is located outside of the self. It is absolute and may be discovered only through years of study in institutions that are formally sanctioned as sources of learning. In the Aboriginal way, truth is internal to the self. The Creator put each and everyone of us here in a complete state of being with our own set of instructions to follow. Truth is discovered through personal examination, not through systematic study in formally sanctioned institutions.

In the Ojibwa language truth is *niwii-debwe*. 'Truth', however, is not the literal translation. This Ojibwa word more fully means 'what is right as I know it'.[5] Leila Fisher, an elder of the Hoh nation in what is now known as Washington state, tells this story, which helps to underscore the importance of both truth and introspection:

> "Did you ever wonder how wisdom comes?" Without taking her hands from her weaving or even looking up to see if we're listening, she continues: "There was a man, a postman here on the reservation, who heard some of the Elders talking about receiving objects that bring great power. He didn't know much about such things, but he thought to himself that it would be a wonderful thing if he could receive such an object – which can only be bestowed by the Creator. In particular, he heard from the Elders that the highest such object a person can receive is an eagle feather. He decided that was the one for him. If he could just receive an eagle feather he would have all the power and wisdom and prestige he desired. But he knew he couldn't buy one and he couldn't ask anyone to give him one. It just had to come to him somehow by the Creator's will.
>
> "Day after day he went around looking for an eagle feather. He figured one would come his way if he just kept his eyes open. It got so he thought of nothing else. That eagle feather occupied his thoughts from sunup to sundown. Weeks passed, then months, then years. Every day the postman did his rounds, always looking for that eagle feather – looking just as hard as he could. He paid no attention to his

> family or friends. He just kept his mind fixed on that eagle feather. But it never seemed to come. He started to grow old, but still no feather. Finally he came to realize that no matter how hard he looked he was no closer to getting the feather than he had been the day he started.
>
> "One day he took a break by the side of the road. He got out of his little jeep mail-carrier and had a talk with the Creator. He said: 'I'm so tired of looking for that eagle feather. Maybe I'm not supposed to get one. I've spent all my life thinking about that feather. I've really hardly given a thought to my family and friends. All I cared about was that feather, and now life has just about passed me by. I've missed out on a lot of good things. Well, I'm giving up my search. I'm going to stop looking for that feather and start living. Maybe I have time enough left to make it up to my family and friends. Forgive me for the way I have conducted my life'.
>
> "Then – and only then – a great peace came into him. He suddenly felt better inside that he had in all these years. Just as he finished his talk with the Creator and started getting back in his jeep, he was surprised by a shadow passing over him. Holding his hands over his eyes, he looked up into the sky and saw, high above, a great bird flying over. Almost instantly it disappeared. Then he saw something floating down ever so lightly on the breeze – a beautiful tail feather. It was his eagle feather! He realized that the feather had come not a single moment before he had stopped searching and made his peace with the Creator. He finally learned that wisdom comes only when you stop looking for it and start truly living the life the Creator intended for you. That postman is still alive and he's a changed person. People come to him for wisdom now and he shares everything he knows. Even though now he has the power and the prestige he searched for, he no longer cares about such things. He's concerned about others, not himself. So now you know how wisdom comes."[6]

The results are profound upon individuals of Aboriginal ancestry who try to walk in both the academic world and the Aboriginal world. The instructions we receive through institutionalized education indicate that we must locate truth and knowledge outside ourselves. Introspection is not a proper research method. It is improper to footnote the knowledge that my grandmother told me.[7] Over the last few years, however, Aboriginal academics are more frequently being asked to explain our unique cultural ways of being. Yet it is expected that the objective style of academic writing ought not to be changed to accommodate the request to explain or the new understandings that Aboriginal academics bring to various disciplines. The Aboriginal academic, therefore, forces certain specific contradictions in their experience of academia.

The two conceptualizations of truth are but one example of the contradictions the Aboriginal academic must negotiate. These two understandings of truth are, perhaps, diametrically opposed. Yet these two ways of knowing co-exist within

my experience. My experience is then one of negotiating the contradictions. Justice requires that this accommodation not be negotiated solely on an individualized basis but must also be embraced institutionally. This understanding must come to form part of the basis that we recognize knowledge to be built upon.

As I come to the topic under review in this paper, my mind turns first to questions of process. It must be recognized that there is no academic source to which to refer to substantiate the answering of the questions for this paper's discussion, particularly as they have been formulated by the Royal Commission.[8] Substantiating the way in which I construct knowledge is the first issue of process that must be noted.

Usually, the negotiations I go through to produce an academic paper are not visible in the final product. However, as we look to the future, little is accomplished when these contradictions are faced only on an individualized level. The contradictions, although confronted on a personal level, are not personal inadequacies located within the self, but a contradiction that exists between the two cultures. The contradiction exists in the way that knowledge and truth are constructed and sanctioned in each culture. Language plays an important role in how this process issue is actualized.

Language is the mechanism by which we communicate what knowledge is. Language is a powerful tool whereby mainstream cultural meanings and insights are invisibly incorporated into our communications.

> ...descriptions of People of Colour include their race, while descriptions of White People do not. For example, one reads: 'A black woman crossed the street' when had the woman been white, the sentence would have read 'A woman crossed the street'. This use of language reinforces the view that everyone is White unless defined otherwise, that White is the norm, and the People of Colour are outside the norm.[9]

It is essential that we develop a knowledge of justice that illuminates the many manifest ways in which gender, racial and cultural 'otherness' is reinforced.

The contradictions to be negotiated are compounded when the knowledge gained is implemented in the corresponding institutions or belief structures of mainstream life. By failing publicly to label and address these contradictions, they are perpetuated. These questions of process arise when I examine my experience as both Aboriginal and academic. But the contradictions I negotiate also arise because I am both Aboriginal and woman.

A similar contradiction exists when I am asked to write or speak from the experience of a woman who is Aboriginal. The historical oppression of women and our subsequent powerlessness in mainstream society has been challenged through the creation of bureaucracies, organizations, ministries and so on that focus solely on women's experience. We see the same structure within academia

with the creation of women's studies programs and women's courses within other departments, faculties and programs.[10] The problem of exclusion from mainstream thought is not remedied through the creation of programs that in their outcome leave the potential for women to be marginalized. The conclusion is simple enough. Although many institutions of the dominant society claim to be objective or value-free, they actually reflect a male construction of reality. The solutions we advocate must be seen to challenge this structure.

Law is a particularly good example of how the male construction of reality is implemented in such a way that the gender specificity of legal relations vanishes. Sherene Razack, drawing on the work of Ann Scales,[11] explains:

> The legal test cases that constitute feminism applied to law in Canada are fundamentally projects of naming, of exposing the world as man-made. Men, Ann Scales writes, have had the power to organize reality, "to create the world from their own point of view, and then, by a truly remarkable philosophical conjure, were able to elevate that point of view into so-called 'objective reality'" Women working in law find themselves demystifying that reality and challenging its validity in court, substituting in the process their own description of reality. In law, the issues that preoccupy women, Scales notes, are all issues that emerge out of a male-defined version of female sexuality. Abortion, contraception, sexual harassment, pornography, prostitution, rape, and incest are "struggles with our otherness" that is, struggles born out of the condition of being other than male.[12]

The construction of woman as 'other' must be the fundamental focus of any analysis that hopes significantly to end the oppression of women. When one gender is constructed as 'other', the goal of equality will continue to be elusive.

The examination of the creation of roles of 'otherness' must not conclude in the construction of a definition of equality prefaced on sameness. This is equally problematic. Equality when constructed as sameness perpetuates race and gender oppression. Again, an analysis of legal relations illuminates this point:

> There is also a reluctance to record and acknowledge differences when everyone is supposed to be treated the same. In theory, race and sex are irrelevant to being a good lawyer. The "Myth of Equality" is a culturally sanctioned belief that everyone in our society is legally and socially equal and that any differences in their situation are attributable to factors personal to them, such as effort, responsibility, and honesty. This "Myth of Equality" is superimposed on our inherently biased institutions and social systems, hiding from view the pervasive nature of racism and sexism.[13]

The identification of the similarities (as well as the differences) between race and gender oppression is essential to the development of theories of equality and justice that can be applied in a meaningful manner to both Aboriginal women and mainstream individuals.

The way women's programs are marginalized within mainstream institutions is paralleled in the marginalization of Aboriginal peoples. Over the last few decades, "Native" studies departments and courses have been created in a way that parallels the contradiction I have already presented in the development of women's studies departments. A second example worthy of note is the criminal justice system. The move to embrace Aboriginal experience within the existing mandate of Correctional Service Canada is well documented in the many Aboriginal justice inquiries.[14] The Canadian correctional system is a further example of the process of marginalization of those individuals who do not occupy mainstream status. This process of creating Aboriginal-specific programs[15] does not require the actors in the system to question the status quo or how systemic constructions of race and culture affect their own behaviour. Again, the conclusion is simple enough. Although many institutions of the dominant society claim to be objective or value-free, they actually reflect a specific cultural construction of reality.

My point is *not* to suggest that the development of Aboriginal-specific programs or women-specific programs is wrong and should be discontinued. On the contrary, these programs are both essential and necessary, particularly in the short term. However, if the goal of women or Aboriginal peoples is to change the structure of society, we must also develop new ways of challenging the philosophies and beliefs of the mainstream. This is the only way meaningful and substantive long-term change can be secured.

The mandate of the Royal Commission provides a unique opportunity to do precisely that. As we approach the question of Aboriginal justice systems, we must take extreme care to challenge existing structures, so that the end result is greater than a mere accommodation of Aboriginal people or the creation of a 'safe' corner for Aboriginal peoples. Relegating Aboriginal peoples to a removed corner of experience also fundamentally denies the mainstream the opportunity to benefit and learn from the culture and ways of the Aboriginal nations. If the existing remedial process is not questioned, the result will be to create a safe place for Aboriginal women inside the safe place for Aboriginal peoples. This will marginalize Aboriginal women twice. This result must not be satisfactory to either Aboriginal peoples or the mainstream culture.

In recent years, I have begun to assess the meaningfulness of Aboriginal justice initiatives against a two-pronged standard. First, will the conditions of Aboriginal criminal justice 'clients' be ameliorated in the short term? Second, in what way will the long-term needs of Aboriginal communities[16] be positively affected? I see this two-pronged standard as the optimum criteria. Similar approaches have been adopted by the Manitoba Aboriginal Justice Inquiry and the Law Reform Commission of Canada. Both these bodies also recognized the contribution to mainstream society that will be lost if Aboriginal experience continues to be denied and/or marginalized. For these reasons, this two-pronged approach is also advocated here.

This paper proceeds on the assumption that the solution to the over-representation of Aboriginal people in the criminal justice system and the systemic discrimination in that system requires the re-creation of Aboriginal justice systems. The Manitoba Aboriginal Justice Inquiry also proceeded to this same conclusion after lengthy discussions. Further, as noted by the Task Force on Federally Sentenced Women, it is long past time to end the lengthy discussions and statistical descriptions of the problem of over-representation and proceed to take meaningful (and immediate) action.[17] The Manitoba Commissioners stated succinctly:

> In the face of the current realities confronting Aboriginal people, we believe that it is important to recognize that the greatest potential for the resolution of significant Aboriginal social problems lies in Aboriginal people exercising greater control over their own lives.
>
> The dependency on alcohol, the increasing rates of suicide, homicides and criminal charges, and the high rates of incarceration are problems that we believe can be dealt with best by Aboriginal people themselves.
>
> These social conditions, we believe, are indeed the products of dependency and powerlessness, created by past government actions and felt deeply by the majority of Aboriginal people. This dependency will not disappear, we are convinced, until Aboriginal people are able to re-establish their own sense of identity and exercise a considerable degree of self-determination.[18]

This regeneration of Aboriginal cultures must occur through the healing of both Aboriginal men and Aboriginal women.

Healing,[19] that is, the restoring of individuals to a healthy and balanced state of being, of individuals alone will not be sufficient. Healing eradicates the affects of the multi-dimensional oppression Aboriginal people have faced. Healing creates a clean slate, and from this place the new beginning Aboriginal people dream about must be built.

The relationships among Aboriginal women and Aboriginal men must also be restored, and this may require more than just the healing of individuals. There is a story that may help us understand the balance between women and men that we are trying to achieve:

> 'Power' in an Indian sense is understood according to a different set of values. In Aboriginal terms, 'power' or empowerment is individual and can be equated with self-determination: the right to have control of your life and future, as an individual and as a community. Power is relational but not dichotomous or hierarchial. It is balanced and complimentary. Marie Wilson of the Gitksan Wet'suwet'en Tribal Council helps me here. She has compared the relationship between women and men to the eagle. An eagle soars to unbelievable heights and has tremendous power on two equal wings – one female, one male

> – carrying the body of life between them. Women and men are balanced parts of the whole, yet they are very different from each other and are not 'equal' if equality is defined as being the same. Marie Wilson's metaphor of equality is the contribution of both wings to the flight. 'Power' in an Indian sense is understood according to a different set of values.[20]

Actively pursuing the goals of justice is believed to be one way of facilitating the regeneration of Aboriginal nations, as well as the women and men of these nations.

It is essential not only to regenerate Aboriginal nations from within but also to establish meaningful external relations with the mainstream communities that surround us. Essential to this development is the necessity to construct an analysis of race that is inclusive of the Aboriginal world view. Frequently, race is constructed merely as biological difference. This is a gross over-simplification of the Aboriginal world view. Culture, tradition and spirituality also influence fundamentally the world view of Aboriginal people. Reliance on the current academic construction of racism may not advance our understanding of the issues that confront our conversations as completely as need be. One critical analysis of the Marshall Inquiry provide this example:

> In the absence of critical examination of racial beliefs and information, the Inquiry validated the immigrants' view of the *Indian*. It accepted the racial tool of colonialism: the European invention of Aboriginal "reality" and their names for that reality. For example, not once did testimony of non-Mi'kmaq in the Inquiry ever mention the particular tribe of *Indians* to which Junior Marshall belonged. He was always considered an *Indian*, a member of a certain race of people, probably primitive in nature. There was no mention of nationality or ethnicity – only his race. Nationality, like ethnicity, is primarily a subjective phenomenon, a sense of social belonging reinforced by common language, culture, custom, heritage, and shared experience. The difference between being *Indian* and Mi'kmaq is the frontier between racial existence and being human.[21]

Justice requires humanity. It is this recognition that must shape our efforts in dealing with issues of race and culture, spirituality and tradition.

Concurrently, the valuing of cross-cultural understanding and racism theory (for lack of better phrases) in a way that is sensitive to women must also be paramount. The experience of all so-called minority women is not the same. One simple example is worthy of consideration:

> ...women of colour differ in our races, cultures, class, and our experiences of racism and sexism. A woman of colour of Asian heritage may have experienced membership in a dominant group before coming to Canada. She may be economically wealthy and from a privileged class. Her experiences in Canada may differ from the experiences of a First

> Nations woman whose people have lived in a White dominated society for generations. Each woman encounters different stereotypes directed towards her. Each has her own strategy for coping with discrimination.[22]

This particular danger in the construction of alternatives may be characterized as the danger of over-inclusiveness – that is, assuming that all individuals who experience 'otherness' share the same understandings.

Before developing this discussion in a way that focuses on Aboriginal women and justice, one further comment about education is required. The relationship between Aboriginal people and the education system must also be understood as having been about the oppression of Aboriginal people. In many ways this oppression remains central to the Aboriginal experience of educational institutions today.[23] For example, the removal of Aboriginal children from their homes and their placement in residential schools was one of the paramount factors in the repression of Aboriginal languages and cultures. As a result, education alone – and especially academia – cannot be seen to be the solution, as it has in fact been, and remains, one of the central problems. The solution to the justice conundrum does not lie in better research or better researchers, but within Aboriginal communities themselves. We must rely on the knowledge of the people of the many Aboriginal communities, both reserve and off-reserve, if we expect meaningful progress to be made. Especially, we must rely upon the elders and their wisdom.

Moving Justice Forward

It is 1992, and Aboriginal people are celebrating 500 years of resistance to colonial oppression. The context of resistance[24] is very important to understanding justice on Aboriginal terms. To understand that Aboriginal peoples are resisting is to understand that Aboriginal peoples have been reacting to forces outside themselves. To resist means to push away. To resist means never to be able to be in control of your own life or the destiny of your community. Resistance is the 'culture' in which Aboriginal people have been forced to survive, but it cannot be viewed as a healthy state in which to exist. The rejection of the culture of resistance is the shape in which we must initially decolonize our hearts and minds.

When this climate of resistance is recognized as the overwhelming force in Aboriginal people's lives, we must accept that justice will remain an elusive goal. To have justice means to be in control of one's life and relations in terms of either individuals or communities. To address justice, we must therefore address the realities of colonial oppression and the forces that create the situation that Aboriginal peoples are not able to be central actors in our own lives. Although Aboriginal men and Aboriginal women as groups experience this colonial

oppression in different ways, I believe the end result remains the same – the denial of the basic right to be in control of your own life.

Looking specifically to the criminal justice system, which houses so many of our people, resistance must include the rejection of the very basis on which the non-Aboriginal system is based. This system turns on the value of punishment, in other words, coercion.[25] It is coercion that binds both the individuals in mainstream society, as well as the institutions, in a seemingly cohesive pattern. James Youngblood 'Sakej' Henderson is a Chickasaw man who married into the Micmac family. This is his legal analysis of the role coercion plays in mainstream society:

> The generality of the criminal laws and formal equality before the law are two principles that reflect the artificial nature of an immigrant state. It is a voluntary association of individuals from various circumstances around the globe. To equalize individuals' social circumstances and perpetual struggle for their interest in comfort and honour, all individuals are viewed and treated by the law as fundamentally equal.
>
> The general criminal laws enacted by the federal parliament are viewed as somehow above the antagonism of private interests. The rules are imperatives of the state. They are commands of an artificial political order over individuals, who have no inherent social or cultural order. By acts of a national institution the contending private interests are reconciled; rather than embody any factional interest in Canadian society, an impersonal criminal justice is established.
>
> Given the fact that the criminal laws are an artificial compromise between various interests in Canadian society, the greater is the importance of force and punishment as the bond among individuals to guide human conduct. *Coercive enforcement takes the place of a natural community of culture. It is seen as the best way to guarantee order.*[26]

Can the same be said for Aboriginal social order? Aboriginal people, regardless of their place of residence, have maintained a sense of both community and culture that is related to the natural order. The conclusion is logical. The criminal justice options available for guaranteeing order (obviously a value in both cultures) are not limited within Aboriginal nations in the same manner that they are limited within mainstream society. The central question that must be answered is also simple. Should Aboriginal people be forced to forgo these opportunities because they are no longer available to mainstream individuals and institutions?

This analysis of Sakej Henderson is contextualized in his discussion of the Marshall Inquiry. He notes:

> If the law appliers in Nova Scotia could justify their actions to the Commissioners, the concept of the uniform application of the law would be upheld. If not, the uniform application could be rejected as a sham. If the law appliers cannot rationally justify their decisions

> according to established procedures, then those to whom the criminal law is applied are subjected to arbitrary exercise of local power. Legal justice becomes transparent; no decisions can be said to be uniformly applied.[27]

The findings of the Marshall Inquiry are well known. Justice was not done; an innocent Micmac man was convicted of a murder he did not commit. For many Aboriginal people, the Marshall Inquiry only affirmed what we already knew – what has been substantiated by the treatment of many Aboriginal individuals at the hands of the criminal justice system and our over-representation therein. Justice is not applied uniformly in Canada.

If the principles of uniformity and coercion that preface the operation of criminal law in Canada are inappropriate in their application to Aboriginal individuals, then the end result must be that the entire system of criminal law will fail Aboriginal peoples. Yet many mainstream individuals continue to refuse to confront this obvious conclusion. If the principles are wrong, then the system they support must also be misinformed. Reform is, from the Aboriginal perspective, seen to be not only essential but obvious. The failure to recognize and create a climate of commitment in which the inappropriateness of mainstream values to Aboriginal people will be addressed results in the necessity of Aboriginal people continuing to resist the dominant culture and its institutions. A climate of resistance cannot foster the development of equality or justice.

The experience of Aboriginal women, as that of "double disadvantage",[28] exposes the consequences of resistance in even more fundamental terms, if only because it is more extreme and therefore more obvious. The goal that we set for ourselves should be to eliminate the disadvantage that women face because it is more profound. It is the greatest of the challenges that face Aboriginal people. By confronting the disadvantage that women face as both women and as Aboriginal, we will also be confronting the discrimination, disadvantage, oppression and dependency faced by our fathers, uncles, brothers, sons, and husbands. We must also accept that in some circumstances it is no longer the descendants of the European settlers that oppress us, but it is Aboriginal men in our communities who now fulfil this role. This realization must been seen as a fact that demonstrates the advanced stage of colonialism in our communities. In particular, we have the *Indian Act* to blame for this reality. But blaming the Act will not solve the problem.

It is not enough to recognize that Aboriginal peoples must be afforded the opportunity to be actors in their own lives. It is not enough to reject resistance and reject compartmentalized justice. All Aboriginal peoples have been influenced by colonial oppression, dependency and powerlessness – obviously to varying degrees. The first step must be to recognize that we must unlearn our own individual as well as our community responses that are based on the internalized colonization.[29] Only then, when we are able to think and see with

decolonized minds and hearts, can forward progress (that is, truly Aboriginal institutions of justice) be honestly made.

Within a Legal Paradigm: Aboriginal Women and Feminism

Feminist[30] academics have challenged the way in which experience has been separated from knowledge in mainstream social institutions. This feminist challenge has benefitted many individuals and collectives who share the robes of 'otherness' with the women's movement. Standpoint theory[31] exposes the fact that knowledge is socially constructed. The location of the 'knower' is as important as the understanding that is put forth. This principle has a further application:

> ...'outsiders', those who are excluded from dominant systems of knowledge, are "able to see patterns of belief or behaviour that are hard for those immersed in the culture to detect."[32]

It is the status of 'otherness' or 'outsider' and the corresponding consequences where the feminist mind and the perspective of Aboriginal women is shared. This shared reality does not amount to a shared totality of experience such that the 'commonality of all women' becomes a fact. The experience of Aboriginal women is minimally[33] based on an experience of 'otherness' that is layered and can involve both race and culture, as well as gender. However it has also been part of Aboriginal culture to pick up the good things and simply walk by those things that will harm our people. It is within this teaching that feminism must be placed.

Much energy within the feminist praxis has been devoted to understanding the way in which patriarchy[34] is reproduced in modern society. For example, criminal law is seen to reinforce patriarchy in the following way:

> It is essential to understand that Western law, of which Canadian criminal law is a part, has been constructed out of male experience. Law is both a support for and a means of exercising patriarchal domination. One of the problems that feminists confront is that patriarchal dominance has existed for so long that male experience under patriarchy is perceived as the "norm". Thus concepts which have a particular importance in law such as "bias", "neutrality", "objectivity", "reasonableness", and "common-sense", are all interpreted from within a masculinist social construction of reality. When feminists question this masculinist experience, they are immediately perceived as "biased", "non-objective", "subjective", "unreasonable", and "irrational".[35]

Although I do not want to disturb the conclusion of many renowned feminists regarding their experience of patriarchy and the legal system, I do wish to question the universality of this approach when it is applied to Aboriginal women.

As already alluded to, not only is an Aboriginal women's experience of the mainstream criminal justice system an experience of 'otherness' based on gender, it is also an experience of 'otherness' based on both cultural and race. Experiencing the criminal justice system as masculinist is not more profound in the experience of Aboriginal women. In fact, it is next to impossible to separate the experience I have as woman from the experience I have as Mohawk.[16] It is not just Mohawk women who have rejected the totality of feminist analysis.[17] A Cree colleague, Winona Stevenson, states:

> I do not call myself a feminist. I believe in the power of Indigenous women and the power of all women. I believe that while feminists and Indigenous women have a lot in common, they are in separate movements. Feminism defines sexual oppression as the Big Ugly. The Indigenous Women's movement sees colonization and racial oppression as the Big Uglies. Issues of sexual oppression are seldom articulated separately because they are part of the Bigger Uglies. Sexual oppression was, and is, one part of the colonization of Indigenous peoples.
>
> I want to understand why feminists continue to believe in the universality of male dominance, the universality of sisterhood, and why they strive so hard to convert Aboriginal women. I want feminists to know why many Aboriginal women do not identify as feminists. I perceive two parallel but distinct movements, but there ought to be a place where we can meet to share, learn, and offer honest support without trying to convert each other.[18]

Many Aboriginal women are aware of this basic contradiction between their experience and the constructs of feminist thought. This contradiction does not foreclose the sharing of our experience with the feminist movement any more than it forecloses the borrowing of feminist analysis to inform our own consciousness. However, caution must be exercised before any complete embracing of feminist thought or feminist analysis occurs. The consequences of the feminist analytical structure contains serious barriers for the scope of social change defined as desirable from the Aboriginal perspective.

After studying the Women's Legal Education and Action Fund (LEAF)[19] and its involvement in litigating so-called women's issues, Sherene Razack concludes:

> Along the path to a more inclusive feminist theory and practice, it is tempting to reduce the theoretical and practical tasks at hand to merely "adding" on layers of oppression by grafting racism on to sexism, as understood by white women...
>
> If whiteness remains unproblematized, that is if white privilege remains unexamined, and feminist analysis continues to "universalize otherness" so that sexism and racism are not seen as interlocking systems of domination, there is little chance that women of colour will be able to ask "what is true for us?" There is still less chance that minority women will be in a position to reshape their answers into forms

> acceptable in court.... [W]hen sexuality is identified as central to women's oppression, as it is in cases involving rape, there is little room left for understanding the experience of women equally oppressed by racism and, I would add, little space for understanding how sexuality itself is constructed along racist lines.[40]

Feminist thought can inform attempts to understand Aboriginal women's reality. But feminism must be seen as only one tool that may or may not accurately inform our developing understanding.

A second example of the way feminist praxis may invalidate Aboriginal women's thought is found in the work of Zuleyma Tang Halpin.[41] Halpin suggests that there is a relationship between the domination of women and the domination of nature by a patriarchal structure, such that women and nature are both seen as 'other'. I do not dispute the validity of this conclusion. This is one example of how feminist thought does not fit the experience of Aboriginal women. The cultural relationship between nature and people in an Aboriginal construct is vastly different from the way this relationship is viewed in mainstream thought. Harmony with nature and with natural law is essential to the Aboriginal perspective. Oren Lyons explains how this natural world view informs all aspects of Aboriginal thought:

> What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility.[42]

This contradiction is easily understood and resolved, but only once it is express. Until the contradictions are express, then it is the oppressed view of the world that is vanished (that is, the consequences will be carried by Aboriginal women).

The way in which issues are first named and then sanctioned as important is also a necessary consideration when applying feminist thought to Aboriginal women's realities. Feminist accounts[43] have documented and criticized the way rape laws have protected the 'sexual property' of a husband in his wife. The examination of child custody laws exposes that prior to the nineteenth century, fathers were almost always awarded custody of their children, as children were also seen to be the property of the man.[44] It cannot be (and should not be) concluded or assumed without careful consideration that Aboriginal women will construct a response to rape, battering and other instances of abuse, incest, child welfare laws, and abortion in the same way that the mainstream feminist movement has. The pre-contact cultural histories are not the same. Nor can it be assumed that the dispute resolution mechanisms that Aboriginal women will advance will look the same as those advanced by the mainstream women's

movement. All of these are presumptions that must be questioned first, prior to any assumptions being made about the general applicability of the solutions.

One example should clarify any confusion regarding the seriousness of this discussion around consequences. In the child welfare field, feminist have studied the impact of parental custody proceedings on women's lives.[45] In particular, the way in which domestic violence is relevant to these disputes is (or can be) exposed in both the courtroom experience and in the feminist literature. The same is not true for an Aboriginal women who is involved in a child welfare action and an abusive relationship. For most Aboriginal people, disputes over the custody of children are not actualized as disputes between parents. The two parties are the parents and the state. When father and mother 'fight' against the state to maintain custody against the state, the mother, if involved in a situation of domestic violence, cannot expose this situation. If she does, it is used against her to demonstrate that the home is not a safe one. Feminist analysis of children's law has yet to examine the special disadvantage that Aboriginal women face within all the specific components of the legal system.[46] Failing to examine the situation, in fact, perpetuates it.

Some Aboriginal women have turned to the feminist or women's movement to seek solace in their experience of oppression. This can have some devastating effects on Aboriginal constructions of reality. Many, but not all, Aboriginal women reject the rigours of feminism as the full solution to the problems that Aboriginal women face, both in the dominant society and within our own communities. One further consequence of relying on feminist analysis without first searching the landscape for the pitfalls, is found in the way in which rights are conceived. In the recent constitutional debates, the media emphasized the alleged chasm between Aboriginal men and women as exemplified by the position on individual and collective rights. The traditional understanding that has been shared with me indicates that this construction is a false dichotomy. Individual rights exist within collective rights and vice versus. Any hierarchical ordering of either notion will fundamentally violate the culture of Aboriginal peoples. Individual rights cannot be given precedence over collective rights any more than the collective can trump the rights of the individual.

In conclusion, then, feminism is one source of analysis that Aboriginal women may be able to borrow from in our search for our own answers. But, in the end, the answers that are developed must be our own. Failing to find the space to develop our own answers does not allow us to break free from the pattern of resistance that has been slowly forced upon Aboriginal people. Without critically analyzing the feminist solution, we fall prey to the same traps patriarchy has enforced. This can be traced to the common European underpinnings (that is, colonialism) that patriarchy and feminism share. Finally, only working in co-operation with other collectives will ensure that the knowledge that is developed is shared across collectives in a positive way.

What is Known about Traditional Justice Systems and the Role of First Nations Women

> Indian people must wake up! They are asleep!...Part of this waking up means replacing women to their rightful place in society. It's been less than one hundred years that men lost touch with reality. There's no power or medicine that has all force unless it's balanced. The woman must be there also, but she has been left out! When we still had our culture, we had the balance. The woman made ceremonies, and she was recognized as being united with the moon, the earth, and all the forces on it. Men have taken over. Most feel threatened by holy women. They must stop and remember, remember the loving power of their grandmothers and mothers.
>
> – Rose Auger[47]

This paper began with a recognition that little documentation and discourse exists within mainstream academic understanding about the ways in which justice was traditionally constructed by Aboriginal peoples. This is true for First Nations[48] generally, but it is even more true for the perceptions about First Nations women. Most historical accounts are polluted by beliefs that First Nation societies were absolutely inferior to European societies. This error is compounded by a second, equally serious issue. The historical material is also undulated with European perceptions of the inferiority of women. One example, from the archival materials in the New York State Library, provides all the illumination that is necessary:

> Women are admitted to the Council fire and have the liberty of speaking, which is sometimes used; when the nature of the Education of this tribe is considered, the difference of the instruction of the girls and boys is so small, the sources of knowledge are so inconsiderable that I see no reason why a Woman with strong natural sense should not acquit herself in the Council with general Satisfaction...[49]

It must be emphasized that this diminished view on the status and contributions of women is not the view of the Longhouse people. In fact, they would be quite insulted by the comment.

This construction of both women and First Nations as inferior to the European settlers has had some most distressing consequences for First Nations women in particular.

> Women in our society live under a constant threat of violence. The death of Betty Osborne was a brutal expression of that violence. She fell victim to vicious stereotypes born of ignorance and aggression when she was picked up by four drunken men looking for sex. Her attackers seemed to be operating on the assumption that Aboriginal women were promiscuous and open to enticement through alcohol or violence. It is evident that the men who abducted Osborne believed

> that young Aboriginal women were objects with no human value beyond sexual gratification...
>
> It is intolerable that our society holds women, and Aboriginal women in particular, in position of such low self esteem. Violence against women has been thought for too long to be a private affair. Assaults on women have not been treated with the seriousness which they deserve. Betty Osborne was one of the victims of this despicable attitude towards women...
>
> There is one fundamental fact: her murder was a racist and sexist act. Betty Osborne would be alive today had she not been an Aboriginal woman.[50]

Any initiative constructed in the future must take into direct account the histories, both personal and collective, that First Nations women have faced. This is a principle that must guide the construction of future justice initiatives.

When I am trying to understand traditional ways of being, I have found that learning the word in my own language and the literal interpretation facilitates my own understanding of the matter in question. When I first asked about the word for justice in Ojibwa, I was told *ti-baq-nee-qwa-win*.[51] When literally translated, it means to come before a system for something that has already been done wrong. The reference to 'a system' alludes to the Euro-Canadian system of law. It became obvious that this Ojibwa word was used to describe justice after the period of contact with European society's justice system. During our conversation, the grandmother repeated many times to me that there really is no word for justice in the Ojibwa language.[52] I found our conversation interesting because it was most obvious what effect on the people and the language contact had had. The reference point for this word in the Ojibwa language was a system not their own.

Recognizing the impact contact had on the Ojibwa word for justice, for me, was a profound reminder of the nature of the work of regenerating traditional justice mechanisms in our communities. The second guiding principle I discovered was respect – respect not only for the uniqueness of Aboriginal ways of being, but also for the responsibilities of women and men and, finally, for the realization that decolonization is both a painful process and a long one.

This realization leads to some conclusions about the involvement of First Nations individuals in the current criminal justice system. A First Nations person does not understand that system. In the First Nations system, you do not admit quilt, but you admit honesty: "I have done wrong." This understanding must be connected to the realization that coercion and punishment are not the glue that holds the First Nations system of dispute resolution together:

> In the Mi'kmaq worldview, individual behaviour faithfully accommodates collective culture; there is a firm consensus on proper respect of

> inherent dignities. The mechanism by which individual passions are prevented from wreaking havoc on society is deference to shared values, reinforced by family opinion and rewarded with honour and respect. Order in society presupposes and evokes order in the soul. Order is a matter of kinship, education, and personal self-control. Every family is equal and every Mi'kmaq has an equal right to be heard and heeded by others. Coercive institutions are generally absent, if not vigorously opposed. Aggressiveness is considered wrongful and contrary to human dignity.[53]

Accepting that the current system is nonsensical from a First Nations perspective is essential. This realization is the realization upon which decolonized thought will come to rest.

When I asked Shirley O'Connor if her understanding of justice was based on gender, my question made little sense to her. When I asked whether there was a difference between how men and women would understand the concept of justice in a traditional sense, she was easily able to respond. She told me to go and ask a grandfather and see what he would say. (The minute Shirley said this, I knew this was something I should have already understood.) When pressed, Shirley thought that a man's answer would in fact be different. A man's perspective, she thought, would focus around what happened in the bush. Justice was the offering you made when you took an animal's life. For Shirley, the women's view of justice is the respect that women receive because they are women. The conclusion is that justice initiatives must respect experiences (and not just incidents of alleged offences). Further, the experiences of women and men cannot be presumed to be the same. The resultant experiential understanding of justice is not necessarily the same among men and women. At minimum, it is derived from different experiences of the world, as well as different roles and responsibilities.

We know that First Nations social relations, including relations of justice, were and remain holistic. This means a variety of things. First Nations recognize that our relations and institutions must address the well-being of individuals in a complete way. This means that the body, mind, and spirit all must be well to have a healthy individual.[54] Communities cannot be healthy if the individuals members of those communities are not healthy. In recent years, First Nations have also been recognizing that to have a healthy body, mind and spirit may not necessarily be enough. The emotional well-being of individuals has also gained prominence in the teaching of elders on holistic ways of being.[55] Perhaps this new emphasis on the emotional realm did not require a great deal of attention in historical societies because First Nations were not surviving oppression and abuse. It is the emotional well-being of women, children *and men*[56] that is affected most significantly by physical and sexual violence in the home and in the streets.

It is also well documented that the structure of First Nations societies were based on kinship systems. If justice, or the settlement of disputes, was based on kinship – that is, familial relations – then obviously women were integrally involved in these systems. Alex Denny, Kjikeptin[57] of the Mi'kmaq Nation, provides:

> The Mi'kmaq did not have any adjudicative institution, no inquisitional system, no specialized professional elite, because they did not conceive of "public" wrongs. There were only private wrongs, and families themselves were the courts. This remains our vision of a fair and equitable system.[58]

Historical records also indicate that women had many different responsibilities in First Nations societies. It has been said of Iroquoian women:

> The government established by the clans was firmly controlled by the women, who enjoyed the right to select and even depose chiefs, and had competence in such matters as land allotment, supervision of field labour, the care of the treasury, the ordering of feasts, and *the settlement of disputes.*[59]

Establishing kinship relations (or equivalent structures operating on the same premises) is necessary to the restoration of women's respected position in First Nations society and is an important key in understanding traditional justice mechanisms.

What were the mechanisms of dispute resolution in First Nations societies? Again, I turned to Shirley O'Connor who shared her understanding with me. Justice starts from childhood. Children are taught about respect, honesty, and the truth life. This is taught to the child by way of example and by lecture, that is, the telling of legends. What is emphasized to the child is that he or she must always be mindful of doing what is right. "So this generation will know and will understand" are the words of Shirley's own grandparents to her. "Justice was a part of everyday living and how you were good to yourself. Every individual knew why this was beneficial both spiritually and emotionally." This is where we must begin to understand what justice is in a First Nations sense.

When a 'wrong-doing' occurred, the Ojibwa treated males and females in different ways. When the 'wrong-doer' was male, male members of the extended family would speak to him. If he did not listen to these men then eventually he would be taken to a very old grandmother.[60] At that time, everyone in the community knew what this action meant, being spoken to by that old woman. Shirley asked, "How many men today still respect and understand this traditional way of being? How many of our men even remember?"

As Shirley continued to explain, the grandmother would give the man the entire history and all the teachings on why it is that we must respect each other.[61] The grandmother begins by explaining why we respect all living things. She talks

about why we respect our bodies. And finally, she tells him all about the things that are men's and why they happen (such as when the young man's voice changed). Nothing will be said about the so-called wrong-doing. What is important to teach, or perhaps to re-emphasize to the man, is the reason why he is on this earth. And that grandmother is so kind. She has no resentment or anger. Always that grandmother assumes that the man has not learned certain things in his life and it is her responsibility to teach him now.[62] Eventually that man is humiliated. He understands. When the man walks away it is his choice on how he will fix things. He may fast, or just meditate in a quiet place. He is not required to confess to any person, but he could talk to the Creator or a tree or a plant or a spirit. It is the job of all the other living things to take away the 'garbage' that the man has been carrying around with him.

If the 'wrong-doer' is a woman, then the process is slightly different. It may be her grandmother by kinship and/or her mother who speaks to her first. Women are very close to their grandmothers and mothers, so maybe this will not help, particularly if the 'wrong-doing' is serious. Her great aunties may be called upon to speak to her in this situation.[63] The woman who speaks to the female wrong-doer will give the woman the teachings that are required. A woman who has done wrong may also end up sitting before a grandmother from the community. This grandmother is the oldest woman in the community. It will be a woman who no longer can conceive children. Such a woman is believed to have the ultimate 'power'. Woman is the only one who is the giver of life. Once a woman has entered her advanced years (past menopause), she has almost walked a full circle. She can now turn around and look at life, her own but also at where you have come from. Disciplining is, therefore, the responsibility of the grandmothers. It is a greater responsibility than the responsibility that parents have to discipline. It is not punishing, this kind of discipline, but nurturing. To the Ojibwa, "justice is teaching about life".[64]

Justice must be seen to be a process, not a concept, and particularly not a concept that is once removed from the process of dispute resolution as it is currently known in Canadian law. One final story will expand on this point. During a conference on justice held in 1986, the participants play-acted an informal dispute resolution mechanism in the belief that they were mimicking a non-adversarial process of dispute resolution akin to the First Nations system of dispute resolution. In the conclusion of the session, Charlie Fisher, an Ojibwa man from Whitedog, was asked whether the exercise bore a resemblance to what might have occurred in traditional times in his community. The strength of his resounding 'no' jarred the participants. As a result, Mr. Fisher reconstructed the exercise:

> He began by getting rid of the chairs and tables; everyone sat on the floor in a circle, as equals. He then asked for two other people to act as "Representing Elders", one each for the boy and the store manager

> [the situation involved vandalism of a store]. As he continued, it became clear that our little experiment in non-adversarial mediation was flawed in virtually every respect. In Charlie's version, the boy and the store manager never spoke in the presence of the panel of Elders. There was no discussion whatever about the break-in, the damage, the feelings of the disputants, or what might be done to set matters straight. There was no talk of compensation or restitution, much less the actual imposition of such measures.
>
> Once we understood what was not going to take place, we had only one question left: "Why, then, is there a panel at all?"
>
> Charlie Fisher tried to answer us in this way. The duty of each Representing Elder, he explained, was not to speak for the young man or the store manager, but to counsel them in private. That counselling was intended to help each person "rid himself of his bad feelings" Such counselling would continue until the Elder was satisfied that "the person's spirit had been cleansed and made whole again" When the panel convened, an Elder could signify that such cleansing had taken place by touching the ceremonial pipe. The panel would continue to meet until both Elders signified. At that point, the pipe would be lit and passed to all. As far as the community was concerned, that would be the end of the matter. Whether the two disputants later arranged recompense of some sort was entirely up to them. Passing the pipe signified, as Charlie phrased it, that each had been "restored to the community and to himself".[65]

After considering Charlie's story, I wondered whether, perhaps, approaching this paper through the concept of justice was in itself an error. I take seriously that there is no word in many First Nation languages to express this concept. Alex Denny stated that "Harmony, not justice, is the ideal."[66]

Notes

1. When the words of elders and grandmothers are cited in this paper their nations and clans will also be referenced where possible. This is *not* a way of credentialing these well respected individuals. In fact, any such attempt would be a grave insult. I offer this information for readers, to assist them in understanding and organizing the information presented.
2. Although my original intention was to focus solely on justice within the criminal law paradigm, this has not been possible at least in the introduction of this paper. I believe that this is a reflection of the way justice is constructed in the Aboriginal world view. The focus on criminal justice will develop as the paper proceeds.
3. My experience of the culture to which I was born has often been an experience of negation (or living in the gaps and silences) as I was raised in cities away from the Mohawk people. I am also influenced in my understandings as a result of my parentage, one Mohawk and one white. Over the years, I have come to respect that I was put down in the middle and this is where my work

is. I have also married into a different nation. My understandings now also reflect the teachings my Cree husband and his people share with me.

4. A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991), p. 251 (cited hereafter as Aboriginal Justice Inquiry).

5. Aboriginal Justice Inquiry. p. 41.

6. Steve Wall and Harvey Arden, *Wisdomkeepers: Meetings with Native American Spiritual Elders* (Hillsboro: Beyond Words Publishing, 1990), p. 74.

7. Bruce E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Boston: Harvard Common Press, 1982), p. xii.

8. The questions the Commission asked me to address are as follows:

   (a) What are the fundamental values, norms, and concepts which Aboriginal women hold [toward] Justice?
   (b) What were the underlying principles employed for resolving disputes, claiming redress and restitution, compensating victims, etc.?
   (c) What relevance do these traditional beliefs and practices have for contemporary Aboriginal women in developing a new relationship with Canadian society?

   I have some difficulties with the way these questions are constructed. First, they presume that the attitudes of Aboriginal men and Aboriginal women toward justice are not the same. It is much too early in the development of academic understanding (and by that I mean the knowledge that has come to be written down) to come to this conclusion. It is an indication to me that the presumptions upon which the Commission is working on the topic of justice relations has adopted a mainstream and/or feminist approach to the construction of justice. This I find most problematic and is fully discussed in the section of this paper on feminism.

   Here, my comments should not be viewed as base criticism of the Royal Commission, its mandate or its work. The reality is that we are attempting to undo 500 years of oppression and this cannot be accomplished overnight. My comments should be seen as a reflection on the shape and magnitude of the challenge that lies before us collectively.

   In particular, question (b) disturbs me. This is my second concern. Implicit in the construction of this question is the assumption that justice can be institutionalized in Aboriginal communities based on the structures of criminal justice developed to accommodate mainstream society. It is only through further systematic study and discussion that we can determine whether concepts such as restitution and compensation are applicable in the Aboriginal sphere. To be an alternative dispute resolution system, it must be truly an alternative and not part of an adversarial structure already deemed to exist. Not to question the paradigm's structure is completely unacceptable.

9. Johansen, p. 155.

10. My comment here should *not* be viewed as a condemnation of women-specific programs. Often such programs are a *required* part of the solution. My criticism is that these programs can allow mainstream individuals or factions to congratulate themselves prematurely about the progress that has been made. Without meaningful structural change, the long-term sanctioning of the status quo has not been challenged.

11. "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?", *Harvard Women's Law Journal* 12 (1989), pp. 25-73.

12. Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women", *Canadian Journal of Women and the Law* 4 (1990-1991), p. 441.

I am clearly not suggesting that the current construction of sexuality is the central aspect of the way Aboriginal women view their gender oppression. This topic will be canvassed fully later in the paper.

13. Shelina Neallani, "Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex", *Canadian Journal of Women and the Law* 5 (1992), p. 151.

14. For a discussion of the many justice inquiries from a woman's perspective, see Patricia A. Monture-OKanee, "Discussion Paper: Aboriginal Women and the Justice System", unpublished manuscript prepared for the Royal Commission on Aboriginal Peoples, 1992.

15. Again, I am not condemning the creation of Aboriginal-specific programs, provided they are viewed only as short-term solutions.

16. I use the word 'community' to refer to any collection of Aboriginal people, from a small and remote reserve to major urban centres.

17. Correctional Service Canada, *Creating Choices: Report of the Task Force on Federally Sentenced Women* (Ottawa: Supply and Services, 1990), 24.

18. Aboriginal Justice Inquiry, p. 263.

19. The concept of healing in some social service circles has become an overly structured, perhaps even institutionalized, phrase. Here I use it in its simplest form, true to the Aboriginal understanding of the concept.

20. Winona Stevenson, Rhonda Johnson and Donna Greschner, "Peekiskwetan", *Canadian Journal of Women and the Law* 6 (1992) forthcoming.

21. James Youngblood 'Sakej' Henderson, "The Marshall Inquiry: A View of the Legal Consciousness", cited in Joy Mannette, *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992), p. 39 (emphasis in original). See also Patricia A. Monture, "Reflecting on Flint Woman", in *Introduction to Jurisprudence*, ed. Richard Devlin (Toronto: Emond Montgomery, 1990), p. 359.

22. Neallani, p. 149.

23. For further discussion, see Patricia A. Monture, "Now that the Door is Open: First Nations and Legal Education", *Queens's Law Journal* 15/1 (1990), pp. 179-191.

24. Understanding that the discourse of racism does not fully express my experience has led me to begin to develop an alternative theory. I have been using the framework of resistance to begin developing my understanding.

25. For a fuller discussion of the impact of punishment and coercion, refer to Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations", *Canadian Journal of Women and the Law* 3 (1989), pp. 4-7.

26. Henderson, pp. 35-36 (emphasis added).

27. *Ibid.*, p. 36.

28. I am not fond of this term because it does not embrace the reality that I have experienced. In this society, being Mohawk and being women is not disadvantage that can be measured by adding one to the other. It is disadvantage that is wound within disadvantage.

    Sherene Razack proposes that "if male domination is the prism through which gender oppression is viewed, race and class enter the picture as background scenery". ("Speaking for Ourselves", p. 441) Serious methodological problems arise when the multifaceted forms of oppression are presented in additive and/or hierarchical form.

29. This has been, perhaps, the most difficult lesson in understanding the politics of resistance (of which internalized colonialism is a part) that I have personally had to face – the belief that if I just struggled hard enough up someone else's ladder of success, studied hard in university for years, then one day mainstream society would accept this Mohawk woman as an equal. This has not been my experience of either academia or mainstream society. In many ways, I lead a very privileged life (based on so-called socio-economic variables) and this has been very difficult to reconcile with the experiences of discrimination that I still face. What I now understand is that I do have a limited amount of control regarding my personal circumstances (or the individual experience of oppression), but I still remain powerless to eradicate the effects of systemic oppression of First Nations people.

30. Although I will discuss feminism as though it is a single unified theory, this is a simplification. The subtleties of feminist thought are beyond the scope of this paper.

31. Standpoint theory is articulated by and continues to be developed in the work of the following authors: Linda Alcoff, "Cultural Feminism versus Poststructuralism: the Identity Crisis in Feminist Theory", cited in *Feminist Theory in Practice and Process*, ed. Micheline R. Malson (Chicago: University of Chicago Press, 1989), 295-326; Sandra Harding, "The Instability of Analytical Categories of Feminist Theory", cited in *Feminist Theory in Practice and Process*; Sandra Harding, *Whose Science? Whose Knowledge? Thinking From Women's Lives* (Ithaca: Cornell University Press, 1991); Nancy C.M. Harstock, "The Feminist Standpoint: Developing Ground for a Specifically Feminist Historical Materialism", *Feminism and Methodology*, pp. 157-180; and Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Toronto: University of Toronto Press, 1987).

32. Sandra Harding, "Starting Thought", cited in Colleen Sheppard and Sarah Westphal, "Equity and the University: Learning from Women's Experience", *Canadian Journal of Women and the Law* 5 (1992), p. 7.

33. Aboriginal women's experience may also be compounded by class, disability, and sexual orientation.

34. It should be noted that feminism is very much a response to patriarchy, and both can therefore be seen to be constructs grounded in European (and now Euro-Canadian) philosophy and experience. I am indebted to James Oka for clearly articulating this connection to me.

35. Marguerite Russell, "A Feminist Analysis of the Criminal Trial Process" *Canadian Journal of Women and the Law* 3 (1989), p. 552.

36. For a fuller discussion, refer to Patricia A. Monture-OKanee, "The Violence We Women Do: A First Nations View", in *Contemporary Times: Conference Proceedings of the Contemporary Women's Movement in Canada and the United States*, ed. David Flaherty and Constance Backhouse (Montreal: Queen's-McGill Press, 1992), pp. 191-200.

37. This recognition should *not* be constructed as a suggestion that Aboriginal women share a commonality of experience based on either or both our culture and/or gender. Our experiences are not homogeneous and are filtered by our experiences of our national identities, our residence, northern versus southern geography, education, and so on. The degree to which feminist thought and practice are embraced by Aboriginal women varies from individual to individual.

38. Stevenson, p. 12.

39. LEAF is the most visible Canadian women's organization that is involved in litigating women's issues before the courts.

40. Razack, pp. 454-455 (footnotes omitted).

41. As cited in Razack, p. 455.

42. Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights", cited in Menno Boldt and J. Anthony Long, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), p. 19.

43. This is not to suggest that a single cohesive theory of feminism has been articulated. See, for instance, Christine Boyle, "A Feminist Approach to Criminal Defences", in *Canadian Perspectives on Legal Theory*, ed. Richard F. Devlin (Toronto: Emond Montgomery, 1991), p. 273.

44. Constance Backhouse, "Nineteenth Century Judicial Attitudes Toward Child Custody, Rape, and Prostitution", in *Equality and Judicial Neutrality*, ed. Sheilah L. Martin and Kathleen E. Mahoney (Toronto: Carswell, 1987), pp. 270-274.

45. See, for example, Susan Boyd, "Child Custody and Working Mothers", in *Equality and Judicial Neutrality*, ed. Sheilah L. Martin and Kathleen E. Mahoney (Toronto: Carswell, 1987), p. 168.

    An excellent critique of race and feminist legal theory exists in the work of Marlee Kline, "Race, Racism, and Feminist Legal Theory", *Harvard Women's Law Journal* 12 (1989), p. 115.

46. One recommendation would be to ensure that research into this area is completed.

47. Cited in Diane Meili, *Those Who Know: Profiles of Alberta's Native Elders* (Edmonton: NeWest Press, 1991), p. 25.

48. At this point my discussion is to become, unfortunately, more focused. This is reflected in my change in language from Aboriginal peoples to First Nations. I use the term First Nations to refer to the people whom the government of Canada would refer to as "Indians". I refuse to adopt, however, the on-reserve/off-reserve dichotomy artificially created by the federal government. I also do not embrace the distinction of status/non-status. How a human being can have no status is a construction that my mind is not able to embrace. In other places I have used the term First Nations to include the Métis and the Inuit; that, however, is not my intention here. I think it is worthwhile to point out that the general usage of the term First Nations has become more specialized over time, perhaps more specialized than is my intent, to refer primarily to "Indian bands"

    In the course of writing this paper I have had to come to terms with just how particularized my understanding about traditional justice relations is. My understanding does more accurately reflect what First Nations understand.

    Although I do not wish to shirk my personal responsibilities for the exclusion of Métis and Inuit that I have just made, I do believe that there are some structural justifications for this exclusion. The Métis trace their history to "nine months after the arrival of the first European man in this country". First Nations trace their histories to "time immemorial" The Inuit also trace their histories to "time immemorial"; however, their experience is unique in their experience of the North. Therefore, the process used to trace the traditional relations to justice of each of these distinct peoples must necessarily be different. I set the Métis and the Inuit apart in an attempt to do justice to their distinct ways of being.

49. Charles M. Johnston, ed., *The Valley of the Six Nations: A Collection of Documents on the Indian Lands of the Grand River* (Toronto: University of Toronto Press, 1964), pp. 28-29.

50. A. C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper*, vol. 2 (Winnipeg: Queen's Printer, 1991), p. 52.

51. This understanding was shared with me by Shirley O'Connor, a grandmother from the Lac Souel reserve in Northern Ontario. She is Ojibwa. Currently employed as a counsellor in the

child welfare field, Ms. O'Connor now resides in Sioux Lookout. Any error in the recording or understanding of the teaching Ms. O'Connor shared with me is my own.

52. Professor Leroy Littlebear, of the Native American Studies Department at the University of Lethbridge and a citizen of the Blackfoot nation, also affirmed that there was no word in his language for justice. "Justice is not a concept but a process," he stated.

53. Kjikeptin Alex Denny, "Beyond the Marshall Inquiry: an Alternative Mi'kmaq Worldview and Justice System", in *Elusive Justice: Beyond the Marshall Inquiry*, ed. Joy Mannette (Halifax: Fernwood Publishing, 1992), p. 103.

54. Aboriginal Justice Inquiry, vol. 1, p. 19.

55. Although it was several years ago, I believe that Edna Manitowba was the first person I heard share this teaching in a workshop that I attended. Edna is of the Bear Clan, Ojibwa nation. She is a member of the Midewiwin Lodge of the Three Fires Society.

56. The perspective of many traditional First Nations women does not allow for the condemnation of the men who are the abusers in their communities. This is quite complicated to understand. It arises in part, I believe, from the different conceptualization of justice within First Nations communities. It also has its source in part in a different gender construction. A detailed discussion is found in A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991), pp. 475-485.

57. This Mi'kmaq word indicates that he is the Grand Captain, Grand Council of the Mi'kmaq Nation.

58. Denny, p. 104.

59. J.A. Noon, *Law and Government of the Grand River Iroquois* (New York, 1949), p. 39 (emphasis added). Again, in this historical account, we can see the attitude of incredibility with which the position of Iroquoian women is viewed.

60. This would not have been the man's grandmother by blood relation. The name 'grandmother' is assigned to the old women of the community; the grandmother in this instance would usually have been the oldest woman in the community, who was the court of last resort, so to speak.

61. It seems quite important to emphasize that the 'offence' did not lie in the incident itself but in the lack of *respect* that had been displayed for self and community.

62. This is very different from the Canadian justice system. The Ojibwa system does not place any value on the individual wrong-doer's intent or purpose. If an assumption is to be made, it will be assumed that the person does not understand the way in which he or she is expected to behave.

63. It is important to note that unlike the situation of the male wrong-doer, the men of the extended family do *not* speak to the woman. Shirley also explained to me that the woman will never be sent to speak to a grandfather.

64. I am indebted to Shirley O'Connor for trusting me with her culture and her insights into the way in which justice is constructed within the Ojibwa community traditionally. This discussion of process in Ojibwa culture is her understanding, which I have merely re-told. Any misunderstanding is my own.

65. I have respectfully borrowed this story from Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham: Octopus Publishing Group, 1992), pp. 8-9. I would also add that Mr. Ross is a non-Aboriginal, legally educated man. The understanding that he has developed, although not always perfect or exact, gives me hope and inspiration for our collective futures.

66. Denny, p. 104.

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Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice

*Jeremy Webber**

For a very long time, Aboriginal people have criticized, with telling effect, the way in which they are treated at all stages of the criminal justice system. Many argue that the solution lies in a parallel system of justice (or, more accurately given the diversity of Aboriginal peoples, parallel systems of justice), drawing on specifically Aboriginal traditions. This solution has been closely linked to Aboriginal peoples' fundamental commitment to the inherent right of self-government.

There is considerable agreement that the present justice system is unsatisfactory. A series of commissions and task forces, sponsored by non-Aboriginal governments, have confirmed Aboriginal criticisms.[1] There has, however, been much less agreement on solutions. Although some have endorsed the creation of parallel systems of Aboriginal justice, non-Aboriginal political leaders – and, it seems, non-Aboriginal Canadians generally – have tended to balk at those proposals. Non-Aboriginal Canadians appear willing to consider reforms within a common institutional structure, but to oppose solutions that involve separation.

This opposition is rooted in a deep commitment to equality before the law and to individual freedom, and an entrenched suspicion of any distinctions based on cultural or racial difference, especially in the administration of justice. The criminal law is concerned with individual responsibility, and criminal sanctions should be structured (so the argument runs) so that they apply equally to

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all Canadians, fully respecting the autonomy of the individual. Cultural distinctions, it is said, undermine this commitment, subjecting Canadians to different penalties and different standards of conduct, perhaps even subordinating the individual to some vague sense of the collective interest. For many Canadians, the creation of separate systems of justice would be tantamount to apartheid, profoundly dividing Canadian society and entrenching inequality. Many non-Aboriginal Canadians simply cannot see how cultural difference can justify a separate system of criminal law without radically undermining freedom and equality.

These criticisms have immense force within Canadian society. Their simplicity and emotional resonance are such that they often appear (to non-Aboriginal Canadians) irrefutable. But they are too simple. They misunderstand the demands of individual freedom and equality. They tend to confuse equality of treatment with identity of treatment, and the protection of individual freedom with the particular form that that protection has taken within structures of justice derived from the British model. This paper argues that when one thinks more carefully about freedom, equality, and the relevance of culture for law, there are circumstances in which parallel systems of Aboriginal justice are both acceptable and appropriate.

This paper takes a very different tack from many arguments for parallel systems of Aboriginal justice. Those arguments often have the same structure as arguments for Aboriginal title to land: Aboriginal societies are seen as having, at the moment of contact, the right to govern themselves, including the right to administer justice in their own way. The observer then reconstructs the pattern of interaction between non-Aboriginal and Aboriginal societies since contact in order to determine if that right has been validly extinguished. If not, Aboriginal societies retain the right to their own parallel institutions.

This reasoning may well be an important component of a submission that an Aboriginal system of justice is an Aboriginal right, within the terms of section 35 of the *Constitution Act, 1982*. I believe, however, that even for that purpose it is insufficient. Without a doubt, it is incapable of persuading non-Aboriginal Canadians that a parallel system of justice is truly "just" (as opposed to merely constitutionally required). It is undeniable that at the time of contact Aboriginal societies were fully developed, with their own conceptions of justice and their own methods for compelling compliance. But Canadians want to be convinced that distinctively Aboriginal institutions should exist today, in today's society. This is true not only of Canadians generally, but also of judges. They will be very reluctant to treat self-government like a property right – something which, if it existed once and was not formally extinguished, continues to the present time. Before they would decide that a parallel system of justice was included within section 35, they would need to be convinced that such a system was justified in the light of the current circumstances, including the courts' commitment to individual freedom and equality before the law.[2] One cannot use legal

arguments to avoid this problem, then. The contemporary justification must be addressed.

Nor is it sufficient to argue the intrinsic merits of Aboriginal justice, another common way of justifying a parallel system. That kind of argument is certainly an important part of a complete justification. Indeed, I suggest below some of the ways in which it is essential. But the problem with relying on it exclusively is that it still fails to suggest why Canadians should accept a *parallel* system of justice. A skeptical audience may well respond, "We know you believe that the Aboriginal way of handling disputes is better than ours. If you persuade the majority of Canadians that it is, we will be perfectly willing to change the system. But if not, we will have to keep something like the existing arrangement." One has to argue not only the intrinsic merits of an Aboriginal system of justice, but why it makes sense for Aboriginal people to have one system and non-Aboriginal Canadians another. This second question is the one that raises fundamental issues of equality and individuality. It is the principal focus of this paper.[3]

This paper begins by exploring the positive justification for distinctively Aboriginal systems of justice. Why precisely is it valuable for Aboriginal peoples to have their own forms of criminal justice, drawing on their own traditions? I will not describe the merits of particular forms of Aboriginal justice; others can do that much better than I. Instead, I will concentrate on how we should think about the general relationship of culture to law. One of the premises of this paper is that we have been poorly served by the terms we use to talk about these issues. Our notions of culture, of equality, of individual rights are often too blunt to capture the problem. They force us into unnecessary oppositions, presuming that we have to choose between individual and collective rights, between equality and apartheid, between an open and a closed society. This paper proposes a different way of thinking about these issues. It tries to justify the conviction that one can have Aboriginal systems of justice which are, in a very real sense, traditional, but which nevertheless are open, respectful of individuality, and adaptable.

The paper then goes on to address a number of objections to parallel systems of justice. Some of these are straightforward, genuinely based on claims of liberty or equality. But others are much less obvious, hiding among the others, disguised by labels that do not sufficiently represent their content. I will discuss these concerns in turn, showing that the creation of separate institutions is not, in principle, objectionable.

The argument in this paper is based upon a particular understanding of the significance of culture to law. I present it in the hope that it will strike the reader as a way of making sense of his or her own experience – a good way of expressing what it means to be governed by one's own laws, based on one's own cultural heritage. It does not, however, simply reproduce the terms in which Aboriginal

or non-Aboriginal people think about culture and law. Instead, it attempts to suggest how we might come together on these issues, how we might reconceive the relationship between culture and law so that we do not fall into sterile debates that ultimately misrepresent our commitment to individuality and community. It is important to strive for a reconception for two reasons.

First, the words we use to describe our world are always inadequate and provisional. They are in large measure artifacts, made in another time for another purpose (and I am referring here chiefly to the non-Aboriginal language of nationalism and tradition, because after all, here as elsewhere, the cross-cultural debate occurs predominantly through the use of non-Aboriginal concepts, in part because they are the only concepts non-Aboriginals know). These forms of expression need refinement and reconception as our situation changes, as we come to accept the value of other cultures, and as our understanding grows. The conception presented here tries to express the reality more adequately than the alternatives do. It tries to capture why Aboriginal people legitimately want their system of justice to reflect their culture, and fully believe that this can occur without reinforcing inequality or creating a stark and confining conformity.

Second, there is a particular need to reach an understanding between Aboriginal and non-Aboriginal peoples at the present time. Whether we like it or not, our destinies are intertwined. The best way of solving the issue of Aboriginal justice is to persuade each other of the validity of our concerns. This at least involves attempting to explain our position in a manner intelligible to the other, and it may require additional adjustments as well. The outcome of that process may well be the recognition of a very substantial measure of Aboriginal autonomy. But even if we do come to that solution, we will almost certainly do so by justifying that autonomy to each other. We simply live too close to each other to act now as though the other did not exist.

Understanding the Claim for a Parallel System of Justice

A central difficulty in justifying a parallel system of justice is that often our very language seems to suggest that, in the design of public institutions, a concern for culture comes at the expense of individuality. We talk about returning to traditional ways in a manner that suggests to some listeners that options are going to be foreclosed and the power of individual choice limited, all in the service of a communal end. The use of "collective rights" to justify parallel systems contributes to this tendency, almost begging the listener to think in terms of an opposition between the "collective right" to Aboriginal justice and the individual right simply to justice. To many, the emphasis on culture and tradition seems confining and retrograde, forcing individuals into moulds they may not like, simply because that was the way Aboriginal people used to do things. The very notion of tradition seems resistant to change, to reform, to adaptation.

I believe that these concerns are, in large measure, the result of our misperception of the role of tradition in social ordering. They flow from the tendency to conceive culture in terms of substantive content, as a set of specific values and customs. It is this view that tends to produce the conclusion that any change or adaptation, no matter how it occurs, is a departure from tradition – that any individual innovation means a renunciation of one's culture. The focus on a defined content tends to force us to think about culture in static terms, frozen in time.

In life, cultures are manifestly dynamic. They evolve, adapt, are continually subject to interpretation and re-interpretation. This does not mean that the idea of cultural distinctiveness melts away, undermined by an unconstrained openness to change and lack of fixity to any determinate content. There remains real substance to the idea that a culture can have a unique and valuable character. But that character must be conceived in terms that embrace movement and development, not a rigid constancy or uniformity.

A better way to think about culture is through the metaphor of conversation. In a way, a tradition or culture is a conversation through time, with its own history, its own points of reference, its own distinctive modes of discussion. The content of a conversation changes, develops, and indeed can include specific positions that are strongly opposed to each other. It is not marked, then, by uniformity in its content. Instead, it is marked by the specific character of its debates, by the way it poses and then goes about resolving questions.[4] No aspect of this culture is impervious to change. Even the modes of discussion can evolve as the discussion proceeds, although if a culture is robust, change occurs in a way that continues to draw, at least in part, upon what has gone before. The value served by respect for a culture is not an absolute constancy, then, but continuity.[5]

For non-Aboriginal Canadians, the fact that this dynamic conception of culture has some real grounding in experience becomes apparent, I believe, when one considers the nature of "Canadian culture." Such a thing does exist, but it is not adequately described as a common set of values or beliefs, as some interventions in the recent constitutional debates would have us think. Any attempt to describe the Canadian identity by describing its values either produces a list of such broad generality that it could fit any western industrialized democracy, or it lies about the extent to which a particular value is shared. The Canadian identity is marked as much by the character of its oppositions as by its agreements. There are certainly broad themes which have preoccupied Canadians in many parts of the country. There is a distinctive structure to public debate in Canada, a body of experience upon which we draw, and specific ways of framing issues that are not the same as those in, for example, the United States. But that structure, that specificity, cannot be reduced to agreement to a set of principles. Indeed, in large measure, it is the result of tensions within our country (most obviously, the interactions of French- and English-speaking Canadians), differences which continue to work themselves out in unique ways.[6]

I believe the same holds true for distinctively legal traditions. Often, western legal systems are conceived as elaborate sets of norms, precisely defined and hierarchically arranged. They tend to be conceived, in other words, in terms of a definite substantive content. Anyone who has worked with the common or civil law realizes, however, that this content does not and cannot exhaust the law. Legal reasoning is of necessity a creative process, in which previous principles are reinterpreted – sometimes radically – and new principles are developed. In this process, factors outside the formal sources of law inevitably shape the outcome. The content of the law is always in movement, and not simply in accordance with its own internal dynamic. But though this movement is real, legal argument does not dissolve into unconstrained political discussion. It still has its own distinctive character, its own manner of marshalling reasons, its own reference points to which lawyers and judges refer in structured ways when making their arguments. That structure includes considerable deference to previous decisions, and thus has a substantial bias towards consistency and predictability. But even this deference simply serves to channel the debates, setting the terms in which questions are addressed. It does not absolutely constrain it. For sufficient reason, there can be major departures in the law. Previous opinions can be interpreted in novel ways, others can be rejected outright.

I believe that the demand for a distinctively Aboriginal system of justice is best understood through the lens of this more open concept of tradition. The objective is not to create a justice that has the precise content that existed in Aboriginal communities prior to contact (if that were possible). The objective is to establish institutions for the administration of justice which are able to speak to and draw upon the distinctive contributions of Aboriginal peoples to the problem of social order. It is to allow the administration of justice in Aboriginal communities to take into account the experience of Aboriginal peoples – their reference points, their way of framing issues, their methods of striving for resolution – rather than baldly imposing the language and forms of non-Aboriginal traditions. Aboriginal justice is, in other words, above all about restoring continuity with Aboriginal ways of talking about society.

Re-establishing continuity may require a measure of separation between Aboriginal and non-Aboriginal justice, especially if distinctively Aboriginal approaches suggest fundamentally different procedures from those of Canadian criminal law (emphasizing, for example, mediation and discussion rather than conviction and punishment[7]). This separation need not be absolute, however. Given the changes that have occurred in Aboriginal societies since contact (including the influence of European societies on Aborginal individuals and communities), and the fact of their presence within large industrialized societies (which at least would require a rethinking of such traditional sanctions as banishment), the challenge of Aboriginal justice will almost certainly involve fashioning structures that draw upon both Aboriginal and non-Aboriginal forms.

Thus far, this argument has suggested how we should think about the relationship between culture and law. It has not yet suggested why we should care about restoring continuity with Aboriginal traditions. Why indeed should we bother? Aboriginal societies have changed dramatically. What do we gain by weaving Aboriginal traditions back into the administration of justice? Is it simply romantic nostalgia, or do we secure something of value?

Restoring the connection to distinctively Aboriginal traditions is valuable not because of some kind of biological determinism – some sense that Aboriginal traditions are better for Aboriginal people simply because they are Aboriginal. There is no inherent imperative that Aboriginal peoples always be governed by norms which are, in some sense, "Aboriginal." Continuity is valuable not for the sake of some notion of collective purity, but because of the fundamental significance of cultural continuity to the members of the community. And this significance is grounded in the particular ways in which we understand ourselves as individuals.

Many recent authors have emphasized the importance of narrative to identity.[8] We do not understand ourselves simply by listing our characteristics at a given point in time. We understand ourselves in terms of stories: how we got to where we are; where we are going; what our roles are and how well we are fulfilling them. Development in time, continuity, are important to our understanding of identity. We define ourselves, then, by situating ourselves within a context, and that context is always inherited, to some degree, from the society of which we form a part. We learn the debates of that society, we enter into them, and gradually we define ourselves, at least in part, in relation to them. We need not agree with the dominant perspectives of our society. Sometimes, we react against them. But even rebellion is shaped by what we are rebelling against.

This emphasis on context and narrative is important not only to a sense of collective or communal identity, but also to our understanding of ourselves as autonomous individuals. We recognize ourselves as responsible agents in part by our understanding of how we, as individuals, came to be where we are. Did it involve choice, decision, responsibility? Or are we victims of circumstance, buffeted by forces over which we have no control? Confidence in our identities both as individuals and as members of a group, in other words, depends upon comprehension of ourselves in relation to the past. Cutting off that past – severing our relation to our histories, especially by forces over which we have no control – can devastate our sense of ourselves, dividing us from the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world.[9]

That is the underlying significance of the demand for Aboriginal justice. It is not simply a question of "collective rights" in the sense of some inherent right of collectivities to insist upon their character. It is an element in Aboriginal peoples' connection to the richness of their past, a connection that is important not

because Aboriginal people are locked within a particular world view forever, but because Aboriginal people, like all people, define themselves in relation to their past. In the process of moral and political argument, it is therefore a real benefit to be able to draw upon the language of distinctively Aborginal traditions.

Not all Aboriginal people, it is true, conceive of culture in the open, dynamic terms described here. Some do suggest, at least by the way in which their arguments are framed, that their objective is to ensure that Aboriginal societies are run in accordance with tradition – tradition conceived in terms of a defined set of substantive principles or values. I wonder, however, whether this isn't the product of a misunderstanding of the way in which culture conditions social action (a misunderstanding that is certainly common among non-Aboriginal Canadians) rather than an inherent element of Aboriginal understandings. I am struck, for example, by the extent to which traditional Aboriginal institutions (at least those with which I am familiar) are built around discussion and consensus rather than authoritative imposition.[10] That suggests that openness and adaptability have always been fundamental elements of the public decision-making of Aboriginal peoples. Moreover, there is, within Aboriginal communities, significant opposition to those who try to arrogate to themselves the sole right to determine what is traditional (on the rare occasions that that occurs).

It seems clear, then, that the objective of Aboriginal justice reform is not to impose a single, static vision of Aboriginal identity on an Aboriginal community. It is to create institutional structures through which the distinctive conversations of Aboriginal peoples about justice can continue, responding to new situations and challenges in a manner that retains connection to the past.

Objections to Parallel Systems of Justice

The previous section attempted to show how, in positive terms, we should think about the demand for parallel structures of Aboriginal justice. This section responds to several common objections, objections which are generally phrased in the language of equality and liberty, but which sometimes (as we will see) involve considerations going beyond concern with strictly individual rights. My approach is not to deny the importance of the commitments underlying those objections, but rather to explore the substance of the commitments more deeply, showing that, when properly understood, they do not pose insurmountable obstacles to the creation of parallel systems of justice.

A general point lying behind my arguments is that our conventional discourse of equality and liberty was developed within integrated societies, societies already possessing or aspiring to a high degree of cultural homogeneity (or at least rise of classical liberalism in Europe coincided with the rise of nationalism, and that many liberals were also nationalists.[11] In consequence, that discourse does not do a very good job of understanding how the persistence – indeed, the conscious

acceptance – of a very substantial degree of cultural diversity may legitimately be reflected within the structure of public institutions. This section tries to remedy that defect.

Objections based on the protection of individual liberty

Some of the arguments against a parallel system suggest that the very fact of making justice (and especially criminal justice) depend on the culture of the accused undermines individual rights. Law should be based on respect for individuals, these people argue, not upon collective, cultural objectives. Otherwise, the nature of the community will take precedence over individual autonomy, collective over individual rights.

Often, the criticism remains at this level of generality. Sometimes, however, it focuses on specific aspects of a parallel system. The evolution of criminal law in the British tradition has, for example, been strongly conditioned by the need to safeguard individual liberty; many non-Aboriginal Canadians are now very reluctant to allow those protections to be set aside. Their concerns are reinforced by the opposition of some Aboriginal representatives to the *Canadian Charter of Rights and Freedoms*, or the still more far-reaching claim that individual rights are a non-Aboriginal concept, inappropriate in an Aboriginal context.

There certainly is a real concern with individual liberty. The criticisms need to be taken seriously, and an alternative system of justice structured so that it adequately respects individual autonomy. Often, however, the rights arguments are overdrawn, suggesting that the rights of individuals, conceived as abstract beings without regard to culture, are the *only* legitimate concern, the only proper determinant, of law – a perspective which ignores the extent to which all systems of justice, including the Canadian system, necessarily embody cultural choices. A respect for individual autonomy, often expressed in terms of individual rights, is an important element in law, but it does not exhaust law. One can imagine a variety of different legal systems, all shaped by the particular society in which they emerged, all adequately respecting individual autonomy.

This is apparent if we consider the enormous diversity of law among European countries. In most liberal theories, for example, an important individual right is the right to dispose of one's property. But in Europe, the very definition of property – including such fundamental questions as its conceptual nature, the determination of what objects are subject to property rights, or the extent of control that a property owner can exercise – differs significantly from one jurisdiction to another. This can mean, for example, that what one can do with a mountain pasture in Switzerland differs dramatically from what one do with a similar pasture in another country. That difference is, in part, the product of cultural factors: the significance of a certain mountain lifestyle to the cultural image of the Swiss.[12] That policy may be wise or foolish, worth the trouble or not, but few would argue that because of it, fundamental human rights are

imperilled. It simply means that the interest in individual autonomy expresses itself differently in the two countries.

The same is true of Aboriginal land rights. At least some Aboriginal societies define entitlement to land in terms of stewardship. Specific individuals or groups are entitled to use and administer a given territory, but this right is not conceived in the absolute terms characteristic of continental-European conceptions of ownership. There is no presumption, for example, that one can dispose of land in any way one chooses. On the contrary, the right to territory always carries with it the obligation to preserve that territory's productive capacity.[13] Now, this does seem to restrict the scope of individual action, but when it comes to evaluating the effect of this system on individual rights, does it really differ all that much from the Swiss example? All current systems of law constrain what an owner can do with property. Is stewardship any less respectful of the individual than non-Aboriginal systems of ownership, qualified as they are by zoning regulations, environmental controls, or cultural heritage provisions, and which similarly allow more than one person to share ownership? Individuality, conceived as taking responsibility for how one lives in the world, can be valued and respected under either.[14]

A similar tolerance for diversity exists with respect to criminal procedure. Procedure on the European continent differs dramatically from the British common-law tradition, yet few who know the continental approach would say it impairs fundamental human rights.[15] Moreover, this diversity is present among legal traditions that use state resources to impose very severe punishment. Many Aboriginal traditions emphasize much less draconian measures: processes of discussion, restitution and reformation, in which the community as a whole is involved.[16] That is a fundamentally different approach, rooted in Aboriginal cultural traditions, but surely it is not, because of that fact alone, less respectful of individual rights. The mere presence of cultural considerations in the shaping of a legal system does not imperil individual rights. Radically different systems can co-exist, reflecting different cultural preferences, without undermining individual autonomy.

The fundamental point is that the commitment to individual autonomy operates at a level of generality. A full commitment to autonomy is compatible with a wide range of structures, and the precise detail of those structures can legitimately be shaped by the culture of the society. The commitment to individual autonomy can, in other words, take on many possible exemplifications. Individual autonomy is not a single, magic principle from which every aspect of a legal system must be derived. It is a minimum guarantee which, once respected, is fully compatible with a range of normative choices.[17]

These choices are just as present in European law as they are in Aboriginal traditions. Respect for individuality is one component of the Canadian legal system, but it is not and cannot be the whole.[18] I am often amazed at the tendency of

some observers to see aspects of Aboriginal traditions as limitations on individual rights while accepting without question – indeed, while remaining utterly blind to – analogous limitations within non-Aboriginal law. The most striking example in the recent Canadian debate is the argument that Aboriginal land rights, because they restrict access to a particular territory, are contrary to mobility rights in the Charter. How are these limitations materially different from those resulting from private property? Canadian law allows owners of private property to exclude others. Those owners can even be corporate entities, controlling access to huge tracts of land in the interests of a number of natural persons. If such limitations are consistent with mobility rights, surely the same must be true of Aboriginal rights.

In much of our analysis, the choices inherent in our own law seem to have faded into the background. They have, for us, become part of the landscape, and we no longer see the extent to which (for example) the very content of property – the definition of the objects upon which individual autonomy is exercised – is not natural and eternal but the product of culturally conditioned choice. There is no reason why Aboriginal people should not make those choices differently.

A measure of diversity, rooted in cultural difference, is therefore acceptable within the body of the law. But the legitimate effect of culture on law does not end there. Cultural difference also shapes the very means by which individual interests are protected.

In Canada, one of the means used to protect individual rights is the *Canadian Charter of Rights and Freedoms*. That instrument does not directly enshrine the general value of autonomy, however. Instead, it attempts to further that general commitment by entrenching a set of specific guarantees. The phrasing of those guarantees is necessarily the product of a specific cultural context. They are premised on the existence of certain institutions, and frequently spring from the historical experience of European societies. We realize the importance of "freedom of the press," for example, precisely because of the press's historical importance in the expression of ideas in European societies. In a different context, with different institutions, the protection of individual autonomy might take a different form. I do not mean to suggest that a specifically phrased freedom like freedom of the press is only important for Europeans. It may well be that it should be protected everywhere, even where presses do not yet exist, simply out of respect for all forms of expression. My point is merely that the phrasing of specific guarantees is not culturally neutral. Adjustments may be appropriate in different contexts.

A good example, directly relevant to criminal justice, is the right to remain silent. Whenever there is a criminal prosecution, in which the resources of the state are mobilized against an individual with the possibility of very severe punishment, it may be essential to guarantee that right. But what if wrongdoing is handled through means that seem more therapeutic – or more compensatory

– than punitive: for example, through promoting direct discussion between wrongdoer and victim, with the only potential prejudice being restitution of the damage caused? In those circumstances, does it make any sense to guarantee the right to remain silent? That right is a product of its context. It is intrinsically bound up with the specific character of the criminal law. If the context changes, the right may be neither necessary nor appropriate. Even in the Canadian system, the right to remain silent does not exist outside of criminal proceedings. There is no such right in a civil action designed to obtain compensation against the wrongdoer. A suspect can even be forced to testify at an inquest into a death he is believed to have caused (although he can later exclude that evidence from his trial). If an Aboriginal system of justice is established along the lines described above, the right to remain silent may be just as inappropriate.

It is important, then, not to be mesmerized by a given expression of rights. We should not, for example, treat the language of the Charter as a sacrosanct code – as a substitute for the individuality it was designed to protect. The fundamental value remains that individuality, not the detail of its expression in a specific document (appropriate as that document may be for its context). In an Aboriginal system of justice, one may wish to create additional guarantees, tailored directly to the new institutional structure. Other guarantees may lose their meaning and need to be revised.

In fact, the influence of context over how precisely we express individuality may be largely responsible for the disagreement over the relevance of the entire concept of "rights" to Aboriginal communities. The very notion of "fundamental human rights" (or at least its dominance) may go hand in hand with a strong state. After all, the emergence of instruments expressly guaranteeing individual rights coincided with the rise of nation states. The effect of those instruments was generally limited to the state; they did not apply to the host of private-sector pressures towards conformity – criticism, ostracism, the threat of religious sanctions – which also constrain individual action. Even where rights are guaranteed against infringement by private action (for example, through human rights codes), a strong state exists to serve as guarantor. The language of human rights may be particularly appropriate to the control of or by a coercive state apparatus; the dominance of that language may be most appropriate in societies possessing that kind of state.

In Aboriginal societies (at least in northern North America), on the other hand, public decision making, the authority to express the demands of justice, and the power to compel compliance were all traditionally much more dispersed. They depended on the less formal, more diffuse mechanisms that charters of rights do not touch. To non-Aboriginal Canadians, those mechanisms tend to look like private rather than state action (although the very distinction tends to lose meaning in the absence of a state on the European model). In that context, the language of rights may well have lacked its object: against whom was a right

opposable? against one's neighbours? against one's elders? against the clan? The essential value of individuality may still have been cherished, but it would have been expressed in the language of individual freedom or responsibility, instead of the language of rights.[19]

This may mean that for parallel systems of justice established today, the language of freedom will be more important than that of rights. One should not jump to this conclusion, however. Although there are still large elements of continuity, Aboriginal societies have changed since the arrival of the Europeans. Those societies are unable to go back to precisely the kinds of authority that existed at contact. Depending on the form of justice established, the language of rights may now be the best way to preserve respect for individuality. The point remains, however, that that response may legitimately be tailored to the specific context of Aboriginal societies. The mere fact that a parallel system of justice exists, one which reflects the culture of a particular people, does not mean that the interests of individuals have been sacrificed on the altar of "collective rights." We have to look more deeply to see whether the underlying value of individuality is protected.

Objections based on the legitimacy of authority

There is, I believe, yet another objection lurking behind the concern for the protection of individual rights, one which goes to the adequacy of the institutions of Aboriginal societies. Here, the concern is not that the Aboriginal ways are inherently anti-individual, but rather that Aboriginal societies lack safeguards which non-Aboriginal Canadians consider important.

A good example to illustrate this phenomenon is the recent case in British Columbia, in which members of the Coast Salish people kidnapped another member and forced him to undergo, against his will, a four-day spirit dancing ceremony in the hope that this would help resolve the man's personal problems.[20] This case would, I believe, strike many non-Aboriginal Canadians as a gross infringement of that individual's autonomy. Now this may look, at first sight, as the same objection I dealt with above, but I think it reveals an additional, very important, consideration. The objection here is not so much to the fact of forcing a person to undergo treatment (or at least, this is not the only objection), but rather to the way in which it was done. Most Canadians are willing to accept that significant constraints may be placed on individual liberty. Many are willing to concede, for example, that people may be strongly encouraged – perhaps even forced – to undergo treatment for drug addiction in certain circumstances (for example, as part of the sentence for a criminal offence). But they believe that these constraints should only be imposed through a carefully regulated exercise of public authority. The chief problem in the kidnapping case was the lack of institutional control, the fact that the participants took matters into their own hands.

This concern with institutional controls is deeply embedded in Canadian legal culture. It is reflected in the predominantly procedural orientation of section 7 of the Charter, which does not directly guarantee liberty but merely imposes conditions on deprivations of liberty: they must be imposed "in accordance with the principles of fundamental justice." Similarly, section 1 requires that limitations on rights, to be upheld by the court, must be "prescribed by law." This concern with due authority is captured particularly in the principle of the "rule of law." Some Canadians might quarrel with some of the things done in the name of that principle,[21] but few would disgree with the idea that certain forms of coercion should only be permitted when authorized by legitimate authority – and here, legitimacy is usually conceived in terms of formal institutions following proper procedures.

This, for example, is one of the reasons for the traditional division of roles between legislature and executive. Each has a particular character designed to support its role. The legislature is the primary law-making body. It is broadly representative, and performs its functions through open debate and the formal enactment of law, establishing law through a predictable and open process in which citizens can, in theory, voice objections before a rule becomes law. The executive, made up only of members of the governing party and acting without the same level of scrutiny, is charged with carrying those laws into effect. It cannot act directly to impair the interests of individuals, however, without the authorization of the legislature. Thus, the roles are divided to preserve the efficiency of the executive, while providing a public, popular control over actions adversely affecting individuals.

This emphasis on formal controls poses a challenge to the acceptance of parallel systems of Aboriginal justice. Traditional Aboriginal societies, with the diffusion of decision-making power throughout the society and the tendency to draw upon unwritten norms rather than formal enactments, lack many of the formal, procedural controls non-Aboriginal Canadians are used to. They rely much more upon an appeal to consensus and to the authority which comes with wisdom. This strikes many non-Aboriginal Canadians as dangerously informal, potentially subjecting the interests of the individual to decisions taken in an ad hoc, arbitrary manner.

Frequently this concern is the result of ignorance of the decision-making processes in Aboriginal societies, a failure to see the very real controls present in practices of discussion and consensus. It may also result from an over-emphasis on the effectiveness and stability of formal institutions, an inability to see the force of an ingrained ethic of community decision-making and of respect for individual responsibility in Aboriginal societies. After all, non-Aboriginal institutions too ultimately depend on the strength of such an ethic.

Still, the existence of this objection does show how the general issue of a parallel system of Aboriginal justice may be wrapped up with the more basic issue of

trust in Aboriginal institutions. Acceptance of the general principle may depend upon the detailed justification of very specific institutional arrangements. I know that this kind of observation frequently sounds patronizing, especially given the extremely poor performance of the Canadian justice system. But it is a mistake to dismiss the issue simply because the present system is inadequate. At the level of *realpolitik*, it is likely to be a real concern for non-Aboriginal Canadians in any negotiation. But much more importantly, similar worries are being voiced within Aboriginal communities. One thinks, for example, of the concerns of some Aboriginal women's groups with traditional courts' treatment of sexual offences.[22]

Aboriginal justice is not simply a matter of returning to traditional institutions. The context of Aboriginal life has changed, the communities themselves have changed. The challenge is to reinvent Aboriginal institutions so that they draw upon indigenous traditions and insights in a manner appropriate to the new situation. That may mean inventing checks to prevent abuse that were unnecessary two hundred years ago, or which existed in a very different form. I am not suggesting that Aboriginal should mirror non-Aboriginal institutions. That would largely defeat the purpose of having distinctive systems of justice, and there is certainly room for creativity. I am simply saying that detailed attention to institutional and procedural controls may, in the end, be absolutely fundamental to the acceptance of a parallel system of justice.

Objections based on equality

This section addresses the second major criticism of a parallel system of Aboriginal justice: the idea that separate systems – especially systems that seem to be based on race – are always, inherently, unequal. Such a separation would, one variant of this argument claims, violate a foundational principle of Canadian law: that every person is equal before and under the law. It may even mean the establishment of a hierarchy of rights, a hierarchy of citizenship, with some Canadians separated from and perhaps placed above others, creating ethnically defined ghettos of privilege or penury. But does equality require that all members of society be treated in precisely the same way, that all be subject to a single system of justice? What does equality mean in this context?

Definitions of Equality

Equality cannot possibly mean the absence of all distinctions. As the old cliché tells us, law making is necessarily a matter of drawing distinctions. Even the criminal law distinguishes between those who have committed the elements of an offence and those who have not. The norm of equality only prohibits certain kinds of differentiation, considered illegitimate. The precise definition of what is illegitimate is a matter of debate, and this is certainly not the place to defend a specific theory of equality. I will therefore confine my comments to a discussion of how parallel systems of Aboriginal justice relate to common elements in definitions of equality.

Theories of equality usually focus on two interconnected factors when determining whether a distinction is legitimate: 1) the nature and extent of disadvantage suffered; and 2) the grounds for the distinction.

Virtually every theory requires, as a crucial component of inequality, that there be a disadvantage imposed on an individual or group. In some theories, any material disadvantage will suffice, but in most, the disadvantage has to be of a particular kind, usually demeaning the moral worth of the person. In *Law Society of B.C.* v. *Andrews*[23] (the leading decision of the Supreme Court of Canada on the Charter's guarantee of equality), for example, McIntyre, J. emphasized this element when he suggested that the purpose of equality was "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[24] This focus on the moral worth of the person is also evident in *Andrews*'s suggestion that the equality guarantee is concerned particularly with the imposition of disadvantages on "discrete and insular minorities."[25] Imposing disadvantages on those groups is objectionable because it reinforces the impression that those groups, already on the margins of society, are worthy of less public concern – that they are somehow second-class citizens. In most theories, if this demeaning element is present, there is no need for a financial or other further disadvantage. One of the most influential expressions of this opinion is the decision of the U.S. Supreme Court in *Brown* v. *Board of Education*, holding that, because of the feeling of inferiority engendered by segregation, "Separate educational facilities are inherently unequal,"[26] or the argument in Harlan, J.'s dissent in *Plessy* v. *Ferguson*, that the arbitrary separation of citizens is "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[27]

Frequently, analyses of equality also focus on the grounds for the distinction. Some theories suggest that any distinction which is not rationally connected, or not sufficiently connected, to the difference in treatment constitutes inequality. Many others focus on whether the distinction is based on grounds that again suggest denial of moral worth, sometimes because the distinction is based on personal characteristics over which an individual has no control. In *Andrews*, the court held that any distinctions based "on personal characteristics attributed to an individual solely on the basis of association with a group" (as opposed to those based on an individual's "merits or capacities") would very likely amount to discrimination. In that case, the phrase, "discrete and insular minorities," was also used to describe the kinds of grounds that would be considered illegitimate.[28] It is very often suggested that some grounds are generally so lacking in rational justification or have been so linked to the denial of equal moral worth that distinctions on those grounds are virtually certain to be bad. Distinctions based on race are probably the most common example.

Advantage and Disadvantage

Does the recognition of a parallel system of Aboriginal justice create the kind of disadvantage that offends equality?

Some criticisms of self-government do suggest that separate Aboriginal institutions will be to the material disadvantage of Aboriginal people. Separation will, these arguments claim, delay the full participation of Aboriginal people in Canadian economic life, resulting in their continued "ghettoization." Often, this criticism is coupled with attacks on Aboriginal culture, suggesting that although Aboriginal traditions may have worked well prior to contact, they are radically incompatible with society today.

I do not intend to respond in detail to the empirical claim that structures of self-government will result in continued economic disadvantage, but I doubt that this is true: the recent trend towards greater Aboriginal control seems to have improved rather than worsened the situation of Aboriginal communities, and there is good reason to believe that people who are confident in their identity – who have a strong sense of responsibility and self-respect – are likely to be more effective in economic pursuits. To put it another way, it is wrong to see the recognition of distinctively Aboriginal institutions as necessarily causing communities to close in upon themselves. A certain security at home, a confidence in one's identity, may well be an essential prerequisite to effective action outside the community. In any case, it is extraordinarily difficult to predict the effect of Aboriginal institutions – especially systems of Aboriginal justice – on economic welfare.

More importantly, I believe the "ghettoization" argument can be rejected on another ground: its astonishing paternalism. This paper is based on the assumption that Aboriginal governments have popular support. If that is true, the creation of an Aboriginal justice system would be the result of a community decision, obtained through mechanisms whose legitimacy for Aboriginal people is equivalent to that of non-Aboriginal governmental institutions for non-Aboriginal people. In those circumstances, surely there is no reason for non-Aboriginal Canadians to override the decision.

This is undoubtedly the case with regard to objections based on the economic argument, given its highly speculative nature. But more fundamentally, even if there were an economic cost involved in the creation of Aboriginal justice, who are we to deny Aboriginal peoples the ability to decide? We allow our own governments to pursue ends other than those dictated by economic liberalism. Why should we override similar choices by Aboriginal people?

There is, quite simply, no good reason for us to deny to Aboriginal individuals the power to decide. To do so would constitute a denial of moral equality offending against the value usually conceded to be fundamental in equality theory: the recognition of equal moral worth.

This brings us to the second kind of disadvantage discussed above. Would Aboriginal people, subject to a separate system of justice, suffer the same kind of moral injury produced by the segregation of Afro-Americans? In large measure, the above discussion has already answered this. Unless one assumes that the grounds for distinction present here axiomatically deny moral worth (a possibility discussed below), there seems to be no such impairment. On the contrary, the very justification for permitting Aboriginal traditions of justice institutional expression is founded upon respect for individuality and the importance of culture to the development of that individuality. Moreover, Aboriginal people themselves, through their chosen representatives, are the ones demanding accommodation of their traditions. Finally, if any individual wanted to reject those accommodations, he or she would be able to do so, by opting out of Aboriginal communities.[29]

Thus far, this discussion has focused on the possibility of disadvantage to Aboriginal people. Usually, the objection is phrased in these terms. Occasionally, however, especially in the popular debate, the judgement runs in the other direction: non-Aboriginal Canadians are worried that under a separate system of justice, Aboriginal people would be *better* treated – that an Aboriginal system might permit Aboriginal people to get away with murder (or sexual assault or cigarette smuggling). Does this undermine the argument for Aboriginal justice?

I should begin by saying that I presume the creation of a reasonably effective, uncorrupt system of Aboriginal justice. That was one of the reasons for my discussion of institutional adequacy above. Inefficient or corrupt proceedings can exist under any system, and unless it can be shown that an Aboriginal system will be unable to control for those problems, it makes little sense to base our discussion on a presumption that they will occur. The question, then, is whether the simple fact of different treatment is unacceptable because it might appear that Aboriginal people are being treated more leniently than others.

I believe that there would have to be some underlying consistency in the basic standards of conduct imposed on all members of society, including Aboriginal people. Aboriginal individuals would retain their status within the broader pan-Canadian community (as well as their distinct status in their own communities); along with that status would go the expectation that certain basic standards of conduct would be enforced. That would mean, for example, that conduct prohibited by the most serious criminal offences would have to be prohibited with similar efficacy in Aboriginal communities (although not necessarily by means of the general criminal law). Judging by proposals for self-government, however, this should not be a problem. The real conflict would come over the extent to which Aboriginal peoples were governed by different procedures, more favourable sentencing practices, or different standards in minor offences. To what extent is different treatment acceptable under the criminal law?

That law already allows for some differences. Sentencing and some aspects of criminal procedure (for example, diversion; youth protection) are tailored to the characteristics of each individual accused. Even the content of substantive offences varies from place to place if one includes provincial as well as federal offences, and crimes that expressly accommodate provincially controlled regulatory regimes. Moreover, this variation is especially pronounced in those areas of principal concern to Aboriginal people (policing; sentencing; the use of therapeutic alternatives to punishment).

These differences are based in part on the principle that the criminal law is concerned with the moral responsibility of individuals, and, if possible, with their reformation. Some measure of individual variation is acceptable because effective reformation has to be tailored to the needs and opportunities of the individual. The same principles would appear to justify the accommodation of Aboriginal traditions. To the extent that self-confidence and a sense of responsibility depends on a measure of cultural security, and to the extent that resources exist in Aboriginal communities that would aid in reformation, some measure of accommodation would be justified, based on the very objectives of the criminal law itself. Non-Aboriginal offenders would, it is true, be unable to share that specific benefit, but that alone is no reason to deny it to Aboriginals. In sentencing, judges base their decision on the character of the accused, even though that character – and therefore the range of possible sentencing options – is not shared by others convicted of the same crime. That is acceptable. To do otherwise would be to adopt the logic of beggar-my-neighbour.

Moreover, in the case of Aboriginal people, the argument for differential treatment can be put with still greater force. The argument in the preceding paragraph is valid even if all offenders are equally affected by the existing justice system. However, a central finding of all the Aboriginal justice inquiries is that the administration of justice has a disproportionately severe impact on Aboriginal people. Aboriginal offenders are in a worse position under the present system than other individuals. We are faced, then, with a choice not between a neutral alternative and one more favourable to Aboriginal people, but between one which has an excessively harsh effect on Aboriginal offenders and one which has a beneficial effect.

In these circumstances, if we are truly concerned with substantive equality – or even if we wish to manifest roughly equal attention to the welfare of the individual – we cannot insist on absolutely identical treatment. To do so would create inequality, because Aboriginal offenders would be systematically treated more harshly than non-Aboriginals. There is a well-established principle in human rights law that when a policy has a differential impact on different groups in society, equality may require that groups be treated differently.[10] That is the situation here. Our standard of equality has to be sufficiently supple that it can take into account the fact that the justice system already treats Aboriginal people

differently. It treats them worse. In order to treat them equally, we have to recognize their difference.

Equality and Citizenship

Sometimes it seems that objections expressed in the language of equality are not really concerned with ensuring that all individuals receive equivalent attention, or that the impact of the law is roughly equivalent, but rather with aims having nothing to do with protection of the individual. These objections insist on identical treatment simply because, according to this view, in a country, all citizens should be governed by the same law, they should obey the same rules. Obeying that law is part of the common identity of citizenship. It is part of what it means to have a country. Insisting on different treatment suggests that the common run of rules are not good enough for you, that you are better than your fellows. This objection is almost visceral, then, having more in common with nationalism – an idea of the degree of identity necessary to a country – than a concern with individual rights.

It does have a kernel of validity. Being a member of a society and sharing its benefits may well require acceptance of certain standards – basic standards essential to continued co-operation. That was the idea underlying my suggestion that participation in the broader Canadian society may require a measure of consistency in minimal standards of conduct, upheld by the criminal law or other means. We should be careful, however, not to exaggerate the need for uniformity. There is sometimes a tendency to push for much greater uniformity in the law than necessary, just as certain strains of nationalism insist on greater cultural homogeneity than necessary.

In fact, in Canada, the structure of government has never conformed to the degree of uniformity presupposed by this objection. The very existence of federalism is premised on the idea that variation in law from one part of the country to another is legitimate. This variation even affects the criminal law, though indirectly, through provincial control over policing, prosecution, the establishment of courts, some elements of the corrections system, and such other associated measures as youth protection.[31] Those differences do not appear to have imperilled continued co-operation among Canadians. Other federations tolerate more substantial variation in the criminal field. In the United States, for example, the substantive criminal offences themselves are a matter of state jurisdiction and the court system is rigorously divided between state and federal courts. Given the degree of tolerance, the ideal of citizenship in Canada is surely flexible enough to allow parallel systems of Aboriginal justice.

The Grounds for Distinction

There is one major difference, however, between the variation inherent in federalism and that proposed here: the grounds for the distinction. In federalism,

the different legal regimes are based on territorial divisions. Here, the different regimes would be based, ostensibly, on cultural or perhaps even racial grounds. For many non-Aboriginal Canadians, distinctions based on those grounds are inherently suspect, if not intolerable.

In many theories of equality, the legitimacy of grounds for distinction ultimately turn on their justifiability: on whether there is a rational connection between the grounds for the distinction and its effect. Even when certain grounds – race, gender, national origin – are singled out, it is usually because those characteristics rarely if ever justify differences in treatment. This paper has argued at length, especially in the second section, that there is a strong, rational connection between cultural differences and the administration of criminal justice, a connection which does not involve a denial of moral worth. That discussion might appear to conclude the matter, but it often seems that the objections to Aboriginal self-government run at a deeper level, that they are not so much based on a rational calculation of justification as on an almost instinctive reaction against distinctions based on race. It is the appropriateness of that reaction that I now want to address.

There are indeed very good reasons to distrust distinctions based on race. Biological ancestry is almost always irrelevant to how people should be treated today (the only exception I can think of is the prevention of diseases, like sickle-cell anemia, that are racially specific). But does the argument for Aboriginal justice rely on racial distinctions? That argument is not founded on biological differences, but rather on cultural particularity: the distinctive history of Aboriginal peoples, the particular structure of their public discussions; their ways of posing and answering questions of public order. At least at the level of justification, then, the relevant distinction throughout this analysis has been culture rather than race.

If, however, Aboriginal justice applies to Aboriginal people, hasn't one effectively instituted a racial distinction, whatever the justification? Even this, however, is not strictly the case. Traditionally, Aboriginal peoples were not closed societies, defined in terms of racial purity. They frequently absorbed members of other peoples, accepting them as full members of their own group.[12] One very common way of doing this was through adoption. Kinship was a strong indication of commitment to the community, but it was not an exclusively biological criterion. It could be bestowed artificially in order to bring others into the group. In recent times, Aboriginal peoples have established criteria of membership that similarly emphasize community recognition over exclusively racial criteria. Undoubtedly, most members of Aboriginal peoples will always be of Aboriginal descent, but the peoples themselves acknowledge that one can become a member by other means.

Not only that, but it is highly unlikely that a system of Aboriginal justice would apply purely and simply to members of a particular Aboriginal people. First,

many such systems would have a strongly territorial element to them: they would apply to Aboriginal people, but only within a particular territory, or they would apply to all people, including non-Aboriginal people, within that territory. In the latter case, the situation seems little different from that of the existing provinces, especially when one considers that at least one province (Quebec) obviously exists to accommodate cultural diversity. The qualification in the former case is also very significant, because it would introduce a measure of choice into the application of the system: individual members of an Aboriginal people, who did not want to be subject to the regime, could escape its application by leaving the territory. This, in fact, would allow Aboriginal individuals a greater measure of choice than that available to the citizens of most countries, who need to find another country willing to receive them before they can emigrate. Second, even if elements of an Aboriginal justice system were not tied to territory, it is likely that individuals would be permitted to opt out of the Aboriginal system and into the general criminal system, once again preserving an element of choice in the regime's application. This, in fact, is the structure contemplated in the recently adopted International Labour Organization *Convention No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989): Aboriginal peoples have the right to retain their own institutions, but they also have the right to opt out of those institutions and into those of the broader society, without discrimination.[33]

A parallel system of Aboriginal justice would hardly be, then, in any strong sense, a system based on race. At the level of both justification and application, it departs significantly from biological factors.

That said, there is an undeniable coincidence between culture and race that complicates the issue, and that we, as an academic community, have not sufficiently explored. In part, this is a product of coincidence in our use of language. We commonly use the same terms to refer to both cultural and ethnic identity, obscuring the distinction. An analogous problem is evident in the use of "Québécois" to refer both to political membership and to ethnic origin in Quebec, generating very awkward ambiguities regarding the relationship of one to the other. Furthermore, in the case of Aboriginal people, there is a strong factual coincidence between cultural and ethnic identity. The pattern of assimilation has run strongly in the direction of non-Aboriginal society: in recent centuries, very few non-Aboriginal people have moved in the other direction, to adopt the culture of an Aboriginal people. This means that now virtually everyone who is Aboriginal culturally is also Aboriginal ethnically. Genuinely cultural distinctions tend to coincide with ethnic distinctions. This is reinforced by the substantial reliance on lineage and kinship to determine membership, both by Aboriginal peoples themselves and, to an even greater extent, federal legislation. There are good reasons for this reliance that have nothing to do with racism: in relatively small communities that do not rely on centralized structures of authority – communities which once were threatened by hostile neighbours and more recently

by the erosion of the land base – lineage (including fictional kinship established through adoption) is a good test of commitment to the community. Finally, one cannot help wondering whether at some fundamental level there is a sense in which our ethnic origin enters into our conception of identity, whether we like it or not.[14] I am struck, for example, by the painful struggles of adopted Aboriginal children – even children raised entirely within a non-Aboriginal environment – to recapture their identity. An Aboriginal identity may in part be thrust upon them from outside. But perhaps it goes deeper than that: perhaps the need to understand our identities within a coherent narrative forces us to come to terms with aspects of our history that have had no influence upon us, other than biological.

These issues are troubling, and they deserve more substantial exploration. But they do not undermine the argument that a parallel system of Aboriginal justice is sufficiently removed from race to be acceptable. In establishing Aboriginal self-government, we are allowing room for the expression of a distinctive *cultural* heritage, just as the province of Quebec serves as a forum for the expression of francophone Quebecers' heritage. Although there may be a strong coincidence between the scope of an Aboriginal justice system and a group of Aboriginal ethnic origin, that coincidence does not involve either a denial of moral worth or the forced confinement of Aboriginal individuals within an ethnically-defined ghetto.

Conclusion

This paper has argued that a parallel system of Aboriginal justice may, in certain circumstances, be justified. The justification is, of its nature, limited. It does not suggest that a completely separate system is essential or even desirable. It may even be that no separation is necessary. It grounds its argument on a very specific (although very important) benefit to Aboriginal people: the value to individuals of retaining some continuity with the past, with maintaining public institutions through which distinctively Aboriginal conversations over justice and social ordering can be pursued. That benefit constitutes the ultimate justification for separation. The appropriate degree of separation should also be shaped by the desire to secure that benefit.

This paper has also responded to a number of objections to an Aboriginal system of justice. Again, those responses have a very particular character. They acknowledge that individuality and equality are very important values. They claim simply that the fact of separation does not, of itself, threaten them. One can, then, create parallel systems of Aboriginal justice in a manner consistent with individuality and equality. Not every separate system, however, will satisfy the demands of individuality and equality. One must pay attention to the detail of each system to ensure that it has *in fact* respected the values.

Moreover, that appreciation has to occur in the context of Aboriginal communities as they are now, taking into account the need for institutional controls against abuse. Almost certainly, this will involve adjustments to the institutions that existed prior to contact. The authority of traditional institutions may have been weakened by the long period of colonization. That authority will have to be re-established, perhaps through a process of gradual implementation. Today's Aboriginal governments may have a measure of coercive power unlike that of pre-contact institutions, requiring greater safeguards on the potential for abuse. The growth of a large, complex society surrounding many Aboriginal communities, the pressures imposed on traditional economic activities, and the penetration of new forms of technology and new hazards such as drugs into Aboriginal communities all may require responses somewhat different from those used in the past. Banishment, for example, can no longer serve as a sanction for serious crimes, at least not in the same way. The ideas of Aboriginal people themselves have undoubtedly evolved, justifying changes in Aboriginal justice.

The precise form of cultural accommodation may well vary, then, from people to people, and will largely be a matter of reinvention. The difference, however, would be that the reinvention would respond to the distinctive heritage of Aboriginal people. The conversation would continue.

Notes

1. See, for example, Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989); Aboriginal Justice Inquiry of Manitoba (1991); *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (1991); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (1991). See also Michael Jackson, "Locking up Natives in Canada", U.B.C.L. Rev. 23 (1989), 215.

2. This is not just a matter of legal realism. It is not a case of judges simply doing what they want, regardless of law or justice. Rather, as I try to suggest elsewhere, Aboriginal rights – including Aboriginal rights to land – necessarily join an appreciation of history with a consideration of contemporary aboriginal/non-aboriginal relations. See: Webber, "Rapports de force, rapports de justice: la genèse d'une communauté normative entre colonisateurs et colonisés," paper prepared for the Réseau québécois of the "Droit et société" program of the Canadian Institute for Advanced Research.

3. For an important analysis of the scope of self-determination generally, with certain affinities to the argument in this paper, see: Avishai Margalit and Joseph Raz, "National Self-Determination" (1990) *J. of Philosophy* 439. Compare also W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989).

4. The notions of culture and tradition used here are close to those used, in different contexts, by Clifford Geertz and J.G.A. Pocock. See Geertz, "Thick Description: Toward and Interpretive Theory of Culture" in Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 3; Pocock, *Politics, Language and Time: Essays on Political Thought and History* (New York:

Atheneum, 1973), especially the first and seventh essays (although note that the latter is concerned with positions that are self-consciously 'traditionalist', and not just with the underlying discourse upon which actors draw). The Aboriginal context raises considerations different from western political thought – the main subject of Pocock's work – although recently Pocock has begun to address Aboriginal questions. See "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi", Iredell Memorial Lecture, Lancaster University, 10 October 1991 (unpublished). Other works influential in the analysis that follows are Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983); Alasdair MacIntyre, *Whose Justice? Whose Reality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988); and Hans-Georg Gadamer, *Truth and Method* (New York: Crossroad, 1988).

5. I realize that the reconception of culture described in these paragraphs may seem to depart considerably from the self-understanding of those within a specific culture. I can only repeat my plea in the closing paragraphs of the introduction. I suspect that, although we usually do not speak of cultures in these terms, all cultures – even cultures which are relatively stable through time – involve to some degree the openness described here; they necessarily allow for interpretation and re-interpretation. The rest of this paper draws very heavily upon this conception, indeed depends on it.

6. I develop this argument further in *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (forthcoming, 1993). As I argue there, I do not believe it is limited to a country as apparently divided as Canada, but also holds true for countries whose national mythology expressly emphasizes commitment to a shared set of values, such as the United States or France.

7. See note 19 below.

8. See, for example, Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass: Harvard University Press, 1989), at 47ff.

9. Compare Gerald J. Postema, "On the Moral Presence of Our Past", *McGill L.J.* 36 (1991), 1153.

10. See, for example, the description of government among the Huron in Bruce G. Trigger, *The Children of Aataentsic: A History of the Huron People to 1660* (Montreal: McGill-Queen's University Press, 1987), 54-59. Richard White, in *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991), gives many examples (for example, pp. 37-40) of misunderstanding arising from the differing expectations of leadership held by colonists and Aboriginal peoples.

11. See, for example, E.J. Hobsbawm, *Nations and Nationalism since 1780: Programme, myth, reality* (Cambridge: Cambridge University Press, 1990).

12. See, for example, the Swiss government's reports on agricultural policy (which deal only with federal and not with cantonal measures). The sixth report notes specifically the contribution of culture to the regulation of mountain agriculture. Conseil fédéral suisse, *Sixième rapport sur l'agriculture* (Berne: 1984), 310. The mention of different understandings of ownership's conceptual nature refers especially to the divergence between civil-law and common-law concepts of ownership. For a very brief discussion for common-law lawyers, see F.H. Lawson, *Introduction to the Law of Real Property* (Oxford: Clarendon Press, 1958), especially pp. 79ff. See further John E.C. Brierley and R.A. Macdonald, ed., *Quebec Civil Law* (Toronto: Emond-Montgomery, 1993 [forthcoming]).

13. See, for example, Alain Bissonnette, "Droits autochtones et droit civil : opposition ou complémentarité?", in *Droit civil et droits autochtones : Confrontation ou complémentarité* (Montreal: Association Henri-Capitant (Section québécoise), 1992), 1.

14. The predominant conception of the aim of individuality in Aboriginal societies may not be quite the same as that of some economists – profit-seeking individuals acting only for personal, material gain – but surely our notions of individual rights do not require everyone to be individuals in that sense. If so, I would hope that many non-Aboriginal Canadians would fail that test!

15. For a useful discussion, see Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" *U. Penn. L.R.* 121 (1973), 506.

16. See, for example, James Dumont's paper in this volume; Trigger, *The Children of Aataentsic*, pp. 59-61; White, *The Middle Ground*, especially pp. 75-93; and Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus Publishing Group, 1992), 8-10.

17. Charles Taylor makes a similar point in *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992).

18. The fact of impossibility cannot be argued here, but see Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass: Harvard University Press, 1985). For the purposes of this paper, I will confine myself to the observation that no practical tradition of law has ever been uniquely derived from a commitment to individual autonomy.

19. See James Dumont's paper in this volume and Ross, *Dancing with a Ghost*, pp. 12-28.

20. R. Matas, "Native rite ruled subject to law: Band member unwilling subject of four-day spirit dancing ritual" *The [Toronto] Globe and Mail*, 8 February 1992, p. A6.

21. See, for example, Harry Arthurs' influential article, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

22. See, for example, the concerns raised by Teressa Nahanee in her paper in this volume.

23. (1989), 56 D.L.R. (4th) 1 .

24. *Ibid.*, at 15 (per McIntyre, J.).

25. *Ibid.*, at 24 (per McIntyre, J.), and 32-33 (per Wilson, J.).

26. 347 U.S. 483 (1954) at 495.

27. 163 U.S. 537 (1896) at 562.

28. *Supra*, note 23, at 18 and 24 (per McIntyre, J.) and 32-34 (per Wilson, J.).

29. This, for example, is the situation envisaged in the International Labour Organization Convention, cited below.

30. For a brief introduction to this principle, on which there is not a considerable literature, see Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990), 133-137.

31. For an overview of the interaction of provincial and federal jurisdictions in the criminal law field, see Peter W. Hogg, *Constitutional Law of Canada*, third edition (Toronto: Carswell, 1992), 467-520.

32. See the discussions of adoption that occur throughout the ethnographical literature. Many examples can be found, for example, in Trigger, *The Children of Aataentsic*, and White, *The Middle Ground*.

33. See especially the third paragraphs of Articles 4 and 8 of the Convention.

34. My thanks to Susan Drummond for first bringing this to my attention.

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On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In

*Mary Ellen Turpel**

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths.[1]

I spend some of my professional life practising law in a storefront Halifax law firm with five women lawyers. Their practices span the areas of real estate, family law, criminal law, civil litigation, estates, and human rights law. All of my practice is in the area of Aboriginal and treaty rights, and for the most part I feel like an oddball in the context of the mode of work legal practitioners engage in at Nova Scotia firms. My colleagues are 'white'[2] and committed feminists.[3] I am half-white[4] (Anglo-Saxon and Cree) and probably half-feminist. (Some days I feel like I am half-everything, especially half-crazy to be teaching and practising Canadian law as part of a resistance movement to it).

I am not culturally comfortable with 'feminist' given that I have one Aboriginal parent (a Cree father). My experiences have been different from those of my (white) colleagues, even though I believe theirs have been vastly different from the mainstream (white male) profession.[5] While I am a woman and a lawyer, I cannot escape the fact that my world view has been shaped by my Aboriginal ancestry. Indeed, my values and preferences seem to fall on the side of the predominant values of Cree ways when or if able to choose. These experiences have

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reinforced for me how sexual oppression is one part of the story for Aboriginal peoples: colonialism and the denial of cultural difference are front and centre and cannot be set aside in the analysis of problems or solutions.[6]

My colleagues at the law firm travel fairly well-defined pathways according to acknowledged modes of practice, although they innovate to serve the needs of women better. They are creative in delivering lawyering services to their clients, but their modes of practice are fairly predetermined by forms of action in the legal system. While this might be the case for some work I do, I seem to spend a lot of my time on thickly overgrown legal trails researching historical materials. Seldom do my clients come to me; I go to them. This involves travelling fair distances to remote communities. My primary form of practice is arguing with government bureaucrats (when able to secure a meeting with one) over rights. Most of my clients cannot afford to go to court, and if they could the obstacles are considerable.

My files inevitably involve research into early European life in the colonies and what colonial officials thought and did regarding Aboriginal peoples. Like today, *how* they thought was profoundly more important than *what* they said or wrote in terms of its impact. The common colonial viewpoint of Aboriginal peoples as "beasts in the field", incapable of imagining a concept of property, has to be of central importance in assessing the historical evidence on, for example, the extinguishment of Aboriginal land rights.[7] It is like believing that the world is flat and being a cartographer: it's just got to be relevant. However, proposing that cultural viewpoint is indeed relevant to the assessment of evidence in the legal process is not readily acceptable to those who apply the law.[8] Indeed, judges say this is culture and not law and they have to apply the law.[9] While the subjective experiences of women have become accepted as different and valid (battered wives syndrome)[10] and the experiences of children (as a specific exception to the hearsay rule),[11] what about Aboriginal peoples' cultural experiences and viewpoints? And, specifically, what about those viewpoints prejudicial to Aboriginal culture?

Getting back to my legal practice, my colleagues seem to get definitive results, close cases (even celebrate victories with their clients because they are zealous advocates and dedicated lawyers) and move on. The cases I deal with have spanned and will span generations. In fact, when I was retained a few years ago on a land claim matter, my clients expressed great delight in discovering that I was a relatively young person because an outcome might take thirty years. For them I am just one more interloper in the history of a conflict with the Canadian state that has spanned many generations and will continue to do so long after I have passed on.

My experiences in the law firm highlight differences: in modes of practice, world view, strategies for working for social change. This interests me because I believe that it is the 'best' firm to be in because of the friendly atmosphere, the

dedication to a set of principles, and the commitment to improving the delivery of legal services. Nevertheless, for an Aboriginal lawyer with Aboriginal clients, I still feel like an oddball. This might say something about adaptation versus fundamental reform. I am a product of the 'access' mentality, which said if only we could get more Aboriginal lawyers into the profession, things would improve.

One thing that certainly unites me with my colleagues is the constant writing of memoranda of law. I write them primarily on Aboriginal and treaty rights and especially on the historical evidence being researched. A while ago I dictated a memorandum for a client into my dictaphone (one of the few concessions to oral tradition in the legal profession). I spoke throughout my dictation about "Aboriginal peoples' rights in section 35(1) of the Constitution Act, 1982." The secretary, who works mainly for the other five lawyers, typed what she heard, or rather interpreted, from her standpoint. I reviewed the draft of my memorandum to find the phrase "Aboriginal peoples' rights in section 35(1) of the Constitution Act, 1982" appeared throughout the document as "average little peoples rights in section 35(1) of the Constitution Act, 1982."[12]

The dictation story is funny to both Aboriginal and non-Aboriginal people because of the ambiguity of language. The irony of this miscue is more profound than comic – replacing 'Aboriginal' with 'average' is exactly the process of denying difference by insisting on sameness. For me, this is the crux of the problem in the criminal justice system and in Canadian society's treatment of Aboriginal peoples. I want to explore this further in relation to the criminal justice system.

I have been invited by the Royal Commission on Aboriginal Peoples to prepare a paper for the Round Table on Justice on what has been identified as a fundamental question with which the Commission must grapple in fulfilment of its mandate. The overriding question posed is "In light of the fact that the present justice system has failed Aboriginal peoples, can the system be adapted to correct its shortcomings?" More specifically, I was asked two sub-questions:

(a) Does the difficulty of adaptation lie in fundamental elements of the existing system such as
    (i) the adversarial nature of the process, including the method of assessing credibility,
    (ii) the emphasis on punishment as opposed to healing? and the concepts of guilt and innocence? or
(b) Do the difficulties lie instead in the administrative aspects of the existing system, such as policing, the correctional system, bail, the attitude of people working with the system, etc?

I have explored some of these issues elsewhere,[13] and I have been careful to note the limitations of my own analysis. As Patricia Monture-OKanee and I explained in an earlier paper on criminal justice prepared for the Law Reform Commission of Canada:

> It is important for us to emphasize that we do not presume that we have "the" answer to the problems which plague the criminal justice system from an aboriginal perspective. It is important to note here that aboriginal peoples are not homogeneous. Our culture and traditions vary from nation to nation, territory to territory. Our work is inspired and influenced by our individual cultural heritage. The authors' views reflect our Cree and Mohawk ancestry and teachings. Our views are also southern and urban. We have tried to respect these limitations and recognized that many other perspectives could and should be brought to bear on this initiative. We do not believe in any single answer or the capacity of a few individuals to change an historical relationship. We believe in the potential of working collectively toward answers.[14]

It is important to read my response to the complex question posed by the Royal Commission as exactly that: *my* responses offered without pretence that they are *the* answers. I want to begin to address the question by offering a framework for analysis and specific consideration of the elements of the criminal justice system that are problematic.

Adapting the System: Dual Respect

The basic question is whether the current criminal justice system can be adapted to correct its shortcomings. This question leads to a further question about which shortcomings of the criminal justice system need to be adjusted, rethought, or trashed altogether. These have been the subject of extensive recent study, and I do not propose to review the research and findings of the four major criminal justice studies completed in the past three years.[15] I have found each of these four justice studies remarkable in different respects. Nevertheless, I must acknowledge the profundity and breadth of the report of the Aboriginal Justice Inquiry of Manitoba (AJI) and its agenda for action. For me, this report is the benchmark for the continued analysis of reform of the criminal justice system. The AJI concluded that the justice system has failed Aboriginal peoples from Manitoba on a "massive scale" and in all facets of the administration and application of the criminal justice system to Aboriginal peoples and Aboriginal communities.[16]

A statement that has influenced my approach and assessment of criminal justice matters was made by the Royal Commission on the Donald Marshall, Jr., Prosecution. In their report, Commissioners noted that

> In our view, Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.[17]

Dual respect in criminal justice matters through a system(s) that can enjoy both the respect of Aboriginal peoples and demonstrate respect for us is the goal toward which I would suggest we strive in considering reform of the criminal justice system. The only clarification[15] I would make to the Royal Commission's formulation is that the criminal justice system must dispense justice in a manner consist with and sensitive to Aboriginal peoples' human rights, such as the right to self-determination as peoples.

The notion of dual respect is useful to orient the response to the question posed because it dovetails well with a fundamental Aboriginal teaching (which I have found in my exposure to Aboriginal cultures) of respect and acceptance of others, despite differences. For the criminal justice system either to enjoy the respect of Aboriginal peoples or to dispense justice in a manner consistent with Aboriginal history, culture, and language is at this point only a stated goal. It is perfectly clear from the recent reports that today the criminal justice system fails on both identified dimensions of respect.

3-D Vision: Understanding Difference, Diversity and Destruction

The notion of dual respect is a helpful orienting concept when we consider a standard against which to assess reform of the present criminal justice system, and I will return to it again at the end of this paper. However, in order to arrive at an agenda for change that could satisfy this standard, a broad and culturally sensitive approach must be undertaken to the complex and interconnected problems of Aboriginal peoples within and because of the criminal justice system. The connections between problems in the criminal justice system and the varied economic, social, cultural and legal problems Aboriginal peoples experience in Canadian society are too critical to ignore.

All too often the experiences of Aboriginal peoples are divided into thematically defined categories for study, and recommendations are developed based on this approach. This approach itself represents an epistemology that is foreign to Aboriginal culture and traditions, which universally teach the need for holistic approaches to understanding oneself and our relations to all of creation (which means *all* relations: human and with all of the natural environment and particularly the spiritual realm). The reverse is clearly the case with western science-inspired analytic approach. We need only read Aristotle's attempt to delineate expression into ten neat categories to remind us of this historically entrenched tendency. In particular, the development of the sciences with the inductive method of study (e.g., Descartes) and analysis of discrete problems through internally verifiable (or falsifiable) processes has shaped the western approach to knowledge and research.

For Aboriginal peoples in Canada, this approach does not speak to lived experience. One of the biggest problems with the prior study of Aboriginal peoples is the fact that seldom is it acknowledged that Aboriginal peoples themselves have different approaches to experiencing and viewing their relationship with natural and supernatural phenomenon, outside of this western/scientific approach. This is a profound problem for analysis when one tends toward instrumental thinking and forgets that Aboriginal peoples may not share many of the goals, ways of seeing, or lifestyles of the outsider doing the studying. This is especially problematic when Aboriginal peoples are 'studied' and solutions are proposed to our situation by those who have little understanding of Aboriginal culture or epistemologies.

My own studies and experiences have proven to me that what happens in one discrete area like 'criminal justice' cannot be separated from the broader texture of Aboriginal experiences in Canadian society and under the Canadian legal and political regimes. For example, in attempting to understand what happened in the Helen Betty Osborne tragedy, one cannot just look for procedural or substantive legal or professional error in the police investigation or the trials. We have also to look at why this 19-year-old woman who desired a formal education had no choice but to attend high school in The Pas instead of her own community, Norway House. We have to consider why the fact that she was an Aboriginal woman made her the chosen target of an abduction, violent rape and murder by four white males. We also have to consider why the Aboriginal community and the non-Aboriginal community in The Pas did not press for the arrest of Helen Betty Osborne's murderer(s), some of whom were brought to justice only 16 years after the offence.[19] These dimensions to the Osborne case defy classification as 'criminal justice' problems – they reveal dysfunctional relationships between Aboriginal peoples and non-Aboriginal peoples at many levels, including among governments and citizens.

I would suggest that when we carefully take apart Aboriginal experiences and perspectives on the criminal justice system – or for that matter any other 'issue' – a tangled and overarching web gets spun. From economic and social disempowerment to problems in the criminal justice system, Aboriginal peoples' issues are seemingly indivisible – one crosses over to another in an interconnected and almost continuous fashion. Alcoholism in Aboriginal communities is connected to unemployment. Unemployment is connected to the denial of hunting, trapping and gathering economic practices. The loss of hunting and trapping is connected to dispossession of land and the impact of major development projects. Dispossession of land is in turn connected to loss of cultural and spiritual identity and is a manifestation of bureaucratic control over all aspects of life. This oppressive web can be seen as one of disempowerment of communities and individual Aboriginal citizens.

There are no satisfactory isolated solutions to each of these problems – the fundamental uniting dilemma is that of control and power and the structural inability of Aboriginal peoples to take control of their lives and communities. This is what I see as the experience of colonization – subjugation and loss of control premised on conceptions of Aboriginal peoples and their cultures as inferior, needing protection or direction, and requiring supervision.

With the Royal Commission on Aboriginal Peoples, possessed of a broad mandate, this is our first official opportunity to look at the situation within the context of connections and colonialism. Connections must be recognized between the nature of external control or 'power over' Aboriginal peoples and deplorable situations for individuals and communities. The federal and provincial governments have controlled and simply unilaterally assumed power over Aboriginal peoples since Confederation – as colonial regimes did long before that date – despite treaties and other obligations. Today, Aboriginal peoples are legally and politically surrounded in Canada – they are fenced in by governance they did not discuss, design, or desire. It is only as part of a realization of the totalizing and confining nature of this situation that a discrete area like criminal justice can be approached.

I believe we have to look at the criminal justice system as one incident of this larger experience of colonialism. I suggest to do this we need 3-D vision. The three Ds here are *difference*, *diversity* and *destruction*. For me, viewing the situation with the 3 Ds helps to expose the depth and interrelatedness of the situation confronting Aboriginal peoples in Canada, whether it be with respect to the criminal justice system or any other aspect of the relationship with the dominant society and government(s). The 3 Ds also reveal the complexities in prescribing solutions when so much damage has been done both wilfully and unintentionally.

Let me explain further what I mean by each of these concepts and how they interrelate, particularly regarding criminal justice issues.

Difference

Aboriginal peoples are different – culturally, politically, spiritually, linguistically. This difference is profound, and it is not imaginary. Often, when confronted with difference, the dominant society (and Canadian judges) view Aboriginal peoples as simply engaged in romantic fantasies about their ways, knowledge, approaches.[20] Sometimes Aboriginal peoples' differences are equated with genetics or biology.[21] Generally, the dominant society has problems with difference because of its shadowy images of the 'Indian' and its own concepts of knowledge and progress. As James Clifford suggests in his analysis of the Mashpee land claim in Massachusetts:

> Indians had long filled a pathetic imaginative space for the dominant culture; they were always survivors, noble or wretched. Their cultures had been steadily eroding, at best hanging on in museumlike reserva-

> tions. Native American societies could not by definition be dynamic, inventive or expansive. Indians were lovingly remembers in Edward Curtis' sepia photographs as proud, beautiful, and "vanishing"...[22]

Canadian society shares many of these preconceptions about Aboriginal peoples. Indeed, the justice system in particular exhibits many of them. Aboriginal peoples are different. In a separate paper prepared for the Round Table on Justice by James Dumont entitled "Justice and Aboriginal People", the Ojibwa world view is related to justice. Just a cursory review of this paper underscores the significance of the differences.

The Canadian legal system – and Canadian society – often reacts to the fact of cultural difference with two kinds of stance. First, Aboriginal peoples and cultures are viewed through the biases of an earlier era, and it is suggested that Aboriginal culture has been lost because Aboriginal peoples do not now conform to the stereotypes of the European imagination. Hence, Chief Justice McEachern in *Delgamuukw* suggested that the Gitksan and Wet'suwet'en no longer live an Aboriginal way of life because they no longer behave exactly as their ancestors did prior to exposure to European civilization. In other words, they do not wear skins for clothes and they do not get all their food through trapping, fishing and gathering off the land.[23]

The second response to cultural difference (which is often the obverse of the first) is that Aboriginal peoples' culture and traditions (where they have survived unchanged) are too primitive to be considered acceptable. Hence, Chief Justice McEachern finds that the Gitksan and Wet'suwet'en people held no uniform or universal notion of property and hence not have a property 'law' per se.[24] I always find these kinds of statements amusing (and there are many such examples that come from the judicial system, anthropologists, historians, etc.), because British law itself has been described as a mere "thing of shreds and patches" and a "jumble" of disconnected elements which legal theorists like Bentham sought, using fantastical methods, to transform into some "systematic form".[25]

I find the *Delgamuukw* case important, especially for criminal justice, because this case involved the most extensive evidence and legal argument on Aboriginal culture to date. Many witnesses, including elders and hereditary chiefs, gave evidence, and the written submissions were massive. Yet what did the court do with this extensive evidence and presentation of the Gitksan and Wet'suwet'en culture? Chief Justice McEachern found that given what he could only call their "primitive existence"[26] off the land, the Gitksan and Wet'suwet'en people are better off today and are "more cohesive as peoples, and they are more culturally sensitive to their aboriginal birthright than they were when life was so harsh and communication so difficult....In addition, they have access to a great many advantages which were not formerly available to them."[27] He condemned their culture as primitive and glorified his as civilizing and therefore superior.

So the problem with the dominant society's interpretation of difference is that either you are too different (under-average little people) or not different enough (average little people) – usually both at the same time. This always seems to me as a ludicrous exercise in point-missing. Aboriginal peoples are different, and the dominant society (or specifically judges) cannot have a monopoly on deciding how different or whether that difference is "acceptable".

These judicial and society responses to Aboriginal difference must be identified in the context of the criminal justice system at the level of analyzing the issue of adaptation of the existing system. These (mis)perceptions cannot be allowed to restrict Aboriginal peoples in finding solutions to the serious problems encountered with the criminal justice system. As Archibald Kaiser has suggested in his trenchant review of the Canadian *Criminal Code* and Aboriginal peoples:

> ...the survival and development of Aboriginal ways in face of the onslaught of colonialism demonstrates their resilience, flexibility, and transcendent qualities...no culture remains static and, if anything, Aboriginal peoples will imprint their own blend of custom, law and procedure upon criminal justice as their rights are recognized. Considered in historical perspective, there has been a mere temporary disruption of the otherwise uninterrupted control by Aboriginal communities over what is now called crime.[28]

Difference has to be identified, even if not entirely understood by the dominant culture, and no meaningful analysis of the situation of Aboriginal peoples will be possible without this dimension. Moreover, difference has to be seen outside the context of inferiority or superiority. Chief Justice McEachern nearly put his finger on it in *Delgamuukw* when he observed: "It is almost as if the parties are leading evidence in different kinds of lawsuits."[29]

Having reinforced the notion of difference, I do not want to leave the impression that Aboriginal cultures should be seen as totally separate wholes utterly apart from the dominant Canadian political and consumer culture. There are influences that run both ways, and this too is relevant for the question of reform of the criminal justice system.[30] However, the overlap and intersection of the dominant culture and Aboriginal peoples cannot be seen simply to vitiate the legitimate Aboriginal claim for self-determination in the area of criminal justice.

Diversity

While Aboriginal peoples are different from Canadians, so too are Aboriginal cultures, traditions, lifestyles and experiences diverse. Contrary to the expectation of Canadian society, Aboriginal peoples do not walk, talk and dream in ideological lockstep. This was vividly exposed during the debate over the Charlottetown Accord; Canadian society was divided over various components of the Accord, yet when Aboriginal peoples expressed different views these were met with outrage, surprise and condemnation. "You mean you cannot all agree?"

I was asked about this so often I got tired of pointing out the obvious double standard. The fact that it is surprising that diverse views would be expressed on important issues represents a lack of understanding of diversity among peoples. However, gratefully this round of discussions did not provoke the insight of "Gee, there are some really smart Indians" quite as often as did the Meech Lake Accord debate.

Diversity among Aboriginal peoples is complex for Canadian society to accept because, particularly on political questions, Aboriginal peoples do not have political parties and party discipline, which is antithetical to consensus building by airing differences. Hence Aboriginal people freely express their differing views and discuss them; it is when the pressure of anything resembling party discipline is brought to bear that Aboriginal peoples will likely stop the debate.

Diversity is critical in understanding Aboriginal experience with the criminal justice system because it varies according to cultural background, language, and geography. The situation for First Nations citizens who live on-reserve and for those who live in cities is also different. The situation for an Inuit community in the North is different than that of one of the Métis settlements in Alberta. This diversity means the analysis has to be both subtle and broad. It must reach out to all of Aboriginal peoples' experiences without overlooking their diversity. Most critically, the solutions or responses to the problems with the criminal justice system must be varied – changes are needed both for those who live in their communities and for those who live in urban centres.

Often diversity is plugged into a policy mentality of 'multiculturalism' where visible differences warrant adjustments in the application of Canadian laws and policies to accommodate so-called minorities. Diversity in this sense means you can have all the things Canadian society values even if you are Black, Aboriginal, Asian, etc. However, what if you are neither a 'minority' – except in terms of numbers – nor do you accept the Canadian that which have been imposed on your people? (Values like retribution, wealth maximization, property ownership, competition in global markets...the list is too long.) Multiculturalism in this sense is another imposition of an ideology that you neither discussed, designed nor desired.

In the same vein, talk of inclusive justice is troubling if the premise is extending to Aboriginal peoples the benefits of the values Canadian society has set for itself, without considering whether these are appropriate. Hence, when the Minister of Justice suggests that "A second priority of mine as Justice Minister is based on the principle that a system of justice that is both fair and inclusive must protect its constituents equally",[11] I wonder whether this is a workable framework for Aboriginal peoples. Is equality or equal access to a value system that Aboriginal peoples do not share an answer to anything? Is it more of the same? Perhaps for some Aboriginal people it is a workable framework – equal application of the existing criminal law without distinctions because of the fact one is

an Aboriginal person. However, it certainly is not the case for all Aboriginal peoples. Most First Nations leaders want to design and control a justice system to deal with anti-social acts according to principles that work for them and can restore harmony and good feelings in the community. Diversity requires an examination of a range of options and views on criminal justice, and this cannot be predetermined or dictated by one party.

Destruction

The final aspect of 3-D vision is the most painful part of the framework for analysis. We cannot appreciate anything about the criminal justice system, or for that matter any aspect of the relationship between Aboriginal peoples and the Canadian state, without realizing that the 'power-over' character of the relationship has had devastating effects. Aboriginal peoples have been colonized, and the attitude of the Canadian state remains an imperial one of paternalism, control and resistance to change. Loss of control over the welfare of children and the governance of communities, as well as the condescending denunciatory attitude toward Aboriginal spirituality, culture and language have had an incalculably negative impact. Some Aboriginal people have actually been influenced to the point of looking at themselves and their own people in these same modes.

It is a testament to the overall strength of Aboriginal peoples' belief in themselves and their commitment to the land that Aboriginal cultures, languages, and spirituality have survived. Nevertheless, in many instances, they have survived just barely. For me personally, this is the harshest reality we must face. It is difficult and it is heart-wrenching. Youth suicides especially reveal the real violence this colonial regime has caused for the lives of Aboriginal peoples. The fact that a young person would choose death rather than life is a chilling reminder of how brutal life under the existing system is for young people.[12] Aboriginal suicides within the prison system are indicative of lost hope.

The clever nature of the oppression of Aboriginal peoples has meant that resistance to colonization has been relatively ineffective to date. The use of a bureaucratic mentality, the divide-and-conquer political strategies, and the use of organized religion have been only too successful in oppressing Aboriginal peoples. This too is the impact of power over and bureaucratic rule. It is difficult to resist a faceless bureaucracy that rules your life from a great distance. Political theorist Hannah Arendt has written of the effect of bureaucratic control over people's lives, although not in the context of Aboriginal peoples. Her observations are nonetheless fitting:

> In a fully developed bureaucracy there is nobody left with whom one can argue, to whom one can present grievances, on whom the pressures of power can be exerted. Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to

> act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant.[32]

This could be a description of life under the *Indian Act*. Taking the power for daily decision making in one's life away and giving it to a faceless bureaucracy has been and continues to be disempowering. What it leaves in its wake is loss of control and social breakdown within the community.

Statistics on everything from unemployment to suicide show that the horror of the situation is real – and the situation is not improving. The impact of colonization has not only resulted in the destruction of Aboriginal cultures, languages and people; it has left a more complex and symbiotic imprint. Aboriginal peoples have been colonized and are now in many cases dependent and powerless, and there are many situations of violence that demonstrate that the oppression inflicted on Aboriginal communities has imploded.

Aboriginal people now abuse each other at rates that are disturbing and cry out for immediate attention and change. As Patricia Monture-OKanee highlights in her paper on the situation of Aboriginal women prepared for this round table, "We must also accept that in some circumstances it is no longer the descendants of the European settlers that oppress us, but it is Aboriginal men in our communities who now fulfil this role....In particular, we have the *Indian Act* to blame for this reality. But blaming the Act will not solve the problem."

Teressa Nahanee goes further than this. She suggests that it is Aboriginal men who are to blame for the situation in Aboriginal communities because they have not taken responsibility for the situation and have not willingly shared power with Aboriginal women.[33] She suggests that particularly in relation to sexual offences "males do not understand the violation of a female body and cannot determine appropriate forms of punishment and deterrence."[34] The internal problems in Aboriginal communities are not confined to Aboriginal men abusing Aboriginal women. There is also physical and sexual abuse of children and pervasive alcoholism and substance abuse – that is, self-abuse. Blaming the *Indian Act* will certainly not solve the problems. However, understanding how the Act and how colonialism have been destructive forces is a first step toward change so we do not repeat these experiences again or continue them in another form.

This implosion of violence is no surprise in the historical context of colonialism. It has been a factor in every colonial context – often coming into sharp focus in decolonization efforts. For Aboriginal peoples, the implosion of violence can be seen to stem from the isolation of Aboriginal people from who they are and what they believe – a deprivation of self-esteem – a non-Aboriginal concept but one that has been interpreted recently in light of Aboriginal perspectives:

> Understandings of life are often developed in relation to the aspects and cycles of nature. The cycle of nature, and life, is a circle, without

> beginning and without end. While individuals are unique beings, to try and understand them separate from these aspects and cycles is to isolate them from a large part of who they are. When such intactness is broken, it becomes difficult for the individual to live in harmony with the people and things around them. Much of who they are is, in a sense, lost. As people lose their cohesion with their world, they also lose touch with themselves; as they are in disharmony with their world, so are they in disharmony with themselves. They may dislike their world and themselves and act accordingly. An outcome of the kind of interactions one experiences with their world is the sense of self-esteem.[16]

The destruction in Aboriginal communities and the implosion of violence and anti-social behaviour has to be seen as part of the loss of self-esteem that colonialism brings and the *anomie* that is pervasive in colonial situations.

The destructive situation that now exists for Aboriginal peoples means that responses to problems like the criminal justice system must allow for restoration of Aboriginal peoples through ending the power-over relationship of subjugation and domination. It also means that the self-destructive aspects of Aboriginal people's lives cannot be seen in isolation from the broader situation and cannot be taken as an invitation for continued paternalism. In other words, violence does not mean that more government control is required (e.g., through the criminal justice system) but that control needs to be relinquished (with provision for the safety of women and all Aboriginal people) to enable a process of restoration to begin. Of course, as Aboriginal peoples, we have to acknowledge how we are implicated in the situation and that simply taking over control is not enough. We have to be willing to examine how colonized our own perspectives are and how we do violence to each other contrary to our traditional teachings and responsibilities.

Viewing the Fundamental Elements of the Criminal Justice System with 3-D Vision

Mindful of this 3-D vision framework, can the criminal justice system be adapted to correct its shortcomings? Given the argument presented above, you should have the impression that I cannot accept mere tinkering reform of the criminal justice system on the 'inclusive' model (to ensure equality for all individuals) or on the minor adjustment approach by the existing actors in the system. This might be part of the solution for some contexts (e.g., urban) but not for all of them. I was asked specifically to consider whether the adaptation of the existing system may be too limited because of the difficulty Aboriginal people may have with fundamental elements of the existing system. The adversarial system and the emphasis on punishment and guilt were identified as some of the basic elements to consider.

I have isolated seven basic elements (or concepts) worth considering in light of this question of adaptation. The Aboriginal Justice Inquiry provides an excellent review of many points touched upon in the analysis to follow. I have hazarded this selection of seven but freely acknowledge that what is or is not fundamental to the criminal justice system is far from settled. One need only read the Supreme Court of Canada's decision in *Thomson Newspapers* v. *Canada*,[37] in which five justices offered five different versions of what they saw were the fundamental tenets of the legal system, to realize that the search for fundamentals is rather uncertain in Canadian law.[38] I should make one specific note regarding my own lack of understanding. I have not had extensive access to information regarding Inuit traditions, customs and experiences with the criminal justice system. On some of the contrasts brought out below, I must defer to Inuit to offer their perspective on these matters.

Crime as Against the State

An anti-social act or 'crime' is considered in the Canadian criminal justice system to be an offence against society if it is against the person or possessions (property). Consequently the machinery of the Canadian state is invoked to examine the act and punish the offender. For Aboriginal peoples, anti-social acts against people or possessions are likely to be seen as a violation of one person by another. This does not mean that the community takes no interest or has no involvement in reacting to an anti-social act, but that it is seen within the context of the individuals, families, or accomplices to the event. When the offences are what might be called violations of responsibility and trust for others (by those in political office) or for the land, these would be seen as affecting all members of the community. This is relevant in terms of the broader requirement of restoration when an anti-social act is committed that demonstrates a violation of one's responsibility for others or for the land.

Adversarial System

The Supreme Court of Canada has opined that "[t]he principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person."[39] The adversarial system is one of the most troubling aspects of the criminal justice system for Aboriginal peoples, and most Aboriginal people would say it exhibits little respect for their autonomy or dignity as persons. The notion of reaching truth (honesty) through combat, which infuses the rules of procedure that accompany the adversarial system, stand in sharp contrast to Aboriginal ethics and approaches. Specifically, it conflicts with the Aboriginal ethic of emotional restraint, which encourages people to be restrained in their interactions and responses and to avoid confrontation. This ethic is gravely compromised by the criminal trial process, which relies on words of indignation, hostility and angry

rebuttal. All of this testimony is channelled through detailed formal rules and objections, which make the process very mystifying for Aboriginal people.

For an Aboriginal person, the information pertinent to understanding a criminal act would be shared openly without consideration of what is admissible, inadmissible, relevant or irrelevant, prejudicial or supportive. However, when this is filtered through the formal presentation of evidence and argument by counsel, an accused person or an Aboriginal witness would be extremely uncomfortable and indeed lost in the process. Those persons may also be deeply shamed by the accusation that their accounts may not be totally honest in that forum, even though this is simply a trial technique employed by counsel to test witnesses. Rather than compel the Aboriginal witness to a vigorous defence of his or her character and credibility, the witness may simply withdraw and refuse to participate in this exercise in so-called fact finding. This is a technique to avoid confrontation. It is a reaction to a system that is threatening and upsetting and that places one's credibility on the line to root out the lying witness.

Finally, the ethic of emotional restraint often means that public criticism of others is curtailed. The structure of the criminal trial process is that this is critical whether you are the accused person or a witness. However, a reluctance to criticize the conduct of others in the course of one's testimony would likely be interpreted by the court as meaning one is not certain of whether a specific person was at fault. The reluctance to criticize others is greatly exacerbated by the trial process, which is extremely intimidating and loaded with alien cultural baggage. Aboriginal witnesses tend to be soft-spoken and are often asked to speak up and admonished to behave better in court. During the Mashpee trial, Clifford reports that Judge Skinner said to an Aboriginal witness, "Think of yourself shouting across a field to those people", indicating the jury "over there".[40] The Aboriginal witness continued speaking softly despite this direction, although it no doubt angered and frustrated the judge and jury.

Formal Written Offences/Defence

The Canadian criminal justice system relies upon formal and abstract definitions of crime in the *Criminal Code* and specifically defined defences (which may be set out legislatively or developed according to the common law). The definitions of crime include specific mental and physical elements (*mens rea* and *actus reus*). In many Aboriginal languages there is no separation of these two elements and indeed no equivalent concepts. This presents enormous problems for translation and undoubtedly many ill-informed guilty pleas. During the inquiry into the prosecution of Donald Marshall, Jr., Bernie Francis, a Micmac translator, was asked what the word 'guilty' meant in Micmac. He said there was no equivalent word except the concept of 'blame'. Hence the question "Are you guilty?" would be translated as "Are you blamed?".

In addition to the language problem, the idea of guilt is troubling because it involves intent. Intent and guilt are not necessarily found in Aboriginal cultures, because notions of shame and acceptance of responsibility for situations are emphasized. Moreover, in relating the physical acts involved in an alleged crime, an Aboriginal person may not communicate details in the context of European notions of time and space.

Professional Class

Aboriginal justice systems did not for the most part (the Cherokee are an exception here) use professionally trained classes of persons like lawyers and judges to adjudicate disputes. Professionals are deeply distrusted in Aboriginal cultures because of the experiences with various experts – experts on education, experts on child welfare, etc. Professionals are respected in the dominant society because they have been educated for long periods at post-secondary institutions. This is in direct contrast with Aboriginal communities, where the degree of respect in the community is not premised necessarily on education in the formal system. The extent of life experience, faithfulness to Aboriginal culture and traditions, competence in one's language, and commitment to the community are most often the basis for respect in Aboriginal communities. Knowledge of sacred and spiritual traditions, ways and practices also commands special respect, even sometimes fear.

The idea of securing someone previously unknown to speak for you is quite alien. An Aboriginal person would have a representative of the family or clan speak for him or her but not a stranger who is a trained 'talker'. Also, it is seen as important that one have the opportunity to talk, uninterrupted, about important matters and that this be done publicly. The great Aboriginal tradition of public oratory stems from this responsibility to acknowledge one's accountability to the people and to find the best path for everyone, not simply oneself.

The concept of judging is also alien. A judge makes a win/lose decision. He or she is asked to do so based on knowing the rules and is accordingly respected within the legal profession. The only citizens of Aboriginal communities who may be comparable to judges are elders. The parallel is a weak one, however. Elders are respected because of their knowledge, commitment and wisdom. They are not simply educated, they are proven wise. Elders do not 'judge'. They see the whole person and find ways (through stories, meditations, prayers, and ceremonies) of helping an individual understand the shortcomings or problems that led to anti-social acts. They focus on harmony, rehabilitation, reintegration of an offender into the family, clan and community – not on guilt. They do not so much care whether an accused was at a certain place at a certain time. They want to know about the balance in their life and the fulfilment of individual responsibilities to others.

I remember speaking with an elder about my own struggle to understand how I felt sometimes about my responsibilities as a lawyer and the kinds of things I had to do in my work. She listened, and we had a long 'quiet' time together. She then told me to "talk to the Earth, she will show you how to understand." This instruction was important at many levels. It was an encouragement to see beyond the inter-human relationship and to learn from the natural world, which my work often takes me away from even though land may be the object of dispute. It was also an expression of the emphasis on personal responsibility for understanding. This anecdote demonstrates how heavily some Aboriginal cultures value self-understanding, exploration, and awareness. The elders do not sit in judgement of you. They guide you on your own path of understanding and fulfilment of responsibilities. For Aboriginal peoples, the role of the judge is one of an outsider who knows nothing about you except regarding a specific incident and who is called to judge you. This is alien and terrifying.

Involvement of Strangers: Juries

The involvement of other strangers, in this case juries, in the criminal justice system is also problematic for Aboriginal people, although in a different way. The jury of one's peers in the criminal justice system is not an Aboriginal jury. Indeed the barriers to jury duty for Aboriginal people are considerable. Moreover, an Aboriginal person has no right to have Aboriginal people on the jury that deliberates on his or her case. The concept of juries is one that may have some compatibility with Aboriginal cultures. In the Aboriginal paradigm, however, your peers are not strangers to you; their knowledge of a person is precisely why they would be relevant to restoring harmony after an anti-social act or breach of personal responsibility. For example, if your offence is against a person of a different clan, it might be a jury from that clan that will decide on restoration of the victim and the community. They might deliberate with others from your clan.

Impartiality

The concept of impartiality in the criminal justice system, on the part of the judge, jury and criminal justice officials (the police), is contrary to the nature of Aboriginal experience in kinship communities. You value someone's participation and involvement in your problems not because they are strangers but because they know you, your family, your clan and your history. Obviously, impartiality may have a role in an impersonal pluralistic society, but within Aboriginal communities those who can help are often those who are wise and knowledgeable about family history.

Punishment

One of the biggest difficulties with the criminal justice system for Aboriginal people is the fact that it is oriented toward punishment of the offender in the interests of society by imposing a term of imprisonment, fines and, less often, forms of restitution and community service. The two cornerstones of punishment, imprisonment and fines, are both alien to Aboriginal peoples. The Canadian system is grounded in a retributive theory of punishment that hopes to match a measure of deprivation with a wrong-doing. Deterrence is also a central concern. Finally, rehabilitation of individuals is a goal of the Canadian criminal justice system. Realistically, efforts expended on rehabilitation consist mainly of ensuring that the severity of retribution will deter more wrong-doing.

The goal for Aboriginal communities after an incident of harm against a person or possessions was to resolve the immediate dispute through healing wounds, restoring social harmony and maintaining a balance among all people in the community. Harmony, balance and community welfare cannot be satisfied when an individual is imprisoned and taken out of the community. In very rare cases, Aboriginal persons may have been banished from the community, but imprisonment in the Canadian system is a harsh form of banishment and exclusion from what might be the offender's only avenue for healing and restoration. Also, when the offender is removed it may not be possible to restore the victim and the victim's family or clan to right the wrong. If the offender is paying a 'debt to society' through a prison term, what about the repair of the debt to the victim and others in the community?

Too often in the criminal justice system the victim and the victim's family are simply forgotten. The case of Helen Betty Osborne's mother Justine is one in point. She was not kept informed of the police investigation into her daughter's murder, nor was her grief considered and community members involved to assist her with her loss. Her daughter's assailants were not required to make any reparations to her mother and family.

The Aboriginal experience in Canadian prisons has nothing to do with Aboriginal concepts of justice or Aboriginal culture, traditions and values. It is completely imposed and it does very little, if anything, for the rehabilitation of the offender and the healing of the community. The payment of fines is similarly alien. Paying the state for wrong-doing to an individual is alien to Aboriginal communities, where restitution and restoration require good conduct, exchange of gifts and compensation to the victim. The fact that Aboriginal communities are not structured as cash economies means that the payment of a monetary sum is particularly alien and especially burdensome to satisfy. Imprisonment for fine default, a problem that has been widely identified, stems from this context. These notions of punishment are not shared by Aboriginal peoples, even though they are mostly subject to them in the Canadian criminal justice system.

It is impossible to escape the conclusion that the Canadian criminal justice system is an alien system for Aboriginal peoples. It does not accord with the basic teachings and traditions of Aboriginal cultures, and it has never been agreed to explicitly by them. Even in the numbered treaties, such as Treaties 6, 7, and 8, the treaty signatories agreed to maintain peace and order between themselves and others of Her Majesty's subjects. This provision acknowledges the responsibility of Treaty First Nations to maintain peace and order in their communities, and it places upon those peoples an obligation to enforce adherence to the terms of their treaty among their citizens.

These seven basic elements or concepts in the Canadian criminal justice system are all problematic for Aboriginal peoples. Aboriginal peoples' approaches, as informed by Aboriginal culture and traditions, do not accord with the Canadian system. If Aboriginal peoples choose to abandon their traditional approaches and follow the path of the Canadian criminal justice system, that is their choice to make. However, to date I know of no Aboriginal people who have chosen this path. The history has been one of imposition of this system on Aboriginal peoples without regard to the fact that they do not share many of its elements, premises or concepts.

My answer to the question of whether the difficulty lies in fundamental elements of the Canadian criminal justice system is, *most definitely*. This is the problem, and it cannot be wished away simply by having Aboriginal people act as the administrators of a system that is not premised in Aboriginal culture and approaches.

Additional Problems with the Administration of Justice

The second aspect of the question posed by the Royal Commission was whether the problems with adapting the criminal justice system rest with the administrative aspects of the system, such as policing, the correctional system, bail, and the attitude of those working within the system. The answer is yes, there are problems here too. However, the basic problems are with the elements or building blocks of the criminal justice system. The administrative difficulties are serious and require redress; they can be appreciated fully, however, only in light of the different approaches Aboriginal peoples have to criminal justice and antisocial behaviour. The approximately 400 justice projects now under way across the country are mostly at the back end of the justice system, involving administrative restructuring. What Aboriginal leaders are indicating is that this is one step toward change but only an interim one, because it does not address core value differences and central issues of control. Once again, we need 3-D vision to assess the inadequacies of cosmetic alterations of the status quo.

Conclusion: Don't Fence Me In

The criminal justice system cannot simply be adapted in terms of administration and thereby accommodate the experiences or situation of Aboriginal peoples. There must be scope for distinct justice institutions, space for Aboriginal customs, traditions and approaches to anti-social behaviour, and active listening on the part of criminal justice actors so that the process of understanding difference, diversity and destruction can begin.

Does this mean 'separate' justice systems? In my view, it means anticipating distinct justice systems, but these are not necessarily entirely separate from the criminal justice or legal system. The critical point is that the interlocking elements require discussion, definition and acceptance by Aboriginal peoples – not more imposition. The Canadian justice system can be seen as a system of systems. I would not want the possibility of distinct systems to be foreclosed because, as Patricia Monture-OKanee and I have observed elsewhere:

> To deny difference at the outset by suggesting that the discussion of distinct justice institutions for aboriginal communities is not possible is to jettison respect for difference. It is an affirmation of hegemony, of cultural superiority and of blind defence of a particular conception of cultural superiority and of blind defence of a particular conception of the Rule of Law at the expense of the existence of distinct cultural communities. The Rule of Law can only be understood in Canada as being highly differentiated; it is a rule of laws – common, civil, statutory and Aboriginal. For one arm of the state to unilaterally impose its concept of law or criminal justice on another without discussion and acceptance, is fundamentally repugnant in a free and democratic society...[1]

Canada is a state with a rule of laws, and Aboriginal peoples' laws, customs, traditions and cultures have been ignored or suppressed for far too long. Aboriginal peoples' experiences are diverse, and a range of options must be considered based on culture, history and those desired by Aboriginal peoples themselves. Working with the existing concepts and premises of the Canadian criminal justice system is simply too confining – don't fence us in.

Notes

1. Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991), p. 10.
2. Nothing more correct than this adjective comes to mind, although I'll explore the implications of this classification later in the paper.
3. In terms of their uniting ideology as feminists I see it as a commitment to bettering the conditions of women in the interests of equality. It is not an abstract or theorized feminism – it is a commitment to equality through practice based on the knowledge and experience gained

through lawyering. I appreciate this lived, experience-based feminism rather than academic feminism because it has a context and a meaning I can understand. The firm has a refreshing acceptance of learning through experience and sharing, which takes it out of the sometimes doctrinaire allegiances that I have observed some feminists line up with (e.g., "I'm an Andrea Dworkin feminist.").

4. I know it is an absurdity to describe oneself as 'half' anything – it's a lot more complex than this, but bear with me, I get to it later.

5. Most important, unlike the mainstream of the profession, they are women. They come from different backgrounds. Some are working-class, some middle-class; one entered the profession after pursuing a different career, the others as a first career. What unites them is a deep commitment to justice for women. They are also committed to delivering legal services in a manner that is sensitive to the situation of women in Nova Scotia and Canada.

6. Even the socio-economic status of my upbringing, that of poor and working class (or non-working class), is for me only meaningfully understood through the prism of cultural disempowerment of my family. For further understanding of the complexities of this experience, especially regarding gender, see Patricia Monture-OKanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s," prepared for the Royal Commission on Aboriginal Peoples, elsewhere in this volume.

7. I take this reference from the evidence of Cornwall cited and relied upon by Chief Justice McEachern in *Delgamuukw et al.* v. *R. in Right of B.C. and A.G. Canada* [1991] 5 C.N.L.R., p. 153.

8. Chief Justice McEachern's decision in *Delgamuukw* is probably the most sustained illustration of this problem. He reviewed evidence like that of Cornwall mentioned above and held that "it does not matter how ...[an official] or those with whom he interacted chose to characterize aboriginal interests, but merely to provide a chronological framework for this historical review..." *ibid.* Mr. Duncan had suggested, in 1875, that "To treat Indians as paupers is to perpetuate their baby-hood and burdensomeness. To treat them as savages whom we fear and who must be tamed and kept in good temper by presents, will perpetuate their barbarism and increase their insolence...", p. 135.

9. Chief Justice McEachern in *Delgamuukw* found that

> When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with *legal, not cultural principles*. (p. 41, emphasis added.)

10. *R.* v. *Lavallee* [1990] 4 WWR 1 (S.C.C.).

11. *R.* v. *Khan* (1990) 113 N.R. 53 (S.C.C.).

12. Granted, this transcription error was no doubt a consequence of the fact that the secretary had not been exposed to Aboriginal people or Aboriginal issues in her life or work.

13. See M.E. Turpel, "The Judged and the Judging: Law or Marshall? Locating the Innocent in a Fallen Legal World", *U.N.B. Law Journal* (1992), p. 281; M.E. Turpel, "Further Travails of Canada's Human Rights Record: The Marshall Case" International Journal of Canadian Studies 3 (1991), p. 27, reprinted in J. Manette, ed., *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992), p. 79; and P. Monture-OKanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" *UBC Law Review* (1992), p. 239.

14. "Rethinking Justice", p. 242.

15. Law Reform Commission of Canada (1991), the report of Manitoba's Aboriginal Justice Inquiry (1991), the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (1991), and the Royal Commission on the Donald Marshall, Jr., Prosecution. In addition to these four major studies, commissions and inquiries, there have been several other studies and inquiries on a more local scale or that target specific components of the justice system (e.g., corrections).

16. Aboriginal Justice Inquiry, p.1 (cited hereafter as AJI).

17. Digest of Findings, p. II.

18. I use the expression 'clarification' because I believe they formulated this notion of dual respect to encompass self-determination, since this is part of understanding Aboriginal peoples' history – they were self-governing, and this was oppressed by the *Indian Act* and other colonial policies and instruments.

19. See AJI, vol. 2.

20. Chief Justice McEachern in *Delgamuukw* stated this clearly when he found that "the plaintiffs have a romantic view of their history" (p. 40).

21. I was disturbed to read in Olive Dickason's recent text, *First Peoples of Canada* (University of Toronto Press, 1992), of a taxonomy of the different racial characteristics, blood types, etc. of different Aboriginal peoples of Canada. This struck me as frighteningly similar to nineteenth-century race theory. It also misses the point. Differences are not just visible racial differences (whatever those may be) but differences in ways of seeing, believing, and understanding the world.

22. J. Clifford, "Identity in Mashpee", in *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* (Harvard University Press, 1988), p. 284.

23. p. 214.

24. p. 199.

25. John Stuart Mill, *On Bentham and Coleridge* (New York: Harper, 1962), p.78.

26. p. 235.

27. pp. 235-236.

28. A. Kaiser, "The Criminal Code of Canada: A Review Based on the Minister's Reference", *UBC Law Review* (1992), p. 90.

29. *Ibid.*, p. 158.

30. Jeremy Webber's paper on culture prepared for this round table is very helpful on this point. He characterizes culture as a conversation through time and addresses the mistaken view of change as meaning a loss of culture as opposed to its transformation into another form.

31. Hon. Kim Campbell, Minister of Justice, Address to the Canadian Bar Association Annual Meeting, Halifax, Nova Scotia, August 24, 1992.

32. The coroner's inquest at the Big Cove reserve in New Brunswick, which started in December 1992, reveals this painful destruction. Young people are committing suicide because they feel there is no reason to live in their situation.

33. H. Arendt, *On Violence* (Harvest, 1970), p. 81.

34. T. Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter," discussion paper prepared for the Royal Commission on Aboriginal Peoples (Ottawa: 1992), reproduced elsewhere in this volume.

35. *Ibid.*, p. 10.

36. F. Pepper and S. Henry, "An Indian Perspective on Self-Esteem", *Canadian Journal of Native Education* 18, p. 145.

37. *Thomson Newspapers* v. *Canada* (1990) 1 S.C.R. 425.

38. As Peter Hogg suggests in his analysis of the case, "it is obvious that this mode of interpretation introduces great uncertainty into all legal rights, even those that are couched in very specific language...". *Constitutional Law of Canada*, 3rd ed. (Carswell, 1992), p. 1037.

39. *R.* v. *Swain* (1991) 1 S.C.R. 933, p. 936.

40. Clifford, p. 301.

41. "Rethinking Justice", p. 257.

Accommodating the Concerns of Aboriginal People Within the Existing Justice System

*John Giokas**

Introduction: An Emerging New Relationship

It is clear in 1992 that the relationship between Aboriginal and non-Aboriginal Canadians has changed irrevocably. The general nature of the Aboriginal political mobilization since 1945 that has seen Aboriginal peoples move from being the object of national debate in Canada to participants in that debate is proof enough of that. It cannot be forgotten that when Canadian status Indians first advanced the idea of being direct participants at the negotiating table in the constitutional renewal process in the 1970s it was initially considered by the federal government to be a non-starter. In essence, Aboriginal organizations entered the constitutional debate in the 1970s as citizens groups of a special type and came out of it at the 1992 Charlottetown meeting as full participants on a par with the federal and provincial governments in most respects.

This is not an isolated Canadian phenomenon. Throughout the world there are growing political movements among indigenous peoples for new power sharing arrangements within their respective states. The collective force of these movements is such that 1993 has been declared by the United Nations to be the international year of the indigenous people. Indigenous political movements since 1945 have been supported by the international expansion of human rights consciousness over the past several decades that finds expression in a worldwide intellectual trend toward "ethnic pluralism and a global ideology of racial and

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cultural equality".[1] The domestic Canadian counterparts of the international rights expansion include the *Canadian Bill of Rights*,[2] under which the first modern human rights challenges to Canadian Indian legislation were brought,[3] the Charter and the various federal and provincial human rights acts and codes.

But the international movement has gone beyond the protection of individual human rights to the protection of the right of self-determination of "peoples", largely under the auspices of the United Nations.[4] The Canadian parallel is the demand of Aboriginal peoples for self-determination in the form of a constitutionally protected right to self-government that has resulted in the various first ministers conferences on the subject and which will likely continue to dominate the national debate around Aboriginal issues generally for some time to come.

This paper has been written against the backdrop of this national and international drive of Aboriginal peoples for a greater degree of control over their own affairs. The basic theme of this paper can be summarized in one word: emergence. A new order is emerging in Canada that will cover most important aspects of the new relationship between Aboriginal and non-Aboriginal Canadians. Its shape is not yet entirely visible. The Aboriginal peoples, however, are ahead of most Canadians in that they can sense the general contours of the new relationship, and have been pressing in a number of areas to permit it to be fleshed out in an orderly way. Justice administration is one of those areas.

Many voices are now heard to argue for particular solutions to the Aboriginal justice problem such as a parallel or separate Aboriginal justice system. Given the thesis set out here, however, the final form the new relationship will take in the justice field is of marginal relevance. The real issue from this perspective is whether government can play a useful role to facilitate change within the current constitutional framework. During this period of transition to a new relationship, it will be important to lay the groundwork for the coming changes to the power sharing relationship between Aboriginal peoples and the federal and provincial governments.

It will be equally important, however, to lay this groundwork in such a way that the overall relationship between Aboriginal and non-Aboriginal Canadians can be maintained in the face of the challenges that will inevitably test that relationship. The essential quality required to perform both tasks will be a renewed commitment to an equal partnership between the Aboriginal peoples and the federal and provincial governments. The approach set out in this paper is an attempt to provide a way to foster such a renewed commitment. As in so many other areas of national life of late, however, the proof will be in the actual doing.

The Current Debate About Aboriginal Justice in Canada

One of the startling features of the present debate around Aboriginal justice issues is that there is so much disagreement while at the same time there is such a remarkable degree of consensus. The various provincial inquiry reports, academic studies, research papers, government documents and even public opinion coalesce around four broadly shared conclusions:[5]

- the current justice system has failed Aboriginal people;
- the solution is increased Aboriginal responsibility for defining and resolving Aboriginal justice problems;
- given the diversity of Aboriginal peoples and communities across the country, those definitions and solutions will not be identical;
- those Aboriginal definitions and solutions cannot exist apart from the current justice system, at least at the outset.

Disagreement is in the details of the problem and in the nature of the solutions; i.e., whether the failure is primarily with respect to more traditional, reserve-based Aboriginal peoples or whether it applies equally to urban residents; whether the causes are socio-economic or whether they lie in cultural differences or a combination of the two; or whether we start our analysis and efforts from the current justice system, or whether we start from the position of a more generalized right to a parallel or separate system, etc.

In many ways, these differences reflect, on the one hand, the disagreements over the nature and causes of crime generally, for which there is no singular explanation, and, on the other hand, the merging of Aboriginal justice issues with the broader political debate around Aboriginal self-government. Thus it may be expecting too much to have a higher degree of agreement regarding Aboriginal crime than exists in the scientific community regarding crime theory generally. And it may also be naive to expect easily to disentangle justice issues from the wider self-government debate.[6]

But, as general as the four points of consensus may be, they nonetheless provide a framework for approaching the problem while the particular points of difference are investigated and debated in scientific and even in political and constitutional forums. For whatever may be the ultimate explanation for these problems, the one common element in all the reports is that there are simply too many Aboriginal people being processed and incarcerated by the current justice system. At this point, and after around thirty reports and studies, it is hard to disagree with the trenchant observation of Patricia Monture-OKanee and Mary Ellen Turpel that "the era of collecting data about the over-representation of aboriginal people in the criminal justice system must end. It is now time to begin to focus on meaningful change...".[7]

Justice System Failure

Three themes have consistently emerged in the various provincial Aboriginal justice inquiries and studies over the past decades.[8] Aboriginal over-representation is affirmed by report after report documenting the high contact rates of Aboriginal people with police and their disproportionately high rates of arrest, conviction and imprisonment. Over-representation in prisons and jails is now an acknowledged fact, and there is every indication that the problem may be worsening, given that the federal Aboriginal inmate population is increasing at more than twice the national rate. In 1991, Aboriginal persons generally were around 11% and 15% of the populations of federal and provincial carceral institutions respectively. Rates are even higher for Aboriginal women. In addition, Aboriginal offenders are less likely to be paroled early in their sentences. Aboriginal youth are also disproportionately represented in juvenile detention facilities. General Aboriginal over-representation is particularly acute in the prairies.[9]

A second common theme is the existence of discrimination against Aboriginal people at all levels of the existing justice system. The reports and studies conclude that it is largely systemic[10] and have made numerous recommendations to correct it. Aboriginal people have indicated through their testimony before the various inquiries that they believe they are dealt with more harshly by the justice system. In court they often do not understand the trial process, the sentence hearing or the sentence itself. Many assert that police and prison staff are racially prejudiced in their treatment of them. The various inquiry reports and studies are careful about accusing anyone of overt racism, but their conclusions also support the existence of some degree of overt discrimination in the system.

These factors have fuelled a third common problem: the perception among Aboriginal people that "the criminal justice system is an alien one, imposed by the dominant white society."[11] In short, it is not "theirs" in a way that would command their respect and has come to be seen as their enemy, a view too often derived from first-hand experiences with the systems of child welfare, youth justice, family court and criminal justice. Every indication is that the alienation of Aboriginal people is pervasive and growing. Increasingly it finds academic support in the continued emphasis on cultural differences between Aboriginal and non-Aboriginal approaches to justice issues.[12]

It also finds political legitimacy in the statements of national Aboriginal leaders and the acknowledgements and apologies of Canadian churches and politicians regarding past and present injustices in all areas of the relationship between Canadian society and Aboriginal peoples. This apparently profound sense of alienation may itself be the most serious aspect of the overall Aboriginal criminal justice problem since it is intimately tied to the political struggle being waged by Aboriginal peoples for new power sharing arrangements in Canada as well as abroad.

One thing preventing a concerted focus on meaningful change is the lack of general agreement on the causes of these problems. From the publication of *Indians and the Law*[13] in 1967 the inquiry reports and studies are of one voice regarding the relationship between Aboriginal justice problems and underlying social and economic problems. But beyond that observation, there remain quite different ways of explaining the connection between Aboriginal socio-economic conditions and criminal justice problems. In a recent article, Michael Jackson refers to the "larger pattern of social disorganization and economic deprivation that characterizes life in many Aboriginal communities"[14] and goes on to discuss the diverse explanations for over-representation and the pattern of Aboriginal social and economic disruption. His analysis crystallizes the explanations into three main camps.

The first, cultural difference between Aboriginal and non-Aboriginal Canadians, holds that the gap between Aboriginal and non-Aboriginal cultures is so great that Aboriginal societies have not been able to adapt to non-Aboriginal values and conceptions. This has led to their marginalization from mainstream culture and the modern Canadian economy.[15] The second explanation sees Aboriginal criminal justice problems in structural terms, as problems grounded in economic and social disparities that are not necessarily related to cultural factors. From this perspective, age and socioeconomic status, for example, are more reliable indicators than culture in explaining why Aboriginal persons are disproportionately represented in the prison population.[16] A third view reconciles these two explanations. It focuses on the process of colonization "which has made native peoples poor beyond poverty"[17] and strikes a responsive chord in the experience of other indigenous peoples worldwide.

All three explanations have independent merit and should be explored further. But that exploration should not delay action. From these explanations it seems possible to derive working hypotheses to underpin that action while that exploration goes on:

- The unique history and current socio-economic circumstances of Aboriginal peoples and communities create equally unique pressures on them; behaviours designated as criminal are but one symptom of deeper inequities.
- The justice system has historically functioned, and continues to varying degrees to function, in ways that discriminate against Aboriginal people, whether through racial prejudice, insensitivity or lack of knowledge or some combination of these factors.
- The very process of defining crime and of setting justice priorities reflects a Euro-Canadian conceptual framework and continues to dominate in ways that exclude and perhaps even threaten Aboriginal culture.

Increased Aboriginal Responsibility for Justice

That the solution to Aboriginal justice problems is increased Aboriginal responsibility hardly seems arguable in 1992. This theme emerges from virtually every provincial Aboriginal justice report, as well as the only federal government document to address Aboriginal justice from a conceptual framework.[18]

The theme of increased Aboriginal responsibility for defining and resolving Aboriginal problems is also a political commitment. It underpins federal government Aboriginal policy as set out in the Prime Minister's "four pillars" speech to the House of Commons on September 25, 1990[19] where he promised that "this government will find practical ways to ensure that Aboriginal communities can exercise greater control over the administration of justice". He reaffirmed this in his speech of April 23, 1991 to the First Nations Congress in Victoria, B.C., adding that "Aboriginal leaders have sought reform in the justice system as a necessary step towards the realization of their wider aspirations."

As already mentioned, a global human rights revolution is going on that has assisted Aboriginal peoples worldwide in their drive for new power sharing arrangements in the states in which they are found. Since 1982 and the renewed emphasis on rights under the Constitution, it seems inevitable that a new relationship based on new political and constitutional rules that will recognize the right of Aboriginal peoples in Canada to self-government is just around the corner. It is important to note that the rights revolution has changed not only the rules of the game,[20] but also the language through those rules will be debated. Maxwell Cohen, writing nearly twenty-five years ago, noted the burgeoning Canadian interest in human rights and commented that human rights had become "an important piece of debating language" and a "part of the political dialogue, part of the debating experience of peoples in all parts of the world, even those in affluent societies".[21] This helps to explain the curious dominance of the debate by lawyers, and the generally enhanced policy role of the Supreme Court in national policy making.

In addition to these larger trends, in the justice area there has been a general turning away in Canadian society from notions of reactive policing and aggressive criminal justice processing to one of community crime prevention. A recurrent theme in the literature and submissions to various task forces has been the importance of empowering communities to identify and solve their own crime problems. Given this, and the international and domestic movement toward the empowerment of Aboriginal peoples and communities and the recent political commitment to the same principle, what is it that impedes Aboriginal peoples and communities from assuming greater responsibility for their justice processes and problems?

One impediment is the merging of the more abstract human rights rhetoric around self-government issues with the concrete and day-to-day crime and

justice problems experienced at the community level. The international and domestic human rights expansion and accompanying political mobilization of Aboriginal people has, in effect, created a new process or "track" for resolving Aboriginal issues. This track is oriented towards global solutions, necessarily operates at a higher level of abstraction and uses the language of legal rights. This is the track sometimes referred to as the "political agenda" of Aboriginal peoples.[2]

There are now two tracks for action regarding Aboriginal issues: the pragmatic, community level empirical approach; and the global human rights/self-determination approach. In the self-government debate these tracks appear as the Department of Indian Affairs-led community-based self-government program and the more recent *Indian Act* alternatives approach versus the constitutional entrenchment of the inherent right to self-government. In the justice area, these tracks appear as the pragmatic approach of working with Aboriginal communities and of repairing the existing system versus the rights/self-determination approach of establishing a parallel or separate Aboriginal justice system.

The terms in which the debate has been cast have created something of a false dichotomy between the two tracks as if they were mutually exclusive. The entire process seems to have been hijacked by this dichotomy and all action has been arrested while the debate plays itself out. At the risk of stretching a metaphor, the debate boils down to the following question: Should we provide the right to an Aboriginal justice system first and then build the remedy in the form of Aboriginal processes and institutions, or should we build the remedy first and then provide the right to them?

From this perspective, the real debate seems to be less incremental adaptation of the existing system versus a global right to create parallel or separate systems, but whether there is any kind of blueprint for action to address Aboriginal justice problems. The tendency has sometimes been to see a right to a parallel or separate system as such a blueprint. But it is not; it is merely a rights framework for the realization of Aboriginal responsibility for justice processes. In many ways justice issues, like constitutional issues, have become a lawyers debate that discounts the fact that on either track the actual assumption of greater responsibility begins in the same way – at the community level on the basis of community needs and desires.

Of course, the advantage of the rights track is that it establishes a framework of rough equality from the outset. This is the ideal way to proceed. But the starting point for action will be the same whether the rights framework is there or not: it will be the community, and the terms upon which it is willing and able to begin to take responsibility for its own processes in the justice area, and the degree of political will on the side of government to assist the community to take responsibility. The rights track merely provides a lever in the form of the threat of court action if political will is lacking on the government side.

The tendency has been to cast this as an either/or issue: either we deal with the rights track or we focus exclusively on pragmatic community matters. Few voices are heard to argue that both efforts proceed simultaneously. But at the community level the question has in many cases been rendered moot. Many communities are not standing still waiting for their national leaders to resolve the issue with national non-Aboriginal leaders. They are simply going ahead in practical, community-oriented ways to deal with local community issues, including justice problems. The federal Justice Department knows of well over a hundred such community justice projects that are seeking federal funding assistance. There are in all likelihood more local initiatives going ahead with provincial funding or with no financial assistance at all.

Two things are evident at this stage of the debate. The first is that we cannot await the outcome of the larger debate about rights and self-determination before taking action: the justice system has failed Aboriginal people and there is danger in delay. Further delay risks rupturing what is left of the partnership between Aboriginal people and government upon which action on Aboriginal justice issues depends.[23] As will be discussed below, the need for partnership between Aboriginal peoples and government will in all probability extend well into the future whether or not a constitutionally entrenched right of self-government or separate systems come into being tomorrow.

Second, we cannot ignore the rights debate and the broader political aspirations of Aboriginal peoples. Patricia Monture-OKanee and Mary Ellen Turpel express it well:

> An additional but related factor required for reform is an appreciation and sensitivity towards aboriginal political objectives.... an idea of what type of criminal justice system aboriginal peoples can respect can be facilitated only by respecting aboriginal political authority, not only the authority of non-aboriginal politicians. An appreciation of aboriginal political objectives is only possible through extensive consultation and review of aboriginal generated literature.[24]

Other students of Aboriginal issues such as Sally Weaver seem to agree that we have passed beyond the point where Aboriginal political aspirations can be discounted in formulating policy in other areas. She argues that Canada is currently experiencing a "paradigm shift"[25] in Indian (and by extension, Aboriginal) policy development as we move from a paradigm or perspective that focuses on legal formalism and state control to one that focuses on justice more broadly defined and emphasizes mutual adaptation and ongoing inter-cultural relations. This paradigm shift would thus correspond with the shift in role of Aboriginal peoples in Canada – from objects of debate in the 1940s to full participants in that debate in 1992.

While the thinking in many government circles still has not caught up to the permanent change in the federal landscape of the country, the thinking in other

circles seems to have gotten well ahead of the real pace of change in Canada. This, it is submitted, is one of the reasons for frustration on all sides of these complex issues. During the shift from one paradigm to the other, Sally Weaver argues that "we should expect to see erratic policy experiments, unfocused initiatives and false starts until the new mode of thinking settles into acceptance."[16] From this perspective, the current round of inquiries and studies may be seen as a form of judicially led and somewhat erratic experiments in policy thinking that are still seeking focus. This Royal Commission National Round Table on Aboriginal Justice Issues is one way of trying to develop that focus so that false starts may be avoided.

Importantly, the essential characteristic of the new paradigm is the permanency and flexibility of the relationship between Aboriginal peoples and the state:

> The first and perhaps most basic idea in the new paradigm is the notion that the relationship between the First Nations and the state (Canada) is a *permanent organic relationship*, one that will prevail into the distant future. The relationship is an ongoing and growing one, not a convergent one where the two political entities are expected to meld into a unitary form. Rather it is cast as parallel political forces flowing down through time, the key feature being that each force adjusts to the other and the environment in which they both operate. Hence there is no concept of termination of First Nations' relations with the state.... In sum, new paradigm thinking holds that finality is neither empirically achievable nor politically desirable.[17]

Two important elements of new paradigm thinking will be joint policy making and the transformation of some government departments into service providers to assist Aboriginal people rather than to direct them. The permanency of the relationship is crucial, as is the openness and partnership that this paradigm implies.

Diverse Peoples: Diverse Solutions

One reason why there cannot be a global blueprint for action is the sheer diversity of the Aboriginal peoples of Canada themselves. Patricia Monture-OKanee and Mary Ellen Turpel seem to agree that not only must the Aboriginal justice challenge be faced in partnership, but that there can be no singular answers for diverse peoples:

> What must be remembered as we begin to face this new challenge together is that the shape of the answer is not singular. There is not a single answer that will speak to the diversity of experience, geography, and culture of aboriginal people and our communities. To give but one example, the problems and solutions will be different for aboriginal people living on reserves or Inuit or Métis communities, as compared to those living in urban centres. Any reasoned response must be tailored to answer both the internal dimension of criminal justice

> problems (i.e., for aboriginal communities) and the external dimensions (i.e., for aboriginal individuals living away from their communities.)[28]

Projections from available census data[29] reflect some of this diversity. Canada's population includes 958,500 Aboriginal people: 490,178 status Indians, 33,000 Inuit, and 435,322 non-status Indians or Métis. Most experts would probably agree that the figures for non-status Indians and Métis are highly approximate, given that self-identification is the major tool for identifying these groups. The Native Council of Canada, for example, has repeatedly asserted that it represents 750,000 people (status Indians off-reserve, non-status Indians and Métis). The Manitoba Métis alone are claimed to number 111,000 people.[30]

Of the status Indians, only around 60% (less than 300,000) live on reserve. Of those living on reserve, 40% live in or near larger urban centres. The rest, nearly 180,000, live in rural or in isolated areas. Of the 603 bands and the 617 registry groups (discrete groups contained within a single band listing), 40 have less than 100 people, 265 have between 100 and 499 people, 259 have from 500 to 1,999 people, and 53 have populations of over 2000. The effects of Bill C-31 on the overall population of status Indians are still unknown. Projections for 1991 for all status Indians indicate a potential population of just over 521,000.

Aboriginal peoples inhabit all regions of Canada, with 84% living west of Quebec. Aboriginal cultures are often as or more different from each other as those of the countries of Europe are from each other. There are over 50 Aboriginal languages in Canada falling within 11 different linguistic groups. Moreover, Aboriginal peoples have different historical experiences of contact with non-Aboriginal settlers, and have different legal and constitutional relationships with the federal, provincial and territorial governments, depending on that history of contact and their status under Canadian law.

In short, the notion of Aboriginal "people" as such appears to be an illusory abstraction, as does the notion of a singular and global "Aboriginal" solution to problems in an area as broad as justice administration. Large numbers of Aboriginal people now live in urban centres. Of those Aboriginal people who continue to live in Aboriginal communities, many move back and forth to urban centres, often on a seasonal basis.[31] Many exclusively Aboriginal communities are themselves in close proximity to non-Aboriginal centres, with their residents of necessity following lifestyles reflecting a mix of cultural values. Many Aboriginal traditions have been wholly or partially lost, and some communities are now engaging in the difficult task of reconstructing traditional approaches and in adapting them to the modern reality of Canada.[32] Thus, the Indigenous Bar Association makes a point which is often lost when non-Aboriginal commentators discuss Aboriginal people and Aboriginal culture as a unitary phenomenon:

> All of the foregoing, of course, must be qualified by the observation that traditional values are more likely to be found in Aboriginal people who have had a traditional upbringing and less likely to be observed in Aboriginal people who have prior exposure to a contemporary urban lifestyle or to the criminal justice system. Moreover, it should also be kept in mind that the behaviour of individuals varies widely. Nevertheless, traditional values exist and have been the subject of frequent comment....[33]

But this is not to say that there are not common values or commonalities of approach among the widely different Aboriginal peoples. The Alberta Task Force Report sets out in broad terms the different underlying cultural values of Aboriginal and non-Aboriginal societies[34] in terms that are reflected in much of the inquiry testimony of Aboriginal people across Canada. There is an identity of culture in the broad sense among the otherwise diverse Aboriginal peoples that is real and undeniable.[35]

There is also an identity of aspiration in the broad sense that has been called the Aboriginal political agenda[36] and which expresses itself in the language of rights. It coalesces around the issue of self-determination and has been discussed earlier as one of the two tracks on which Aboriginal issues are being advanced. Thus, at the level of international debate and domestic constitutional discussions there is a tendency for Aboriginal peoples to speak as if they were one, as if their aspirations were identical or nearly so. This is natural given the high level of abstraction of human rights and self-determination terminology. It is also natural given the political imperatives that demand from Aboriginal peoples a high degree of co-operation in advancing such issues. But even on this track the particular forms that the right will take will reflect cultural and political diversity as well as shared cultural and political aspirations.

In short, on one track there may be exaggerated similarities, while on the other there may be exaggerated differences, depending on the focus of the inquiry. The truth will lie somewhere in the range between them and will be discoverable only through action at the community level in accordance with the will of that particular community. But there increasingly appears to be little possibility of a universal blueprint to be followed in the area of Aboriginal justice, even to repair problems about which there is consensus.

Aboriginal Justice Solutions and the Justice System

Thus, even if the political agenda of Aboriginal peoples on the rights track succeeds in bringing about constitutionally protected forms of self-government satisfactory to Aboriginal peoples, the relationship with Canada will continue. Hence the requirement in the Charlottetown Accord constitutional package that inherent sovereignty was to be exercised within Canada, federal and provincial laws apply until displaced by Aboriginal laws, and that federal and provincial

laws "essential to the preservation of peace, order and good government" will trump Aboriginal laws.

Similarly with regard to Aboriginal justice, it cannot be expected that parallel or separate systems will have no linkage with the existing system, even in their most developed forms. The starting point for their creation will be what now exists; they will of necessity evolve in stages from what now exists, and they will in all likelihood retain substantial links with what now exists because they will still be within Canada. In any event, even if a separate system were created tomorrow, it is highly unlikely Aboriginal communities would wish to take on the full range of *Criminal Code* matters, for example, even if such a thing were contemplated by government.

The establishment of parallel or separate systems will change the terms of that relationship, but not the fact of a relationship. In other words, parallel or separate systems of Aboriginal justice would not spring full blown from the void and they would not exist in a void even in their most fully developed form. The necessity of proceeding in stages is recognized by the authors of the Manitoba Inquiry. They propose a process based on trilateral negotiations as a way of acquiring gradual Aboriginal jurisdiction over different areas:

> It seems logical to us that one of the concerns which Aboriginal groups will want to address in particular is the question of having the provincial justice system withdraw from particular areas of jurisdiction at the same pace as they are being assumed by Aboriginal justice systems.[v]

This is a vision that is apparently shared by the national chief of the Assembly of First Nations. In an extensive interview, Ovide Mercredi described his vision of an Aboriginal justice system in terms that indicate a similar phased approach, the absence of an authoritative blueprint and continuing linkage with the existing system as a matter of practical necessity:

> The basic approach we want to take in the creation of our own systems of justice is flexibility, allowing for the evolution of systems of justice rather than a universal plan. For example, if one community wants to proceed on the basis of a juvenile court system and that is all they want, then that is all they should have until they want more in the future. If a group of First Nations wants to join together to create a family court, or a child welfare court, let them do it in their own way. If that is the only system of justice they want to administer, so be it. If they want to keep the *Criminal Code* for the other system, that's their decision. Flexibility is important.
>
> Consensual development is equally important. If a native group wants to adopt parts of the white system and create other parts of an indigenous court system where the two work in tandem, that's their business. Those are things that can be worked out. It really depends on each First Nation and what their needs are.The Manitoba Report presented

> one model of how to proceed. They have studied the situation in Manitoba, and the model they present is probably workable in that area. The idea of Indian tribal courts is a very plausible option, provided the people want it that way. The key is consent – the people's consent.
>
> Right now, there is a feeling that the white system of justice is not serving the interests of native people, so we're looking to alternatives. But the alternatives that are developed have to be developed by us. And they have to be accepted by the community, otherwise they're not going to work. It would be another imposition by people like myself, or chiefs. If the people consent to it, they will respect the system and they will work within it. The native system doesn't have to be a mirror of the institutions of justice that are presently in place.
>
> We don't have to have courts, we can set up grievance procedures or mediation panels. The important thing is to restore harmony in the community and to provide some form of recovery or healing.[18]

Leaving aside this conceptual debate about linkage between the Canadian system of justice generally and whatever variations may emerge in Aboriginal communities, there are also practical reasons why specifically Aboriginal definitions of and solutions for Aboriginal justice problems cannot exist apart from the existing system: economies of scale, human and financial resources, the needs and desires of communities themselves, etc. In short, it cannot be expected that Aboriginal systems within or outside the formal structure of the existing system of justice will not be linked. Thus, from this perspective the more useful question is not whether there should be a move to separate systems. Rather, it is how to move to Aboriginal control over and responsibility for Aboriginal justice processes under present conditions in a way that will provide the basis for their continued evolution should the momentum of the Aboriginal political agenda result in some sort of parallel or separate status for them.

Justice Administration in the Governance Environment

The present governance environment will dictate the extent to which the current system can be adapted to simultaneously meet the present concerns of Aboriginal people and respond to their broader political aspirations. In terms of justice administration, the most salient characteristics are shared federal/provincial constitutional jurisdiction; the necessity to share costs for any changes or programs; and the changing and politically volatile nature of the overall federal landscape in Canada where, following the advent of the *Constitution Act, 1982* and several subsequent abortive attempts to continue the amendment process, the roles of the political elites, citizens groups and Aboriginal peoples are still being defined.

In addition, the judicial re-articulation of the special relationship between the Crown and Aboriginal peoples as a fiduciary obligation, but without clarification of its nature or extent, has added an element of real uncertainty to an already tense and complex environment.[39] In the same way, the growing attention focussed on domestic Canadian problems by international human rights organizations, although not yet a determinative factor in Aboriginal matters, is adding new pressures that will be discussed below.

The various Aboriginal justice reports and studies contain a host of detailed suggestions for meaningful change to the existing justice system. Most of these reports have been relatively confined in scope, however, being geographically limited to a particular province, or limited in subject matter to one aspect of the problem (such as corrections, for example). It was not the mandate of these commissions of inquiry or academic researchers to take account of the overall justice administration environment in Canada, and they have not done so.

The issue from the viewpoint of government, and particularly that of the federal government, is that it cannot respond in discrete areas, no matter how important or pressing the need may be, without considering the wider implications of any actions it takes. These wider implications are primarily constitutional, fiscal and political.

Constitutional

Divided constitutional jurisdiction over justice administration requires a cautious approach to justice reform by both levels of government. Given the general federal power over criminal law and procedure and the overall provincial responsibility to administer justice, it is very difficult to draw a clear line separating federal from provincial jurisdiction. Since neither level of government is easily able to proceed unilaterally, a high degree of co-operation is required in order to make the system work.[40] And co-operation was the order of the day until relatively recently in Canadian history. Partly as a result of the constitutional renewal process that began in the 1970s, tensions have arisen in a number of areas.[41] John Whyte observes that "long-standing arrangements that had been assumed to be both functionally and constitutionally appropriate have been challenged and the 'administration of justice' has joined the ranks of trade regulation, resource management and criminal sanctioning as one of the active areas of constitutional conflict."[42]

The competing federal and provincial policy objectives have found fertile ground for conflict in the area of justice administration. As the Neilsen Task Force Study Group notes, somewhat blandly: "It is inevitable that there will be tensions in an arrangement where the federal government legislates, as for criminal law, and the provinces pay for its administration."[43] Nowhere, for example, has this been more evident than with regard to the *Young Offenders Act*, with the provinces delaying or frustrating the federal policy objectives in many cases.[44]

Even where the *Criminal Code* has been amended under exclusive federal constitutional authority, as in the case of the victims provisions, the provinces have frustrated the implementation of the overall scheme largely because of the added administrative and financial burden the victims restitution and enforcement provisions would impose on them.[45]

There is little doubt that the federal government could oust the provinces from the administration of justice regarding federal legislation,[46] including the *Criminal Code*. There is also an attractive argument favouring wide federal power over anything to do with "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. This argument was adopted by the authors of the Penner Report in 1983 and its force has not diminished since then.[47] It is highly unlikely, however, that any federal government will wish to proceed without the full concurrence of the provinces in any area of justice reform.

Fiscal

Federal/provincial cost-shared programs comprise a second and related aspect of the equation. Since the Neilsen Task Force Report on Justice in 1985, the emphasis of the federal government has been on the development of a strategic focus for the available federal funds. The conclusion of the Neilsen Study Team was that national justice services should be shared between the federal government and the provinces and that all new justice initiatives should be on a co-operative footing. The joint development of program costing data and joint demonstration projects was recommended as the best way to proceed.[48]

Since then Canada has seen a series of decisions in areas such as legal aid, for example, where federal contributions have been capped at the 1989-90 funding levels. Other programs such as Native Courtworkers are under review, while still others are headed for extinction if the current round of internal federal government consultations are any indication. In short, there is just less federal money to go around and it is being targeted more precisely than ever. Less federal money means less money for cost sharing with the provinces and less financial incentive to them to co-operate with the federal government in implementing national justice policy of any kind.

Fiscal restraint is not simply the result of the current recession, and it will in all likelihood outlive this recession and whatever federal government may follow the next general election. As this paper was being prepared, the federal government was continuing to study how government departments and services could be rationalized and even eliminated. As a result, further tensions have been introduced as provinces increasingly argue for greater federal financial responsibility for Aboriginal people. While this is itself not a new theme, what is new is the extremely high degree of uncertainty now present in the justice area. After two decades of having been encouraged by the federal government to enter into

justice program cost-sharing agreements, the provinces are now understandably apprehensive about the reliability of the federal commitment to long-term arrangements of the type with which they have become familiar. Pending clarification by the federal government of its long-term intentions regarding programs in this area, these heightened tensions will not likely subside.

Political

The effect on the legal and constitutional order of Canada of the broader political struggle of the Aboriginal peoples has now been acknowledged (and, some would say, legitimized) by our highest court.[49] But it is precisely this political dimension that often confounds government policy making.

In the first place, all governments are struggling with the post-patriation changes to domestic law and politics since 1982. New "cleavages" have been introduced as a host of new actors enter all areas of public policy debate.[50] The new array of individual and collective rights enter into conflict not only with existing state prerogatives, but also with each other. The current struggle between the Native Womens' Association and the Assembly of First Nations regarding the limits of Aboriginal self-government vividly illustrates a brewing problem – the difficult fit between traditional Aboriginal conceptions of governance and the individual rights regime in the Charter.[51] In a contest between individual and collective rights of this nature, the possibility of a public backlash against Aboriginal self-government in the name of equal rights[52] cannot be discounted.

Secondly, government must now scan the international environment. Alan Cairns notes that "the significance of race as a category in international political thought invests its domestic treatment with international dimensions absent from many other policy areas – hence, the tendency for Canadian aboriginals to scan the international environment for political resources that can be exploited for domestic purposes."[53] The international trend toward ethnic pluralism and racial and cultural equality finds a domestic echo in the writings of academic commentators[54] and in the public pronouncements of national Aboriginal leaders. Ovide Mercredi's use of terms such as "cultural imperialism" in the domestic context of justice reform[55] echoes the international decolonization debate and strikes a sensitive nerve in government which now devotes more attention to international indigenous matters as a consequence.

The international debate has other domestic echoes that indicate that international pressures will likely increase in the future.[56] In 1985, for example, the *Indian Act* was amended partly to bring it within international norms.[57] Other Aboriginal complaints that may have similar repercussions are now pending against Canada in the international human rights arena.[58] One of the most significant developments in recent years was the presence of human rights observers from the European Parliament during the Oka crisis. Canadians and

their governments are not used to an international image other than that of U.N. peacekeeper. The stated intention of the national chief of the Assembly of First Nations to take the issue of domestic Aboriginal self-government to the United Nations simply adds pressure to an already pressurized area.

Thirdly, and despite the past few years of constitutional discussions, governments remain unclear on the precise political objectives of the Aboriginal peoples. The meaning of self-government has always been problematic, hence the emphasis on definition. The example of the American notion of "domestic dependent nations" is often advanced by Aboriginal groups in Canada.[59] But in the United States the reality does not match the rhetoric, and the American courts have been forced over the last several decades to sketch out the modern contours of tribal inherent sovereignty (and in so doing to limit its scope in many instances). This exercise has been made necessary by the great variety of third party rights that have arisen on reservations during the lengthy period when tribal self-government was not operating. The judicial balancing of those interests with those of tribal self-government[60] has introduced large gaps in the law, created uncertainty in important areas like taxation and justice administration and severely strained already bad relations between the tribes and the states. An additional complication has been the sustained popular backlash against tribal governments.[61]

In addition, government often finds itself perplexed by the internal politics within national Aboriginal organizations. The Assembly of First Nations, where there exist significant groupings (such as the prairie treaty Indian nations) whose interests and objectives do not always mesh with those of the national organization, is the prime example. Some First Nations are willing to work with government on non-constitutional issues such as alternatives to the *Indian Act* or community based self-government while others are not. Some are willing to work with provincial governments in areas such as the regulation of gaming activities on reserve, for example, while others are not. Other examples could be cited.

In summary, and despite the long list of Aboriginal justice inquiry recommendations, government finds itself in what Sally Weaver has described as a paradigm shift: without a clear understanding of the problem or its precise causes, overwhelmed by conflicting demands from an increasingly tense governance environment and without a clear, generally accepted and explicit policy framework to ensure a consistent and co-ordinated approach that would provide a firm basis for federal commitment to federal/provincial cost shared initiatives.

A New Approach: Two Simultaneous Projects

One of the difficulties in taking action is the absence of an explicit policy framework. Related to this is the knowledge that the justice system alone cannot deal with the consequences of historically based social, economic and cultural

inequity. The justice system or, for that matter, any single jurisdiction acting unilaterally is ill-equipped to address the root causes of crime and related justice problems. Accepting that there cannot be a singular answer or a simple blueprint, government finds itself confronted by a vast list of justice recommendations from a series of reports going back to 1967. They fall roughly into two camps: reactive adaptation of the type exemplified by the Blood Policing and Alberta Task Force reports, or radical transformation through the creation of a separate system of justice such as recommended by the Manitoba and the Law Reform Commission reports.

Straightforward reactive adaptation, through cross cultural training, hiring of more Aboriginal staff ("indigenization"), training more Aboriginal lawyers, creating Aboriginal community liaison mechanisms and advisory groups etc., will respect current federal/provincial responsibilities (although possibly straining resources) and impart greater awareness and sensitivity to Aboriginal concerns among justice personnel. Adaptation of this type may fail to address the alienation of Aboriginal peoples and will certainly fail to respond to the larger aspirations toward self-government.

Radical transformation may well meet Aboriginal political aspirations, but may also prove too radical for Canadian political and administrative institutions still digesting the constitutional and fiscal changes of the last decade. It may also run afoul of a mobilized citizenry (including a politically significant group of Aboriginal women) still sorting out its approach to individual versus collective rights and may inflame less liberal segments of the Canadian electorate that have the ability to influence the outcome of elections in Canada. It will certainly require the allocation of diminishing resources and will almost certainly require constitutional amendment.[62] Radical transformation will also not alter the basic equation: all change begins with the existing system, grows from the existing system and remains linked to that system in a permanent organic relationship.

The approach of government must reconcile the reactive adaptation and the radical transformation approaches in a way that prejudices neither. It must repair the existing system in accordance with the many inquiry recommendations to that effect, and it must lay the groundwork for the type of institutions that Aboriginal communities will need in the event the current constitutional framework is amended to reflect the demands for constitutionally protected self-government. Moreover, it must harmonize with other efforts to deal with the underlying social and economic problems confronting Aboriginal people: poverty, family breakdown and violence, substance abuse, and general youth crime and delinquency.

These general community problems contribute to and aggravate community disintegration and inhibit social and economic development. An important element of this community breakdown has to do with the destruction of the family unit and the growing rift in the cultural relationship between Aboriginal men and women.[63]

The proper approach must therefore be holistic. It must be part of the community healing process, because that is how Aboriginal communities are approaching their own problems.

Although many examples could be cited, that of the Lheit-Lit'en Nation of the Carrier Tribal Council of northern British Columbia is particularly illustrative of the holistic nature of the healing process, of which justice administration is a part:

> ...the elders, chiefs and council decided in 1990 that the community needed to prepare to heal itself. There were a lot of problems in the community. We started with community education based on survey interviews in which the community identified problems and suggested solutions. These problems included family issues, unemployment, poverty, racism, discrimination, drug and alcohol abuse, child neglect, child abuse, sexual abuse, and jealousy. Once the issues were defined, a series of community meetings focused on each issue to solicit feedback; this process also made public many issues and feelings that had been kept private. Family violence was no longer a private issue. It was now a community issue....
>
> ....In early 1991, the elders held a community meeting to address these issues. The whole community got together, including the two major family factions, and reached an agreement to operate as one. They decided to adopt band customs, and among other actions, eliminate the election of the band chief. The Council of Elders is now trying to define very explicitly what is meant by Lheit-Lit'en justice in these issues. We are not talking about justice as a category separate from others, but justice as part of all categories, whether related to young children or the elderly, economic development and land, the relationship with nature and relationships with each other.[64]

The proper approach must therefore cut across the jurisdictional barriers that divide governments and the individual departments and ministries of government to address the complex interplay between crime prevention, cultural recovery and social and economic development and in so doing avoid the "file" and "list" approach so favoured by the judicial and bureaucratic mind. In short, the proper approach must be part of the agendas for action of Aboriginal peoples and communities to the extent possible under current constitutional arrangements. It must be driven by Aboriginal peoples as part of their cultural renewal and political mobilization at a national and at a community level and allow them to follow both the rights track and the pragmatic community track simultaneously.

Once again, Monture-OKanee and Turpel seem to capture what is required to make real progress:

> The solutions most commonly discussed are a separate justice system for aboriginal peoples, parallel systems or considerable

> accommodation within the existing justice system. Just as aboriginal peoples are not homogeneous, it would be a mistake to characterize the solutions to the current problems as unitary choices. While the contours of aboriginal control over community life are negotiated in many areas and subsequently instituted, it will be necessary to improve the conditions of aboriginal offenders in the short-term through further accommodations within the existing system. Therefore, it would be misguided in our view to conclude that movement in one direction precludes movement in other areas. Clearly there are two simultaneous projects which must be undertaken to eliminate systemic discrimination in the criminal justice system:
>
> (i) the development of internal community structures for aboriginal criminal justice;
>
> (ii) improvements to the non-aboriginal system, or the system aboriginal people encounter outside of their communities. [65]

Thus there must be movement on these two simultaneous projects: developing internal community justice structures; and improving the overall justice system. The latter can be accomplished on the basis of the many recommendations to this effect in the various inquiry reports and can be begun on a unilateral basis by government.[66] Both levels of government have already started on this latter project, however haltingly, and will no doubt outline their efforts to this Commission in another forum.

Developing internal community justice structures requires a different approach, however. In the context of the constitutional, fiscal and political features of the current federal landscape already discussed, a tripartite approach (federal government, provincial and territorial governments and Aboriginal communities or other groupings such as tribal councils, urban associations, etc.) in joint action seems to be the only appropriate one. This means that funding arrangements should reflect legislative jurisdiction, and that cost sharing in areas of shared responsibility should be based on formulae agreed by all parties. Failure to agree on funding responsibilities at the outset will risk invoking the current unsatisfactory attitudes in other areas of federal/provincial justice cost sharing where bickering and stalemate seem to be the order of the day.

Clearly, this approach will be successful only if Aboriginal communities see it as part of their own ongoing programs for self-renewal, if they are implemented with appreciation by government personnel of the varying capacities of communities to develop and manage programs, and if they are developed on the basis of a shared understanding of the limits imposed by the current legal and constitutional justice administration framework. In other words, such steps must fit into the track or pathway on which Aboriginal communities are already walking.[67]

Michael Jackson has recently described what some of those first steps might look like[68] under the general rubric of alternative dispute resolution. This term captures different mechanisms that have in common that they are community

based, utilize Aboriginal community resources and customary approaches, exploit the inherent flexibility of the existing justice system and are delivered by Aboriginal people to Aboriginal people as part of a larger program of community self-regeneration. In an earlier work for the Canadian Bar Association, he also described a number of similar approaches that exploit the flexibility in the justice system at the sentencing stage.[69] There are other areas such as probation etc. in which that flexibility could be exploited by Aboriginal communities in the same way.

Importantly, they are the type of innovations in which governments can participate without prejudice to the current constitutional framework. If that framework changes through constitutional amendment or otherwise, these are also precisely the sort of mechanisms upon which Aboriginal communities will build if they wish to establish their own justice systems as part of their wider self-governing powers. This approach is also consonant with the practical vision of Ovide Mercredi, who has stated in the justice context that:

> The basic approach we want to take in the creation of our own systems of justice is flexibility, allowing for the evolution of systems of justice rather than a universal plan....
>
> We don't have to have courts, we can set up grievance procedures or mediation panels. The important thing is to restore harmony in the community and to provide some form of recovery or healing.[70]

These are also approaches that are not confined to rural or isolated Aboriginal communities of status Indians or Métis. Alternative dispute resolution mechanisms could be adapted to the conditions of Aboriginal residents of urban centres. The Vancouver Storefront Liaison Project[71] is one example. It provides an alternative to the Vancouver police department for urban Aboriginal victims to report crimes and file informations. It also provides counselling and referral services, promotes crime prevention and liaises with other agencies. This is the type of project that could evolve into an urban Aboriginal "community" service provider that might expand into diversion, sentencing, probation and other areas if permitted to evolve with Aboriginal political mobilization in the urban context.

In his earlier work for the Canadian Bar Association, Michael Jackson proposed a pilot project approach to the establishment of alternative native justice systems.[72] The same approach could apply to initiatives to develop alternatives within the current system, since they are the foundation upon which future alternative native justice systems will be built. The pilot project approach has the further advantage of complying with the emphasis in the Neilsen Study Group report on demonstration projects as the best way of attracting scarce financial resources. Most important, a pilot project approach seems to be consistent with how Aboriginal communities are now proceeding.[73]

Aboriginal communities are experimenting with mixtures of traditional and modern alternatives to the court system and attempting to find ways of linking their approaches to the existing system. The Gitksan-Wet'suwet'en alternative dispute resolution project is a good example. It proposes "to implement an alternative in northwestern B.C. that will allow the dispute resolution laws and methods of the Gitksan and Wet'suwet'en people to interact with the provincial system in a way that does not undermine the integrity of either."[74] Aboriginal communities should be able to continue to experiment with the assistance of government without being tied irrevocably in the eyes of government to any single approach.

One practical problem that will have to be overcome is the current structure of government funding for such projects.[75] Michael Jackson has outlined this problem and a possible solution as follows:

> One of the other problems which Aboriginal justice initiatives have encountered in obtaining the necessary level of funding is that government commitments are often structured in such a way that it is difficult for a community or a tribal group to have any confidence that the funding will continue beyond the first phase. The programs therefore have no assurance of continuity from year to year; furthermore the Aboriginal community is placed in the position of having to prove to non-Aboriginal justice officials that the initiative is worth continuing.
>
> Some of these problems would be avoided by the establishment by the federal government of an Aboriginal Justice Commission which would have committed to it monies which it could assign to Aboriginal justice projects around the country. Such a Commission would be staffed by Aboriginal people with expertise in the area and it would be anticipated that its funding criteria would avoid the pitfalls of existing departmentalised government programming. The level of funding would be substantial (sic) bearing some relationship to the enormous financial costs of the over-representation of Aboriginal peoples in Canada's prisons.[76]

There is much merit in this suggestion for a body that might perform an independent function of this nature. However, there is always the danger of creating simply another bureaucracy that would add a third corner to the current two-cornered federal/provincial squabble over justice program funding. Another avenue that might be explored is a national Aboriginal steering committee coupled with the hiring of more Aboriginal people within existing government structures to influence decision making in this area. It is perhaps here that this Royal Commission could bring its influence to bear, for it is in the thorny question of allocating resources that all initiatives, including the establishment of separate justice systems, may flounder.

In summary, the answer to the question of how to accommodate Aboriginal concerns must be twofold: unilateral government action that has here been

described as reactive adaptation to sensitize the existing system; and assistance to develop alternative approaches that exploit the flexibility that exists within the existing system. Government can assist but must not direct or try to assume control of what to all appearances is a naturally evolving and spontaneous attempt by communities to begin addressing their own problems on their own terms.

This second project of community-led action cannot unfold according to lists or priorities prepared by outsiders. It must evolve on its own terms and at its own pace. The resulting adaptations to the existing system will be prepared by Aboriginal peoples to reflect their own culturally shaped perspective on their problems and their solutions. This will be the foundation upon which future change will be built. What effect this will have on the overall Canadian system of justice administration cannot be known in advance. Once more, Monture-OKanee and Turpel have grasped the essence of what is required:

> While we do not attempt a list of recommendations ...we have attempted to highlight the conceptual understanding of cultural differences in this area. This is the essential groundwork that we must build on in order to develop a new perspective on criminal justice. This is the first and only a very small step. It is clear that what is required is meaningful and systematic change which respectively embraces aboriginal perspectives and experiences and shows an openness to aboriginal systems and their implications for Canadian criminal justice.[7]

Accommodation in Particular Areas

In a brief passage in its report, *Aboriginal Peoples and Criminal Justice*, the Law Reform Commission succinctly summarized its impression of the essential problems experienced by Aboriginal people in particular areas of the existing system, focusing on the role that counsel could perform to alleviate the apparent injustices:

> Aboriginal persons face unique difficulties in the criminal justice system: cultural misunderstandings may lead a police officer or a prosecutor to lay charges or continue charges; conditions of bail that are otherwise routine may be unusually arduous for an Aboriginal accused; an Aboriginal person may have unusual difficulties in understanding the trial process; legal defences unique to an Aboriginal accused may be appropriate; an understanding of Aboriginal culture may be necessary for the trier of fact to assess credibility; a sentence may have unusually harsh effects on an Aboriginal accused. In each of these cases sensitivity on the part of police, prosecutors, judges, juries, and probation officers is required, and a failure by any one group can have unintended adverse consequences. In all of these situations, defence counsel can do much to compensate for the shortcomings.

> An Aboriginal accused person's lawyer, owing to the protective nature of counsel's role, is the one most intimately engaged in ensuring that his or her client is treated not only equally, but in an equitable manner and with respect. Lawyers acting on behalf of Aboriginal accused persons must therefore be aware of Aboriginal justice issues and able to raise them in a meaningful way.[78]

The Commission provides in its report a number of recommendations, most of which are not Aboriginal-specific, to remove problems based on cultural misunderstanding and economic bias. The Commission was apparently sensitive that the overall system had to maintain its universal nature in order to continue to be generally relevant to the broad mass of Canadians. In situations where the Commission saw it as appropriate to depart from this principle, it has, mainly to recommend the creation of "Aboriginal justice systems".[79]

The position of the Commission and of this writer do not differ in this respect. The major point of difference is that in this paper the rationale for a pilot project approach to the creation of Aboriginally controlled justice processes in Aboriginal communities is set out in evolutionary terms, on the understanding that they may or may not grow into fully fledged parallel or separate "Aboriginal Justice systems".

Thus, from this perspective, there are two simultaneous projects. The first is to amend justice processes in the overall system to correct elements that result in discrimination against Aboriginal persons. These elements often discriminate against other persons too, and so universal repairs are called for. The second project is to work with communities to develop alternatives by exploiting the inherent flexibility of the existing system. Communities from this vantage point must be broadly defined to include urban Aboriginal people who may decide to create such a community, by creating a "community of interest" in the form of a liaison project, legal services corporation or something else of a like nature.

Thus, special rules or *Criminal Code* amendments regarding, for example, the taking of statements from Aboriginal persons on an "Anunga" style model[80], or special search and seizure guidelines[81] for Aboriginal people are not recommended. The major problem will be practical: who is to be considered "Aboriginal" for purposes of these rules? Ultimately the courts may be forced to create sub-rules on how "Aboriginal" one needs to be; i.e., status Indians from reserve communities may qualify, but non-status Indians from urban environments may not etc. There is also the inevitable Charter section 15 argument looming.

It seems to this writer that the better solution is thoroughly to educate the judges and the defence bar to the issues to ensure that the relevant Aboriginal perspective is brought to bear more forcefully in all areas. Routine bail conditions are simply not fair to a range of people, including Aboriginal people. Statements given by some Aboriginal persons to police may not be "voluntary"

because of cultural differences. Some pleas of guilty may not be voluntary or informed for the same reasons. There are arguable justifications, excuses and mitigating circumstances for many Code offences based on cultural or other factors unique to some Aboriginal persons, and possibly to other minority cultures as well. The question of intent, or reasonableness under the circumstances will need to be more thoroughly explored in the fact pattern of each case where Aboriginal or other persons of different cultures are involved. Speaking to sentence will have to go beyond the usual recitation of the bare number of facts such as age, address, place of employment, etc. to incorporate the cultural dimension that may call for a different disposition.

All this poses new challenges to the bench and bar that should be taken up before considering changing a complex, interrelated and already strained system of justice. If cross-cultural training, appointing more Aboriginal judges, indigenization of the system, drawing Aboriginal people out of the system through alternative measures like diversion projects, etc. fail to correct the problems, then it may be time to consider further changes. But by then, at least, the changes attempted and the pilot projects undertaken in Aboriginal communities and in urban centres will provide a stronger factual basis for statutory or other changes of a more rigid nature.

Policing

Policing has been extensively criticized in the inquiry reports and studies: non-Aboriginal police are generally seen as out of touch with Aboriginal communities and not accountable and, in urban centres, are described as insensitive, if not discriminatory. Aboriginal delivered policing services to reserve communities have too few officers to respond to the demands made on them or to do anything other than reactive policing, and have insufficient or inconsistent powers and jurisdiction under the various statutory or administrative regimes in place (ranging from non-Aboriginal RCMP to local band constables).

The cure for the urban problems seems plain enough: the recommendations in the reactive adaptation camp must be studied and implemented. In short, the "corporate culture" of urban policing must change through greater accountability to civilians generally, cross cultural training and representative indigenization. This has already begun with the proliferation of civilian review agencies for police actions across Canada, increased hiring of ethnic minorities generally and a burgeoning interest in Aboriginal cross cultural training.

Beyond this, it is difficult to envision other changes specific to Aboriginal concerns that could be introduced without creating special measures for Aboriginal persons, inevitably leading to issues of how to identity someone as "Aboriginal" and to the inevitable question of how "Aboriginal" is "Aboriginal". In any event, Aboriginal persons are not the only ones who complain of mistreatment at the hands of the police. Special measures for Aboriginal people would be hard to

justify to other minority groups in urban environments such as the black population of cities like Halifax, Dartmouth, Montreal and Toronto.

To the extent that Aboriginal persons are less able to cope with urban culture, initiatives like the Vancouver Storefront Liaison Project[82] offer a community-like alternative to direct contact with the existing justice system, providing urban Aboriginal persons with a culturally sensitive means of reporting crimes, offering counselling, crime prevention and referral services, and assistance in dealing with other urban agencies. Funding should be directed to services like this which act, in effect, as a surrogate "community" for Aboriginal people in an otherwise non-Aboriginal environment.

It is on reserves and in other discrete Aboriginal communities that the tripartite approach to policing can lay the groundwork for the future development of greater Aboriginal control over justice processes. Tripartite negotiations would have as their goal to come up with policing arrangements that are more responsive to individual community needs and to correct the pattern of inconsistent, incompletely funded and jurisdictionally uncertain Aboriginal policing programs. The goal would be to establish local community police services under provincial jurisdiction on a federal/provincial cost shared basis. Such an approach would create police forces under greater community control; i.e., civilian review agencies would be community-based, etc.

Provincial jurisdiction will be necessary under current constitutional arrangements and to assure cost sharing and standards of training and actual policing consistent with other communities in the province. In other words, Aboriginal police officers would be provincial police in terms of training and powers, but community police in terms of the first level of accountability. A related goal is to increase the numbers of fully trained and empowered Aboriginal police officers serving in Aboriginal communities and to thereby lay the groundwork for future evolution in accordance with the political agenda of many communities.

Access to legal services

Access to legal services for Aboriginal persons has also come under criticism, largely because of the lack of availability or the cultural inappropriateness of the services provided and the resultant inability of Aboriginal persons to utilize them. Many Aboriginal people are reluctant to seek out legal help which they too often find to be remote, alien and unsympathetic. This results from the relative lack of Aboriginal legal professionals; the insensitivity of non-Aboriginal legal professionals; the inappropriateness of current legal aid models for addressing Aboriginal needs and concerns; and the physical remoteness of legal services for rural and isolated communities.

There is no question that current federal and provincial programs ought to be improved in line with the many recommendations to this effect regarding

Native Courtworkers, federal programs to provide financial and counselling assistance to Aboriginal persons seeking entry into the law schools; public legal education; and cross cultural training. And there is no question that legal aid ought to be beefed up generally, although that is hardly likely in the current fiscal environment.

An area that has been somewhat neglected to date is the private defence bar. The law societies should be encouraged to promote greater cross-cultural training and awareness of Aboriginal issues among this segment of the legal population. An aroused defence bar is the best way to change attitudes throughout the legal system. Through their efforts the Charter has become a real instrument of change in the courts and in the legal environment generally. Greater awareness of Aboriginal concerns and a corresponding willingness to advance them might produce the same effect and might produce additional pressures on provincial legal aid systems to be more responsive to the need for better service delivery to Aboriginal persons. At the very least, Aboriginal accused might get better legal representation on an individual basis.

At the community level, the solution is to empower Aboriginal people to design and deliver unified legal services in accordance with their knowledge of their own needs and capacities. Such an approach would lay valuable groundwork for an eventual expansion into other areas of justice administration. A promising model is the current Nishnawbe-Aski Legal Services Corporation from northern Ontario.[8] It is a "one-stop-shopping" centre where community legal workers provide public legal education, assist defence counsel (interviewing witnesses, obtaining information from the police), and play an active role in the various stages of the court process (coordination of court circuits, commissioner of oaths, representation of clients before courts and tribunals, etc.).

The Nishnawbe-Aski Nation is made up of 44 individual scattered bands and has a population of approximately 26,000, occupying an area spanning the remote north. The 44 communities, with few exceptions, may be reached only by air. In 1985, the Nishnawbe-Aski Nation proposed the concept of a legal services corporation as a way to improve the delivery of legal services to the fly-in communities. Following a feasibility study, the Nishnawbe-Aski Legal Services Corporation was established pursuant to negotiations between the Nishnawbe-Aski Nation and the Governments of Ontario and Canada. All the members of the corporation board of directors are members of one of the communities within the Nishnawbe-Aski Nation.

The purpose of the Board of Directors is to provide overall direction to the administration of the corporation in order to make certain that it serves the needs of the First Nations. At the annual Keewayin Conference, the Board provides a report on the corporation to the First Nations of Nishnawbe-Aski Nation. The mandate of the Corporation is three-fold: legal aid, public legal education, and law reform. It is intended that the major thrust of services will

occur in the areas of public legal education, cross-cultural training, legal services, interpretation services, and a law reform function which will largely consist at the outset of a research project."[4]

The Head Office is in Thunder Bay on the Fort William Indian Reserve, with a branch office in Sioux Lookout. The executive director oversees the day-to-day running of the corporation and is responsible for the delivery of legal services by the corporation since he is also an area director of the Legal Aid Plan of Ontario. The public legal education co-ordinator is responsible for legal education and the development of a training program for the community legal workers. This person will also assist in the development of continuing legal education for members of the legal system, the government and the non-Aboriginal public.

There are in addition a number of community legal workers, all members of Nishnawbe-Aski Nation who speak the language of the communities they serve as well as English. They will provide summary legal advice under the direction of the executive director, take legal aid applications and carry out much of the public legal education and law reform functions.

The costs for the services for criminal matters are eligible for cost-sharing under the federal-provincial legal aid agreement. However, the federal government has chosen to fund this project on a pilot project basis in order to isolate the costs and determine its feasibility for other areas of the country. This is also a model that, like the Vancouver Storefront Liaison Project, could work in the urban environment where there are enough resident Aboriginal people to form a community for purposes of many of the services available.

Bail

Bail is an area that should not be changed except to remove the over-reliance on monetary and other routine conditions of release generally. It is also an area where rural and urban legal services corporations or urban Aboriginal storefront liaison offices might be of considerable assistance in finding appropriate sureties where monetary conditions of release are imposed. In appropriate cases it is even conceivable that such agencies might play a direct role by assisting the court to dispense with sureties or cash conditions on the strength of a connection to the urban Aboriginal community that the corporation or storefront operation itself represents, etc.

Trial procedure

Trial procedure is another area singled out for criticism because of the cultural inappropriateness of Euro-Canadian procedures that focus on legal formalism and denunciation and which are executed by culturally remote professionals speaking a language unfamiliar to ordinary people. These concerns are often

compounded by more practical problems such as the lack of adequate interpretation and translation, the lack of understanding by court personnel of local issues, particularly in those communities which have no regularly sitting court, and the alienation of many Aboriginal people from a court system they do not understand. The pervasive view among Aboriginal people that the court system is imposed on rather than part of the Aboriginal community, that prosecutors initiate proceedings on behalf of the police or the system rather than the community and that judges make decisions without adequate understanding of or input by the community contribute to that alienation.

Here again, the Law Reform Commission recommendations seem to have struck a reasonable balance[85] between maintaining the integrity of the overall system and correcting obvious problems. But once again, in practical terms the problems boil down to official insensitivity to Aboriginal ways, for which cross cultural training and "indigenizing" the existing system and appointing more Aboriginal judges is a workable response across the board, as is the provision of greater access to interpreters, etc.

The more direct way to address the problem of Aboriginal alienation is to modify procedures where that is possible. For example, in some cases[86] courts have experimented with a circle format that allows more people to participate than just the professionals, requires plainer language by those professionals as a result, and has people facing each other rather than having the professionals perform with their backs to the people in court. This is the type of innovation that is worth continuing because it may lead to others that similarly maintain the integrity of the process and yet allow flexible adaptations. It is probably inappropriate for urban centres where time and space pressures are already beyond control, but it may be premature to speculate even here.

The best way, of course, is simply to avoid court altogether by the development of alternative approaches of the type described by Michael Jackson[87] whereby Aboriginal communities can simply divert their members from the whole trial process into more appropriate forums that can focus on community methods of restoring and healing etc. This is the area of greatest potential for removing people from the court system and the one that has the most promise of turning into an Aboriginal justice system, whether separate or not, in the future. But, as the Sandy Lake initiative in Ontario shows, sometimes it is of great advantage to the community to be able to invoke the outside power of the existing system to remove someone who is beyond control by such community processes.[88]

Sentencing

Sentencing is the area that brings into sharpest focus the conflict between Aboriginal ways and the attitudes underlying the existing system of justice. The Indigenous Bar Association, for example, notes the main difference and the similarities between the Aboriginal and non-Aboriginal sense of justice:

> The Aboriginal sense of justice, traditionally and currently, emphasizes the involvement and role of the community in the system of justice rather than prescribed laws and formalized roles and procedures. Nevertheless, functional Aboriginal objectives for justice are similar to those of the Canadian criminal justice system: deterrence of members from misconduct, public condemnation of offenders, means of restoring the offenders to society, and punishment, if necessary."[89]

There are a variety of government studies and legislative proposals going forward now that will address those aspect of both processes and they will be outlined by government representatives in another forum. But here again, greater awareness by justice system professionals such as social workers who prepare pre-sentence reports and defence counsel who make the submissions might go a considerable way to reducing the problems. The development of initiatives like the legal services corporation and the Vancouver Storefront Liaison Project as broad Aboriginal service agencies able to assist urban Aboriginal people and the courts might alleviate the current complaints about fine option programs and community service orders.[90] A more direct way is simply to exploit processes already going on in Aboriginal communities that use community input into sentencing and attempt to make effective use of traditional Aboriginal sanctions and approaches to healing as alternatives to current sentencing practices. Michael Jackson has already described how some might work.[91]

Corrections

Corrections reform must be a high priority in its own right since overrepresentation is one of the elements of the problem on which there is consensus. The correctional system inherits the consequences of other social, economic, cultural and justice problems of the type already described, and should benefit from improvements made elsewhere. A great number of changes have been made to the corrections system already[92]. For example, the federal Hobbema Minimum Security Correctional Facility will now be built in Alberta in cooperation with the Samson Cree on their land. Work on the operational plan for this facility is currently under way. A design for the facility will follow and it is hoped that construction will commence in 1993.

This facility will be staffed primarily by Aboriginal people for Aboriginal offenders. Program objectives support spiritual healing and development of Aboriginal cultural awareness as a basis for substance abuse counselling, academic upgrading, and job skills training. Both programs and the facility itself will stress reintegration into the community and will require extensive community involvement. The overall program operation would be holistic in nature, integrating program content into daily living and stressing personal growth, cognitive and social skills.

In addition, a healing lodge designed specifically for federally sentenced Aboriginal women is to be built near the community of Maple Creek/Nankeet

in Saskatchewan. The physical space for the lodge will reflect Aboriginal culture. The needs of the Aboriginal inmates will be addressed through Aboriginal teachings, ceremonies, contact with Elders and children, and interaction with nature. Program delivery will stress a holistic approach, supported by interaction with the community, and with a focus on release preparation.

The Correctional Service of Canada has for several years been working with a Council of Elders in each of the regions except Quebec. In addition, individual Elders from all regions have been going into correctional institutions to work directly with Aboriginal offenders. For many such offenders, this may be their first real contact with Aboriginal traditions and spiritual values.

Over the past several years, the federal government has also supported a number of developmental and experimental projects in Aboriginal communities. These projects are designed to gather information about innovative approaches to community corrections which are then shared with other Aboriginal communities across Canada. For example, the federal government contributes funds to the Dakota/Ojibwa Probation Service[93] in Manitoba which is exploring how to make probation services more culturally appropriate by increasing community participation and control over those services.

An option that has yet to be explored is that of privatizing correctional services in the way it is being done in some U.S. jurisdictions. In the context of Aboriginal concerns, there may be scope for Aboriginal communities, organizations or entrepreneurs to develop such alternatives exclusively for Aboriginal offenders using funds borrowed from government initially.

Parole

Parole is within the mandate of The National Parole Board, which occupies a transitional position in the criminal justice system. It is situated at the end of an already heavily criticized process that begins with the police, continues through prosecution and trial, and culminates in sentencing and imprisonment. At the same time, it is situated at the beginning of the process of reintegration of the offender into the community.

The Parole Board has begun opening up lines of communication with Aboriginal organizations in all regions, instituted cross cultural training programs, is attempting to hire more Aboriginal persons as staff and as members of the Board, and has participated in regional meetings with the Councils of Elders established by the Correctional Service of Canada in some regions. Parole readiness videos for Aboriginal offenders are being prepared and translated into Aboriginal languages to assist them to benefit more fully from the process, and translators made available for the actual hearings. A steering committee made up of Aboriginal and non-Aboriginal persons, chaired by a senior Parole Board member from the Samson Band in Alberta, has been established to make sure Aboriginal concerns are addressed.

An innovative pilot project has made radical adjustments to the actual parole hearing in the prairie region. Aboriginal parole applicants are heard by a panel consisting of Aboriginal members. In addition, an Elder is present to assist the panel and may comment during the course of the hearing. The session will be opened by traditional prayers if the applicant desires, and the actual hearing is conducted in a circle arrangement with a non-aggressive style of questioning.

One thing that has not been considered is the possibility of establishing a parole board for Aboriginal people from identifiable communities (i.e., Métis settlements, Indian reserves, Inuit communities) in much the same way that provincial boards have been established under existing legislation. Such a board would arguably be in a better position to assess the degree of risk etc. in releasing an offender to his or her home community.

Attitudes of system personnel

Attitudes of system personnel must be changed. That is a constant theme throughout this paper and the many reports and studies. Justice administration and service delivery can be effective only when conducted by those who understand and respect the culture and perspective of the community they serve. This will require the recruitment of more Aboriginal people within the system and a commitment to cross cultural training specifically focused on Aboriginal issues and emphasizing their special legal and constitutional position as well as cultural and other differences.

But it is important to recognize that cross-cultural training is limited in how much it can accomplish. It cannot necessarily teach people the other perspective; it can only make them aware that another perspective exists and that they do not necessarily grasp it. In other words, cross-cultural training cannot substitute for the presence of an Aboriginal person for whom that perspective is natural. In the same way, cross-cultural training cannot substitute for actual Aboriginal community control of justice processes important to that community. Cross-cultural training and increased knowledge and awareness generally can facilitate the transfer of control of those processes to the community, as has been demonstrated by the numerous experiments occurring now across Canada with sensitive prosecutors and judges, usually in more remote places. The literature does not record them all. It may not even record a fraction of what is occurring in terms of innovations to the existing system.

The importance of cross-cultural training and increased awareness is that they provide the foundations for the bridge between cultures and peoples upon which all progress depends. Ultimately, no justice system, unitary, parallel or separate, can function without people who understand that rules and agreed procedures do not necessarily accomplish justice. It is the inherent human wisdom that transcends procedures and even cultures that will bring about a better reconciliation between the system of justice and justice itself. Ovide Mercredi

captures the essence of the kind of bridges that need to be built for real change to occur:

> To get people to work for you, you first have to establish a common ground by creating an understanding for change. Then your real work begins, because once people agree that there should be change, the next question is "What kind of change ?"; and "How do we do it ?" After a while, you build an awareness, an understanding that this is the right thing to do. Then it happens....
>
> So we need to create allies within the system who can become champions for our cause. How do you do that ? Do you do it with force, or do you do it through a policy of respect ? I think you do it with a policy of respect, because if you do it with force you alienate people. If you alienate people, they are going to resist change. And if they resist change, you have not achieved your objectives.[94]

Establishing a common ground by creating an understanding for change is the key to the success of any attempts to modify Canada's justice system. And this will be so whether the attempt is to implement wholesale changes at once through the creation of a separate or parallel system, or whether the attempt is to adapt the existing system as outlined in this paper. Cross-cultural training can create allies within the system, but it cannot of itself change the system without the efforts of those most directly concerned, namely, the Aboriginal peoples themselves. Cross-cultural training to change the attitudes of system personnel can assist the ongoing efforts being made by urban and rural Aboriginal communities to bring about changes that accord with their needs and aspirations. For this reason alone it is vital and must continue. But it should never be forgotten by those within the system that they can be no more than the handmaidens of that change. The architects of that change must remain the actual communities that are taking control of their own processes on terms acceptable to them on the ground of the common understanding for change to which Ovide Mercredi refers.

Summary

This paper began with the paradox of Aboriginal justice reform in 1992. It is somewhat startling to find that there exists simultaneous agreement and disagreement on four basic conclusions: justice system failure concerning Aboriginal peoples; the need for increased Aboriginal control of defining and resolving the problems they experience; the necessity to recognize that those definitions and solutions will be as diverse as the Aboriginal peoples themselves; and the fact that such definitions and solutions cannot exist apart from the current justice system.

Reference has been made in this paper to the sources of much of the disagreement. We are still at the beginning stages of research, empirical and otherwise,

into the causes of the problems. There are a variety of starting points for that research, many of which are intertwined with poorly understood historical processes and a legacy of conflicting government policies. The relatively recent resurgence in Aboriginal political and legal activism and the advent of international human rights norms regarding indigenous peoples and populations have caused a merging of the justice debate with the larger Aboriginal political agenda. A not negligible part of this process is the new language of international, constitutional and legal rights we now use to discuss this and related issues involving Aboriginal peoples.

Governments are reluctant to address justice issues entirely in terms of the new language of rights, and perceive that they are constrained by the changing face of a justice administration environment marked by federal/provincial wrangling in a field of shared constitutional jurisdiction, growing fiscal uncertainty, and the continuing political evolution of the country following the advent of the *Constitution Act, 1982* and the entry into the debate of all sorts of new actors.

The approach set out here is an attempt to reconcile these differences and conflicts, and to do so in a way that harmonizes with the efforts of Aboriginal communities – urban and rural – to deal with their own justice processes in the context of their overall community regeneration. This approach must also harmonize with the larger political and constitutional efforts of Aboriginal peoples at the national level that has here been referred to as the "human rights track". It must therefore be an open-ended approach that could produce processes and even institutions of the type Aboriginal communities will require if the current trend towards greater Aboriginal governmental autonomy within the Canadian federation continues. It must not fall prey, therefore, to the "false dichotomy" between the path of local community action and that of the larger rights debate occurring primarily at the constitutional level that focusses on separate Aboriginal institutions of all kinds.

A tripartite, pilot project approach that exploits the inherent flexibility of the justice system is recommended. But this approach can only work if it is embraced by all three partners: the federal and provincial governments and the Aboriginal peoples. It could be a way of building bridges, starting from where we are now, and without waiting for the ultimate resolution of the larger debate around the Constitution. In fact, the process of communities taking control of their own destinies in areas of importance to them such as local justice is already underway and has been for some time. In the view of this writer, the process of taking control is something that will and must occur regardless of the degree of approval or support from government. Hence the unspoken assumption upon which this paper has been built: the inevitable emergence of a new order in Canada.

New norms are now emerging in Canada that point the way to innovative social and political institutions based on new power sharing arrangements within the

federation. And this is occurring even as we debate particular aspects of those new arrangements such as the form that justice processes will take in the future. These new arrangements will likely cover all important aspects of the relationship between Aboriginal peoples and the federal and provincial governments. While existing treaties and a growing body of case law on Aboriginal and treaty rights offer some hints, the overall contours of the emergent arrangements are not yet entirely visible.

But Aboriginal peoples themselves can sense them. In this respect they are well ahead of other Canadians and are increasingly frustrated by the reluctance or inability of non-Aboriginal politicians, judges and justice administration officials to grasp the inevitability of these changes. To use the terminology employed in this paper, a "paradigm shift" is occurring that will require a new and shared perspective as the ongoing relationship between Aboriginal peoples and the two existing levels of government changes.

The real question for government from this perspective must be how to take part in this inevitable process of change. What useful role can government play in a process that is already under way? No definitive answer can be given. That answer can only be provided through action: by actually taking part in this process on the basis of a real partnership between governments and Aboriginal peoples. And this will require a shared understanding and a degree of trust between all three parties coupled with a commitment to joint action on the basis of equality.

This is not an impossible program. What is impossible is to do nothing. That is why this paper begins with a paradox and ends with a question. After some thirty Aboriginal justice inquiries and reports, are Canadians, Aboriginal and non-Aboriginal, finally ready in 1992 to stop talking about the problem and to show the courage to begin as partners to do something about it?

Notes

1. These terms are used throughout Alan Cairns most recent book, *Charter versus Federalism : The Dilemmas of Constitutional Reform* (Montreal and Kingston, McGill-Queen's University Press, 1992). In another, earlier work professor Cairns describes the international human rights movement:

> The crumbling of the great European empires destroyed the legitimacy of ideas of racial hierarchies on which they had rested and stimulated ethnic consciousness and sub-state nationalism within Western states. The intellectual legacy of World War Two included a renewed search for mechanisms to protect citizen rights and, with the strong backing of the United Nations, not only stimulated a rights consciousness that swept across national borders but also fostered support for entrenched, judicially enforced charters as instruments for their protection.

Alan Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto, McLelland and Stewart Inc., 1991) at 177.

2. R.S.C. 1985, Appendix III.

3. *R.* v. *Drybones* [1970] S.C.R. 282, and *A.G. Canada* v. *Lavell* [1974] S.C.R. 1439.

4. Since its formation in 1945 the United Nations has emphasized human rights. Article 55 of the Charter sets the tone: the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all...". In response there have been dozens of human rights declarations and nearly two dozen treaties, conventions and covenants dealing with the subject, beginning with the 1948 Universal Declaration of Human Rights. An overview of the evolution of international law in this regard is available in Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States", 32:1 *The American University L. Rev.* (1982) 1.

   The U.N. Charter also sets the tone for the extension of human rights protection for collectivities in Article 1: a primary purpose of the U.N. is to "develop friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples." This was a significant step for the international community because to that point international law had always been regarded primarily as the domain of states as such. The Charter does not define "peoples". Nonetheless, since 1945 there has been a massive increase in the number of U.N. member states as former colonies, protectorates, peoples and other "non-self-governing territories" have formed states in their own right.

   The creation of instruments containing human rights standards is how the United Nations creates international human rights law. Even where member states do not agree to be bound by such an instrument, however, the very existence of international standards provides criteria for assessing the behaviour of all states. Examples of ratified human rights instruments are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights. Passed by the General Assembly in 1966, they entered into force in 1976 upon receiving the required ratification of 35 member states. Each has around 90 signatories now, including Canada. Significantly, Article 1 of each covenant is identical, and gives further impetus to the international indigenous rights movement:

   > All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

   Many U.N. member states fear the international identification of groups within their borders as indigenous "peoples" with a right of "self-determination", and make two separate arguments in response to such assertions. They claim first that their Aboriginal inhabitants are "populations" i.e. groups that retain some distinct cultural characteristic, but which are already assimilated into the body politic of the state. As minority populations (as opposed to "peoples"), such Aboriginal groups have recourse to those human rights protections reserved for minorities. There is no right of self-determination for minority populations in any U.N. instrument.

   If such Aboriginal groups do qualify as "peoples", on the other hand, the argument is made that the right of self-determination only applies to peoples beyond the borders of existing states i.e. in overseas colonies distant from the dominant society. In other words, there can be no "peoples" within the borders of existing states. This is popularly known as the "blue water" thesis.

   There is a parallel to be drawn between the favoured status in international law of "peoples" as compared with "populations", and the federal protection afforded to status Indians on reserve and Inuit as compared with the lack of protection for non-status Indians and Métis in Canada.

5. The analytical framework set out in this paper was suggested to me by my friend and teacher Alex Himelfarb. I thank him for that and for the other pertinent advice and comments he offered to me during the preparation of this paper. Any errors or omissions, however, are entirely my own.

6. The authors of the *Report of the Osnaburgh – Windigo Tribal Council Justice Review Committee* (Ontario, July 1990) note in this regard at 5 that "[w]hile this Report addresses the justice system, it is but the flashpoint where the two cultures come into poignant conflict"

   A similar situation obtains in the United States where the essentially political struggle is masked by the legalization of the debate:

   ... Indian law is greatly concerned with actual or potential conflicts of governmental power. When such conflicts arise in a legal setting, they appear as issues of jurisdiction. It is not surprising, therefore, that controversies in Indian Law usually have at their core a jurisdictional dispute.

   William C. Canby, *American Indian Law in a Nutshell* (St. Paul, West Publishing Co., 1988) at 2.

7. P.A. Monture-OKanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] *U.B.C. L. Rev.* 239 at 250.

8. Michael Jackson acknowledges two of them, over-representation and discrimination, in his recent article "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" in [1992] *U.B.C. L. Rev.* 147 at 148-50. The third theme, Aboriginal alienation from the justice system, is drawn from the strong statements by Aboriginal persons themselves in testimony before the various provincial inquiries.

   The federal government acknowledges these three aspects to the Aboriginal justice problem in the only federal government attempt to date to deal with Aboriginal justice reform from a conceptual viewpoint: Canada, Department of Justice, *Aboriginal People and Justice Administration: A Discussion Paper* (1991) [hereinafter Justice Discussion Paper] at 7-11.

9. The federal government admits this, examining the problem in some detail in a 1988 report: Canada, Ministry of the Solicitor General, *Final Report: Task Force on Aboriginal Peoples in Federal Corrections* (1988). The statistics and findings cited are taken largely from this report. Many similar statistics and findings are cited in Jackson, *supra* note 3.

   However, not all who work in the area accept that Aboriginal over-representation is as severe as it seems at first blush. Carol LaPrairie, for example, calls for more rigorous analysis in traditional structural terms in order to determine whether the criminal justice system is not simply incarcerating persons of a certain age or of a certain social class, or those who commit a certain class of offenses, irrespective of their racial or cultural background. She also calls for closer study of the repeat offender phenomenon to determine whether the system is counting the same Aboriginal offender more than once in cases of several relatively short terms of incarceration occurring during the period of data collection. Focusing on such factors may show that Aboriginal persons are not so grossly over-represented by comparison with similarly situated non-Aboriginal offenders. She summarizes her approach in Carol LaPrairie, "Aboriginal crime and justice: Explaining the present, exploring the future", (July-October 1992) 34:3-4 *Can. J. Crim.* 281 at 282-83 as follows:

   > To date, there has been little attempt to separate the aboriginal political ambition of achieving control over aboriginal justice matters, on the one hand, and the needs of specific communities, on the other. Frequently, these are taken to be so intimately related that solving the first is considered to solve the second automatically. In our opinion, this requires further examination....

> One way of introducing an examination of aboriginal justice issues is to situate the discussion within a broader context, one that is less obviously concerned with an aboriginal perspective on justice than on the problems associated with the practice and administration of justice more generally. This is a useful approach because it may help to define what is a distinctly aboriginal difficulty with justice, in contrast with the strains and problems that are now being experienced by many sectors of society regardless of their social or cultural province.

10. The Alberta Task Force Report offered the following definition of systemic discrimination:

> Systemic discrimination involves the concept that the application of uniform standards, common rules, and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardship or injustice may result.... The reasons may be geographic, economic or cultural.

Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial*, ch. 2-46.

11. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Report 34, 1991) at 5. The commissioners go on to note that Aboriginal people "regard the system as deeply insensitive to their traditions and values: many view it as unremittingly racist."

12. Even in this area, however, it is arguable that it is not only Aboriginal peoples that have come to see the justice system as remote. For over a decade, there has been a growing recognition that the Canadian justice system has become too formal and remote from all the communities it serves. Thus, every component of the justice system has been exploring new approaches that encourage community participation and greater community responsibility for crime prevention, victim assistance and justice administration. Nevertheless, it is apparent that the gap between Aboriginal peoples and communities and the justice system has widened in ways that have had more serious consequences for them due to other factors such as poverty, cultural breakdown and a legacy of unresolved historical grievances.

13. Canadian Corrections Association, *Indians and the Law* (1967). This was a general survey prepared for the Department of Indian Affairs.

14. Jackson, *supra* note 8 at 151.

15. One compelling exposition of this viewpoint in the context of Canadian constitutional values in general and the Charter in particular is provided by M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", (1989-90) 6 *Can. Hum. Rts Y.B.* 3.

At the risk of oversimplification, her basic thesis is that cultural differences are, at root, not mere differences in racial characteristics, but differences in paradigms or ways of knowing the universe. The Aboriginal way of knowing cannot be grasped except on its own terms; i.e., except by entering into it. The non-Aboriginal paradigm that is reflected by the Charter and liberal values generally cannot comprehend the Aboriginal way of knowing other than as a variant of itself, namely, an individual rights oriented frame of reference. In other words, the Aboriginal way of knowing will be invisible to someone who is not schooled in it. It will only become visible when it is translated into a rights claim.

The fact of making a rights claim on behalf of Aboriginal values, however, is in itself an abandonment of an Aboriginal frame of reference and an acceptance of an alien one. A judge, schooled in the individual rights paradigm, will call upon his or her own sense of non-Aboriginal liberal values to decide conflicting rights claims of this type. Thus, anytime a Canadian court has an opportunity to decide cases involving Aboriginal people and their values, it will become another occasion for the regime of individual rights to be extended into areas unsuitable for such an approach.

One passage in particular (at 42) captures the heart of the argument that Canadian courts not only cannot bridge the cultural gap, but that in attempting to deliver justice on their terms they may actually be acting as agents of the cultural destruction of Aboriginal societies:

> If internal disputes are brought before Canadian courts, it will seriously undermine the Aboriginal styles of dispute resolution based on, for example, teachings of responsibility (like the Four Directions), and impose a system of individual based rights. it would also encourage people to go outside the community and its customs, to settle disputes in formal courts, instead of dealing with problems within the community. This is particularly threatening, perhaps even ethnocidal, to Aboriginal peoples who are on the brink of cultural destruction because of the legacy of colonialism and paternalism under the *Indian Act*.

16. See e.g. LaPrairie, *supra* note 9.

17. Jackson *supra* note 8 at 154. The Aboriginal Justice Inquiry of Manitoba examined a number of theories that attempt to explain the higher Aboriginal crime rates and drew a conclusion supportive of this third view:

> The assault on Aboriginal self-government and culture that we outlined in the previous chapter served to impoverish and subordinate Aboriginal people. The overview of Aboriginal socio-economic conditions that we present now should be seen as the adverse impact of the European civilization of North America.

Aboriginal Justice Inquiry of Manitoba, vol.1 *The Justice System and Aboriginal People* (1991) [hereinafter Manitoba Report] at 92.

18. Justice Discussion Paper, *supra* note 8.

19. The first pillar is land claims. Negotiations on specific claims, treaty land entitlements and modern comprehensive land claims agreements will be accelerated and procedures improved. The second pillar is improving the living conditions on Indian reserves across Canada through joint action with provincial and local Indian community government. The third pillar calls for changing the relationship between Aboriginal people and governments, primarily by enlarging the capacity of Aboriginal people for self-government. The fourth and final pillar addresses the wider aspirations of Aboriginal people by a thorough review of their fundamental place and role in contemporary Canadian life.

20. In keeping with the changed rules, issues that were formerly considered political have been transformed into matters of legal and constitutional rights. In *Sparrow* v. *The Queen* [1990] 1 S.C.R. 1075 the Supreme Court refers to this transformation in the form of the rights set out in section 35 of the *Constitution Act, 1982* (at 1105) as "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights." The Court goes on (at 1106) to quote Professor McNeil to the effect that section 35 "renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."

In the United States, by contrast, the relationship between the tribes and the state has not been transformed into a rights struggle under the constitution in the same way as in Canada. Aboriginal and treaty rights in that country are subject to the overriding "plenary" power of Congress (subject to just compensation under certain circumstances) to alter or extinguish them. In short, they remain political matters that have yet to be recast in human rights terms in the U.S. domestic arena. For a comprehensive examination of the origins and nature of the U.S. judicial deference to Congress in this area see Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations", 132:2 *University of Pennsylvania L. Rev.* (1984) 195.

21. Maxwell Cohen, "Human Rights: Programme or Catchall ? A Canadian Rationale", 46 *Can.B. Rev.* (Dec. 1968) 554 at 557.

22. We recognize that the call for completely separate justice systems is part of a political agenda primarily concerned with self-government. We need not enter that debate. Aboriginal-controlled justice systems have merits quite apart from political considerations.

    Law Reform Commission, *supra* note 11 at 14.

23. This "partnership" is based on trust and on the patience of Aboriginal people with a situation that has been intolerable for too long. The danger is that this patience may be exhausted, and that with this exhaustion of patience will come a complete erosion of trust. The extraordinary patience of Aboriginal people is well expressed by Elijah Harper:

    > With so much discrimination occurring against our people, it is often amazing how accepting we are of our situation. We know that without tolerance there can be no justice. Without understanding there can be no justice. Without equality there can be no justice. With justice we can begin to understand each other. With justice we can work and live with each other. With justice we can love and feel confident with each other. Aboriginal people want a judicial system that recognizes the native way of life, our own values and beliefs, and not the white man's way.

    Manitoba Report, *supra* note 17 at 251.

24. Monture-OKanee and Turpel *supra* note 7 at 253. Consideration of Aboriginal self-determination was listed in the "top ten" of the recommendations from the preceding 22 major reports on Aboriginal justice from 1967 to 1990 in a compilation of those recommendations by the Alberta Task Force Report, *supra* note 10, in vol. III, "Working Papers and Bibliography" at 4-7.

25. "By paradigm I mean a reasonably consistent set of ideas that guide policy thinkers in defining the 'problem' and in seeking information to shape the policy 'solution'"

    Sally M. Weaver, "A New Paradigm in Canadian Indian Policy for the 1990s", [1990] vol. XXII no. 3 *Canadian Ethnic Studies* 8 at 10.

26. *Ibid* at 10.

27. *Ibid* at 11. The other elements of new paradigm thinking are that relations between First Nations and the state will be regulated at a high level by sanctioned rights that are capable of evolving; cultural co-existence means that Aboriginal cultures evolve too; the honour of the Crown will be a guiding political ethic in these relations; policies will be jointly formulated; there will be real empowerment through Aboriginal self-government; there will be joint management systems in many areas; Aboriginal knowledge and perceptions will inform relations between First Nations and the state; and the Department of Indian Affairs will evolve into a development oriented service provider.

28. Monture-OKanee and Turpel, *supra* note 7 at 253.

29. These figures are all drawn from a recent federal publication: Canada, Department of Justice *National Inventory of Aboriginal Justice Programs and Research* (1992). The figures in the Justice Department document are themselves drawn from diverse sources.

30. This assertion is made by Lawrence Barkwell and David Chartrand "The Struggle for Recognition: Canadian Justice and the Métis Nation" in *Northern Justice Society, Self-Sufficiency in Northern Justice Issues* (Winnipeg, Kromar Printing Ltd., 1991) at 111. [hereinafter Northern Justice Society].

31. John Young, Constable and Native Liaison Officer with the Calgary Police Service gives one example of this well-known phenomenon in "Current Issues and Future Challenges in Aboriginal Policing" in Northern Justice Society *ibid* at 152:

    > Calgary is a municipality of about 700,000 people....There are approximately 15,000 Native and Métis people living in the city. The numbers fluctuate depending on

> the time of year and may reach between 30,000 and 40,000 in the summertime. Many people who live in Calgary are there for short-term, gainful employment or an educational program.

Young's point is that for effective liaison with the Aboriginal community in Calgary, it has proven necessary to extend his activities to the home reserves of this transient population that are outside Calgary city limits.

32. The Dene of Lac La Martre in the Northwest Territories are one of those communities attempting to document traditional approaches to justice and to determine whether they are still practiced. Sandy Lake reserve in Northern Ontario is a community experimenting with an elders council in an attempt to blend customary practices with mainstream Canadian justice. Their projects are briefly described in "Dene Traditional Justice" and "Current Initiatives on Sandy Lake Reserve" in Northern Justice Society *supra* note 30 at 91 and 95 respectively.

33. Leonard Mandamin, Dennis Callihoo, Albert Angus, Marion Buller, "The Criminal Code and Aboriginal People", [1992] *U.B.C. L. Rev.* 5 at 21.

34. Alberta Task Force, *supra* note 10, ch. 9-1.

35. See e.g. M.E.Turpel, *supra*, note 15.

36. Law Reform Commission, *supra* note 11.

37. Manitoba Report, *supra* note 17 at 313. The Law Reform Commission is not as explicit, but its recommendations that control be transferred to Aboriginal communities through negotiations implies just such a staged process: Law Reform Commission, *supra* note 11 at 16-23.

38. "The First Nations and the Future", interview conducted by M.A. Gaudet for the official publication of the Canadian Bar Association, *The National*, vol. 19, no. 1, February 1992 at 11.

39. Patricia Monture-OKanee and Mary Ellen Turpel refer to the possible impact of the fiduciary obligation on the criminal justice issue as requiring "at a minimum, an examination of the inherent aboriginal jurisdiction which has been retained by aboriginal peoples." Monture-OKanee and Turpel *supra* note 7 at 255. While this potential aspect of the fiduciary obligation has been ignored by governments to date, it is submitted that the approach outlined in this paper of working with Aboriginal communities to explore how they can take back control of their own justice processes under current constitutional and jurisdictional understandings is consistent with the program put forward by Monture-OKanee and Turpel.

40. The overall system is succinctly described in John Whyte"Federal-Provincial Tensions in the Administration of Justice", *The State of the Federation 1985* Peter M. Leslie ed. (Kingston, Institute of Intergovernmental Relations, 1985) at 174 as follows:

> Complexity and imprecision are dominant features of the legal framework of these disputes. The simple assignment to the provinces of jurisdiction over "The Administration of Justice in the Provinces" in head 24 of section 92 of the Constitution Act, 1867, is placed in the constitutional text, in a convoluted context which is created by a number of other allocations of authority which touch on this matter. For instance, the federal level of government gains authority over the administration of justice from a number of sources. First, it has the power to appoint the judges of superior, county and district courts. Second, its legislative jurisdiction over criminal law, including procedure in criminal matters gives it some access to the administration of laws. Finally, administrative powers derive from holding primary jurisdiction over substantive matters such as trade and commerce. Further complications arise from the provincial power over the administration of justice being conditioned by the constraints on administrative arrangements created by Part VII of the Constitution Act, 1867: "Judicature". That part of the constitution preserves for courts a class of judicial functions and thereby precludes provinces (and possibly the federal level of government) from having a free hand in creating mechanisms for the administration of provincial laws and regulatory regimes.

> There is, then, an arrangement of constitutional provisions which lacks certainty about both the meaning of specific provisions and the relationship between the various sections.

41. Whyte notes the following areas of conflict, *ibid* at 174-75:

> ...the appointment of superior court judges; the jurisdictional overlap between provincial courts and the federal court; removal of the limitations placed by Part VII of the Constitution Act, 1867, on the creation of non-judicial administrative arrangements; the question of who has authority over criminal prosecutions; and, finally, policies for dealing with the criminal activities of juveniles.

42. Whyte, *ibid* at 173. While he concedes that under the current conservative government there has been an apparent lessening of these tensions, he cautions (at 174) that this "may be as much the result of simple failure to pursue debate as it is the result of the active process of reconciling conflicting views and policies." Subsequent events, like the difficulties over young offenders and the impasse over victims restitution and enforcement mechanisms seem to have confirmed this analysis.

43. Canada, Study Team Report to the Task Force on Program Review, *Improved Program Delivery: Justice System* (Ministry of Supply and Services, 1986) at 15. Not surprisingly, given the emphasis of the federal government on deficit reduction, the Study Team recommended offloading program delivery functions regarding corrections to the provinces in certain areas and that increasing privatization of correctional and parole services.

44. The *Young Offenders Act* R.S.C. 1985 c. Y-1. establishes a separate system of justice for youth that requires the provinces to set up youth courts, alternative measures programs, post-dispositional services, special custodial facilities (open and secure), a separate system of record keeping and providing legal counsel. All these measures put an additional financial and administrative burden on the provincially administered justice system which has not been offset by the cost sharing agreements. The federal funding has been capped at the 1988-89 funding levels. In many cases this legislation also collided with provincial priorities, has been viewed as an unwarranted reduction in the scope of the child welfare system, and has not been universally regarded in the provinces as an improvement over the former regime.

45. The victims package, Bill C-89, has been partly proclaimed, in October 1988, and July 1989. It is the restitution and enforcement mechanism provisions that remain to be proclaimed. The cost implications to the provinces have been the chief stumbling block, with provincial estimates of overall yearly administrative costs running as high as 50 million dollars. The federal and provincial governments have agreed informally to consider the cost implications of any further changes to the existing justice system before embarking on similar ventures. In the meantime, since fines and fine options form the heart of the restitution scheme, the question of restitution and enforcement has been handed to the federal team examining the broad issue of sentencing.

46. A particularly clear and useful summary of this argument is provided by the Alberta Court of Appeal in *R.* v. *Whiskeyjack and Whiskeyjack* [1985] 2 W.W.R. 481.

47. Parliament of Canada, Special Committee on Indian Self-Government, "Indian self-Government in Canada" (Supply and Services Canada, 1983) at 59. The authors repeat part of the argument presented to them by the Indian Lawyers' Association and conclude that the federal government could simply occupy the entire field of "Indians and Lands Reserved for the Indians" to the exclusion of the provinces and then vacate the field so occupied in favour on Indian governments.

48. > Finally, based on the foregoing relationships with the provinces in this sector of shared jurisdiction, the study team believes emphasis should be placed on a more cooperative, fact-based footing. Services wherever possible could be shared, and every effort made to develop new criminal law on a cooperative basis, tying consultation to criteria such as

> jointly developed costing data and providing for the joint development of demonstration projects.

Neilsen Study Group, *supra* note 43 at 22.

49. *Sparrow*, *supra* note 20.

50. Alan Cairns in *Charter versus Federalism*, *supra* note 1 makes the following observation in this respect at 3-4:

> The traditional cleavages of federalism that required the constitution to fashion harmonious coexistence between our federal and provincial selves now encompass a diminishing proportion of who we are as a political people. They have been joined by new cleavages or reinvigorated old cleavages related to sex, ethnicity, the aboriginal communities, the disabled and others....
>
> These clauses [of the Constitution Act, 1982], and the other rights and freedoms of the Charter give Canadians a direct linkage to the constitution they formerly lacked. The Charter gives constitutional identities and a legitimate basis for making further constitutional claims to those it recognizes in both general and specific terms. They are no longer constitutional outsiders.

The October 26 referendum results offer proof, if any was needed, of the problems inherent in too many policy cooks trying to stir the constitutional soup.

51. In the United States this issue has yet to be resolved in a satisfactory manner. With the judicially led resurgence in tribal self-government and the end of the official federal tribal termination policy in the 1960s came a renewed interest in the question of civil rights for individual tribal members. Congress, through a series of hearings lasting several years came to the view that individual Indians needed protection from potential abuses at the hands of tribal governments. The result was the *Indian Civil Rights Act* 25 U.S.C. ss. 1301-41 (1988) of 1968 that imposed many of the provisions of the U.S. Bill of Rights such as the equal protection and due process clauses.

Many tribes, especially the more traditional Pueblos of the southwest, were vehemently opposed to this. The issue came to a head in the case of *Santa Clara Pueblo* v. *Martinez* 436 U.S. (1978) a few years later. The issue was whether a Santa Clara Pueblo tribal ordinance, which denied membership to the children of women who married non-tribal members but not to the children of men who married, was in violation of the equal protection provision of the *Act*. The Supreme Court decision was that the primary forum for relief in such cases was in the tribal courts system and not in the federal courts.

In short, the federal court system more or less washed its hands of the whole problem of the contest between individual rights protections and the traditional values and practices underlying modern tribal government. In the view of many Indian women, having to litigate such issues in tribal courts prejudices them from the outset. More than a decade later the issue is still a live one and may yet result in further amendments to the *Indian Civil Rights Act* or wind up in the federal courts.

The most recent developments and proposals for action are outlined in Carla Cristofferson, "Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act", 101 *Yale Law Journal* (1991) 169.

52. It is no coincidence that the name chosen for the umbrella anti-tribal backlash movement in the United States in the 1970's was the "Interstate Congress for Equal Rights and Responsibilities" This backlash is described in a report of the United States Commission on Civil Rights *Indian Tribes: A Continuing Quest for Survival* (June 1981). The commissioners note (at 1) that "equal rights theory is often advanced to argue that Indian political power and control over Indian destiny is antithetical to the American system of equality and that Indian interests must give way to those of the larger society."

53. Alan Cairns, *Charter versus Federalism*, *supra* note 1 at 25.

54. See e.g. Turpel, *supra* note 15.

55. See e.g. the excerpt from Ovide Mercredi's submission to the Law Reform Commission, (*supra* note 11 at 13) where he refers to the real issue as being "what some people call cultural imperialism" and later calls upon the justice system to "take off the imperial hat".

56. Alan Cairns in *Charter versus Federalism*, *supra* note 1 praises lawyers (at 5) for being "much more sensitive to the interaction of national and international legal norms and instruments". He does not limit the international echo to Aboriginal questions.

> The contemporary citizen is subjected to an unceasing flow of international cultural products, values, and ideas that mocks the borders of modern states. The struggle of indigenous peoples, heightened feminist self-consciousness, the politicization of ethnicity, sustained attacks on the theory and practice of racial discrimination, the rights consciousness stimulated by the United Nations, the proliferation of alternative lifestyles and family structures and the accompanying demands of gays and lesbians for recognition and respect for their differences – these are all linked to international movements.

57. Canada was criticized in *Lovelace* v. *Canada*, [1981] 2 H.R.L.J 158, 68 I.L.R. 17 by the Human Rights Committee (established pursuant to the *International Covenant on Civil and Political Rights* to which Canada is a signatory. Under the Optional Protocol to the Covenant, individual complaints may be brought to the Committee.) The automatic loss of Indian status to Sandra Lovelace due to the effect of s.12(1)(b) of the *Indian Act* was held by the Committee to deprive her of the cultural benefits of living in an Indian community; the denial to her of the right to live in the Indian community was not found to be reasonable or necessary to preserve the identity of the tribe.

    The Human Rights Committee does not act in a judicial capacity and even its decision that a state has breached the Covenant is not binding. Publication of the decision, however, may go a long way to ensuring that a state does carry it out. In this case Canada did heed the decision and committed itself to correcting the *Indian Act*. Bill C-31 of 1985 was the result. Whether it has corrected the problem or merely postponed it for a generation or two is another issue.

58. As an example of a pending complaint, the Micmac Tribal Society made a formal communication to the Human rights Committee in 1986 alleging violations of their right to self-determination under the *International Covenant on the Protection of Civil and Political Rights*. This communication was held admissible in 1990. CCPR/C/39/D/205/1986.

59. Former national chief of the Assembly of First Nations, Georges Erasmus, for example, refers favourably to the U.S. example in *Drumbeat: Anger and Renewal in Indian Country* Boyce Richardson ed., (Toronto, Summerhill Press, 1989) at 3-4.

60. Some commentators argue that the courts have on the whole done a creditable job of balancing these interests. A good statement of this view is Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven, Yale University Press, 1987). Just the opposite conclusion has been drawn by Russell Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, University of California Press, 1980).

61. This backlash is described in a report of the United States Commission on Civil Rights *supra* note 52 at 1-14. The backlash began in the 1970s with the increasing judicial support for the resurgence of tribal self-government. Many would argue that the fairly recent change in attitude on the U.S. Supreme Court in favour of restricting the scope of tribal self-government is a response to that popular backlash.

62. By way of contrast, both the Manitoba Report, *supra* note 17 and the Osnaburgh Windigo Report *supra* note 6 assume that s. 35 of the *Constitution Act, 1982* covers self-government (and the ability to establish a justice system) without further amendment.

63. The devastation of the family unit cannot be minimized because familial relationships are integral to the community's ability to be active in matters of criminal justice. Progress on criminal justice matters requires progress on other fronts, including the socio-economic, land rights and family and child welfare services... There is a further causal link between the destruction of cultural relationships between the sexes and a vulnerability to the sanctions of the criminal justice system...The importance of addressing the relationship between aboriginal women and the pursuit of justice within our communities wherever they are located cannot and should not be understated.

Monture-OKanee and Turpel *supra* note 7 at 266.

64. "Justice and Nation Building: A Comparison of the Lheit-Lit'en Process and Tribal Government in Alaska" in Northern Justice Society, *supra* note 30 at 99-100.

65. Monture-OKanee and Turpel, *supra* note 7 at 267.

66. The Alberta Task Force Report *supra* note compiled a list (in vol. III at 4-7) of over 700 recommendations from the previous Aboriginal justice reports that they grouped into a "top ten":

- Have cross-cultural training for non-Native staff.
- Employ more Native staff.
- Have more community-based programs in corrections.
- Have more community-based alternatives in sentencing.
- Have more special assistance to Native offenders.
- Have more Native community involvement in planning, decision-making and service delivery.
- Have more Native advisory groups at all levels.
- Have more recognition of Native culture and law in Criminal Justice System service delivery.
- Emphasize crime prevention programs.
- Self-determination must be considered in planning and operation of the Criminal Justice System.

Similar recommendations emerge from the subsequent reports. Many could be implemented unilaterally by governments simply changing civil service hiring and training policies and by returning the overall emphasis from reactive policing and justice processing etc to crime prevention and community involvement generally. Aboriginal community involvement as such will evidently require more than simply sending non-Aboriginal officials out to set up programs. This is the area where Aboriginal political aspirations and the naturally evolving community restoration process will require governments to harmonize their efforts with those of the communities and wait to be invited to participate on terms acceptable to the communities.

67. The importance of being in step with Aboriginal community priorities is illustrated by an anecdote related by Tony Mahon, "Current Issues and Future Challenges in Aboriginal Policing", Northern Justice Society *supra* note 30 at 157 where he responds to a question regarding the building of trust between the community and the police force:

> ... While doing a study of policing services in Alberta, I sat down at a tribal council meeting in the northern part of the province and stated that we would be willing to open up a work station in their community. We wanted to have an advisory committee to set up some school programs. An elder said, "For years and years now your people have only come into our community to take people away. You have never stopped to talk to us. You don't get to know us. And now you come in and tell us that you are ready to set this up." He said that if we took the time to gain their trust and respect, then perhaps they would let us set up the work station. But, he stated, "Don't come in here and tell us that, because you are ready to do it, that we should be too."

68. Michael Jackson, *supra* note 8.

69. Michael Jackson, *Locking Up Natives in Canada: A Report of the Canadian Bar Association Special Committee on Imprisonment and Release* (June 1988).

70. The National, *supra* note 38. Although this piecemeal approach within current justice system arrangements is not what the national chief of the Assembly of First Nations would wish as a starting point, since he favours the concept of separate systems as a component of the right to self-government, the process outlined here seems to accord with his practical vision of how to go about getting a functional alternative approach to Aboriginal justice off the ground.

71. Described briefly in Justice Department Inventory *supra* note 29 at 3-1-1. It is funded by the Justice Department and the federal Ministry of the Solicitor General.

72. Michael Jackson, *supra* note 69 at 105-06:

> In many of the areas we have discussed, the initiatives of native communities can be implemented within the framework of existing legislation. Examples of this are the diversion program proposed by the First Nations of South Island Tribal Council and the incorporation of community values in sentencing through community councils such as the Inumarit of Arctic Bay. Because these and other initiatives reflect the consensus on the native communities involved as to the ways in which the criminal justice system can become more responsive to their values and enhance a sense of community ownership of the system and the assumption of collective responsibility for the re-integration of aboriginal offenders, we urge both the Federal and Provincial Governments and the Judiciary, whose cooperation is critical to the implementation of these initiatives, to support and encourage them.
>
> In the area of alternative native justice systems, we endorse the importance of legal pluralism within the Canadian Confederation and we are of the view that priority should be given by Governments in their allocation of criminal justice research funds to encourage the development as pilot projects of working models of contemporary native justice systems. Although we are of the view that there is a sound constitutional basis for the development of parallel native justice systems, we have carefully refrained from endorsing any particular model, because the particular model will be linked with an Indian nation's or native community's view of its path towards self determination and ultimately is for them to choose.

Although his recommendation is in the context of "alternative native justice systems" of the type now endorsed in the Manitoba and Law Reform Commission reports, the validity of the approach is unaffected by the political goal to which it is directed in his recommendation and is applicable to all initiatives, including those within the framework of existing legislation. Thus, a pilot project approach could be applied by government within the framework of the existing justice system without affecting the ultimate goal of a parallel or separate system if the constitution is amended to this end. The institutions developed in this way will be the base upon which further institutions will be built in any event.

73. Initiatives such as those at Lac La Martre and Sandy Lake and that of the Lheit-Lit'en, all described in Northern Justice Society, *supra* note 30, are clearly experimental and research oriented rather than efforts to establish definitive institutions. They are excellent candidates to attract federal and provincial funding since they fit within the current legal and constitutional regime.

74. "Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People" in Northern Justice Society, *supra* note 30 at 213-14. At 228 the proposal is linked to the continuing quest of the Gitksan and Wet'suwet'en for self-government:

> The chiefs have said that they intend to govern themselves according to Gitksan or Wet'suwet'en principles and laws. In many areas, there cannot be a simple switch from the imposed state system to indigenous self-government. The acute social crisis in which people find themselves together with external circumstances much changed since they last

> exercised complete jurisdiction, demand a careful thinking through of how social repair and control of antisocial behaviour is to be accomplished. This thinking has begun....

At 234 the proposal is set out as a three year project in order to have areas of interaction between the provincial and indigenous justice areas "that can be evaluated to determine the feasibility of this joint approach to the Native justice issue. Subsidiary to the main objective are three year-end objectives that can be used to evaluate the progress of the program."

75. The Alberta Task Force Report notes somewhat sharply that "[g]overnment departments must look for reasons to say 'yes' to Aboriginal projects instead of finding reasons to say 'no'." Alberta Task Force, *supra* note 10 at ch. 2-27.

76. Michael Jackson, *supra* note 8 at 220.

77. Monture-OKanee and Turpel *supra* note 7 at 267-68.

78. Law Reform Commission *supra* note 11 at 52-53.

79. *Ibid* at 95.

80. Described by Mandamin *et al*, *supra* note 33 at 13-14.

81. Recommended by H. Archibald Kaiser, "The *Criminal Code* of Canada: A Review Based on the Minister's Reference" [1992] *U.B.C. L.Rev.* 41 at 110.

82. Justice Inventory *supra* note 29 at 3-1-1.

83. It is described in "The Nishnawbe-Aski Legal Services Corporation: Its Origin, Mandate, and Research Program" in Northern Justice Society *supra* note 30 at 373.

84. The Research project is well underway and part of it has now been published as "Crime and Control in Three Nishnawbe-Aski Nation Communities: An Exploratory Investigation" in *Can. J. Crim. supra* note 9 at 317.

85. *Supra* note 11 at 99-100.

86. See e.g. "Current Initiatives on the Sandy Lake Reserve, Ontario" in Northern Justice Society *supra* note 30 at 95 for a description of how one community is experimenting with such procedures. Similar things are happening in the Yukon and elsewhere.

87. *Supra* note 8.

88. *Supra* note 30 at 95.

89. Mandamin et all *supra* note 33 at 9.

90. A comprehensive review of the problems with all areas of sentencing is provided by Susan Zimmerman, "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System", [1992] *U.B.C. L. Rev.* 376.

91. Michael Jackson, *supra* note 8.

92. The Solicitor General's Task Force on Aboriginal People in Federal Corrections, *supra* note 9, reported in 1990 with recommendations that are now a long-term blueprint for corrections, calling for increased Aboriginal involvement in corrections and in program and service delivery, the provision of better information to Aboriginal communities, increased liaison between Aboriginal communities and the corrections system, and increased corrections responsibility generally for Aboriginal communities.

    Recognizing that the successful reintegration of Aboriginal offenders depends, to a significant extent, on the support they receive from Aboriginal communities before and after release, the Task Force noted a growing number of Aboriginal individuals and organizations who assist inmates during and after their incarceration, through formal programs and liaison and informal

visits and support. The current legislative amendments would authorize the Correctional Service of Canada to enter into agreements with Aboriginal communities to permit them to assume greater control and custody over Aboriginal offenders.

The Correctional Service of Canada recently released a report on women: Canada, Ministry of the Solicitor General, *Creating Choices – The Report of the Task Force on Federally Sentenced Women* (Correctional Services of Canada, 1990). The mandate of the Task Force was to examine the correctional management of federally sentenced women from the commencement of sentence to the date of warrant expiry and to develop a plan to respond to the unique needs of women. Although this Task Force focused on the need to improve the treatment of female inmates by creating more appropriate institutional settings, it also highlighted the need to increase the involvement of offenders' families and communities to improve their opportunities for successful reintegration, during the pre- and post-release phases of their sentences and for as long as required.

In accepting the Task Force's recommendation to create new, regional facilities to replace the Prison for Women in Kingston, the Solicitor General and the Minister responsible for Status of Women agreed to establish an Aboriginal Healing Lodge as an incarceration alternative for Aboriginal women. The planning and development of this facility was conducted with the direct participation of Aboriginal women and the federal government is collaborating with Aboriginal communities in the development of institutional programs and aftercare opportunities.

93. Described in Justice Inventory, *supra* note 29 at 3-5-1.

94. This was a continuation of an interview entitled "First Nations and the Future" in the official Canadian Bar Association publication *The National* vol. 19, no. 2 March 1992 at 30.

Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada

*Roderick A. Macdonald**

This essay discusses the benefits that might flow to Canadian society and to its several components from an explicit recognition and legitimation of various Aboriginal systems of law and various Aboriginal understandings of justice, and from an adaptation of the present justice system in Canada to accommodate these systems and understandings. More specifically, it asks "to what extent would the process of adaptation of the existing system...[of Canadian law]...involve reforms beneficial to (a) society as a whole, such as greater emphasis on restitution, reconciliation and rehabilitation? and (b) to segments of society such as the poor, women and cultural minorities?"

It is not my purpose either to offer any detailed observations about what procedural or substantive outcomes these Aboriginal conceptions of justice will actually imply, or to suggest how one might put into practice Aboriginal conceptions of a legal system. Others are much more qualified to undertake this task. Indeed, I have no first-hand knowledge of whether the attributes often ascribed to different Aboriginal systems of justice and law are really properties they possess. I do, however, attempt to show how it is theoretically possible to accommodate, within Canada's existing legal traditions, the plurality of conceptions of justice and

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law which would flow from a recognizing and legitimating diverse Aboriginal justice systems. I also seek to show the extent to which such a multiplicity of systems is already present in Canadian law. The burden of this paper is simply that thinking about how our current justice system might be reconceived and adapted to meet the concerns of Aboriginal peoples will lead us to a better understanding of the nature of that justice system, and of the real causes of its perceived failures for many Canadians.[1]

To develop the above themes properly, it is important to clarify the two basic terms upon which this discussion centres: justice and law. In the first part of this essay I examine the bearing that certain popular (but, at least in polyethnic and multicultural western societies, dubious) conceptions of law have had on the way jurists think about how well or how poorly the current system of justice serves non-Aboriginal Canadians. For the moment, however, I should like to consider summarily the other basic term: justice. Unlike some critics, I take as a given that justice is not an irrational idea; and unlike these critics, I also take as a given that institutionalized systems such as the legal system can be either expressly designed or tacitly nurtured in order to help us to realize that justice.[2] Even though most Canadians do not directly experience the justice delivered by the "official" legal system on a regular basis, in the hundreds of daily interactions which they have with family, friends and colleagues they have substantial acquaintance with the idea of justice and the demands it makes on them. For justice is, above all, a social symbol system. As such, it can have, potentially, an infinite substantive content.[3] Put slightly differently, justice is one of the root principles that human beings develop to produce predictability, regularity and reciprocity in interpersonal interactions. It is a concept which is used by particular societies at particular times to stabilize the institutions and processes of human endeavour and aspiration.[4]

The above perspective finds little support among jurists who hold, as articles of faith, that the idea of justice can be logically derived from the concept of human agency, and that a knowable set of principles of justice can be rationally defended as primary.[5] Nevertheless, however valuable it may be to deduce certain universal principles of just conduct, this philosophical task does not speak at all to the multiple social relationships and processes of interaction among ordinary citizens through which the need for a concept such as justice is most often conceived. In my view, legal theorists and law reformers ought to be primarily concerned with understanding these relationships and processes – that is, with materials and methods for achieving justice in the widely differing communities and societies which make up the modern political state.

The last three decades have seen a growing recognition in many European and North American countries that, whatever might be (in the abstract) the desirability of deriving and legislating universal principles of justice such as those set out in the *Canadian Charter of Rights and Freedoms*, and whatever might be the aspirations toward social justice of our "official" legal order, in practice these

principles have proved often wanting and these aspirations are frequently not being realized. Usually the recognition of this failure has been expressed in the form of a lament not about the inappropriate content of specific legal rules, but rather about the inaccessibility of justice: justice is held to be too costly, too slow, and too complex. In the 1970s, access to justice became the label under which these several ills would be identified and cured.[6] But as jurists developed the access to justice agenda over the years, the target of attention began to shift. Few noticed that law reformers gradually became less preoccupied with access to social justice as such – they were looking at the means for enhancing access to "official" *law and legal institutions*; few also noticed that law reformers came less and less to talk about the deficiencies or the failings in the content or substance of justice – they were looking only at the techniques and procedures for obtaining *access* to justice, regardless of its content. The reform agenda suffered both a surrogacy of content – from justice to law; and a surrogacy of form – from outcome to access.[7]

Despite this displacement of energy and attention, I believe that the most effective way for approaching the questions to which this essay attempts to provide the beginnings of an answer is to examine how jurists have come to understand the problem of access to justice. But I want to take a critical perspective on this central notion. I wish to argue that to understand the failures of the justice system for some Canadians simply as being failings in access to justice is the result of a misdiagnosis, and that this misdiagnosis results from three assumptions we make about law and the relationship of law to justice. Moreover, I claim that scholarly focus on the criminal law (and the impact of the *Canadian Charter of Rights and Freedoms* upon criminal procedure) has deflected jurists from considering the true causes of our access to justice malaise. On the one hand, the criminal law is probably that branch of law which least replicates the everyday legal experience of Canadians and least confronts them with their own conceptions of interpersonal justice. On the other hand, it is also the branch of the law which is most institutionalized and most "official". As a result, a focus on the criminal law means that jurists tend to see the problems of justice only in institutional terms.

I argue further that careful examination of failures of access to civil justice reveals particular inaccessibilities affecting those who are, for a wide range of reasons, "marginalized" by our society and its legal institutions. Understanding the nature and causes of these additional inaccessibilities enables us to pin-point what features of the current justice system (or our understanding of it) are most in need of reform. Finally, I claim that the same examination forces us to recognize that the seemingly procedural questions of access to justice cannot be dissociated from substantive questions about the content of Canadian law. Recognizing the diversity of institutions and procedures by which Canadians formulate, argue about and resolve their conflicts with each other ultimately compels us to recognize that their underlying conceptions of the substance of interpersonal justice may be equally diverse.

The Model of Legal Centralism and the Theory of Access to Justice

The first step in developing an understanding of social justice appropriate to contemporary Canadian society and in assessing the potential contribution of the legal system to its attainment is to explore how "official" law is thought to work. This part begins by setting out the basic assumptions about justice and law which underlie most contemporary accounts of the Canadian legal system. Later these assumptions will be critically tested against a competing model of law in modern multicultural and polyethnic societies. For the moment, however, it is important to be clear about what notion of law is in issue when it is claimed that the "official" system has failed many people. The second section of this part will present the ways in which these failings of the "official" legal system are usually described, also with a view to uncovering the assumptions about law from which the present agenda of access to justice is derived. Once again, the usefulness of looking at the failings of the "official" legal system in this way will be examined more closely later in this essay.

The Legal Centralist View of the Canadian Legal System

It is unusual to suggest that current popular understandings of the "official" legal system in Canada rest on a series of presuppositions and definitional stipulations rather than empirical fact. But, in order to assess whether any modifications to this system are likely to be beneficial one must start from the premise that the system is itself a construction, not something which is absolutely given by nature or history. As a socially constructed artifact, the Canadian legal system obviously has its own assumptions, logic and goals; and it is these assumptions, this logic and these goals (much more than the system's specific rules) which are going to have to be adapted to overcome any of its perceived failures. For the purposes of identifying where modifications are likely to be needed, these assumptions can be grouped around five main beliefs typically shared by jurists.[8] These beliefs, so widely shared as to often escape notice as being a belief system, are usually labelled "legal centralism" or "legal monism".[9]

First, most jurists believe that justice is a concept inseparable from and unrealizable without law; not only is the goal to achieve "justice according to law", it is held that in the absence of law there can be no attainable justice.

Second, most jurists believe that law is a concept inseparable from that of the political state; the only legal order that can ensure the attainment of social justice is the "official" legal order.

Third, most jurists believe that fidelity to the rules laid down by the formal institutions of the "official" system is the highest legal virtue; rule-following and role-fetishism are the best guarantees of impartial justice.

Fourth, most jurists believe that rigorous adjudicative due process is the optimal process for ensuring substantive justice; equality of access to legal institutions for generating commutative justice induces the achievement of, and even stands surrogate for, substantive justice.

Fifth, most jurists believe that access to the services of legal professionals is necessary to ensure access to justice; lawyers are necessary in a legal system which is designed to formulate inter-personal conflicts as discrete disputes, and then to resolve the disputes which it identifies and shapes.

The conflation of the concepts of justice and law has two major consequences for how one understands the Canadian legal system. Most importantly, it structures the problem of justice as being simply a problem of "legitimate" secular authority. The detachment of the concept of justice from either the "eternal", the "traditional" or the "natural" order (however eternity, tradition or nature is understood) requires its rooting in some other order consciously made by human beings. Given the general bureaucratization of modern life, it is hardly surprising that the concept of justice has also become bureaucratized through the concept of law. The logic of western law establishes a Weberian notion of "formal rationality" as the standard against which all legal exercises of authority are to be judged. The possibilities that justice can be individuated (that is, that justice can be unsystemic or "irrational" in the special sense which Weber employs the term), and that broader ethical concerns such as the personal merits of litigants should matter to the creation and resolution of disputes (that is, that legal justice can be driven by a "substantive" as well as a "formal or legalistic" structure of justification) are thus excluded from the administration of authoritative justice in western legal cultures.

The second consequence which flows from conflating law and justice can be traced out at the level of social organization. If the entire concept of justice consists of attributing to individuals their due according to general, objective, pre-existing rules, then persons – even as social beings – will come to be defined by the criteria ordained by formal law. Moreover, all types of human interaction will come to be characterised and evaluated only by reference to these abstract legal categories. In the contemplation of law there can be no longer just persons; there can only be just deeds or acts. More importantly, there can no longer be unjust states of affairs; only unjust inter-personal transactions. Because there can be no justice between persons which exists apart from that applied to particular cases by courts, the purpose of law becomes above all to ensure the maximum possible scope to negotiated arrangements between friendly strangers. Paradoxically, modern law is not at all directed to the maintenance of social solidarity, the very object which, from an anthropological perspective, the concept of justice is supposed to serve.

From this agent/transaction conception of justice which is inherent in the notion of "formally rational" law comes the identification of all law with the

political state. As soon as rules of duty and entitlement become the model for law, it is a small step to claim that the processes by which these rules are announced and interpreted should be institutionalized. Justice as a system of rules implies that the considered application of human reason to social activity can produce an exhaustive set of rules which are universally just. While it is not necessary that the institution which produces these rules be the state, in the day to day practice of lawyers, it is the national political state – where nation has a territorial rather than a socio/cultural reference – which assumes this role. All competing institutions, exercising authority legitimated other than bureaucratically, are not seen as legal.

Another consequence of conflating law to state is that "official" justice cannot tolerate a plurality of normative fields, each competing for the loyalty of citizens. Because the state is designed to produce general rules of justice, these rules are not elaborated through, or even by reference to, the principles and practices of social sub-groups and communities which are directed to resolving group-specific conflicts. On the contrary, the "official" political process is designed precisely to squeeze such detail and specificity out of the legislative calculus. Law is thus redefined as the most general and abstracted expression of normativity produced by the political state. There is one legal order, reflecting but one account of justice. That legal order is the "official" law of the state, and other practices in diverse social or cultural sub-groups and communities are considered simply to be proto-law.

Once the concept of social justice has been uprooted from the communities out of which it grows, and relegated to the realm of political bargaining among these groups in the "official" processes of the state, it is hardly surprising that the form of the rules by which these bargains are systematized should be both explicit and formulaic. Obviously, this explicitation and formulation occurs at the level of bargaining about the constitution of the state itself (viz. the importance in current constitutional rounds of textualizing the inherent right of Aboriginal self-government). But it also occurs at the level of quotidian rules of interpersonal behaviour. To ensure the translation of the plural "just" into the singular "legal" (defined as a uniform rule applicable across widely divergent socio-cultural settings) requires that the resulting rules be consciously elaborated in relatively precise language. It also demands that every legal rule be generated by a specialized body which alone makes all political choices about the requirements of substantive justice.

A commitment to rules and rule-following assures that responsibility for the achievement of true justice can be parcelled out in discrete packages to individuals performing institutionally-defined tasks. Lawyers, jurors, and judges all have a role to play in ensuring fidelity to "official" rules. But, short of certain types of constitutional review by courts, none has a responsibility for ensuring that substantive justice results. The achievement of justice is reduced to a kind of role-fetishism – the following of recipes by actors who have been delegated specific

roles in the "official" legal order. When legal rules are conceived as comprising exclusively the product of designated law-creating institutions (legislatures), applied like a manual of instructions by designated law-applying institutions (courts), then business of justice becomes simply to ensure that everyone has an equal opportunity to set in motion the system which permits these designated "official" actors to play their defined roles.

If the key to legal justice is seen to reside in the distribution of social tasks between law maker and law applier, the idea that these two functions can be captured by the concepts of legislator and, especially, adjudicator will almost inexorably follow. Justice is about ensuring that an objective, passive third party listens faithfully to proofs about past events and arguments about authoritative, pre-existing rules. Consequently, justice is seen to require primarily that adjudicative processes be incorruptible. Justice is not directly the product of formulae which actually have some substantive content, but flows from fidelity to formulae which are directed to process. What often appear as unnecessary (or unduly technical) trappings of the judicial system – rules relating to standing and to burden of proof, for example – are in fact necessary to transform complex substantive claims into recognizable procedural formulae.

Ensuring that procedures are in place to guarantee to individuals their right to invoke the office of courts is fundamental to obtaining the result prescribed by the rules. Substantive rules of law are neither self-identifying nor self-executing. The proceduralist orientation of our present law has an important corollary. Only "official" adjudication before courts can ensure that degree of adherence to the rules demanded by the Rule of Law. In other words, despite the occasional tolerance in regulatory decision making, commercial arbitration or family mediation of alternative conceptions of due process, the dominant procedural model of the present system is that of adversarial adjudication. Due process norms are, therefore, not primarily or directly designed to identify and promote the achievement of substantive justice, but are intended above all to keep the adjudicative system functioning according to basic internal logic.

The belief that justice can only result from state managed processes of dispute-resolution (notably, courts) leads directly to the claim that effective access to them is the necessary and sufficient condition for the achievement of a just legal order. Yet the complexity and technicality of these "official" institutions means that effective access to them depends on having an intimate knowledge of their practical operation. At present only legal professionals have that intimacy. By a seemingly irresistible regression, the concept of justice is recast as access to legal services, and substantive justice has been factored out of the equation (even if, in the eyes of those who hold this view of law, substantive justice has not been lost, but is merely attended to by procedurally effective means).

There is another important consequence of this professionalization of justice. The symbolic function of the concept of justice has been divorced from its instrumental purposes. The image of the blinkered woman holding the scales of

justice has come to be understood as a symbol of process rather than as a symbol of content. The impartial reconciliation of claims so as to produce a balanced outcome (an Aristotelian mean) was once the primary idea; today the image is that of an impartial weighing of claims, however unbalanced the outcome may be. When presented as a professional achievement, "official" justice becomes simply the mechanism by which legal claims and disputes are systematically generated out of human conflict, rather than the actual process of their mediation and resolution. It is for this reason that we can talk of the "justice system" or "justice according to law": justice is the efficient production by legal professionals of cases to be heard and disposed of by courts.

To summarize this section, one can say that at each stage in the intellectual construction of the elements of an "official" legal system the jurist is faced with choices about how to conceive the endeavour. What is typically presented as a pure textbook description of the Canadian legal system is in fact a complex prescriptive elaboration by mainstream legal thought of how such a system should be constructed and understood. In general, these prescriptions are those of an "official" system which aspires to the Weberian ideal of formal rationality. But they are not, however, preordained either by the abstract notion of justice or by the general notion of law: justice can have a structural or systemic referent apart from individuated rules of duty and entitlement; the authority of law can be legitimated otherwise than through the "official" processes of the political state; law need not be produced only through formal institutions or in canonical rules; the just application of rules need not demand an adjudication of rights before courts; and the setting into motion of the system of rules thus created need not be the exclusive resort of professionals. The key, but usually unexamined question is, of course, why jurists are wont to choose stipulative definitions of this sort? More pointedly, the question is whether there is a connection between these professional definitions of "official" law and the bureaucratized structure of modern society?[10]

The above review reveals the many different points at which choices can be made about how to envision what constitutes a legal system. But what is also worthy of note is that the model of "official" law constructed by mainstream legal thinking may not even be descriptively accurate. Recent sociological and anthropological studies indicate that the model would not be not all that coherent with the actual practice of justice and law in contemporary Canadian society.[11] It follows that, if the understanding of justice and law reflected in currently popular views flows more from legal ideology than from empirical data, then any proposals for adapting the Canadian justice system to meet the concerns of Aboriginal peoples, and any benefits to society as a whole that could result from such an adaptation, will have to be argued first of all at the level of legal ideology. That is, the argument will be primarily about what conception or conceptions of law are most appropriate for multicultural and polyethnic contemporary western societies.

Current Conceptions of (Non)-Access to Justice

Let us assume for the sake of discussion, that the conceptions of the relationship between law and justice and of the key features of a legal system reviewed above can be empirically verified as existing in Canada today. Attention can then be focused on how well this legal system is actually performing the tasks which it has been assigned by the theory. This is the question that those who recognize the failures of the "official" system and who promote the agenda of access to justice seek to answer. Yet, presumably in deference to the jurist's preoccupation with procedure and remedies (dispute resolution) rather than substance and planning (dispute avoidance), the usual approach taken by access to justice commentators has been to concentrate on identifying and removing obstacles to getting a lawyer and going to court.[12] The predominant logic of access to justice is derived from the metaphor of barrier – as if justice were like a consumer product, already packaged and there to be delivered by the "official" legal system were only some obstacle external to it to be removed. While this metaphor is obviously inadequate for understanding all problems of access to justice, it is useful for highlighting at least some of the key reasons why the legal system in Canada often fails to live up to current expectations of it.[13]

Barriers to access to justice are usually characterized as either objective or subjective.[14] The former reflect the formal constraints which limit the ability of citizens who do know that they have a problem cognizable in law and who do want to take steps to resolve it, to call in aid the formal institutions of the "official" system of legal justice. The latter depend on the knowledge which individual citizens may have about the law, and their beliefs about the usefulness of hiring a lawyer or going to court – that is, the perceptions they may have about the efficacy and fairness of "official" law. Both types of barrier, of course, constitute obstacles to the use of "official" law and its institutions as a means of achieving justice.[15]

Access to justice analysts have tended to focus almost exclusively on objective barriers, for these are most easily measured statistically, are most easily accounted for on a balance sheet, and most easily lend themselves to follow-up effectiveness studies. In general, objective barriers are identified as those relating to physical access to legal services and legal institutions,[16] to economic considerations,[17] to excessive delay in legal proceedings[18] and, for some commentators, to the structural complexity of the legal system, including its language and its procedures.

It is revealing that the complexity of "official" law is restated as a barrier to access, for the implication of this restatement is that the notions of "official" or institutional law itself, or of formal rationality as a conception of inter-personal relations, or of a universal abstract standard of justice are not the cause of the problem. Orthodoxy has it that reform energy should be directed to removing all structural barriers caused by excessive complexity within the system – the diversity of courts and tribunals, the multiplicity of procedural regimes, including

varying limitation periods or filing delays, and the arcane vocabulary of judicial proceedings. Here one sees how, by transforming justice into justice according to law, the metaphor of barriers also transforms what are essentially psychological impediments to achieving justice through "official" law into technical problems of legal language and system structure. Yet, to restate what is often the rejection by ordinary citizens of "official" law as a barrier to access resulting from the complexity of the system, is to miss an obvious point. The reason for the rejection is the perception either that there is no justice in the institution to which reformers seek to enhance objective access, or that justice can be better achieved in an alternate forum.

This observation leads to a consideration of what have been labelled as "subjective barriers" to access. These barriers are both the most important impediments to the just functioning of the legal system and the most difficult to assess. For they mainly concern attitudes: how are "official" law and its institutions viewed by citizens, and what kind of commitment do they attract from them? As a formal rational system, the "official" legal system theoretically is designed to meet the needs of the citizen viewed without regard to any individuating features. Nevertheless, in practice this design seems especially oriented to the abilities and preoccupations of the average, middle-class, middle-aged, educated, white male. Women, the young, the old, the poor, the immigrant, visible minorities, Aboriginal peoples, and the intellectually or the physically disabled are each seen by the legal system as deviations from the norm whose access to justice difficulties may (in certain cases or for certain purposes) require special consideration. But they, and their particular access to justice concerns, are not perceived as constituting aspects of normality.[19] Hence, the psychological reticences and disaffections which they feel are typically screened out of assessments of how equal access to justice really is. In other words, because these psychological and intellectual "barriers" often go to the substance of what we mean by justice (and not just to its procedures and institutions), the purely instrumental metaphor of barriers is inapt to describe them.

Like failures of access due to the complexity of the system, most of these "subjective barriers" have been recast by mainstream scholars as technical problems: they are said to result from informational shortfalls. If only people had complete information about how the justice system worked they would adhere enthusiastically to it. On this analysis the optimal solution to inaccessibility caused by psychological factors is simply to provide more information to those who currently seem to be excluded. No doubt lack of knowledge, like lack of money, is an important impediment which is at the root of many denials of justice: even the world's best legal aid system, or optimal structure of criminal due process guarantees, or most liberal "judicial interim release" mechanism, or most flexible small claims court structure, or broadly drawn class-action procedure, or expeditious workers' compensation scheme will not contribute much to resolving problems of access to justice if a large percentage of those for whom it was

designed to service do not either know of its existence, or do not know how to take advantage of it. If knowledge is power, the ability to recognize the formal legal dimension of any problem which arises is, from an instrumental perspective, a key component of access to the legal system. But once again, to conceive lack of knowledge as a barrier is to assume that if citizens had the required knowledge, they would not only recognize when they have a problem which can be processed through the "official" system, but also would happily invoke that system.[20] And this assumption about the eagerness of citizens to engage the law is made both of ordinary citizens and of those who could be characterized as "marginalized".

These then are the principal failings in the system of "official" law which have been recharacterized as barriers to access to justice. Given this logic of barriers, it is not surprising that almost all recommendations for enhancing access to justice are focused on the delivery of traditional legal services. For true believers in the primacy and exclusivity of "official" law, the principle of equality before the law can only be made operational if all citizens have equal access to those "official" institutions charged with applying the law and allocating its sanctions (the courts), and to the servants of those institutions (lawyers). The complementary claim is that equality before the law demands that all citizens have exactly the same recourses, and that no particularized alternatives to handle the disputes of certain segments of society are permissible. Here the notion of access to justice as a description of the system's failures, and the logic of barriers which sustains it, cohere perfectly with the popular model of the "official" legal system: access to justice really means access to law.

But there are, in addition, two other types of failure which can also be seen either as failures of access, or failures of justice. Neither attracts much attention in access to justice studies since neither fits very well into the barriers conception of inaccessibility. Nevertheless, both speak centrally to the relationship of law to justice. First of all, true access to justice requires more than access to "official" dispute resolution organs (courts "of justice"). It also demands access to "official" institutions for the production and enforcement of law: the legislature and the executive. Consider the executive and its agencies – the police, licensing bodies, inspectorates, and the public service. Almost all studies observe that it is at this level of administration of "official" law that the principle of equal access is most often put to its severest test. For it is at the level of street contact with the police that the various injustices of law are most manifest to ordinary citizens. Often these front-line agencies are neither well integrated into the constituencies they serve, nor is their exercise of discretion particularly responsive to the needs and expectations of these constituencies. In this larger perspective one must also consider whether current conceptions of democratic enfranchisement are sufficient to ensure true access to legislative institutions by which notions of justice are transformed into the prescriptions of "official" law. Conceived in relation to law making, equal access would demand the allocation

of equal resources to all citizens in order to influence policy by way of lobbying, pressure groups or the submission of briefs to working groups, consultative committees and legislative hearings. More generally, equal access might suggest the need for voting systems which are not based on territorial constituencies, or even for greater devolution of law-making authority in fields of law especially susceptible to local or socio-cultural variance.

The logic of barriers also truncates the notion of access to justice because access is conceived largely in individualized and instrumental terms. The notion of access is individualized because "official" law in the late twentieth century is dominated by the concept of rights. These rights are vested in individuals, and legal justice is seen almost exclusively as the formal adversarial adjudication of rights assigned in a logic of "commutative justice". Social justice, or the idea of "distributive justice" as a goal of legal arrangements for dealing with interpersonal relationships, is discounted because of its non-adjudicative and aggregative orientation. Thus, even procedural concepts such as broadened standing rules, class actions, the possibility of impleading unspecified "industry defendants", and especially the notion of alternative dispute resolution are not usually favoured as law reform initiatives for enhancing access to justice because they fit poorly the framework of rights adjudication. Similarly, achieving distributive justice within existing institutional arrangements by improving the representativeness of the police, the bar, the judiciary, and faculties of law is not viewed as an important component of the traditional notion of access to justice. Since "official" law is the product of a democratic process which ensures its representativeness, neutrality of the key actors in the system rather than aggregated representativeness is thought to be the best guarantee of its efficacy and of access to it. Impartiality and justice, it is argued, flow from the formal objectivity of the system, not from its dynamic and subjective equilibrium.

This section has offered a standard account of how the failings of the "official" Canadian legal system (especially for non-Aboriginal peoples) have been understood by jurists who are concerned with "access to justice" issues. But it also reveals that the image of access and its accompanying metaphor of "barriers to access" misconceives and misstates much of the problem. Some of the most substantial failures of the "official" system flow from what have been called "subjective barriers", and not from "objective barriers" such as cost, delay, and physical impediments to access. These attitudinal and psychological factors, more often than not, result from a perception by citizens that the "official" justice system is biased, unfair, or simply built upon assumptions which are foreign to their beliefs about what constitutes inter-personal justice. Put otherwise, making "official" law and its institutions more "objectively" accessible will not overcome all the failings of the system because the "official" system itself (and especially the ideology of the system as propounded by mainstream jurists) is, at least in some measure, at the root of the failure.

There are four main ways in which the alienation of ordinary citizens reveals itself. First of all, institutionally: many Canadians do not want to perceive that they have a problem which is defined as legal by the "official" system, but prefer to understand and deal with their difficulty within their own socio-cultural framework. Second, procedurally: many Canadians who do perceive that they have a legally cognizable problem mistrust an "official" system which requires them to take a very narrow view of what is relevant to any disagreement, to frame their complaint in terms of a right to assert, and to engage in a win or lose procedure before a third party who doesn't come from or understand their socio-cultural-economic circumstances. Third, substantively: many Canadians are disheartened by the "official" system because its conception of justice seems remote and uncomprehending of the values that they hold, and because they have no way of making their views about how to correct these substantive failures heard. Finally, structurally: however neutrally it is cast, the "official" system seems to favour a certain class of citizen over others. Women, cultural communities, the disabled, the young, the old, and the economically disadvantaged all find the system not especially responsive to their particular circumstances (be this in regard to its institutional structures, its procedures, its substantive rules and remedies, or its unitary and universalist conception of justice). In brief, disenchantment, disenfranchisement and disempowerment, much more than lack of access as this is traditionally understood, capture the root failings of the "official" justice system for many Canadians.

Reperceiving Law and Justice Through the Lens of Legal Pluralism

The failure of "official" law in the modern regulatory state is not just a perception of a small number of ordinary citizens. It is also recognized and announced by jurists themselves. For example, a common belief among professional critics of law in North America who have been at pains to point out its substantive problems is that the fundamental cause of the failure has been the presence of too much law. Law penetrates too deeply into social life and prevents people from leading lives driven by their won conception of just conduct. Unlike scholars who have embarked on the largely procedural access to justice endeavour, these critics believe that the solution to the crises of "official" law lies in "less law", not "more access". Nevertheless, those who take this view have exactly the same perspective on what constitutes law as the access to justice scholars with whom they appear to disagree. Both assume that there is and can be only one "official" legal system operative in a given geographic space at a given time: thus, for one group deregulation necessarily means less law; and, for the other, justice is more accessible only when "official" institutions such as courts are more accessible. All the main tendencies in professional legal philosophy (positivism, natural law, sociological jurisprudence, critical legal studies, marxism, and most feminist theories) tend to share this "legal centralist" assumption.[3]

The first section of this part will focus on clarifying the basic tenets and presuppositions of an alternative vision of modern law developed primarily by legal sociologists and legal anthropologists – legal pluralism. Here, the main concern is to show how this perspective permits jurists to recognize, and therefore, to gain a better understanding and ultimately to acknowledge the legitimacy of, what is actually taking place in Canadian law today, once orthodox preconceptions about "official" law are swept away. The second section of this part will consider some of the implications of the legal pluralist perspective for overcoming the failures of the "official" system – both in terms of access to justice as traditionally understood, and of enfranchisement. At this point, the benefits, both for Aboriginal peoples and for society generally, of using legal pluralism as a model for the reconception, redesign and adaptation of Canada's current "official" justice system will also be suggested.

Distinguishing Features of Legal Pluralism

The term "legal pluralism" has a relatively recent pedigree in North America, finding its first coherent expression in the work of Leopold Pospisil and Sally Falk Moore at the beginning of the 1970s.[22] But the idea can be traced back much earlier, to the studies of sociologists and anthropologists in the 1930s and 1940s,[23] and to the Italian institutionalist Santi Romano just after the turn of the century.[24] Since the mid-1980s, a new "critical legal pluralism" has emerged, which analyzes the diverse non-pathological legal orders in modern, western, multicultural and polyethnic societies.[25] The principal tenets of this new legal pluralism which distinguish it from models of "official" law promoted by "legal centralists" are four-fold.

First, legal pluralists posit that there are a multiplicity of legal orders in every society, and reject the centrality of the state or "official" legal order as the lynchpin or legal normativity.[26] They claim that different social milieux create their own normative standards to shape social behaviour and their own institutions to reinforce or apply those standards: not all law is made by some "official" agency of the state deriving legitimacy from a single system established through the Constitution.[27]

Second, because legal regimes are constituted by a plurality of decision-making institutions, distributive criteria and cultural traditions, each of which interacts in complex ways with state-sponsored normative standards, law cannot be viewed simply instrumentally: law is not an exogenous variable acting upon a passive society and changing behaviour directly by offering rewards for, or placing sanctions upon, certain conduct.[28]

Third, legal pluralists assume that all these different legal orders are in constant interaction, mutually influencing the emergence of each other's rules, and that the structures and trajectories of inter-normativity as between these multiple legal orders are varied and unpredictable.[29]

Fourth, legal pluralists presume that to understand the role that "official" law actually plays in a given social field, one has to understand the structures of "unofficial law" operative in the same field: there is, consequently, no clear separation between legal norms and other social norms, including norms of justice.[30]

There are, of course, affinities between theories of legal pluralism and the general ideology of postmodernism. But they are distinct perspectives, and it is important to note the distinctions. A postmodern conception of law rejects any notion of the natural order. For legal postmodernists, the social world is in no way a scientific given, but is entirely constructed from our beliefs and from ideology. Nothing in life is determined in a fixed and final form. All is flux. Legal postmodernists also reject the possibility of there being transcendent concepts and values: class differences, or differences of sex, religion, ethnicity, age, physical and intellectual capacity are held out as evidence that previously held universal ideals (such as justice, for example) are really particular and contingent upon the political structure of a given socio-economic order. Finally, legal postmodernists assail the jurist's belief in the objectivity of language, and claim that all interpretation is radically indeterminate. Words are held not to have meaning apart from that which users ascribe to them.[31] Fundamentally, like legal realism before it and like its contemporary, the law-and-economics movement, legal postmodernism is both a nominalist (if not a nihilist) and a statist legal theory.[32]

By contrast, legal pluralism puts two quite different premises into play: it rests on a sociological conception of legal normativity – law is not just the exercise of episodic power; and it is clearly not a statist theory – the indeterminacy of legal language is not seen as overly problematic because "official" interpreters are not central to the key normative relations in society. Because the "official" legal system does not consist of a self-contained and self-executing set of rules, it depends on interpretation for its elaboration and application. That interpretation is conditioned by the larger cultural context and draws upon conceptions of value, of justice and of entitlement in society generally, none of which are matters of uncontroversial "shared values" or universal "standard practice", and all of which are highly responsive to local variation. For legal pluralists the key legal problems, given that these differentiations exist, thus become (a) when and how does a state system itself allow for the expression of different values in different contexts? (b) what is the appropriate hermeneutical process for achieving a common framework between these? and (c) when and in what domains is it necessary to build up that common framework? All these questions presuppose a tolerance of a heterogeneous conception of justice within a political state, and a much more open-ended conception of law in modern society.[33]

What are the implications of the legal pluralistic approach for the way in which "official" law is viewed from outside its own system? To begin, because legal pluralists views families, cultural communities, workplaces, neighbourhoods, bureaucratic organizations, commercial enterprises and an almost infinite variety

of other social fields as important sites of legal regulation which both complete, and compete with, the "official" legal order, the root conception of systemic interaction is more one like that of the conflict of laws, than one like official jurisdictional determinations between courts and administrative tribunals.[34] They also consider that explicitly made legal rules (made by whatever type of political or social institution may exist in a given society) are not the only vehicles of normativity, but they too compete with a variety of customary rules, as well as a variety of purely implicit rules.[35] Again, legal pluralists not only decline to equate normativity with institutional organization, they hold that conceptions of distributive justice are infinitely plural even within relatively well defined institutional settings.[36] Finally, legal pluralists presume that the legal processes by which human interaction is structured are infinitely more variant than those suggested by the model which gives priority to legislatively announced claims of right and judicial adjudication of these rights.[37] In every facet of legal structure (rules, institutions, procedures, conceptions of legitimacy), therefore, the pluralist perspective can be applied to illumine how competing or complementary legal orders interact with each other.[38]

Each of these implications of legal pluralism suggests practical consequences for how the failure of "official" law for disempowered segments of Canadian society and for Aboriginal peoples is understood.[39] By postulating a plurality of normative orders regulating the same social conduct in the same socio-geographic field, legal pluralism focuses on the interaction of "official" and "unofficial" normativity. In other words, legal pluralism understands the law/society relationship not simply as the imposition of a normative order (the Law) on a disordered environment (Society). Furthermore, because the relationship between sets of legal norms is a dynamic one involving two agencies, their respective content is often incompatible. But a legal pluralistic approach permits citizens and jurists to address this conflict without being forced to choose an either/or dichotomy for reconciling them. As applied to diverse legal orders in non-Aboriginal society a legal pluralistic approach permits questions of differential treatment for disadvantaged segments of society to be raised in a manner which does threaten the ideology of "equality before the law".[40]

Yet another implication of a legal pluralistic approach is that it offers a means for assessing the relationship of authority (or legitimacy) to norm. Each normative field creates (or presupposes) its abstraction in a model of that field, but each such model also creates (or presupposes) an implicit field which has no defined frontier. The total normative context within which each of us lives is constructed by the totality of the normative fields within which we live. There is no permanent hierarchy of normative orders in any individual's life; each one of us is constantly deciding (and refusing to decide) which normative order (the "official" legal system or some other system) will be supreme. From a legal pluralistic perspective, the relationship between interpreter and interpretation is also one of reconstructing relationships between institutional structure, and institutional

norms; similarly, any society is constantly mediating its diverse normative orders and redeciding the relationships between them.[41]

The legal pluralistic approach also serves to reformulate the very questions posed by those who advocate the cause of access to justice. The systemic questions "how and why does "official" legal regulation fail?" and "is a particular form of "official" legal intervention effective?" are reconceived as the questions "in what contexts do certain forms of normative regulation such as "official" law seem to work?" and "what are the variables which suggest when one or the other normative order is likely to be effective as against all others?" or even "is formal legal regulation and 'official' law necessary to a particular sphere of social behaviour?" Here the access to justice issue becomes an issue of local empowerment, not one of bootstrapping under-empowered segments of Canadian society into an "official" system which, in any event, is not substantively responsive to their conceptions of justice.[42]

To summarize this section, one can conclude that three lines of inquiry opened up by a legal pluralistic approach are especially helpful in evaluating the relative merits of adaptationist and separatist strategies for crafting a model of legal regulation which is responsive to the failings of "official" law in multicultural and polyethnic western societies. These are, first, the selection of a point of reference. Would our perception about the relative efficacy and appropriateness of "official" law be different were we to use the family, rather than the state as the benchmark of legality? More importantly, would our perceptions about authority and legitimation of law be less tied to Weberian notions of formal rationality, and would our views about the pre-eminence of "official law" survive any such transformation of our benchmark of legality?

Second, legal pluralism confronts our capacity to tolerate dissonance among the normative systems which compete for attention and loyalty in the same social space. To what extent do certain fundamental concepts of the "official" legal order – jurisdiction and rights – cause us to believe that there must be a natural hierarchical ranking of these multiple legal orders in such a way as to insulate legal officials from responsibility for their selection of outcomes legitimated by one or other normative system? To what extent would acknowledging the absence of hierarchy cause us better to understand the principles of, for example, mutual recognition and respect which would allow each normative regime to operate within its own domain?

Third, legal pluralism questions our understanding of consistency in the justice system. Would our perception of contradictions in Aboriginal, family or neighbourhood regimes be different if we acknowledged the contradictions and incoherences in "official" law? Would our commitment to the possibility of a centralized system of social engineering through "official" law be less certain were we to understand the difficulties of instrumentalism (of predicting in advance the consequences of individual legislative initiatives) in complex normative fields?

Each of the above challenges to conventional understandings of "official" law has important consequences for how we approach the failings of Canadian law, and for the solutions to these failings which we are prepared to countenance. The next section attempts to address directly the "access to justice" implications of a legal pluralistic perspective.

Beyond Access to Justice

As a point of entry to the question whether adaptation of the "official" system to meet the concerns of Aboriginal peoples can improve access to justice for non-Aboriginal people, it is helpful to recall the root failures of the system for Aboriginal peoples. Several recent studies have pointed out the failings of the criminal law: statistics on the number of Aboriginal peoples in jail, on the number of teen suicides, on family violence, on alcoholism and drug addiction appear to point to its inability to respond to the needs and expectations of Aboriginal peoples. But many of these same studies also show that Canadian law generally is defective in this respect. The paternalism of the *Indian Act* is well acknowledged: its assumption that Aboriginal peoples would gladly trade their resource base (land) for money is counter-factual, and its underlying logic – that Aboriginal societies is just like Canadian society, that Aboriginal values are just like Canadian values, and that Aboriginal peoples react to "official" law exactly as Canadians do – has no empirical basis. Moreover, these various studies have revealed not only how different Aboriginal values and practices are from those thought to be mainstream in Canada, but also, within this general differentiation, just how different the values of various Aboriginal communities are, one from the other.

Any attempt to assess the possibilities of a different conception of the relationship between the "official" Canadian system and Aboriginal justice systems would, therefore, have to take as a starting point the problems of Canadian law as viewed through the eyes of Aboriginal peoples, and not the problems of Aboriginal peoples as viewed by Canadian law. Thus, one can ask what are the connections, if any, between diverse conceptions of the relationship of individual to family, to group, to stranger? How do Aboriginal peoples understand the concept of self and the concept of society? What are the connections, if any, between diverse conceptions of the relationship of people and property (however this is defined)? How do Aboriginal peoples understand notions of ownership and use, of appropriation and conservation? What are the connections, if any, between diverse conceptions of the past and the future, between agent and act, and between responsibility and guilt? How much of the failure of "official" law arises because it assumes that dominating western conceptions of the universality of reason, and the possibility of at least some judgements of truth and value which are close to absolute, are shared by Aboriginal peoples?

To illustrate the range of contributions which confronting the above failures by recognizing the existence of developed systems of Aboriginal justice can make to

improving the "official" system for non-Aboriginal people, let me trace out a brief map of how the possibilities would be characterized under a legal pluralistic perspective.[43] Imagine two axes. On one axis can be placed structural modifications to the civil and criminal justice systems applicable to all members of society. These would include, on an increasing scale of significance, everything from minor modifications to the adversarial system within courts, through the development of structures of mediation and alternative dispute resolution resting on alternative premises to those which sustain the adjudication of rights claims, to public legal information and education so as to permit citizens to prevent their interpersonal conflicts from becoming transformed into legal disputes, and ultimately to a reorientation of substantive rules of law so that they promote substantive equality in conflict resolution even where this means that they institutionalize procedural inequality.

On the other axis one would place solutions which overtly recognize the diversity of Canadian society and which would seek to improve the situation of identifiable members of it. Here, the options would range from the institutional (increasing the representativeness of these groups within the formal system; making the administrators of the system more sensitive to the particular concerns of these groups; building institutions to give special priority to the legal needs of such groups), through the procedural (redesigning certain rules of the system to rebalance it so as to not discriminate the under-empowered segments of society), to the substantive (actually changing the rules of substantive law, and the political processes by which "official" law is made).

Consider first, modifications to the "official" system not directed to specific groups. The most obvious cause for concern in the present system flows from the recognition that formal steps to ensure citizens equal access to courts to vindicate their rights rarely produces substantive justice. American studies show that in all litigation it is the "repeat players" who have a disproportionate degree of success.[44] This observation is merely an illustration of the more general point that each time one develops a new institution or procedure certain parties will be favoured at the expense of others.[45] Even the most objective and uncomplicated litigation system favours those clients best in a position to invoke its competence. Given this observation, the primary question in any reassessment of the civil litigation system should be to determine who now disproportionately benefits from a structure which requires plaintiffs to submit to the adjudication of "rights", and who would benefit if an alternative mechanism were instituted. Because they are less driven by procedural rules and fidelity to form over substance, dispute resolution mechanisms which do not depend on the adjudication of rights – for example, traditional forms of alternative dispute resolution (A.D.R.) such as mediation, arbitration, and simply tossing for it – will, all things considered, improve access to justice for under-empowered groups more than redesigning adversarial systems to make them "more objective" or "more accessible".[46]

Understanding the advantages of traditional A.D.R. (that is, alternative procedures for resolving conflict already cast as a legal dispute) suggests an even more radical reform of the litigation process. Given that legal disputes are themselves constructed on the basis of legal definitions from much more complex dislocations in human interaction, should not mechanisms be developed for addressing conflict in the socio-cultural frame from which it arises, before it takes on the character of a lawsuit? This strategy is more difficult to operationalize in criminal law matters, but the exercise of police discretion not to charge, and other responses such as diversion, restitution, or implicating the victim or the community of affect of the purported offender in sentencing decisions are existing examples of such an approach.[47]

In civil law matters, where no agency of the state (with minor exceptions such as systemic players such as rental boards, human rights commissions, ombudsmen and the consumer protection bureaux) is charged with identifying and invoking the jurisdiction of the "official" system, these alternatives should predominate. For few people know they have a particular kind of legal dispute until a lawyer tells them what it is and gives it a label. The juridification of everyday life is a product of the monopoly of the legal profession, and particularly of the last decades of rampant "rights discourse".[48] De-juridification thus depends on helping citizens develop ways of dealing with conflict other than those promoted by the "official" system and by lawyers operating within it, and on legitimating non-"official" institutions and processes of conflict resolution.

Of course, it is important to note that several types of pre-litigation A.D.R. already exist and have existed for years in civil law matters. These range from the highly informal processes of seeking the counsel or one's elders, to asking advice from one's religious confessor or minister, or putting one's case to a friend or disinterested neighbour. In each case, no one pretends that the advice being rendered is an opinion based simply on the application of the Civil Code or common law precedents to the human problem in issue. The advice is the counsel of prudence, of comity, and of reconciliation among those who already have well-established normative interactions. On a slightly more formalized level one finds a panoply of mediative institutions, either run by third parties or in part sponsored by industry organizations: newspaper consumer redress or tenants' forum columnists, better business bureaux, complaints mechanisms for certain kinds of services (dry-cleaning services, automobile dealerships, travel agencies, and so on). Almost all of these are parasitic on the existence of an affective – be this defined by ethnicity, geographic neighbourhood, socio-economic status, gender, domestic relationship or life cycle – community, or of an ongoing "marketplace" relationship – be this defined by consumer commodity, housing or employment. Recognizing and supporting the "unofficial" legal systems generated through such affective communities and "marketplace" relationships is essential to rendering more than just the present justice system in Canada.[49]

This observation leads to a further element of reform necessary for enhancing access to justice for all citizens. If one assumes that the key to an accessible justice system is the ability to understand one's problems, then public legal education and information take on a great significance. But legal information should not be such as to colonize the lay public. Legal information will have to be designed so that people are able to recognize the nature of the conflicts they face, the various ways in which those conflicts may be conceived, and the need, where appropriate to get professional help in dealing with them. Too often public information and education fails because the "official" law itself is jargon-laden, and the information purveyed is primarily about rights and obligations as established by this "official" law. What good is it to know that one has a difficulty with an insurer, a lender, a seller, a lessor, or any other entrepreneur if there is a written contract which is incomprehensible? As consumer protection legislation has shown, making contract clauses more visible through larger typefaces does little to help consumers understand and work through their difficulties. Under such conditions, far from empowering consumers, educating them about legal jargon usually convinces them only that they need a lawyer to resolve their problems, and consequently, increases their dependence on "official" law.

It follows that the key element in any program of legal information and education is to provide people with the resources to recognize and cope with their own problems – be this through recourse to "official" law or to any one of the systems of "unofficial" law to which they adhere. How often do we think about legal education in terms of its capacity to encourage settlement, compromise and negotiation? Do we think about legal education as providing consumers with insights about how to complain about poor service or defective goods? Do we see legal education as giving people the tools to perceive the diversity of ways in which conflict can be characterized, and the variety of social ordering techniques by which it can be resolved? An investment in legal education of this kind is truly empowering; for it acts directly upon individuals not as discrete bearers of "official" rights and obligations, but in their role as members of diverse normative communities. As such, it gives them the resources to draw on their own experiences and backgrounds to find solutions, and the confidence to assert these solutions in conflictual circumstances.

All of the above strategies for enhancing access to justice find their source in the notion that the most troubling structural properties of the existing system (which should be seen as a system of last, not first, resort) can be at least partially overcome by means of a general reorientation in the way we think about conflicts, rights, adjudication and all or nothing judicial remedies. Of course, overcoming these structural failings in the manner suggested inevitably will lead to the recognition of a plurality of conceptions of justice. But it is important not to see these opportunities and strategies as mechanisms for undermining "official" law; from a legal pluralistic perspective, they are, rather, techniques for legitimating "official" law by legitimating in appropriate contexts its diverse "unofficial" complements.

There is a second major component to the exercise of adapting the "official" system. This flows from the recognition that notwithstanding all these general attempts to enhance access to this "official" system, significant segments of the population will still be relatively disenfranchised. Is it possible to adapt the "official" system so that it is also responsive to the disempowerment of these important segments of society? The legal pluralist model suggests that there are numerous routes for doing so, short of the ultimate strategy of legal separatism. To recognize the heterogeneity of Canadian society (culturally, linguistically, racially), and that this diversity along with other differentiations (gender, age, physical handicap, socio-economic class) bears directly on issues of access to justice and enfranchisement, leads to the conclusion that even the "official" legal order itself ought in some measure to recognize this plurality. Not only would this require the development of diverse "official" institutions endowed with a diversity of procedural and substantive rules, it would demand the recognition of the plurality of concepts of justice held by different groups in Canadian society. In other words, as a matter of legal policy, we should not seek to have "official" law penetrate into more and more sectors of social life, but we should rather make room for group-constituted institutions and procedures of justice as well. Today "official" law should not only recognize, but also encourage competition among, "unofficial" normative institutions, much the same way that courts of the hundred, courts of common law, ecclesiastical courts, commercial courts and courts of equity competed for attention during the formative era of the common law tradition.

Complementing this strategy to legitimate "unofficial" judicial and administrative institutions which are particularly attuned to certain segments of society, should be a strategy to diversify the personnel within existing "official" institutions. Numerous studies indicate the under-representation of different groups among the police, the legal professions, the judiciary and the political class. Increasing empathy and understanding among these key players in the "official" system is certainly an important prerequisite for making the system more responsive and accessible for women, minority groups and other disempowered segments of society. But nothing short of actual representation by someone from their own milieu within existing "official" institutions will enhance the articulation of differences in their point of view, their conceptions of the just, and their sense of participation. For this reason, specialized legal aid clinics, education programs, and remedial structures by which these differences may be stated and acted upon are essential to enhancing true access to justice.[50]

Once the influence of diversity on procedural and remedial aspects of access to justice is acknowledged, it is easy to see how enhancing diversity within the institutions by which law is made would bear on questions of substance. Today, the substantive rules of "official" law frequently favour already privileged categories of claimants. For example, why should secured lenders have a priority over most wage claims in bankruptcy? After all, the dislocations caused by

unemployment, lost opportunity costs, and the like far outstrip those directly resulting to lending institutions and indirectly resulting to creditors of those institutions. Again, why should certain holders in due course of commercial paper (or assignees of credit card claims) be permitted to exercise their rights against debtors, notwithstanding that the goods or services which underlie the paper in question are defective? Given that a perfectly equilibrated procedural system will necessarily favour the person who does not have the onus of setting its remedial structure in motion, and given that in most consumer matters the person who has the onus to do something about product defects is the consumer, it would make sense to redesign the system to put the self-help remedies in the hands of the consumer, and the subsequent judicial redress mechanisms in the hands of the merchant. Similar points can be made in respect of the design of family property or residential tenancies regimes. Broadly speaking, a generalization of self-help recourses such as withholding rent is an important mechanism for permitting the community sense of justice and injustice play a greater role in the overall scheme of "official" justice.

The suggestions in the previous two paragraphs are based on the idea that sometimes "official" law must explicitly differentiate between classes of litigants in order to rebalance a disequilibrium in social or economic power. Such procedural differentiations are already present in numerous fields. In Quebec, for example, only physical persons may invoke the jurisdiction of the small claims court. Recent compensation schemes for victims of automobile accidents distinguish between damage to persons and damage to property. Residential tenancy legislation is now significantly different from that which applies to commercial tenancies. To recognize that different segments of society may actually only achieve an equal access to the institutions and recourses of "official" law when they are treated in their differentiated status is a key to understanding much modern legal regulation.[51] The challenge confronting those who seek to adapt the "official" legal system to enhance access to justice through a better enfranchisement of these segments is thus to find a criterion upon which to ground this enfranchisement. Adopting a legal pluralistic perspective on "official" and "unofficial" justice systems provides this ground.[52]

The above paragraphs have suggested the root causes of many of the access to justice failures of Canada's "official" legal system. While almost all law reform studies of these failures have concluded that addressing procedural questions of access to law and legal institutions can stand an adequate surrogate for questions about empowerment in the construction of substantive justice, and that the logic of barriers to access is a satisfactory means of organizing the inquiry into the system's failures, this section has argued that these two starting assumptions are inadequate. A reconsideration of the failures of "official" law through the lens of legal pluralism suggests a fundamental commonality in the reasons for the failure of the current system for both Aboriginal peoples and non-Aboriginal Canadians. This commonality reduces to the one crucial insight about law that a

"legal centralist" perspective conceals and a "legal pluralist" perspective highlights. The most significant failures of the present system of justice are failures of recognition, not failures of access.[53]

The number of different dimensions along which the specificity of Aboriginal peoples is manifest make this failure of recognition more palpable to them, and more patent to non-Aboriginal peoples who examine the situation of Aboriginal peoples from the outside. But coming to understand the reasons for this failure in the more easily discernable case of Aboriginal peoples, and reconstructing the ideology of "official" law in Canada so as to permit these failures to be overcome, ultimately will lead to a better understanding of parallel failures of "official" law for non-Aboriginal people, and the remedies which are required. The reorientation in approaches to access to justice toward issues of enfranchisement and empowerment which a legal pluralist perspective implies will significantly benefit Canadian society as a whole and especially disadvantaged segments within it.

Conclusion

In broad outline this paper has been about a relatively simple question posed in connection with the Round Table on Justice: "to what extent would the process of adaptation of the existing system...[of Canadian law]...involve reforms beneficial to (a) society as a whole, such as greater emphasis on restitution, reconciliation and rehabilitation? and (b) to segments of society such as the poor, women and cultural minorities."[54] But as I have attempted to show, answering this question raises several others going to the heart of modern understandings of what a legal system is really like. For this reason, it is appropriate to recapitulate briefly the argument of this essay as an answer to the question: "What are the prospects and possibilities flowing from a recognition and legitimation of the multiple Aboriginal legal systems which are currently operative for overcoming the failings of the current 'official' system of justice in Canada for non-Aboriginal peoples?"

While the popular conception of Canadian law is that there is one centrally organized legal system in Canada, on any empirical basis this ideology is shown to be suspect. There are a multiplicity of competing legal orders – often conflicting, always interpenetrating – in modern Canada. What is lacking is only the recognition by the "official" institutions of the legal system put into place by the political state that these other systems exist.

These other systems are characterized by a wide diversity of institutional, methodological, procedural and substantive frameworks. Not all depend on a separation between "legislative-type" organs and "judicial-type" organs; not all depend on defining inter-subjective relationships by means of the attribution of claims of right; not all depend on third-party adjudication (let alone third-party adversarial adjudication) as a procedure for vindicating these rights; not all adopt the logic of corrective justice for the settlement of interpersonal conflicts.

The promise of legal centralism is that all social conflicts can be authoritatively settled by a political process leading to general rules established by a legislature, and that courts can objectively apply these legislative rules. The achievement of justice in this legal centralist conception of law rests on two premises: that all citizens have equal access to the processes by which these social and political conflicts are mediated (that is, that the formal neutrality of the electoral process translates into the substantive equality of all voices in the legislative process); and that all citizens have equal access to the processes by which disputes arising from the application of these mediated norms may be resolved (that is, that the formal neutrality of access to the adjudicative process translates into the substantive equality of access for all citizens).

The scale of organization and heterogeneity of modern society is such that neither of these assumptions is verified in fact: access to and input into the political process are widely differentiated along continua relating to, among other things, ethnicity, gender, age, geographic location, degree of physical and intellectual ability or disability, socio-economic class; and just as important, access to and outputs from the dispute-resolution process are widely differentiated along the same continua.

Recognizing and legitimating the plurality of legal orders operating alongside the "official" justice system in Canada is the best means for overcoming these differentiations of access and outcome. The benefits of this recognition apply to both the civil law and the criminal law. In matters of criminal law, we already know that wide variations in the actual definition of criminal conduct exist as a result of the normal application of police and prosecutorial discretion; a recognition that these variations are normal, and the attempt within Aboriginal communities to develop specific standards is simply the application of this insight. Similarly, at the point of sanctioning conduct, we know that wide varieties of treatment are possible – restitution, reconciliation, rehabilitation – both through the way in which guilt is negotiated, and in the way punishment is attributed; a recognition that these variations are normal, and the attempt within Aboriginal communities to develop specific standards through procedures such as sentencing circles is, once again, simply the application of this insight.

Identical observations apply to matters of the civil law, both as to substance and as to process. In respect of society generally, the design of legal rules to differentiate between litigants reflects this approach. Placing self-help remedies in the hands of those with less economic power, and requiring that those with greater economic power take the initiative for invoking the "official" system are corollaries. Facilitating and legitimating conflict resolution within more localised communities of affect also reflects this approach. This is simply the pendant within "unofficial" systems of increasing the representativeness of "official" dispute resolution institutions.

The upshot of these observations is that the key issue posed by the question this

paper addresses is not whether such differentiated processes exist, for the anthropological and sociological evidence is overwhelming that they do – both in Aboriginal societies and in diverse non-Aboriginal societies in Canada. The key issue is how these variations should be accommodated either within, or in opposition to, the "official" legal order. To recognize, for the particular case of Aboriginal peoples, the implications of a legal pluralistic approach to law in modern society, is to compel us to see that exactly the same criteria of local justice apply to non-Aboriginal peoples. The consequence would be, therefore, the recognition and legitimation of the diverse "unofficial" legal systems and the multiple conceptions of justice upon which they rest, that are not currently accommodated (or not sufficiently accommodated) in Canadian society generally.

Notes

1. Candour requires mention that I have already had an opportunity to consider many of these issues in detail, although from a different perspective. From June 1989 through September 1991 I was the Chair of the *Groupe de travail sur l'accessibilité à la justice* of the Quebec Ministry of Justice. This Task Force produced a report entitled *Jalons pour une plus grande accessibilité à la justice* (Québec: Ministère de la justice, 1991) in which several of the themes I develop here were initially canvassed. See especially, Parts VIII (Besoins particuliers de certains groupes cibles) and IX (Autochtones) of the Report.

   I also have written about the general problem of access to justice, again in a manner consonant with the observations I make here, on several occasions since then: see R. A. Macdonald, "Access to Justice and Law Reform" (1991) 10 *Windsor Yearbook of Access to Justice* 287; "Accessibilité pour qui? Selon quelles conceptions de la justice?" (1992) 33 *Les Cahiers de droit* 457; "Whose Access? Which Justice?: A Review of A. C. Hutchinson, ed. *Access to Civil Justice*" (1992) 7 *Canadian Journal of Law and Society* 175; "Problèmes de participation aux services collectifs: la protection juridique" in S. Langlois and Y. Martin, eds., *Traité de pathologie sociale*, (Quebec: Institut de recherche sur la culture, 1993); and "Theses on Access to Justice" (1992) 7 *Canadian Journal of Law and Society* (forthcoming). Various aspects of the points developed in this essay are considered in greater detail in one or the other of these texts. None, however, directly considers the relationship between recognizing and legitimating Aboriginal justice systems and enhanced accessibility to justice for Canadians generally.

2. I do not, that is, take the position ascribed to Kelsen that justice is irrational and that only "law" can have any normative content (see H. Kelsen, *What is Justice?* (Berkeley: University of California Press, 1957); nor do I take the more contemporary sceptical position that law is irrational in the sense that it is indeterminate and serves only to mask relations of naked power (see, for a particularly severe expression of this viewpoint, A. Freeman, "Truth and Mystification in Legal Scholarship" (1980) 90 *Yale Law Journal* 1229.)

3. For powerful discussions of the idea that the content of justice may have a great diversity grounded in particular experience, see M. Walzer, *Spheres of Justice*, (New York: Basic Books, 1983); Alisdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), and Jon Elster, *Local Justice*, (New York: Russel Sage Foundation, 1992).

4. This view of the social functions of justice is elaborated at length by Mary Douglas, *How Institutions Think*, (Syracuse: Syracuse U. Press, 1986), especially at pages 111-128.

5. To take two well-known North American examples of this approach, consider J. Rawls, *A Theory of Justice* (Cambridge: Belllknap Press, 1973) and B. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

6. For a critical perspective on the history of the access to justice movement in the United States, see D. M. Trubek, "Critical Moments in Access to Justice Theory" in A. C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) at 107.

7. For a detailed discussion of how these shifts in focus occur, see R. A. Samek, *The Meta-Phenomenon* (New York: The Philosophical Library, 1981).

8. Many of the points raised briefly in the following paragraphs of this section are examined in detail in R. A. Macdonald, "Access to Justice and Law Reform" (1991) 10 *Windsor Yearbook of Access to Justice* 287. For a similar discussion in respect of law reform generally, see R. Samek, "A Case for Social Law Reform" (1977) 55 *Canadian Bar Review* 409. Let me emphasize the stylized character of the following few paragraphs. These beliefs are not shared to an equal degree by all jurists; nor would they necessarily be expressed in this manner by those who adhere to them. The five points are presented in this form here primarily to show how traditional views of law and justice lead to particular conceptions of the system's failings and of the remedial "access to justice" agenda.

9. For an early study (with an extensive bibliography) of the tenets of "legal centralism" and its alternatives, see M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 *Journal of Legal Pluralism* 1.

10. It is obviously beyond the scope of this paper to explore this question. For a provocative assessment, see R. Unger, *Law and Modern Society* (New York: The Free Press, 1976). See, more generally, the collection of readings in J. C. Smith and D. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983), especially chapter 4, "Law and State", pages 395-651.

11. The sociological literature on multiculturalism in Canada is, of course, overwhelming. But other disciplines such as history and philosophy have also considered the Canadian case. For an illuminating discussion of the notion of polyethnicity in modern history, and a debunking of national ethnic states and their attendant legal apparati, see W. McNeill, *Polyethnicity and National Unity in World History* (Toronto: University of Toronto Press, 1986); see also, C. Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992).

12. For an excellent collection of papers which illustrate this theme perfectly, see A. C. Hutchinson, ed., *Access to Civil Justice*, (Toronto: Carswell, 1990). See also, *Actes du colloque sur l'accès à la justice*, (Montreal: Faculté de droit, Université de Montréal, 1987), a symposium held on March 6 and 7, 1987; and "Tenth Anniversary Symposium – Access to Justice: Law, Society and Scholarship", (1990) 10 *Windsor Yearbook of Access to Justice* 281-541.

13. I have previously discussed in detail the deficiencies of the barrier metaphor and other conceptions of access to justice which are more inclusive. The next several paragraphs summarize the argument in R. A. Macdonald, "Accessibilité pour qui? Selon quelles conceptions de la justice?" (1992) 23 *Les Cahiers de droit* 457.

14. See, for a detailed elaboration of this distinction, M. Giard et M. Proulx, *Pour comprendre l'appareil judiciaire Québécois*, (Montreal: Presses de l'Université du Québec, 1985), at pages 244 et seq.

15. For a lengthy analysis of these diverse barriers and the various types of adjustments to the "official" system of civil justice which could be made to remove them, see *Jalons pour une plus grande accessibilité à la justice*, *supra*, note 1.

16. Among purely physical barriers are: the availability of courts, tribunals, registries, inspectorates, claims officers, and especially lawyers and para-legals within a reasonable distance of all citizens; the availability of services at convenient hours; the provision of front-line legal information by telephone through reverse charge calls, taped messages, and so forth; and wheelchair access and analogous audio and visual services for persons having a physical disability. For discussion, see J. Frémont, "L'accès à la justice à l'aube du XXIe siècle au Québec: commentaires sur le rapport du Groupe de travail sur l'accessibilité à la Justice (rapport Macdonald)" (1992) 11 *Windsor Yearbook of Access to Justice* 143.

17. The various financial barriers tend to attract primary attention in access to justice studies. They include institutional costs such as filing fees, court costs, the cost of expert witnesses and other judicial disbursements. But they also comprise lawyers' fees – the single greatest economic barrier – as well as indirect costs such as lost wages, opportunity costs, and for those in outlying areas, transportation and subsistence expenses. For a useful, but dated, inventory see M. Cappelletti, "Vers une justice égalitaire: une étude comparative de l'aide judiciaire dans les sociétés contemporaines" in M. Cappelletti, et al., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, (Dobbs Ferry: Oceana, 1975). A comprehensive statistical study of legal aid regimes is presented in Canadian Bar Association, *Legal Aid Delivery Models: A Discussion Paper*, (November, 1987).

18. Among significant impediments to obtaining judicial redress resulting from undue delay are: the inability to reconstruct evidence after a long period; the diminished value of compensation resulting from inflation; the uncertainty or opprobrium attaching to pending criminal charges; the pressure on economically less resilient parties to settle; the additional opportunity costs occasioned to the parties; and the disruption of personal and family life caused by the contingency of litigation. For a general discussion, see S. Shetreet, "The Limits of Expeditious Justice" in *Expeditious Justice*, (Toronto: Carswell, 1979), at 1.

19. There is no easy answer to how the law should respond to the access to justice concerns of these "non-normal" persons. For a detailed exposition of the paradoxes of not recognizing the specificity (or abnormality) of these constituencies, but trying to reconceive them as aspects of normality, see M. Minow, "Foreword: Justice Engendered" (1987) 101 *Harvard Law Review* 10.

20. The point is easier to grasp on the civil law side. If citizens knew about the law and its facilities, the assumption is that they would be less reluctant to engage a lawyer and undertake litigation to vindicate their rights. In criminal process, since carriage of the action normally lies with the Crown prosecutor, the idea is (as concerns victims) that they would call the police and insist upon prosecution (*e.g.* of spouse and child abusers), and (as concerns accused) that they would take advantage of the procedural recourses of the law to optimize their defence (*e.g.* so-called *Charter* rights).

21. For a comprehensive account of how these various theoretical approaches all rest on the "centralist" assumption, see C. Sampford, *The Disorder of Law* (Oxford: Blackwell, 1989).

22. See S. F. Moore, "The Semi-Autonomous Social Field, an Appropriate Subject of Legal Study" (1973) 7 *Law and Society Review* 719; L. Pospisil, "The Structure of a Society and its Multiple Legal Systems" in *Cross Examinations, Essays in Memory of Max Gluckman* (1978), at 78.

23. See, for example, the first English-language edition of G. Gurvitch, *Sociology of Law* (London: Routledge and Kegan Paul, 1947), and the pioneering study of K. Llewellyn and E. Adamson Hoebel, *The Cheyanne Way* (1941).

24. Santi Romano, *L'ordre juridique* (trans. L. François and P. Gothot) (Paris: Dalloz, 1975) being a translation of the second edition of *Ordinamento giuridico* (1947), originally published in 1917-1918 in the *Annali delle Università toscane*.

25. Early North American based studies in legal pluralism tended to focus either on the exotic or the pathological. Thus the conflict between European law and indigenous law in colonial settings was a primary preoccupation – for discussion see S. E. Merry, "Law and Colonialism" (1991) 25 *Law and Society Review* 889. Similarly, diverse inner city legal orders of the criminal underworld became an important focus of study – see J. Auerbach, *Justice Without Law*, (Cambridge: Harvard University Press, 1983). For a statement of the foundations of the newer approach to legal pluralism, and the objects of its inquiry, see J. Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1. See also G. Teubner, "Rethinking Legal Pluralism" (1992) 13 *Cardozo Law Review* 1443.

26. See S. E. Merry, "Legal Pluralism" (1988) 22 *Law and Society Review* 869; N. Rouland, "Les droits mixtes et les théories du pluralisme juridique" in *Droit national et Droit Mixte*, (Aix: Presses de l'université d'Aix-Marseille, 1989) at 41.

27. For a forceful explanation of this point, see P. Fitzpatrick, "Law and Societies" (1984) 22 *Osgoode Hall Law Journal* 115.

28. See, for example, B. de Sousa Santos, "On Modes of Production of Law and Social Power" (1985) 13 *International Journal of the Sociology of Law* 299.

29. See J. Carbonnier, "Les phenomènes de l'internormativité" (1977) *European Yearbook of Law and Sociology* 42. See also, H. W. Arthurs, "Understanding Labour Law: The Debate over 'Industrial Pluralism'" [1985] *Current Legal Problems* 83.

30. See W. Pue, "Wrestling With Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 *Urban Geography* 566. For a particularly nuanced study of this phenomenon in Quebec, see R. Cliche and M. Ferron, *Quand le peuple fait la loi* (Montreal: Hurtubise, 1972).

31. For a general discussion of legal postmodernism, see B. de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 *Journal of Law and Society* 279; see also A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 *McGill Law Journal* 507. In North America the post-modern approach to law has in large measure been appropriated by the Critical Legal Studies movement, and traces itself out in fundamental challenges to the existing structure of legal procedure and substantive law. See, for a brief review, R. Unger, *Critical Legal Studies*, (Cambridge: Harvard University Press, 1986), and compare, A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990).

32. The kinds of questions posed by a post-modern approach to issues traditionally falling under the label "access to justice" are reviewed in J. Handler, "Dependent People, the State, and the Modern-Post-modern Search for the Dialogic Community" (1988) 35 *U.C.L.A. Law Review* 999.

33. For detailed discussion of these points, see P. Amselek, "Le droit dans les esprits" in P. Amselek and C. Grzegorczyk, eds. *Controverses autour de l'ontologie du droit* (1989); C. Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (1983), 167; and C. Taylor, "Interpretation and the Sciences of Man" in C. Taylor, *Philosophy and the Human Sciences: Philosophical Papers: 2* (Cambridge, 1985) at 15.

34. See for various elaborations of these themes, R. Matthews, ed., *Informal Justice?* (London: Sage Publications, 1988). For a powerful historical study of the phenomenon, although not expressed in the same terms as in this essay, see H. W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985).

35. See P. Ellickson, *Order Without Law* (Cambridge: Harvard U. Press, 1991). For a more theoretical study, see R. A. Macdonald, "Pour la reconnaissance d'une normativité implicite et

inférentielle" (1986) 18 *Sociologie et Sociétés* 47.

36. For recent studies of the plurality of conceptions of justice in modern society, see J. Coleman, *Foundations of Social Theory* (Cambridge: Harvard University Press, 1990) and J. Elster, *Local Justice* (New York: Russell Sage, 1992).

37. For a well-developed conception of procedural pluralism, see L. Fuller, *The Principles of Social Order* (Durham: Duke University Press, 1983).

38. For a preliminary series of hypotheses on these interactions, see R. A. Macdonald, "Des Vieilles Gardes: hypothèses sur le pluralisme, l'internormativité et le désordre juridique" (forthcoming, 1993).

39. For further development of the three points raised in this and the next two paragraphs as they apply particularly to Aboriginal justice systems, see the memorandum attached as an Appendix to this paper.

40. Consider the following example. Traditional accounts of local or community legal systems see them as "unofficial" counterpoints to "official" Canadian law. A legal pluralistic approach permits these neighbourhood, or workplace, or culturally co-ordinated structures to be understood as competing normative orders, each responsive to its own logic, and each mutually informing the other. See, for a detailed study, S. E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

41. Consider the following example. Traditional accounts of why a particular co-contractant would not invoke "official" law to gain redress for breach of contract or some other performance problem emphasize features internal to the "official" system: the efficiency value of settlements, the vagaries of litigation, the risk of bankruptcy and so on. A legal pluralistic approach would seek to identify the "unofficial" legal system within which the contract of the parties is negotiated and performed, and would attempt to understand the conditions under which one or the other of the parties considers "official" or "unofficial" law determinative. For a detailed consideration of some of these factors in a particular contractual context, see J.-G. Belley, "L'entreprise, l'approvisionnement et le droit. Vers une théorie pluraliste du contrat" (1991) 32 *Les Cahiers de droit* 253; "Les transformations d'un ordre juridique privé. Les contrats d'approvisionnement à l'ère de la cybernétique et de la gestion stratégique" (1992) 33 *Les Cahiers de droit* 21; "Compatriotes, partenaires ou amis? La normativité contractuelle des échanges entre l'entreprise Alcan et ses fournisseurs du Saguenay-Lac-Saint-Jean" (forthcoming, 1993). Compare the structuralist account of these types of mediating activity by N. Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1992) 13 *Cardozo Law Review* 1419.

42. Consider the following example. Traditional accounts of inaccessibility of justice hold that, for example, an important strategy for dealing with consumer and tenant exploitation in a given disadvantaged neighbourhood would be to set up a local or community legal aid clinic so that consumers and tenants could enforce their legal rights. A legal pluralistic approach would ask if better solutions would be to deploy the "clinic" to organize a comprehensive rent strike and to set up housing co-operatives on the one hand, and to boycott exploitative sellers and set up food and other co-operatives on the other. Is local empowerment only a matter of exporting conflict to the "official" system or does it involve creating and nurturing "unofficial" normative orders? For elaboration of these themes, see J. Conley and W. O'Barr, *Rules Versus Relationships: the Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990); S. Silbey and A. Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to Reconstruction of the Juridical Subject" (1989) 66 *Denver University Law Review* 437.

43. For a more complete development of several of the themes raised in the next few paragraphs see R. A. Macdonald, "Theses on Access to Justice" (1992) 7 *Canadian Journal of Law and Society* (forthcoming).

44. See, for example, M. Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.

45. The American experience is confirmed by a recent study of litigation in the Small Claims Court of Montreal. Almost two-thirds of plaintiffs in that court – a court designed to favour ordinary citizens by excluding corporations as plaintiffs and excluding representation by lawyers – fit the following profile: white, male, middle-class, middle aged (between 30 and 50), francophone, professionals suing to recover a contract debt from a client. Lawyers may be excluded from representing others in the Small Claims Court, but they have a significant presence as plaintiffs in their own right. See R. A. Macdonald, "Are All Small Claims Identical? A Preliminary Inquiry Into the Use of the Montreal Small Claims Court" (unpublished 1992).

46. This does not mean, of course, that one can dispense with the need for coercive third-party dispute resolution mechanisms altogether. For even alternatives to adjudication can reproduce systemic inequalities, and at a certain point, even if there are no longer *a priori* advantages to certain repeat-players forcing a judicial settlement of a dispute, obstinacy, mean-spiritedness, and jealousy will occasionally require an imposed solution. The question here, however, is whether access to third-party adjudication should be enhanced or whether these other means should be developed further. Even within the structure of "official" law we have choices whether or not to define human relationships so inter-personal conflict may be more or less easily judicialized.

47. For a discussion of the latter technique in the Aboriginal context, see the judgment of Stuart, J. in *R.* v. *Moses* (1992) 71 C.C.C. (3d) 347 (Yuk. Terr. Ct.). See also, H. Lilles and B. Stuart, "The Role of the Community in Sentencing", *Justice Report* vol. 8, no. 4, spring 1992, at 3.

48. For a sustained critique of this juridification, see Mary Ann Glendon, *Rights Talk* (Cambridge: Harvard University Press, 1991).

49. This is not to say that the normative orders of these communities and marketplaces exist in complete abstraction from "official" law and that their values must always trump those of the "official" system. The case for such a result would be strongest where Aboriginal peoples are concerned (see M.E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Canadian Human Rights Yearbook* 3), but even here there may be persuasive reasons for promoting at least some of the core values of the "official" system (see A. Cairns, "Reflections on the Political Purposes of the Charter" in G. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville: Éditions Yvon Blais, 1992) 161 at 188-190). One of the advantages of a legal pluralistic perspective is precisely that it gives a theoretical framework within which these questions of normative dissonance can be addressed in a nuanced fashion.

50. In a recent study of the Small Claims Court of Montreal, it appeared that discernible patterns of discriminatory behaviour were present among certain members of the staff and the judiciary within the court: women, immigrants, those who had trouble speaking French, those obviously of the lower socio-economic classes, and the young were systematically given a less sympathetic hearing, and were treated with less understanding. See R. A. Macdonald, "Are All Small Claims Identical? A Preliminary Inquiry Into the Use of the Montreal Small Claims Court" (unpublished, 1992). Providing structures of representativeness is the best first step to overcoming this type of inaccessibility.

51. The connections between this procedural view of differentiated access to justice and substantive efforts to distinguish between litigants through affirmative action programmes is obvious. Nevertheless, as an access to justice concern, strategies such as reversing burdens of proof, relaxing evidentiary rules, and allocating discretionary remedies to only one party have not attracted the stigma which attaches in many circles to substantive affirmative action programmes.

52. For contrasting liberal attempts to find such a ground in respect of Aboriginal justice systems, see W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Clarendon Press, 1989) and B. Slattery, "Rights, Communities and Tradition" (1991) 41 *University of Toronto Law Journal* 447. In my view both these studies confirm that only a legal pluralistic approach to systems of justice provides an adequate theoretical ground for the recognition and legitimation of Aboriginal justice systems. *A fortiori*, only such a perspective provides an adequate theoretical ground for reconstructing non-Aboriginal justice systems.

53. For a theoretical discussion of the meaning of recognition in the analogous context of political representation, see C. Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992).

54. A slightly different formulation of the question, set out in other Commission documents, is: "Would the reforms to the Canadian judicial system advocated by Aboriginal peoples be beneficial to: (i) society as a whole, i.e. as a result of a greater emphasis on restitution and rehabilitation; and (ii) disadvantaged segments of society such as the poor, women, and cultural minorities." In my view, however, despite the difference in formulation, the questions asked are essentially the same.

Appendix

This Appendix is drawn from a longer memorandum submitted to the Royal Commission following the Justice Round Table. It addresses similar issues to those canvassed in the paragraphs following footnote 39, although it does so in connection with the concerns of Aboriginal peoples and not in connection with those of non-Aboriginal peoples – the ostensible subject of this essay.

Follow-up Observations on the Round Table on Justice

The two days of Round Table discussion were particularly enlightening, especially in so far as they dealt with the challenge of modernity for Aboriginal peoples. Of course, non-Aboriginal society also must confront modernity, and it is also struggling to understand how law might be deployed to respond to the challenges which technology and urbanisation and the breaking down of social bonds throw up. The lessons of coming to recognize and legitimate Aboriginal systems of justice are precisely the lessons of confronting modernity. If anything, the experiences of Aboriginal peoples are especially valuable in showing the diversity of law and legal institutions which is already present in Canadian law. These experiences also show that what often looks like a problem of criminal justice ties in deeply with problems of family law, child welfare law, and so on. To recognize Aboriginal systems of criminal justice necessarily means recognizing Aboriginal systems of civil justice.

Let me display a certain temerity by suggesting what I see to have been three of the principal theoretical questions raised by the Round Table discussions which a legal pluralist perspective helps to clarify: 1. What exactly do we have in mind when we ask the questions (a) can the system be adapted, or (b) do we need a

separate system? 2. Upon what basis would either of (a) or (b) above find political or legal legitimation? 3. Do the answers to (a) and (b) in both questions 1 and 2 vary depending on whether one is talking about land-based claims or other types of claims? The following paragraphs attempt to address briefly these issues.

Distinguishing Aboriginal and Non-Aboriginal Legal Systems

A first issue is to ask whether there are there actually Aboriginal legal systems operative in Canada today or whether these regimes of Aboriginal justice are merely "pre-legal customary orders", "internalized mechanisms of social control" and "non-systemic". This compels one to ask what one means by the notion of a legal system. Blanket assertions that "official" Canadian law is only an external system of control and Aboriginal law is only an internalized system don't help very much in answering this question. Canadian law is a very complex amalgam of internal and external controls, the former often existing through religious notions like sin. It does no good to pretend that these internalized controls are not legal, because that is simply to take a highly formal (and questionable) concept of law in order to exclude certain phenomena from consideration so as to make a polemical point. I, for example, could do the same for Aboriginal regimes – that is, I could take a restrictive definition of legal normativity in order to show that Aboriginal legal systems are composed only of external levers as well. Yet what would be the point? From what anthropologists tell us, Aboriginal regimes of law and justice are a very complex amalgam of internalized and externalized controls, of informal and formal institutions, of rites, rituals and procedures.

Simplistic dichotomies do us a double disservice. First, they suggest that Canadian law and Aboriginal law are in fixed and irreconcilable antagonism; on this view, Aboriginal peoples have nothing to learn from Canadian law, and *vice versa*. Second, they prevent analysis of the true components of Aboriginal legal orders by pre-supposing a model of what they are like and discounting any recalcitrant data as either the result of corruption of Canadian law, the introduction of foreign elements, or the imposition of non-Aboriginal views of normativity upon Aboriginal peoples.

What the legal pluralist conception of law does is to open up our definition of law so that these various other normative systems and normative orders which in fact control large sectors of human activity are understood for what they are. In respect of Aboriginal systems of justice, what legal pluralist highlights is not only the multiplicity of competing normative orders among the various Aboriginal communities and societies, but also the plurality of normative orders and systems within individual Aboriginal communities. Let me put this otherwise by means of a general assertion. There is a lot more internalized social control, non-adversarial adjudicative procedures, and concern for rehabilitation and reintegration in the various existing orders of "official" Canadian law than the highly formalized and institutionalized "theoretical model" of the criminal justice

system lets on. And, these so-called values are even less present in the plurality of other legal orders operative in non-Aboriginal society, by which problems which might otherwise fall into the criminal justice system are handled in a non-"official" legal setting. Conversely, there is more externalized social control, adversarial and roughly adjudicative procedures, and retributive orientation in Aboriginal justice systems than its proponents let on. Both "official" Canadian law and Aboriginal law have very strong elements which look to "agent" rather than "act" defined responsibility.

I suggest that there are two main reasons why this false dichotomy between Aboriginal and non-Aboriginal conceptions of law is so strongly drawn. First, the primary experience of most Aboriginal peoples with the Canadian legal system is not at its most responsive and subtle moments. A history of racism among front-line persons in the criminal justice system – police, prosecutors, prison guards (and even judges) – and a failure to apply the same standards of flexibility and discretion routinely applied to non-Aboriginal offenders in the case of Aboriginal peoples means that the possibilities of the Canadian legal system being something other than externalized formalistic control are beyond the experiences of most Aboriginal peoples. Secondly, this false dichotomy is sharply drawn because, given the ideology of "legal centralism", it is necessary (as a purely instrumental question) to make the claim that Canadian law has failed Aboriginal people on grounds of outcomes, rather than on grounds of inputs – namely by recognizing and legitimating it on its own terms. I would argue that the moral case for recognition finds its strongest justification in the legal pluralist argument of legitimation, not in the empirical argument of failure. It may well be that certain features of Canadian law, when articulated in their extreme form, are antithetical to and destructive of, Aboriginal values when the latter are also articulated in their extreme form. But, I would argue, the fact that there are more Aboriginal people in jail, more repeat offenders, more arrests, and so on, is not *per se* proof that the system has failed. What is clear, in all events, is that the system fails Aboriginal peoples because it disempowers them and because it has no legitimacy for them, regardless of its outcomes.

Finally, legal pluralism allows us to see that social control is not the only thing the legal orders are all about. Law is about at least two general ideas: social control and the facilitation of human interaction. The proceedings at the Round Table were driven by problems with the criminal justice system, but there are many other aspects to law than criminal justice. What we need to ask more generally about Aboriginal systems of justice is how they function on the civil side as well – family law, successions, property, delicts, contracts. Understanding the full scope of the various responses to questions of the civil law – the way claims are articulated, argued about and resolved – will also help us understand Aboriginal systems of criminal justice.

Recognition and Legitimation

The second major question is where the legitimation for these other systems come from. This question was formulated for the Round Table by a surrogate question: can the system be adapted or is a separate system required. A legal pluralist perspective helps us to see, for both non-Aboriginal society *vis à vis* its multiple other legal orders, and for Aboriginal peoples, that the answer is necessarily both. Let me attempt to show how this can be the case by addressing directly notions of legitimation.

There are essentially two attitudes that "official" Canadian law can take toward the issue of legitimation of Aboriginal systems. Either these are legitimated expressly by Canadian law, in its withdrawal from certain areas to create space for Aboriginal systems to operate, or these systems are legitimated implicitly by Canadian law in its recognition that they are external to it, and derive their legitimacy from Aboriginal peoples themselves. That is, the question is are they legitimated because state law withdraws, or creates space for them? Or are they legitimated because they are of themselves legitimated normative systems, for whose legitimacy, the presence or absence of state law is of no consequence?

On the former hypothesis, the relationship of Canadian law to Aboriginal systems is like the relationship of the superior courts exercising their power of superintendence and control over administrative agencies. It is one of jurisdiction, and I argue, subordination and colonization. To the extent that the current system is being adapted to meet the concerns of Aboriginal peoples one is involved in legitimation as viewed primarily from the perspective of Canadian law: Aboriginal peoples can run their own system to the extent we permit, but Canadian law will always have a superintending jurisdiction. The question of the extent of Aboriginal law is simply one of jurisdictional fact, not a normative claim, and Canadian law will always have the authority to determine the correctness of that determination of fact. I believe that this was precisely the question that was raised in connection with circle sentencing. If you have a healing circle, but you are still the judge, and you can still impose whatever sentence you wish, in what ways are you really legitimating Aboriginal systems? Legitimation is not just formal and tied to certain types of procedures. It is substantive and relates both to inputs and to outcomes.

On the latter hypothesis, that of legitimation flowing from a claim of an inherent right to formulate and control institutions of justice, legitimation originates in the procedures and values of Aboriginal communities themselves. The relationship of Canadian law to Aboriginal systems is like the relationship of the law of Ontario to the law of Quebec. It is still one of jurisdiction, but *inter se* it traces itself out in the general notions of the conflict of laws. The scope of Aboriginal systems of justice is not determined by a superintending Canadian court, but rather by each of the systems deciding as a matter of its own internal law, the extent of its own operative sphere. Aboriginal systems and the "official"

Canadian system will have to develop their own conflicts of laws rules for determining when to take jurisdiction, and having taken jurisdiction, what law (including what procedures, etc.) to apply. In this sense, there will also have to be a mechanism similar to the *Tribunal des conflits* in France for reconciling in those cases where the issue arises, competing claims to jurisdiction. This type of model assumes two independent structures of legitimation and presumes that questions of jurisdictional conflict are not simply matters of fact to be decided by the higher tribunal, but that they are really conflicts of norms and of legal orders seen as such.

In many cases, such as the "healing circle", Canadian law thinks that it is legitimating Aboriginal law by means of supervision and delegation: Aboriginal systems are said to be legitimated only to the extent determined by Canadian law. The lessons of legal pluralism tell us something entirely different, however. As far as Canadian law is concerned, it may think that it is merely legitimating Aboriginal law on its own terms; but as far as Aboriginal peoples are concerned, there is a conflict of normative orders, and they alone are choosing which one they have greater fidelity to. Thus, "official" Canadian law may step in, and as a matter of fact be able to impose its will, but this imposition in fact will not give it legitimacy. Legitimacy can only come from below.

So what does this tell us about the question whether the system can be adapted or whether it must give way to a separate system of Aboriginal justice? It tells us that whatever may be the case formally (*i.e.*, as a matter of internal Canadian law), substantively the question, framed as such, is not important. From the perspective of legitimation in the eyes of Aboriginal peoples there is only one answer. Whether the system adapts or whether it withdraws completely, the outcomes of the legal process will be legitimate in their eyes on their own terms only. But what is to be noted, and this is the point I take from several interventions at the Round Table, no system of Aboriginal justice wants "official" Canadian law to withdraw completely right now. For some, the amount of jurisdiction, process control and normative definition to be claimed will immediately be quite extensive; for other Aboriginal communities and societies it will be less extensive, and for some it may be quite small. But the decision in each case will be that of the Aboriginal peoples themselves, and not of the concessions made by the official legal system. I cannot pretend to know the answer with certainty, but given the intense interactions between Aboriginal and non-Aboriginal societies in the northern half of the North American continent, the length of time over which these interactions have taken place, and the more extensive imbrication of "official" law with the social problems of modernity, I am doubtful if the time will soon arrive when Aboriginal peoples choose to exclude "official" criminal law totally in matters of murder, rape, different forms of domestic and child abuse. But in the meantime, what is crucial is that the "official" institutions of Canadian law (however they are conceived) gain and maintain legitimacy in the eyes of Aboriginal peoples. Of course, if and when the time comes when

Aboriginal peoples ask Canadian law to withdraw completely from certain domains, legal pluralism explains why it should be understood as the decision of Aboriginal peoples themselves to make.

From the perspective of Canadian law, substantively the answer is also not problematical. Canadian law will always be implicated in the decision as to how much legitimacy to accord to Aboriginal legal orders regardless of whether it does so by means of "jurisdictional" control, or by means of the "conflicts" rules it adopts. The recognition and enforcement of foreign law always has built into it an evaluation of public policy concerns. Moreover, the substance of the law itself will, as in all cases of legal "successor regimes", retain important features of the prior regime. Whether the legitimation of Aboriginal justice is through delegation or through conflicts rules, the result (from a purely formal perspective) is the same. Whether the legitimation of "official" law for Aboriginal peoples occurs in one or the other manner, the result in the same. This suggests that the notion that law must be territorial is much overstated. Real legitimacy flows from persons and societies, not from geographical units and external authorization.

The Relevance of Territory

The third question illuminated by a legal pluralist perspective concerns the distinctions between land-based Aboriginal peoples and those who have no defined land base. This is particularly the problem of the Métis and the non-status groups. Once again this is a question which only has real bite if one already is committed to a model of law which is essentially centralist and monist. A legal pluralist perspective takes the position that what defines a legal order is neither territory, nor any other externally ascribed characteristic. A legal order, and membership in it is defined in large measure (although not exclusively) by choices that people make as to their membership, and their degree of submission to its institutions, processes and norms (that is, the degree to which they afford to that system its legitimacy). This perspective has three very important consequences. First, it does not assert that people have to be exclusively members of any one legal order. Second, it recognizes an almost infinite plurality of legal orders, and recognizes that each of these may have radically different characteristics as to its primary degree of institutionalization, its procedures, its symbolisms, its outcomes, and its degree of totalisation of social space. Third, to the extent that membership is defined in part by notions of group which are not the product of individual choice, it requires us to consider how it is that these notions of group and membership are constructed.

As for the first issue, a legal pluralist perspective assumes, like Roman law and feudal law, that law is in several important respects, essentially personal; more importantly it assumes that law is not just monistically territorial. Territorial control is the default rule, not the primary rule. Once one accepts that each person can have his or her own personal law, once also accepts that a person can

have several such personal laws at the same time. I am, myself, a member of the legal order I live in respect of Canadian law, of Quebec law, and to the extent my family lives in Ontario and I own property in Ontario, also Ontario law. But more radically, I live a legal order in my workplace, which imposes all kinds of formal and informal rules on me – be these in relationship to the criminal law (or libel or assault) or delict, or contract, or whatever. When this order conflicts with the state legal order, I personally have to choose where my primary allegiance is. (Let me open a parenthesis about choice here. I do not have in mind the "rational actor model" of economists. These choices are socially constructed. What I perceive my choices to be, is not and cannot be, just a result of unconstrained individualism. Thus, when I say that I have to choose which is the dominant normative order attracting my allegiance, I do not mean to say that this is a choice like the choice whether I want to eat vanilla or strawberry ice-cream.) Often this choice is of no great consequence, or is made for me by the actions of others. If I am charged with assault, whatever I think the legal order of the Faculty is, the "official" law of the state will claim jurisdiction: but the Faculty legal order will get its due in the outcomes it visits on the professor who (if he or she did so inappropriately) visited the "official" legal order upon me in contravention of the norms of the Faculty. Similarly with contract law and the law of delict. I also am a member of a family normative order, a neighbourhood normative order, a normative order flowing from the dictates of my religion, my ethnicity, my various other poles of affect, and so on.

This is true of Aboriginal peoples. Non-status, off-reserve Indians and Métis each have, depending on a variety of factors, varying degrees of attachment to the other normative orders to which they belong. Of course, territory powerfully shapes this attachment, but not exclusively. The question on the civil law side, is the extent to which the interaction in question is with someone from the same normative order: in Romanist terms, are both disputants Roman or *peregrini*. While the existence of a set territory makes it easier to identify these other normative attachments, to locate certain institutional features we normally associate with law – the police, courts, lawyers, etc. – territory is not necessary to their existence. Even less necessary is territorial exclusivity. The Roman Catholic church does just fine in respect of its assertion of Canon law among believers even though it has no exclusive territory. (I acknowledge that there is, in principle, a subject-matter limitation to canon law, but Canon Law norms do traverse the range from the Ten Commandments, to family law, to successions, to contracts, to delicts and restitution.) Is there any reason to believe that non-status Indians, Métis and off-reserve Aboriginal peoples could not do likewise for their own purposes? What is central to the recognition and legitimation of these orders is the commitment and attachment of the relevant community to them. Do, for example, Métis people recognize their *appartenance* as Métis, and do they recognize the authority of Métis leadership to constitute normative institutions such as courts or any other surrogate to courts which have jurisdiction and authority over

them? Whether the outcomes of this recognition result from the incorporation of Aboriginal norms into the interstices of "official" law, or whether they become more free-standing within the official system depends of a wide variety of factors. A legal pluralist perspective does not predetermine this issue for any particular community, or for any particular individual.

As for the second issue, the pluralist response is implicit in the above discussion. At every functional level of a legal system there are an infinite degree of formalities and structures. Suppose we take, just for the record: rules, decision-making institutions, procedures, and structures of legitimation as features of official law. Rules are more than statutes. They include, cases, custom and general principles of public policy. Our decision making institutions range from the highly formal – courts – to the less formal arbitrators, agencies – to the informal – mediation, etc. As for procedures, we acknowledge that norms emerge from and disputes and conflicts are resolved through legislation, adjudication, mediation, custom, voting, resort to chance, etc. And we know that, in Weber's terms, normative systems may be legitimated by charisma, tradition, legal-rational authority and expertise. All of these are at play all the time in the "official" system. Is there any reason to believe they are all not at play all the time in the various Aboriginal systems of justice?

Nevertheless, jurists are still transfixed by a notion of law that goes like this: law is formally written, institutionally produced written rules which are interpreted and applied following an adversarial adjudicative process in a formally established court with a formally established jurisdiction, all of which is legitimated in a political-legal system grounded in what Weber calls a legal-rational model. Legal pluralism points out not only the infinite complexity of the so-called "official" system, but the complexities of all the other systems as well. Once one abandons the hyper-rational model of law of the "after dinner bar association speech variety" then the possibilities for recognizing these various Aboriginal systems become manifest. Moreover, these systems need not all look the same – they need not all have the same degree of formality, or institutionalization, etc. Seen in this light, territory is only one of the factors that plays into the possibility of the construction and recognition of a legal order. And what is more, the question of recognition need not be the same for any single one of these diverse orders.

These questions of plurality and degrees of informality raise the third issue: that of overlaps among systems, and of membership within a legal community. The legal pluralistic perspective also addresses these issues. To begin, it takes the position that the question of membership is not simply one of individual choice. Whether any non-Aboriginal can or cannot be a member of an Aboriginal legal order, is not for him or her alone to decide. On the other hand, membership is not only to be determined by the group: an Aboriginal person may choose not to be a member of the relevant Aboriginal legal order – a choice more difficult, although not impossible, if the community has a juridical exclusivity over a terri-

torial base. All this to say that legal pluralism squarely confronts (even if it does not have any definitive answers for) the questions of how normative orders are socially constructed, and how membership in such orders is a complex amalgam of individual choice, socially constructed choice and social imposition.

As I have stated, perhaps at excessive length in this memorandum, I believe that the only theoretically justified standpoint from which to look at the possibilities of recognizing and legitimating Aboriginal legal systems is to adopt a legal pluralistic perspective. Once one does so, several of the most perplexing problems of access to justice in non-Aboriginal legal systems also can be seen in a new and promising light. Thus, it is not so much any of the specific outcomes of recognizing Aboriginal systems – more reconciliation, more restitution, less adversarialness, less focus on guilt – that are the general benefit flowing to Canadians from addressing the specific claims of Aboriginal peoples. Rather, the primary benefit for Canadians is the intellectual re-orientation about what constitutes a legal system in modern polyethnic and multicultural societies, and what the role of the "official" legal system should be within the universe of these "unofficial" Canadian legal systems.

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Aboriginal Justice Systems: Relationships

*Leonard (Tony) Mandamin**

> A basic question about Aboriginal justice systems is "What relationship should be established between the Aboriginal justice system and the Canadian criminal justice system?"

Relationships are important because we live today in an interactive society with people, goods and information constantly moving back and forth between the two groups. One criminal justice system serving one group must not come into irreconcilable conflict with the operations of the criminal justice system serving the other group.

The question is complicated by the diversity of the Aboriginal community in Canada and the complexity of the Canadian criminal justice system. The contemporary Aboriginal justice initiatives are very new although based on long standing Aboriginal traditions. They are at the cutting edge of the law. There has been little time to observe Aboriginal initiatives and to assess their impact.

The common objective of both the criminal justice system and the Aboriginal justice systems is the maintenance of the peace and harmony within the society. The priorities each system gives to punishment and rehabilitation are different. However, answers to the question of relationships might be found within the existing criminal justice system.

The purpose for establishing a beneficial relationship between the Canadian criminal justice system and Aboriginal justice systems is to promote confidence

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in Aboriginal justice systems. To accomplish this, the relationship must be rational, flexible and consistent. Ultimately, the Aboriginal justice systems and the relationships that are established must be directed towards the maintenance of peace and harmony in Aboriginal and Canadian society.

Would a Parallel Aboriginal Justice System Mean a Single System or Would it be Composed of Many Systems?

Many different Aboriginal cultures exist in Canada. In addition to cultural differences, there are differences arising from geography, community population, legal status and political affiliation. The Inuit community of Arctic Lake, North West Territories, the Iroquois of Six Nations in southern Ontario, and the Métis community of Duck Lake, Saskatchewan, are all very different communities.

The Canadian Criminal Justice System

The Canadian criminal justice system addresses a certain amount of diversity. It is useful to first examine both the common and the diverse elements of the Canadian criminal justice system before moving to the question of a single or multiple Aboriginal justice systems.

Common Features

A fundamental common element of the Canadian criminal justice System is the *Criminal Code*[1] enacted by the federal government. Enacted pursuant to the federal government's constitutional responsibility for criminal law, it applies throughout Canada.[2] Other federal and quasi-criminal statutes, such as the *Narcotics Control Act*,[3] are also applicable across the country.

A second important common element to the Canadian criminal justice system is the Supreme Court of Canada, the final court of appeal in all criminal matters.

The use of a similar criminal justice structure is the third common element. This structure involves police, prosecution and defence, courts and corrections. These elements of the criminal justice structure are found in each province and territory.

Dissimilar Elements

While the federal government has jurisdiction for criminal law, the provinces have jurisdiction over a myriad of subjects involving quasi-criminal law. Provincial legislation provides for summary conviction offenses in matters relating to provincial jurisdiction with financial and penal penalties for offenders.

The provincial governments have constitutional jurisdiction for the administration of justice.[4] Each provincial government has its own legislation with respect

to the administration of justice. The provincial laws relate to policing, the organization of the courts, and the provincial correctional institutions. Each of the provincial systems is separate from another although they follow the same general pattern.

Interlocking Patterns

The Canadian criminal justice system is an interlocked web of federal and provincial jurisdiction. Sometimes components of the criminal justice system themselves are a mixture of both federal and provincial jurisdictions.

Policing is a provincial responsibility under the administration of justice and the assumption of common law.[5] This jurisdiction includes the power to appoint peace officer. However, the federal government, pursuant to its powers for peace, order and good government, established the Royal Canadian Mounted Police.[6] The RCMP may act as a provincial police force. In Alberta, the RCMP provide policing services under a contract with the provincial government. The Alberta RCMP officers have federal peace officer appointments instead of provincial peace officer appointments.[7]

The prosecution of criminal offences in a province is the responsibility of the provincial Attorney General lawyers. Nevertheless, federal Justice lawyers prosecute offences under the federal *Narcotics Control Act*.

The organization of the courts also discloses the interlocking federal-provincial relationship. Provincial governments appoints Provincial Court Judges. The federal government appoints the Superior Court Judges of Queen's Bench and Court of Appeal. The provinces, however, are responsible for the organization of the criminal courts including Queen's Bench and Court of Appeal.

Corrections also involve federal-provincial relationships. The province is responsible for prisons where the term of sentence is less than two years. The federal government is responsible for penitentiaries where the term of the sentence is two years or greater. The provincial Solicitor General is responsible for probation and other correctional programs in the province; the federal government has established the National Parole Board.

The Canadian criminal justice system therefore is a complex web of interrelated elements from federal and provincial jurisdictions with parallel provincial systems operating on a similar basis. To describe it as a single system is to acknowledge and accept tremendous diversity and complexity within this 'single' criminal justice system.

Aboriginal Justice Systems

To speak of a single criminal justice system is potentially misleading when considering the complexities of the Canadian system. Similar considerations

arise when trying to categorize Aboriginal justice initiatives as a single justice system or as a collection of parallel justice systems.

If the Teslin Tlingit people of the Yukon and the Attawapiskat Cree people of northern Ontario apply the *Criminal Code* but have their own tribal police forces, and involve elders in their respective Aboriginal justice systems, do they have separate Aboriginal justice systems? Is there any less difference between British Columbia and Nova Scotia which apply the Criminal Code, but have their own provincial police forces and provincial court systems?

Aboriginal Diversity

Cultural

Aboriginal communities vary greatly across the country. In all, there are eleven major linguistic stocks of Aboriginal languages in Canada.* Among these Aboriginal linguistic groups, approximately fifty different languages are spoken. Each language group has its own culture and traditions. In addition to the Indian and Inuit Aboriginal peoples, there are also the Métis peoples who have their own history and culture.

Geographic location

The Aboriginal peoples in Canada live throughout the country residing in remote northern Inuit hamlets along the Arctic coastline and large Indian reserves located near the southern borders of Canada. Aboriginal traditional territories cover the country from the east coast to the west coast. They live in rural communities and in the midst of Canada's large urban cities.

Population and territory

Aboriginal communities can vary from First Nations with a few families to the Six Nations with over 10,000 members. Indian reserve sizes may vary from a few hundred acres to the 350,000 acres of the Blood Indian reserve, the largest in Canada.

The Inuit communities of Canada's North vary in population from a few hundred to numbers well over one thousand in communities geographically dispersed across northern Canada.

The Métis people may live in communities such as the Métis Settlements of Alberta or the predominantly Métis villages of western Canada. The populations of the Métis settlements similarly vary. In Alberta, Métis communities range from approximately 350 at Elizabeth Settlement to over 2,200 people at the Paddle Prairie Métis Settlement.

In addition, the urban Aboriginal people living in the major urban centres constitute the largest concentrations of Aboriginal people in the country. For instance, approximately 35,000 Aboriginal people are estimated to reside in Edmonton, Alberta, three times the population of the largest Indian community, the Six Nations Reserve.

Legal status and governing structures

Indian, Inuit and Métis are recognized in s.35 of the *Constitution Act, 1982*. Legally, they all are treated differently. The federal government recognizes status and treaty Indians pursuant to the Indian Act.[9] The Inuit, although held to be Indians for purposes of section 91(24) of the *Constitution Act, 1867*,[10] are expressly defined as not being Indians in the *Indian Act*.[11] While the Métis were recognized in some old federal statutes primarily relating to land allotment in the prairies, they do not have any federal legal status.[12] In Alberta, legislation exists relating to the Métis in the province and the establishment of the Métis Settlements.

These differences in legal status affect the nature of the political regime the individual Aboriginal people are under and add another dimension to the complexity of the question of Aboriginal justice system relationships. This diversity of the Aboriginal national community indicates the need for parallel Aboriginal justice systems. Yet, throughout different Aboriginal justice initiatives, a common theme occurs, the maintenance of peace and, if disrupted, restoration of harmony and rehabilitation of the offender.

Community-Based Aboriginal Justice Initiatives

An Aboriginal community may be a single group of Aboriginal people living at a specific settlement or a collection of many groups of Aboriginal people spread over a large region having a common language, culture and political governing structure.

The premise of community-based Aboriginal justice initiatives implies that separate parallel Aboriginal justice systems are necessary. The best place to germinate a community based justice system is in the community. Aboriginal justice initiatives have commenced in different communities across Canada. It would be unrealistic and indeed counterproductive to expect these community-based initiatives to give way to a single Aboriginal justice system. Rather the Aboriginal community-based initiative must be preserved and built upon. Ultimately, Aboriginal justice systems will need to be developed in a manner that allows flexible responses to community needs and sufficient consistency to satisfy the expectation that justice will be even handed in all Aboriginal communities across Canada.

Many Aboriginal justice initiatives have begun in the community. These initiatives are grounded on the culture and social structure of the Aboriginal community and frequently rely on the participation of the elders of the community. Illustrative of this approach is the Community Court established in Attawapiskat in Ontario,[13] the Native Youth Justice Committee of Wabasca in Alberta, and the justice initiative of the South Island Tribal Council in British Columbia.

While community-based Aboriginal systems may be extended to neighbouring communities, it is not feasible to extend a community-based Aboriginal justice

system across cultural, geographic and political lines. It is an unlikely that a single community-based initiative would extend across Canada to become a single system for all Aboriginal People.

Chief Judge Heino Lilles of the Yukon Territorial Court wrote:

> Native communities are different - different history, different culture, different needs, different resources both human and physical and different in state of readiness. No one blue-print can be developed to meet the aspirations or needs of all of the Native communities in the Yukon, let alone Canada as a whole.[14]

Different models may be developed which would serve as a framework for a community Aboriginal justice system. These models would allow the community to initiate the process and apply the community's own considerations to criminal justice matters. The Onion Lake First Nation recently put forth a justice proposal that discussed three models derived from the Yukon experience: a circle court, a court advisory panel, and a community court. The preferred choice for Onion Lake was the community court model.[15]

At the very least, Aboriginal justice system would be similar to the Canadian criminal justice system in diversity and complexity. Use of an appropriate definition of the word parallel may resolve the question. The College Edition of *Webster's New World Dictionary* offers, as one definition of 'parallel': "the condition of being parallel; conformity on essential points." Aboriginal justice systems may be just that, separate, but the same on essential points.

How Would Aboriginal Justice Systems Relate to and Tie in with the Mainstream System?

Aboriginal justice systems operate on a smaller, more dynamic scale than the Canadian criminal justice system. This provides the opportunity to find new ways of maintaining peace and order in communities and in finding more effective solutions to problems of Aboriginal misconduct. However, these factors may lead to problems of instability and in the administration of justice. Links with the Canadian criminal justice system can overcome this difficulty. The advantages of links with the mainstream criminal justice system are several: stability, consistency, compatibility and resource support. Most important is that such links offer the consistency in the application of criminal laws to ensure unity within the Canadian fabric.

Criminal Code

What is a crime in Canadian society is a crime in an Aboriginal community. An assault that harms someone, a theft that deprives someone of property, an abuse of a position of trust, and a disturbance of peace and order in the community are all offences against society whether Aboriginal or in the larger Canadian

context. Legal reviews of traditional Indian justice conclude that crimes are essentially the same in both traditional Aboriginal context and the contemporary Canadian context.[16]

The *Criminal Code* applies to Aboriginal people.[17] The Royal Commission on the Donald Marshall Jr. Prosecution proposed a Native Criminal Court for Nova Scotia's Micmacs but had this to say:

> We wish to make it clear that the Native Criminal Court we propose will administer the same law as applies to all other Canadians. We do not propose a separate system of Native Law, but rather a different process for administering on reserve certain aspects of the criminal law.[18]

It has been the disproportionate impact of the criminal justice system on Aboriginal people that has been a factor in the call for a separate criminal justice system.[19] For Aboriginal people the emphasis is on restoration and healing rather than punishment. Chief Judge Lilles wrote:

> Upon reflecting on this case and several similar ones, it is evident that Native culture places greater emphasis on rehabilitation, but otherwise incorporates the same principles, including punishment and in capacitation: same principles but different priorities.[20]

The *Criminal Code* will have application in Aboriginal justice systems and be a substantial nexus between Aboriginal justice systems and the Canadian criminal justice system. However, the Indigenous Bar Association noted in its report prepared for the Law Reform Commission that:

> In the view of the writers, it is necessary to amend the *Criminal Code* to expressly allow for the accommodation of Aboriginal values in the criminal justice system.[21]

Policing Agreements and Protocols

A relationship exists between the regular police forces and Aboriginal police forces. The Ontario Provincial Police have a number of Aboriginal police units in the province. These Aboriginal police forces are part of the Ontario Provincial Force. They are an integral part of the OPP organizational structure but are complemented by local Aboriginal advisory committees. The Provincial Aboriginal Police Board provides general advice on the operation of Aboriginal units. However, a number of Ontario Aboriginal communities are seeking stand alone Aboriginal police services.

In western Canada, the RCMP are similarly involved with the Aboriginal police forces in various First Nations. In several instances, independent Aboriginal police forces have been established including the Dakota-Ojibwa Police Service in Manitoba, the Louis Bull Police Service in Alberta, and, more recently, the Stl'Atl'Imx Tribal Police Service in British Columbia.

Different approaches exist for Aboriginal government's provision of Aboriginal policing services. The federal government's Indian Policing Policy provides for two options:

- First Nations Administered Police Service: organized on a band, tribal regional, or provincial basis.
- Special Contingent of First Nations Officers: within an existing police service, including:
  First Nations officers employed within a provincial or municipal police service with dedicated responsibilities to serve an on-reserve First Nation community;
  a group of First Nations police officers employed through a contractual arrangement to provide a policing service to an on-reserve First Nation community.[22]

Nova Scotia recently introduced legislation that provides that the provincial Solicitor General may appoint Aboriginal police officers to serve in Aboriginal communities.[23]

In Alberta, independent Aboriginal police forces have been established under tripartite arrangements entered into between First Nations, the Alberta government and the federal government. The tripartite approach in Alberta was first initiated in 1979 with an agreement negotiated between the Blood Tribe, the federal Indian Affairs Department and the Alberta Solicitor General's Department. The current tripartite arrangements now involve First Nations, the Alberta Solicitor General's Department and the federal Solicitor General's Department. Agreements in effect or under negotiation in Alberta involve the Blood Tribe, the Louis Bull First Nation, the Siksika Nation, and the Lesser Slave Lake Indian Regional Council.

The Alberta tripartite approach is described as a 'concurrent' exercise of jurisdiction.[24] In an address at the signing of the Siksika/Alberta/Canada tripartite agreement in Calgary in June 1992, the Chairman of the Siksika Police Commission, Morris Running Rabbit stated:

> This agreement provides for the concurrent exercise of the jurisdiction for policing between the Siksika Nation and Alberta. The federal role is reflected in the signing by the federal Solicitor General who has responsibility for funding and the federal Minister of Indian Affairs who has the general fiduciary obligation of the federal government. It is a nation to nation to agreement which is based on mutual respect of the parties to the agreement.

The Alberta tripartite approach is grounded on federal, provincial and First Nations laws. The basis for the Siksika Nation participation is by a Council by-law that establishes a police commission and a police service. The *Indian Act* section used by the Siksika Council provides:

> 81(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (c) the observance of law and order;[25]

The Siksika policing by-law specifically references Treaty No. 7 which provides:

> They promise and engage that they will, in all respects, obey and abide by the Law, that they will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half-Breeds or Whites, now inhabiting, or hereafter to inhabit, any part of the said ceded tract; ..... and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty, or infringing the laws in force in the country so ceded.[26]

The Alberta Solicitor General derives his authority from the *Police Act* which provides that the Alberta Solicitor General may enter into arrangements for the provision of policing in areas within Alberta.[27] In addition to entering into the tripartite arrangement, the Solicitor General appoints the Siksika police as special constables under the *Police Act*.

The federal Solicitor General's participation derives from the Order in Council assigning program responsibility to the Solicitor General for the Indian policing program. The federal role is primarily financial and advisory. The federal Order in Council provides:

> His excellency the Governor General in Canada on the recommendation of the Prime Minister, pursuant to section 2 of the Public Service Rearrangement and Transfer of Duties Act, is pleased hereby to transfer to the Solicitor General of Canada the powers, duties and functions of the Minister of Indian Affairs and Northern Development relating to the Indian Policing Services Program.[28]

The relations between the Siksika Police Service and the RCMP is governed by a protocol that is annexed to the tripartite agreement.

The relationship between the Aboriginal police force and the RCMP is generally set out in a protocol that describes the respective responsibilities of each police force for the maintenance of peace and order in the area. These protocols usually acknowledge the RCMP experience in law enforcement and the Aboriginal police services unique knowledge of the cultural and traditional values of the Aboriginal community. The protocols set out specific geographic and investigative responsibilities. They provide for emergency response measures, exchange of information and mutual assistance. The protocols are agreed to by senior police officers or commission representatives of the respective police forces.[29]

The Siksika tripartite agreement represents a middle ground approach to the question of jurisdictional relationships. Other tripartite agreements rely solely on the provincial legislative authorization for Aboriginal policing. On the other end of the spectrum, the Kahnawake Peacekeepers are appointed and organized solely on Mohawk empowerment.

Resources to Maintain Aboriginal Justice Systems

The adequate researching of Aboriginal justice ventures is crucial. The Blood Tribe had first used the by-law as a basis for entering into the tripartite agreement arrangement for Indian policing in 1979 and established the Blood Tribe Police Force shortly afterwards. The initial effort faltered and the RCMP resumed policing the reserve. By 1988, relations between the Blood Tribe members and the RCMP had deteriorated and a public inquiry was called to look into policing on the Blood Reserve. The Commissioner, C.H. Rolf, Assistant Judge of the Provincial Court of Alberta, delivered his report, "Policing In Relation To The Blood Tribe" in February 1991.

Commissioner Rolf reported that there was a need for better communication and cultural awareness was required to improve relations between the Blood Tribe members and the RCMP. More significantly, however, he examined and reported on the Blood Tribe's initial venture into policing. In particular, he held:

> On an examination of the evidence and filed documents the Commissioner of this Inquiry is satisfied that:
>
> a) The by-law authorizing the establishment of their own policing service subject to control of an independent Police Commission was valid and workable and remains so....
>
> c) The budget and a guarantee of long-term funding resources was not really examined or questioned by the Director of Law Enforcement. The Federal government was only committed to provide the Circular 55 funds, which it was, and still is, bound to do....
>
> The Bloods provided, therefore, 65% of the police budget from their own resources. These funds were received by the Police Commission only in competition with the very numerous other programs and projects administered by the Chief and Council. There was no long term financial commitment of funds available for the police project to give it the stability necessary for success. No matter how dedicated and committed the Chief and council were they could not go it alone as had the Louis Bull Force....
>
> g) The level of service was approved under the general description of the mode of delivery being community policing. Even today this is a catch phrase description, used as though it was something new to white European society and peculiar only to the Indian culture.....There is no doubt that fiscal efficiency and technical

> advances caused "community policing" to evolve into a "response to compliant" type of law enforcement. At the start of the Blood Tribe Police project this type of police service was not given enough, if any, consideration."[30]

During the Public Inquiry, measures were taken to reestablish the Blood Tribe Police Service and Police Commission as effective vehicles for providing policing services for the Blood Tribe. Blood/Alberta/Canada tripartite negotiations are under way to ensure ongoing provision of adequate funding are substantially concluded.

In all considerations of Aboriginal justice systems, adequate resourcing is crucial. This factor is a necessary part of relationship to be established and must not be forgotten.

Prosecutions

The Siksika Nation Council of southern Alberta had enacted a traffic by-law for the Siksika Indian reserve roads pursuant to the *Indian Act*.[31] The traffic by-law provides for most of the basic rules usually covered by provincial traffic and motor vehicle administration legislation.[32] The Siksika law enforcement officers charge violators and summon them into Provincial Court.

When individuals were first summoned to court for offences against the Siksika by-law, the Alberta Attorney General prosecutors declined to prosecute the charges. Since by-laws could be prosecuted by agents of the enacting authority, the Siksika Nation sent is own agents to prosecute the by-law charges in Provincial Court. Siksika law enforcement officers handed docket matters in court as agents of the informant.[33] A solicitor appearing as agent for the Siksika Nation prosecuted the trial. The authority of the Siksika prosecutions in Provincial Court has not been challenged. The Siksika Nation is now seeking to take a further step and have its by-laws prosecuted in a Siksika court before a Justice of the Peace appointed under the *Indian Act*.[34]

Judges

The involvement of the judge can make a crucial difference. The judge gives importance and significance to the Aboriginal justice initiative. Chief Judge Lilles has commented:

> Teslin chose this "clan leader model" as a way to participate in the justice system because it was consistent with their culture and traditions. They deliberately declined to adopt a native Justice of the Peace model because it would detract from the authority of the clan leaders. They wanted the Territorial Court to come to their community, seek the advice of their clan leaders, and make prohibition orders involving reporting to and taking counselling from them. *In so doing, the court was empowering the clan leaders and the community, particularly in the eyes of*

> *the youths and younger men and women who had less of a commitment to the old traditions.* This had advantages from the court's point of view: although the court only comes to Teslin every two months, by delegating its authority to the clan leaders its presence is felt in the community on a continuing basis."[15] (Emphasis added.)

The judge empowers the community process. He shares power with the community better enabling it to deal with conflict.[16]

Aboriginal Sentencing Advisory Panels

In Alberta there are two parallel developments involving Aboriginal people in sentencing matters. They are the Native Court initiated in Grande Cache by Provincial Court Judge M.H. Porter, and the Native Youth Justice Committees first begun in Fort Chipewyan by Provincial Court Judge J.C.M. Spence.

The Native Court in Grande Cache got its start after Judge Porter conducted a Fatality Inquiry into the suicide death of an Aboriginal youth from the Grande Cache Native Co-operatives. His troubled life was indicative of the tremendous problems of alcohol and poverty that have overwhelmed many Aboriginal communities. Judge Porter had come to the conclusion that usual sentencing practices did little to redirect Aboriginal people away from their wrongful and self-destructive behaviour. Judge Porter also felt that sentencing Aboriginal people without knowledge of the background of the offender was of limited value.

Judge Porter asked an Aboriginal elder of the Grande Cache Native Co-operatives why the criminal justice system did not have its desired restraint on the negative conduct of Aboriginal accused. The elder, a man 85 years of age, responded that the system had no effect because it was the white man's system, it was not the Aboriginal way. Judge Porter asked the elder whether elders would come and help to deal with these situations. This was the start of the Native Court in Grande Cache.

With the assistance of the Grande Cache elders and Native Counselling Services, Judge Porter set up Native Court. When an Aboriginal accused pleads guilty or, there is a finding of guilt in a trial, the accused may ask to have be sentenced in Native Court. If the judge agrees, then the judge will adjourn the sentencing and directs the accused to appear in Native Court. The judge presides in Native Court assisted by the court clerk. The Crown Prosecutor is present with either the police and a probation officer. Three representatives of the Aboriginal community, usually elders, make up the balance of the Native Court.

The Native Court in Grande Cache does not use the regular court room with its raised dais for the judge and its railing separating the participants from the audience. Rather, it is held at the Grande Cache town chambers with all participants seated in somewhat a circle arrangement. The judge is at the head of the round seating arrangement with the Crown to the right of the judge and

the Native advisory panel directly across from the Crown. The clerk sits beside the judge and the RCMP officers and probation officer sits beside the Crown. The accused sits directly across from the judge. The onlookers are seated to the right and left areas of the room.

The judge introduces the accused to the Native Court indicating the charge, the plea, and then indicating that the accused has asked to come before the Native Court. The Crown prosecutor will give the circumstances of the offence. The judge will invite the Native panel, who are familiar not only with the circumstance of the Aboriginal community but also the accused, to comment. Their contribution usually focuses on the underlying causes of the undesired behaviour of the accused and measures that would address those problems. Finally, the judge asks the accused to speak. The accused may consult with legal counsel but the lawyer is not part of the proceedings. At any point, a dialogue between any of the Native Court participants may commence. After the discussions have run their course, the judge will pronounce sentence considering all the discussion that has occurred.

All parties have observed that the accused will participate more than they do in regular provincial court where Aboriginal people accused rarely speak.

In the view of the Crown Prosecutor, the participation and acknowledgment of wrongdoing by the accused helps achieve the desired result of ultimately changing disruptive behaviour. The Aboriginal people say that they are more able to speak up and give reasons for what has occurred. The Native Court was less threatening and they could better understand and relate to the process that was happening. Judge Porter observed that the young Aboriginal people in Court would keep the commitments they made to their elders. Any commitment they might make in regular court did not have similar force. A succeeding judge observed that the Native Court had an observable deterrent effect on repeat offenders.

The community in Fort Chipewyan consists of two First Nations, a Métis community and a small non-Aboriginal contingent. The Aboriginal members began, with the involvement of Judge Spence, considering establishing a youth justice committee.

Youth justice committees may be established pursuant to section 69 of the *Young Offenders Act* which provides:

> The Attorney General of a province or such other Minister as the Lieutenant Governor in Council of the province may designate, or a delegate thereof, may establish one or more committees of citizens, to be known as youth justice committees, to assist without remuneration in any aspect of the administration of this Act or in any programs or services for young offenders and may specify the method of appointment of committee members and the functions of the committees.[37]

The Native Youth Justice Committee in Fort Chipewyan makes sentencing recommendations to the Provincial Court Judge sitting in Young Offenders Court. Its membership involves elders and leaders of the Aboriginal Fort Chipewyan community. When a young offender pleads guilty or there is a finding of guilt, the judge will direct the young offender and the parents to appear before the Native Youth Justice Committee. The Native Youth Justice Committee meets with the young offender and his parents and discusses the cause of the youth's misconduct and what should be done about the situation.

An elder of the Native Youth Justice Committee explained that it shows the youth that it cares about the youth's well-being. The sentence recommendation is frequently consensus decision that includes the agreement of the young offender.

Since the Fort Chipewyan experience, Native Youth Justice Committees have begun in Wabasca in north-central Alberta, in Anzac and Fort McKay near Fort McMurray, Alberta and, more recently, in Bonnyville in northeastern Alberta. A difference in the Alberta justice committees is that one judge orders the youth to appear before the Native Youth Justice Committee while other judges require the youth's consent before they will direct him to appear before the Native Youth Justice Committee.

In the Fort Chipewyan and Wabasca, the impact of the Native Youth Justice Committees has been significant. It has been anecdotally reported that the numbers of young offenders appearing on the Young Offenders docket have dropped by one third as a result and the amount of repeat offenders has similarly decreased.

The Native Youth Justice Committees have continued to develop and expand their role. In Wabasca, the Native Youth Justice Committee dealt with a case involving one native youth charged as a part of a group escapade. The police had given the others in the group alternative dispositions but they charged this particular youth because he had a prior conviction. When the Native Youth Justice Committee learned of the circumstances and concluded that all the youth involved should have been referred to the Committee. The eventual result was that the RCMP and the Native Youth Justice Committee agreed the Native Youth Justice Committee will decide alternative measures for native youth as well.

Pre-court Aboriginal dispositions are also being explored by the RCMP and the Crown prosecutor in Grande Cache where consideration is being given to Aboriginal adult alternative measures instead of proceeding with charges.

Aboriginal Corrections Societies

The Blood Tribe, through the Kainai Corrections Society, has a master agreement with the Alberta Solicitor General to provide, among other things, correctional services. This master agreement provides for sub-agreements to operate a correctional facility, provide a corrections program and conduct a complementary elders project. The Society's objects are to reduce the crime rate in the community, to help members who are incarcerated become contributing members, and to apply a community approach to corrections.

The Kainai Corrections Centre has a capacity for 24 inmates. The inmates are prisoners who had been serving a prison term in a provincial corrections facility and are serving the final months of their sentence. The Kainai Corrections Centre does not emphasize differences between staff and inmates. The facility does not lock its doors. Elders of the Blood Tribe visit on a regular basis to conduct one-on-one counselling session with inmates and conduct spiritual ceremonies. The inmates may leave on day passes to work for different agencies on the Blood Reserve on projects or tasks of benefit to the community.

One former inmate who had an extensive record and has not re-offended since being released described the Kainai approach as letting him be responsible for himself. In his counselling with an elder, he spoke and the elder listened without judging. The elders see the corrections program as an opportunity to help the community.

The dominant theme of the Kainai corrections facility is the reintegration of the inmates as contributing members of the Blood community.

Relationship Between Aboriginal Justice Systems and the Mainstream System

In the examples discussed, the criminal justice system has served as an incubator for the Aboriginal justice system. The mainstream system was able to empower the Aboriginal justice system by providing legal authorization and approval at the initial stages. The very authority that disempowered traditional Aboriginal means of keeping order by displacing the Aboriginal peacemaking is now being applied to restore respect for Aboriginal justice measures.

Use of the mainstream system as an incubator for Aboriginal justice systems has two beneficial effects.

First, different starting points may be used to initiate the development of an Aboriginal justice system. From a starting point of policing, sentencing panels or corrections, the Aboriginal initiative may expand into other areas and develop into a complete system. Beginning with developed Aboriginal system is possible, but the flexibility offered by a developing system is more likely to serve the needs of different Aboriginal communities.

Second, this approach lends itself to a phased development with the Aboriginal communities, given time to assimilate new developments and plan the next logical step.

The drawback to the incubator approach to development is that it is dependent on the mainstream criminal justice personal involved and the objectives of the government of the day. The transfer of a Crown prosecutor, the retirement of a judge, or a change in government priorities from prevention and rehabilitation to stricter law enforcement can rapidly wipe out Aboriginal justice gain. Without more, it is likely that the long-term result would be to revert to the conventional criminal justice system and the status quo.

The Alberta 1978 Kirby Report[30] and the 1991 Cawsey Report[29] indicate the lack of progress in changing the criminal justice system. In 1978, the Board of Review chaired by Justice Kirby made numerous recommendations concerning the criminal justice system. As a result of submissions by Aboriginal organizations, the Board concluded that aspects of the administration of justice in Alberta affecting Aboriginal people should be changed.[30] It made recommendations concerning different aspects of the criminal justice system directed at resolving problems. So that the recommendations be acted upon and followed up, The Board of Review recommended that:

> The Attorney General and the Solicitor General should establish an office charged with the responsibility of initiating and supervising the implementation of the recommendations of this Report.[31]

This recommendation was not implemented. Instead, follow-up on the recommendations was left to provincial departments and agencies. In 1990, the Alberta and federal governments set up a task force to review the criminal justice system and its impact on the Indian and Métis people of Alberta. The Task Force concluded that Aboriginal people were subject to systemic discrimination in the criminal justice system notwithstanding Justice Kirby's report and recommendations a decade earlier. In its report "Justice on Trial" released in March, 1991, the Task Force recommended:

> We recommend the establishment of an Aboriginal Justice Commission, which, within eighteen months of the filing of the Report of this Task Force with the Alberta Solicitor General, would assume all duties of the Task Force Monitoring Committee.[32]

The committee referred to was an interim measure whose monitoring function was to be assumed by the Aboriginal Justice Commission. The broad mandate of the Aboriginal Justice Commission would be to oversee the implementation of recommendations made by the Task Force. To date there has not been any official government response to the Task Force report. Moreover, some twenty months after the release of the Task Force Report, there has yet to be any word on establishment of an Aboriginal Justice Commission. In conclusion, the Aboriginal justice initiatives that have occurred in Alberta are ad hoc and fragile.

In all the Aboriginal justice initiatives discussed, a mechanism for cooperation exists between the Aboriginal justice initiative and the criminal justice system. Formal and informal agreements, common objectives, and mutual trust are the linkages that have begun to develop. These mechanisms will dominate relationships if Aboriginal justice initiatives take further hold and the criminal justice system relinquishes its often to rigid control.

What Would the Relationship be Between the Various Justice Systems in the Different Aboriginal Communities?

Aboriginal people in pre-contact times were not a single unified people. Even within tribal affiliations, group self reliance and independence was the norm. Unified action arose when there was a common cause or need. In recent times, Aboriginal people are only rarely united on a common course of action.

Given the diversity of the country, it is inevitable that there will be a number of Aboriginal justice systems. Different initiatives have started independently in different parts of the country and operate under different criminal justice jurisdictions.

Aboriginal justice systems that are community based would likely extend only as far as the Aboriginal political organizational structure for that community. The more extensive the Aboriginal justice organization, the less community consideration will affect the process.

Some Aboriginal tribes, such as the Iroquois Six Nations, have organized social and political structures that unify the tribe. Others such as the Ojibwa rely on common language, culture and kinship to unify bands into a tribal unit when the need arises.[43] Much of the common action and direction among Aboriginal peoples comes from persuasion, reason and consensus.

Aboriginal justice initiatives depend in good measure on the Aboriginal community deciding to proceed with the venture. To the extent that there are opportunities for consensus building among Aboriginal communities, there will be co-operation between Aboriginal justice systems.

Regional Aboriginal Justice Systems

Regional tribal councils represent all First Nations within a region. Because of their experience in working together, it becomes possible to develop a regional Aboriginal justice system that would serve the communities of the region. However, some of the Aboriginal communities within a regional organization may wish to proceed while other communities are not yet prepared to proceed with an Aboriginal justice initiative.

The Lesser Slave Lake Regional Council in northern Alberta has proposed an Aboriginal justice system that would include a regional Aboriginal police force,

an Aboriginal public defender office, Aboriginal justices of the peace and Aboriginal rehabilitative programming. The South Island Tribal Council regional justice initiative involves their elders in many facets of the criminal justice system.

Aboriginal police services are frequently delivered on a regional basis. One of the earliest regional police forces is that of the Dakota-Ojibwa Tribal Police established to serve the First Nations in southern Manitoba. More recently, the Lilloet area First Nations have established a regional police service to serve their communities.

Less common are trans-political Aboriginal justice organizations. The Indian First Nation of Whitefish Lake and the Métis Settlement of Gift Lake have a joint Aboriginal police project which operates with Alberta Solicitor General special constable appointments and a protocol with the RCMP.[44]

Appellate Bodies

The Métis Settlements of Alberta may decide disputes in their communities through local dispute resolution. The decisions may be appealed to the Métis Settlements Appeal Tribunal.[45] This is the only existing Aboriginal appellate tribunal currently in existence.

The Métis Settlements Appeal Tribunal has jurisdiction to hear appeals of membership and land decisions made on any of the Métis Settlements in Alberta. The Appeal Tribunal may also hear any type of dispute either according to Métis Settlement General Council policy or where the parties consent to proceeding with an appeal.

The Métis Settlements Appeal Tribunal is established by Alberta legislation. Its jurisdiction is largely administrative and civil but it has the potential to develop further and become a useful form of dispute resolution for the Métis people. The Appeal Tribunal's decisions may be appealed only on grounds of law and jurisdiction to the Alberta Court of Appeal.[46]

If Aboriginal justice systems in a region were to have a common appellate body, then the appellate decisions would tend to direct the Aboriginal justice systems in a common direction. An appellate body provides an opportunity to develop a common approach on criminal justice issues facing Aboriginal communities.

Common Justice Organizations and Forums

The Indigenous Bar Association has a membership of legally trained Aboriginal people. It has sponsored several conferences and symposiums on Aboriginal law including a symposium on Indian Justice Systems in June 1991. More recently, the Aboriginal Chiefs of Police formed an organization with representatives from different Aboriginal police forces across the country as the membership.

The Aboriginal justice forums where representatives from different Aboriginal justice systems have also provided an opportunity to compare ideas and experiences. Conferences have been sponsored by non-Aboriginal agencies including the 'Symposium on American Tribal Courts' held in Winnipeg by Aboriginal Justice Inquiry of Manitoba, the 'Sharing Common Ground Conference' in Edmonton sponsored by the Royal Canadian Mounted Police and the Aboriginal Justice Conference in Whitehorse, Yukon, sponsored by the Justice Department.

The Law Reform Commission of Canada recommended the formation of an Aboriginal Justice Institute. It would be involved in the design, implementation and monitoring of Aboriginal justice initiatives advanced in its report and those advanced by the commissions of inquiry.[47] The Royal Commission on the Donald Marshall Jr. Prosecution recommended a Native Justice Institute.[48] The Alberta Task Force recommended an Alberta Aboriginal Justice Commission.[49] The Aboriginal Justice Inquiry of Manitoba also recommended an Aboriginal Justice Commission of Manitoba to oversee implementation of the recommendations of the Inquiry.[50] Moreover, the Manitoba Aboriginal Justice Inquiry also recommended the establishment of an Aboriginal Justice College.[51] This recurring recommendation of an Aboriginal justice institution underlines the common conclusion of the need to have a body charged with the task of monitoring, educating and promoting Aboriginal justice programs.

If Aboriginal people share the ideas, information and experiences gained in developing Aboriginal justice systems, then Aboriginal consensus building can develop links between the Aboriginal justice systems.

Would an Aboriginal Justice System have Jurisdiction over some Crimes? All Crimes?

The Aboriginal community should be responsible for the enforcement of laws relating to community peace and order.

There are drawbacks with dealing with offences in small Aboriginal communities. An Aboriginal justice system that operates in a tightly knit community may find itself challenged when it has to deal with a serious offence that has occurred in a community. Sexual assault, spousal abuse, and offenses involving family members are crimes that are emotionally charged and difficult to address in an Aboriginal justice system. Potential conflicts of interest between the participants in the Aboriginal justice system, the offenders and the injured parties can also cause problems.

The Manitoba Aboriginal Justice Inquiry acknowledged the question in its examination of the American Indian tribal Courts and reported:

> There is clearly a significant problem with stress. Being a member of a small community and sitting in judgment over neighbours, friends and relatives is inevitably a thankless and personally arduous assignment.[52]

Such problems are not necessarily insurmountable. The Wabasca Native Youth Justice Committee was asked by the Youth Court Judge to review a case involving a young offender charged with sexual assault. The Committee was concerned about dealing with this type of offence. However, the judge advised them that the criminal justice system itself had not shown much success in dealing such cases. Its only recourse was usually to impose harsher penalties that did not improve prospects for the rehabilitation of the accused youth. The Committee agreed and eventually reached a resolution of the case that was satisfactory to the youth, his family and the court.

In the United States, the law recognizes tribal jurisdiction to establish their own criminal justice system. All offences committed by Indian people are within the purview of the Indian justice systems. However, the federal *Major Crimes Act* provides that the federal authorities may try Indian offenders of major crimes in federal court even if they have been dealt with in a tribal court.[53]

The Attawapiskat Elders' Court handles by-law infractions usually related to alcohol, less serious criminal offences and provincial summary conviction offences. The Cree community representatives consult with the police and the Crown and decide which offences will be referred to the regular provincial court. Lesser offences directed to the Elders Court. The more serious offences are handled by the provincial court with the assistance of an elders' sentencing panel.[54]

The *Indian Act* by-laws apply to the territory of the Indian Reserves just as the municipal by-laws apply to the municipal territory. Such laws would be the subject of the Aboriginal justice system. *Indian Act* by-laws dealt with the regulation of traffic, the observance of law and order, the prevention of disorderly conduct and nuisances, the preservation of game, trespass, and the prohibition of intoxicants.[55] The Meadow Lake Tribal Council stated in their submission to the Saskatchewan Indian Justice Review Committee that:

> First Nations laws are community initiated. In order for them to be effective and for the process to be respected, they should be enforced by the community. Without a practical, community driven enforcement mechanism, First Nations are essentially powerless to effect any real order at the Community level.[56]

Similarly, the James Bay and Northern Quebec Agreement contemplates community laws of the Crees being enforced by a Cree justice system. The Agreement provides that:

> 18.0.9 Justices of the peace, preferably Crees, are appointed in order to deal with infractions to by-laws adopted by Cree local authorities and

> other offences contemplated in section 107 of the Indian Act. These appointments are subject to the approval of the interested Cree local authority.[5]

It is fundamental that the Aboriginal justice system deal with laws relating to the maintenance of peace and order. If Aboriginal justice systems are to be relevant, then they must deal with assaults, alcohol offences, public disturbances, break and enter, thefts and such similar crimes against persons and property that occur in Aboriginal communities.

Clearly, the degree of development of the Aboriginal justice system would have a bearing of the degree the system deals with serious crimes.

In summary, all laws of the Aboriginal community should be enforced within the boundaries of the Aboriginal justice system. Moreover, the laws relating to the maintenance of peace and order, with the possible exception of grievously severe offences, should also fall within the purview of the Aboriginal justice system.

On What Basis Would the Jurisdiction of Aboriginal Justice Systems be Invoked?

The jurisdiction of the Aboriginal justice system may be invoked in several different ways. They are:

- status of the accused;
- status of the complainant;
- the choice made by the accused;
- the territory in which the offence is committed;
- the nature of the offence committed.

All these options exist under of the Canadian criminal justice system.

For instance, the jurisdiction may be determined by the status of the accused. If an individual is under 18 years of age, he or she is subject to the *Young Offenders Act* and appears in Youth Court.

The status of the complainant has no bearing on the jurisdiction or the manner in which the prosecution proceeds. However, s. 107 of the *Indian Act* is an exception.

The choice of the accused may be a factor in determining jurisdiction. When charged with an indictable offence, the accused may elect to be tried either in provincial court or in superior court following a preliminary in provincial court.

Territory is always a factor. If the offence is committed within the territory of a province, then the offender is tried in the criminal court of that province.

The nature of the offence may affect the proceedings. If an individual commits an offense involving a federal drug prohibition, then a federal agent prosecutes rather than the provincial Attorney General prosecutor. Similarly, city by-law violations are usually prosecuted by an agent of the municipality that enacted the by-law.

When the Accused is Aboriginal? Non-Aboriginal?

The status of the accused may be the basis for determining jurisdiction. One rationale might be that it is Aboriginal people who encounter systemic discrimination in the Canadian criminal justice system[58]. Accordingly, they should have the benefit of an Aboriginal justice system that could alleviate the discrimination.

Canadian Charter of Rights and Freedoms

A purely racial determination of jurisdiction poses some problems with respect to the *Canadian Charter of Rights and Freedoms* issue of race discrimination.[59] The Charter states:

> Every individual is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical ability.[60]

If an Aboriginal justice system distinguishes on the basis of race, there may be a challenge by an Aboriginal to the Aboriginal justice system because of a Charter violation. Alternatively, a challenge may be made by a non-Aboriginal because Aboriginal people are treated differently in the criminal justice system.

However, the Charter does provide for measures designed to ameliorate the circumstances of disadvantaged groups.[61] The Charter provides:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is arguable that any Aboriginal justice system is established to ameliorate the adverse effect the Canadian criminal justice system has on Aboriginal people. This would allow the Aboriginal justice system to operate notwithstanding the racial distinction.

Moreover the establishment of an Aboriginal justice system may engage the protection of sections 25 of the *Constitution Act, 1982*. Traditional justice systems may be considered an Aboriginal or treaty right and protected by s. 25 of the Constitution which reads:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada ...

Finally, it should be noted that the Royal Commission on the Donald Marshall, Jr., Prosecution concluded:

> Any sort of Native Court system will no doubt seem threatening to some. There will be those who will say, "Why should the Natives get their own Justice system?" The answer: "Because they are Native." As an Aboriginal people, the Micmacs not only have a history and culture that thrived in Nova Scotia before the province was colonized by Whites but they also had in place their own successful methods for resolving disputes.[8]

The issue of an unlawful Charter discrimination does not appear to be a serious barrier to the establishment of an Aboriginal justice system.

U.S. Tribal Justice Systems

The Indian tribal courts in the United States have jurisdiction over their members and other Indians who may happen to be present within the tribal territory. Thus an Indian who commits an offense within the Flathead Reservation is subject to the jurisdiction of the Police and Courts of the Flathead Tribe. A non-Indian however, who commits the same offence is subject to the jurisdiction of the State police and the State courts. First Nations observers who have visited the United States and observed the American Indian Tribal Justice system are virtually unanimous that jurisdiction based on racial distinctions is complicated and an undesirable way of enforcing laws.

Grande Cache Native Court

The Grande Cache Native Court does operate on a racial basis. The accused has the option of asking the judge to have sentencing in Native Court. Non-Aboriginals do not have that option. The same is true for the Native Youth Justice Committees in Alberta. However, in Slave Lake, non-Aboriginal people are involved in the Youth Justice Committee. In Bonnyville, non-Aboriginal people have asked to become involved in the Native Youth Justice Committee.

A major benefit of Aboriginal justice systems is the rehabilitation of Aboriginal people and their restoration as contributing members of the community. Aboriginal justice systems are seen as being most effective in rehabilitating Aboriginal offenders. This is not relevant with non-Aboriginals who are of a different culture. The status of the individual accused speaks more to rehabilitation than deterrence. Conversely, a territorial basis for jurisdiction relates more to deterrence more than rehabilitation.

When the Complainant is Aboriginal? Non-Aboriginal?

Another approach for determining jurisdiction could be the status of the complainant. This distinction has not been significant for the existing Aboriginal justice initiatives. None of these Aboriginal justice initiatives operates on the basis of the status of the complainant.

Section 107 of the *Indian Act* gives jurisdiction to an *Indian Act* justice of the peace over a person who commits an offence in relation to "the property of an Indian." By implication, the status of the compliant confers jurisdiction of the s.107 justice of the peace.

The police may lay criminal charges even in cases where the victim does not wish to complain. Alternatively, the offence may involve a "victimless crime".

It might be argued that Aboriginal people belonged to an Aboriginal society and therefore offences against them should be dealt with by the Aboriginal justice system. Similarly, non-Aboriginal people belong to the Canadian society and therefore offences against them should be dealt with by the Canadian criminal justice system.

Using the status of the complainant to decide jurisdiction is likely to cause racial disputes and differential treatment.

When a Certain Type of Offence is Committed on a Certain Territory?

There are two parameters that need to be separately addressed, the first being the territory upon which the offence is committed and the second being the nature of the offence.

Jurisdiction Based on Territory

Police forces generally operate on a territorial jurisdictional basis. Provincial police forces will enforce the law within the rural areas of the province. Municipal police forces will patrol the municipal area to which they belong.

The provincial courts' jurisdiction is based on the territory of the province. Moreover, they are frequently organized on the basis of a community or region although matters may be waived in from other provincial courts by agreement.

When a city enacts local by-laws, its by-laws have effect within the city boundary. Similarly provincial laws apply within the province. *Indian Act* by-laws enacted by First Nations have application on the reserve of the First Nation.

In the Report of the Special Committee of the House of Commons issued on October 12, 1983, the Parliamentary Committee observed:

> Within areas of exclusive jurisdiction, an Indian First Nation government would exercise powers over all people inside its territorial limits.

> Non-members moving on to Indian First Nation land to live, do business or visit would be governed by Indian First Nation laws.[63]

The fundamental purpose of a justice system is to promote the maintenance of peace and order within the community. This is an important reason for using territory as the basis for determining jurisdiction. If individuals may disturb public order within Aboriginal territories and not be subject to the Aboriginal justice system, then the ability of Aboriginal justice system to maintain peace and order in the community is compromised.

The assertion of jurisdiction based on territory is a common and familiar theme throughout the Canadian criminal justice system. It is a preferable and superior approach to jurisdiction than the racial distinction made in the United States between Indians and non-Indians.

Nature of Offences

The Alberta Indian treaties provide that the Indians will:

> ...assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations this Treaty or infringing the law in force in the country so ceded.[64]

This suggests that Indians should be involved in dealing with Indian offenders. Moreover, it identifies violations of the terms of the treaty as offences. Hunting and fishing are treaty activities that are conducted beyond the bounds of the Aboriginal community. The First Nations which are party to the treaty should be involved in the prosecution of treaty hunting offences.

Offences by Aboriginal hunters in violation of the lawful exercise of treaty or Aboriginal rights within the traditional territories should be dealt with by the Aboriginal justice system.

Would the Decisions of an Aboriginal Justice System be Made Subject to Appeal to a Higher Court in the Mainstream System?

Appeals of court decisions to a superior court made be made on several different grounds. First, there can be appeal on the findings of facts in the case. The *Criminal Code* provides that a judge's finding of the facts in a case can be set aside if found to be unreasonable. Second, there can be an appeal on the question of law. An important subset of an appeal on questions of law is the Charter issues. An appeal may be commenced because there has been a breach of the *Canadian Charter of Rights and Freedoms*. Third, most often in the case of administrative tribunals, there may be an appeal to the superior courts on questions of jurisdiction and natural justice and fairness.

Lack of Understanding of Aboriginal Culture

The basic purpose for establishing an Aboriginal justice system is to incorporate understanding and sensitivity to the issues that concern the Aboriginal culture. The Canadian criminal justice system has regrettably too often missed the mark in terms of addressing that aspect of criminal law and its application to Aboriginal peoples.

There is the possibility that Aboriginal justice decisions may be overturned because mainstream appellate courts may lack understanding of the Aboriginal culture and nullify the benefit of an Aboriginal justice system.

In addition, the solutions found to deterring unlawful conduct in Aboriginal communities may run counter to the current trend in the Canadian criminal justice system of setting minimum or standard sentence guidelines for the dealing with offenders. Such sentencing guidelines may be at variance with the solution arrived at by the Aboriginal community.

The *R.* v. *Nagitarvik* case illustrates this problem. That case involved a 21 year old Inuk charged with a sexual assault of his 14 year old cousin. At the sentencing hearing, the judge heard representations from the Inuit Inumarit, a council of elders. They explained how they dealt with wrongdoing in traditional fashion in the community and indicated that they wished to assist the young Inuit correct his conduct. They did not want him to be sentenced to a term of imprisonment and taken away from the community to a southern penal institution. The judge accepted the Inumarit's submissions and sentenced the young Inuit to 90 days intermittent imprisonment at the local RCMP detachment. In addition, the judge ordered a two year term of probation involving community counselling and 100 hours of community service. In his reasons for sentence, he stated:

> It is obvious to me from what has been said today in evidence that the community is willing to act, the Inumarit is willing to act and the social services are willing to act in this case. It is not an empty promise. It is true. It is a fact. It is proven in the past by the very absence of crime or disturbance. This special part of Arctic Bay is something that I would be very sad to see in any way taken away or diminished. The very things that the Inumarit are trying to do is what the Court is trying to do: rehabilitating the offender, reconciling the offender, the victim and the community so that there is unity in the community and a program of education....
>
> I am impressed with the Inumarit. They promise and appear in the past to have delivered more than what jails can do. I accept what they say without reservation because, as I say, for at the last three years that I have been here we hardly ever come to Arctic Bay, because there is simply no trouble in this community....
>
> So the issue is, what do I do with this group of people in this community that is so eager to be involved and to take care of the problems

> within the community, and at the same time do what is right in law. If the Court can do something to help the community to continue to solve its own problems, to help those whoever they are, and however they work to continue to keep Arctic Bay the good community that it is then I think the court should do it. If whatever, it is in Arctic Bay that keeps this community crime-free continues to function and work with respect to this man then everybody is served and the community will be protected.[65]

On appeal of the sentence, the Northwest Territories Court of Appeal increased the sentence to 18 months. The Appeal Court decided that the Territorial Court's sentence was inadequate and first applied the standard it established in a non-Aboriginal case *R.* v. *Sandercock*[66] that called for a sentence of three years. The Appeal Court then reduced the sentence to 18 months' imprisonment from the standard guideline because of mitigating circumstances. In the reasons for decision, the majority Justices stated:

> The modern reincarnation in Arctic Bay of the traditional Inumarit Committee resembles the usual community counselling service rather that the traditional governing and counselling body of earlier times. I am unable to see, given its recent origin, the community which it serves, its methods of operation, and the absence of the traditional ultimate sanction of the offender, that it is a remnant of ancient culture. Its counselling service, admirable as it undoubtably is, cannot in my opinion, replace the sentence of imprisonment which is required in virtually all cases of major sexual assault.[67]

The dissenting Justice agreed with the Territorial Judge's decision:

> I am unable to detect any error in principle in the reasons of the sentencing judge. The preservation of cultural heritage is given new recognition by the Canadian Charter of Rights and Freedoms and it was proper to take it into account. The Trial Judge weighed this and all other factors and imposed a sentence which in my view was fit in the circumstances disclosed by the evidence before him.[68]

Law Professor Michael Jackson, in *Locking up Natives in Canada*, commented that the majority of the Court of Appeal applied Canadian society values of denunciation and deterrence rather than the Aboriginal community's values of rehabilitation and restoration.

American Tribal Appellate Courts

Where the American Indian tribes had a regional court system, three judges sitting as an appeal panel could hear the appeal from a decision of a single judge. The common law courts in England used this system of forming an appellate court with a panel of judges before the establishment of the higher Courts of Appeal.[69]

Métis Appeal Tribunal

The dispute resolution mechanism established for Métis Settlements includes an appeal of the decision to the Métis Settlement Appeals Tribunal. A decision of Métis Appeal Tribunal may be appealed to the Alberta Court of Appeal. However, that appeal is restricted to questions of law and jurisdiction.[70]

Canadian Charter of Rights and Freedoms

An area of law that will be of concern is the application of the Charter guarantees in an Aboriginal justice system. As a constitutional guarantee of rights, the Charter would apply to Aboriginal justice systems subject to the s. 25 shield for Aboriginal and treaty rights.

The question would then become whether the Aboriginal justice system is an exercise of an Aboriginal or treaty right. If it is, then the Charter will not apply. If it is not, then the potential for a conflict between the Charter guarantees and the Aboriginal justice process arises.

Both the federal and provincial governments have an additional mechanism for limiting the application of the Charter, namely the 'reasonable limitations' provision in s. 1 and the 'notwithstanding' clause in s. 33. The Charlottetown Constitutional Accord provided that the Charter would apply to Aboriginal governments exercising inherent rights of self-government. The Charter application may not derogate from Aboriginal and treaty rights and that Aboriginal governments would have access to the 'notwithstanding' as well.[71]

Absent constitutional amendment, the Charter will apply to Aboriginal justice systems.

Canadian Aboriginal Members of the Judiciary

A resource available for Aboriginal justice systems are the Aboriginal members of the judiciary in the mainstream Canadian Justice system. These provincial, territorial and superior court judges are thoroughly grounded in the operation of the Canadian criminal justice system. Involving such judges in the appellate level of Aboriginal justice systems provides a means of a judicious balancing of Aboriginal and Canadian justice values.

Appeals of Aboriginal justice decisions may be to Aboriginal appellate courts on all issues of merit. Any appeals to the mainstream Canadian justice system should be restricted to questions of law, jurisdiction and Charter issues.

Conclusion

Several observations may be inferred from this review of Aboriginal justice initiatives.

The Canadian criminal justice system is very adaptable and could accommodate much of the Aboriginal justice initiatives. The mainstream system could start the process of empowering Aboriginal justice initiatives and serve as a support and back-up.

Aboriginal justice initiatives will entail many structures largely conforming to Aboriginal geo-political and cultural boundaries with common underlying values being use of the *Criminal Code* and reliance on community values.

The *Criminal Code* will apply in Aboriginal communities but must be amended to accommodate Aboriginal criminal justice system.

Aboriginal justice systems will be part of the interlocked Canadian criminal justice system with:

- internalized traditional social controls;
- intermediate Aboriginal justice systems; and
- the external Canadian criminal justice system as support.

Aboriginal justice systems will be based on the territory of the Aboriginal government and on the traditional territory over which Aboriginal people exercise of Aboriginal and treaty rights.

There are three different types of relationships that may exist between the Canadian criminal justice system and the Aboriginal justice systems.

First, the mainstream system could acquire greater sensitivity and employ Aboriginal people in the justice system. This has the potential of allowing the mainstream system understand Aboriginal perspectives. If the components of the mainstream system, such as the police, the Crown, or the judiciary, change their attitude and approach, then a significant shift would occur in how criminal justice is administered.

Second, establishment of Aboriginal justice systems with Aboriginal governments as employers would greatly increase the prospect of developing justice systems that are responsive to Aboriginal concerns.

Third is the recognition of Aboriginal justice jurisdiction. This represents the desired goal of Aboriginal people and would be a true paradigm shift in the application of criminal justice to Aboriginal peoples. Such jurisdiction is an essential part of Aboriginal self-government.

Much of the process of determining the relationships between Aboriginal justice systems and the Canadian criminal justice system will likely be dependent on negotiations among Aboriginal peoples and the federal, provincial and territorial governments.

The Alberta Task Force favoured a negotiated approach to establishment of Aboriginal justice systems:

The Task Force Recommends:

11.1 That we favour the view of the Canadian Bar Association Native Law Subsection. Whether an Aboriginal Justice System should exist and its scope and extent, is a matter for negotiation between the Indian and Métis people and the Governments of Canada and Alberta.[72]

Implicit in all the various Justice Commissions reports on Aboriginal justice systems is a negotiated approach to implementation.

What is not addressed is the difficulty Aboriginal people will face in negotiations when the governments hold all the cards. Well meaning intentions of governments towards Aboriginal peoples all too frequently fade when it becomes a matter of specific negotiations in which narrow government legal opinions are advanced.

Aboriginal people have often witnessed recommendations of significant new measures by commissions, inquiries and studies and have experienced disappointment when government resolve faded with time. Attention must be given not only to the types of relationships that could exist but also how those relationships are to be successfully negotiated.

The Questions

The discussion in this paper does not fully answer the questions proposed. However, it does suggest possible answers. In revisiting the questions, this writer would answer as follows:

Would a parallel Aboriginal system mean a single system, or would it be composed of many systems?

A parallel Aboriginal justice system will be composed of many separate structures having common characteristics and a common objective of the maintenance of order in the Aboriginal community.

How would Aboriginal justice systems relate to and tie in with the mainstream system?

The mainstream system can initially serve as an incubator empowering the Aboriginal justice system and a support for Aboriginal justice systems in dealing with criminal conduct not responsive to Aboriginal justice correction.

What would be the relationship between the various justice systems in the different Aboriginal communities?

The relationship between various Aboriginal justice systems will be separate but co-operative, using common rehabilitative measures and drawing upon similar principles of approach to criminal justice matters.

Would an Aboriginal justice system have jurisdiction over some crimes? All crimes?

Aboriginal jurisdiction will always apply to the criminal offences that disturb the peace and security of the community, may apply to serious offences that the Aboriginal justice system is prepared and able to deal with, and must always deal with violations of the proper exercise of Aboriginal and treaty offences.

On what basis would the jurisdiction of Aboriginal justice systems be invoked?

Aboriginal jurisdiction will be invoked in the territory over all persons and over Aboriginal people failing to properly exercise Aboriginal and treaty rights properly in traditional territories.

When the accused is Aboriginal? Non-Aboriginal?

The answer to both questions is 'Yes.'

When the complainant is Aboriginal? Non-Aboriginal?

The answer to both questions is 'No.'

When a certain type of offence is committed in a certain territory?

All offences in the Aboriginal territory should potentially be within the Aboriginal jurisdiction dependent on its degree of development.

Would the decisions of an Aboriginal justice system be made subject to appeal to a higher court in the mainstream system?

The appeal of decisions into the mainstream system should be only on questions of jurisdiction and fairness.

Aboriginal justice systems will represent change from the existing order of doing things in this country. Their implementation will require serious commitment and determination from the federal, provincial and territorial governments and firm resolve by Aboriginal peoples in Canada.

Notes

1. R.S.C. 1985, c.C-46.
2. *Constitution Act (1867)* s.91(27) "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction but including procedure in criminal matters."
3. R.S.C. 1985 c.N-1.
4. *Constitution Act (1867)* s.92(14) "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction and including precedence in Civil Matters in those Courts.
5. *R.* v. *Whiskeyjack* (1985) 2 W.W.R. 481 (Alta C.A.)

6. *RCMP Act*
7. R.S.A. 1980 c.P-12.01
8. Source Diamond Jenness *The Indians of Canada* (6th ed.) 1972 p.18
9. *Indian Act* R.S.C. c.I-5 s.6
10. Ref. *Re Eskimo* (1939) DLR 417 (SCC)
11. *Indian Act* R.S.C. c.I-5, s.4(1)
12. *Manitoba Act* 1870; *Dominion Lands Act* S.C. 1879, c.31
13. Brendan Howley, "In From The Cold", *Enroute* September, 1992.
14. Chief Judge Heino Lilles, "Tribal Justice: A New Beginning", Sept 3-7, 1991.
15. Onion Lake First Nation: "Tribal Justice Project Proposal" prepared for the Solicitor General of Canada, Sept. 8, 1992.
16. M. Coyle, "Traditional Indian Justice in Ontario: A Role For The Present", Osgoode Hall Law Journal, vol. 24, No. 3, p.605; also Indigenous Bar Association, "The *Criminal Code* and Aboriginal People", 1991.
17. *R.* v. *Deboning* (1908) 17 DLR 23 (CA)
18. Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioners' Report*, 1989, p. 168.
19. Michael Jackson, *Locking Up Natives in Canada - A Report of the Canadian Bar Association* 1988.
20. Chief Judge Heino Lilles, "Tribal Justice: A New Beginning" Sept. 3 - 7, 1991, p. 13.
21. Indigenous Bar Association, "The Criminal code and Aboriginal Peoples" 1991.
22. Solicitor General of Canada, *First Nations Policing Policy* 1992.
23. Nova Scotia Bill No. 207 assented to June 30, 1992.
24. Sikiska/Alberta/Canada Tripartite Policing Agreement, June 1992.
25. *Indian Act* R.S.C. 1985 c. I-5, s.81(1)(c)
26. Treaty No. 7, 1877
27. Alberta *Police Act* R.S.A. 1980 c. P-12.01, s.5.
28. Canada *Gazette* Part II, Vol. 126, No. 5
29. Protocol between the Chief Constable on behalf of Himself and all others of the Stl'Atl'Imx' Nation Tribal Police and the Royal Canadian Mounted Police (E Division).
30. C. H. Rolf, *Policing In Relation To The Blood Tribe: Report of a Public Inquiry*, February 1991, pp. 157-161.
31. *Indian Act* R.S.C. 1985 c. I-5, s.81(1)(b)
32. Siksika Nation Traffic By-Law, 1991
33. *Criminal Code* R.S.C. 1985 c.C-46, s.785(1)
34. *Indian Act* R.S.C., c.I-5, s. 107
35. Chief Judge Heino Lilles, "Tribal Justice: A New Beginning", Sept. 3 - 7, 1991, p. 6.
36. *R.* v. *Moses* Unreported decision of the Yukon Territorial Court, March 13, 1992.

37. R.S.C. 1985, c.Y-1
38. Board of Review, *Native People in the Administration of Justice in the Provincial Courts of Alberta*, June 1978.
39. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991.
40. *Ibid.* p.1.
41. *Ibid.* p.74.
42. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991, p.10-3
43. Peter S. Shultz, *The Ojibwa of Southern Ontario*, 1991, p. 11.
44. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991, p.2-60.
45. *Metis Settlements Act* S.A. 1990 c. M-14.3
46. *Metis Settlement Act* S.A. 1990, c. M-14.3, s.204
47. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice* 1991, p.105.
48. Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioners' Report*, 1989, p.170.
49. Task Force on the Criminal Justice system and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991, p.10-4.
50. The Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, 1991, p.657.
51. *Ibid.* p.658.
52. *Ibid.* p.294-295.
53. *Ibid.* p.282.
54. Brendan Howley, "In From The Cold", *Enroute*, September, 1992
55. *Indian Act* R.S.C. 1985, c. I-5, ss. 81, 85.1
56. *Report of the Saskatchewan Indian Justice Review Committee*, January 1992., p.45.
57. The James Bay and Northern Quebec Agreement p. 291.
58. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991, p.12-3.
59. *Constitution Act, 1982*, Schedule B, Part I, *Canadian Charter of Rights and Freedoms.*
60. *Ibid.* s.15(1).
61. *Ibid.* s. 15(2).
62. Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioners' Report*, 1989, p. 168.
63. Special Committee on Indian Self-Government, *Indian Self Government in Canada* 1983 p.64.
64. Treaty No. 8, 1899
65. (1986) 26 C.C.C. (3d) 193
66. (1985) 22 C.C.C. (3d) 79
67. (1986) 26 C.C.C. (3d) p. 48 at 196

68. (1986) 26 C.C.C. (3d) p.48 at 207

69. The Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, 1991, p. 317.

70. *Metis Settlements Act*, S.A. 1990, c.M-14.3

71. Consensus Report On the Constitution (Final Text of the Charlottetown Accord), August 28, 1992.

72. Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, March 1991, p. 11-5.

Taking Justice Back: American Indian Perspectives

*James W. Zion**

The Royal Commission on Aboriginal Peoples has come to an essential issue of Aboriginal rights: the right to make and be governed by law. It poses five fundamental questions about justice for Aboriginal peoples and invites presenters to address them.

This paper seeks to inform the Commission about the American experience with Aboriginal courts and justice. As noted in the preliminary planning document for the Round Table on Justice Issues, the problem of how to establish or recognize Aboriginal justice systems has been studied extensively in Canada. I participated in the Native People's Law Conference, held in Calgary, Alberta in September 1983.[1] Geneva Stump, a Cree judge of the Rocky Boy's Reservation (Montana), and I conducted field studies of Indian common law in Saskatchewan for the 1984 Joint Canada-Saskatchewan-Federation of Saskatchewan Indian Nations Studies of Certain Aspects of the Justice System As They Relate to Indians in Saskatchewan.[2] I also provided information and views for the Australian Law Reform Commission's study of Aboriginal customary laws[3] and the Manitoba Aboriginal Justice Inquiry.[4] The many conferences and studies of justice systems for Aboriginal peoples in Canada have been disappointing: There has been a lot of talk about Aboriginal justice systems; many reports have been tabled; many officials have voiced their approval of the notion that Aboriginal peoples are capable of administering justice themselves. Now, ten years after initial discussions of Aboriginal justice, the time has come to

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make concrete proposals for policies to create or acknowledge Aboriginal justice systems.

Canada again looks to the American tribal court experience.[5] This paper seeks to answer the five questions posed by the Commission. More important, it seeks to put the American experience into perspective. American tribal courts are a model, but they must be viewed in a different perspective than that found in most published accounts of their nature and work. There are problems and some failures in the American system, but they are primarily the product of official neglect by the Government of the United States. Published accounts of tribal court limitations by critics and detractors should not deter the Commission or cause it to reject the American experience.[6]

American Indian courts work, and they work well. They are a model for Canada, with some changes, but the American tribal court model should not be imported wholesale or imposed on Canadian Aboriginal governments. On the surface and in publications, American tribal courts are a state-model system, with adjudication and court rules that are familiar to most lawyers. In reality, many tribal judges adapt what may be seen on the surface to tribal conditions. Written accounts often do not describe that level, and it is essential to an understanding of both how Aboriginal justice works and why it is a viable alternative to the state system.

American Indian Justice Systems in Perspective

The first Indian courts, i.e., court systems operated by Indians, were imposed by the government of the United States during the latter half of the nineteenth century.[7] In 1883, the Commissioner of Indian Affairs created the Courts of Indian Offenses.[8] That judicial body was an administrative arm of the Bureau of Indian Affairs (BIA), controlled by local BIA Indian agents. Indians were selected as judges based upon their compliance with non-Indian values (e.g., not wearing long hair, having only one wife and not being a 'blanket Indian'). The law applied was an adaptation of American justice the peace codes, and decisions were reviewed and controlled by Indian agents. The Court of Indian Offenses, also known as the CFR Court (after the *Code of Federal Regulations*), exists today in limited numbers.

The United States Congress, recognizing a basic shortcoming in American Indian policy resulting from a lack of tribal governing bodies, enacted the *Indian Reorganization Act* of 1934. That statute, which was a model for Canada's *Indian Act*, allowed American Indian tribes to create their own justice bodies – tribal courts.

As it was with the Court of Indian Offenses, tribal governments were not permitted to develop their own systems or codes of law. In 1935, the Bureau of

Indian Affairs revised the code for the Court of Indian Offenses, and that "Law and Order Code" was the basis for codes enacted by tribes.[9] Today, there are approximately 170 tribal courts in the United States. For the most part, they operate with variations on the 1935 Law and Order Code. It is, as in the past, a code adapted from the state justice of the peace model. It provides misdemeanour criminal jurisdiction (i.e., a maximum jail sentence of one year for a given offence) and unlimited civil jurisdiction.

Observers of American tribal courts see court systems that appear to be mirror images of state systems. The tribal Law and Order Code is similar to state statutes, and many tribal courts have a modified form of federal rules of civil and criminal procedure. On the surface, there does not appear to be anything to distinguish tribal courts from state systems (other than the Indian-ness of their judges).

In 1968, following sensational congressional hearings on abuses of civil rights by tribal governments and courts, the United States Congress enacted the *Indian Civil Rights Act*. It imposed most U.S. *Bill of Rights* protections upon tribal courts and provided for federal court review of criminal convictions by means of *habeas corpus*. The Act prompted further intrusions into tribal court operations, and their actions were measured using non-Indian civil rights standards. One report that is often used is S.J. Brakel's *American Indian Tribal Courts: The Costs of Separate Justice*.[10] The report is useless, given Brakel's methodology and attitudes. He observed tribal court operations using the imposed model as a measure. He failed to recognize the fact that tribal courts had not been given the funds and resources to operate using the imposed model, and he could not see Indian adaptations of the model, given his non-Indian perspective.[11]

Other reports repeat Brakel's mistakes. Non-Indian (and some Indian) observers use American criminal and civil procedures and substantive provisions to measure tribal court operations. However, they do not see or report what actually takes place.

Many tribal courts conduct proceedings in a native language. Many litigants are related to the judge by blood (usually an extended relationship) or by clan, or they are actually known by the judge. They are members of the community, as is the judge in most cases. What actually takes place in many tribal courts is that customary principles and procedures are applied.[12] The BIA Law and Order Code permits the use of tribal customary law in civil proceedings,[13] and the United States Supreme Court has sanctioned the use of customary law in criminal proceedings.[14] Rather than articulate Indian common law principles in decisions, many tribal judges unconsciously apply tribal values in cases in a way outside observers cannot see.

When viewing American tribal courts as a possible model, therefore, the Commission must recognize the fact that what is related in studies or reports

may not reflect what actually takes place. There are two levels of activity: there is a conscious and observable level that uses general American legal principles, and an unconscious and non-observable level, which uses Indian languages and customary methods. To understand American tribal courts better, the Commission must turn to a consideration of the nature of Indian common law and customary practices.

A Theory of Indian Law and Justice

Spanish colonial administrators recognized Indian law as a valid form of law in 1555,[15] and the English recognized it in 1763 and 1774.[16] Indian law is valid as a matter of American and Canadian law (as received from the English), and there is an international human right, under the *International Covenant on Civil and Political Rights*, for Indians to make, use and be governed by their own laws.[17]

What is the Indian common law that has been recognized consistently in North America for 437 years? It is simply Indian or Aboriginal norms, values, moral principles and even emotions,[18] which are enforced by institutions.

Indian norms, values, moral principles and emotions are expressed in language, traditions, ceremonial knowledge and rearing. They are known to Indians by their upbringing and education in traditional values. In turn, when Indians assume leadership or decisional roles, they use them as part of the decision-making process. The means of reaching a decision may be conscious, as in an articulated relation of decisional motive or reasoning, or unconscious, as described above.

Institutions are people; individuals operate them. Tribal courts or other justice bodies are staffed by people who use their values as law.[19]

It is important to focus separately and knowingly upon the two elements of law – norms and institutions. The questions are as follows: Whose norms shall apply to establish substantive rules of law or legal procedures? Will justice institutions accommodate and reflect the norms of those who staff them?

Some Indian judges in the United States reject or modify the norms which are embodied in the imposed Law and Order Code. That is why outside observers 'see' and declare that Indians are not following their 'own' law. Indian judges are in fact using their own common law to make decisions. Likewise, many Indians adapt and modify imposed institutions when they serve as tribal judges.

The models for Aboriginal justice bodies include (1) assimilation of Aboriginal people in state institutions (e.g., sitting in provincial courts), (2) special bodies (e.g., Aboriginal justices of the peace), (3) tribal courts on the American model, and (4) traditional justice bodies.

Indians of the United States who sit in state institutions are not allowed to use their own common law. Although there is a move to open the doors of American courtrooms to Indian lawyers, as they have been hired by some federal or state agencies, they are not permitted to use their own common law as a rule of decision.[20] Thus, the state option does not fit the dynamic of this definition of law.

There are special bodies for Indians in the United States government. The most prominent are the Office of Hearings and Appeals of the United States Department of the Interior, which decides Indian probate cases, and the Interior Board of Indian Appeals of the Department of the Interior, which hears probate appeals and some Indian administrative law questions. Indian administrative law judges apply non-Indian legal principles and use non-Indian procedures. Their written decisions are not based on Indian common law.[21] Here, too, the law applied is not the law of Indians.

The situation may or may not differ in tribal courts. To the extent that a given tribal court uses the state model completely, the primary difference from a state court is the actor. That individual will dictate an outcome based on state rules unless, given language or acculturation, he or she unconsciously uses Indian values and reasoning. On the other hand, some tribal court judges vary from the state rule or reject it. This causes confusion when outside observers measure what is done using general American rules of law. Tribal courts will either fit the definition of law from the American viewpoint (i.e., Anglo-European values used in an Anglo-European institution) or the tribal one (i.e., Indian values in an Anglo-European shell, modified to tribal expectations).

Traditional bodies fall within a definition of Indian common law in that it is Indian norms, values, moral principles and emotions that are used and applied by Indian institutions.

Therefore, Aboriginal justice planners (who should be Aboriginal people themselves to be 'Aboriginal' justice planners) must consider the norms they will use as law and the nature of the institutions they create. Those institutions must adapt to the legal culture of the group, and their human components must reflect the group's legal culture.

That is what the Courts of the Navajo Nation are doing. The Navajo Court of Indian Offenses was created in 1892, and although its Navajo judges had to use the imposed values contained in BIA regulations (many of which were designed to destroy Indian legal values), history shows they often ignored them and used Navajo values. Beginning in approximately 1981, the Courts of the Navajo Nation undertook a conscious program to use Navajo common law as the law of preference. The initiatives of the program include:

- use of Navajo common law in written opinions as the law of preference of the Navajo Nation;

- use of Navajo common law as a means to interpret codes such as the Navajo Nation Bill of Rights (with U.S. *Bill of Rights* and civil rights principles) and the Navajo Nation Criminal Code;
- creation of the Navajo Peacemaker Court (1982), an adapted traditional justice method;
- use of Navajo common law principles in court rules and codes (e.g., the 1991 Navajo Nation Code of Judicial Conduct);
- articles and studies of Navajo common law as applied to major legal problems (e.g., mediation techniques, a code of judicial conduct, restitution or reparation and domestic violence);
- studies of traditional legal methods; and
- the Navajo Common Law Project, the Navajo Peacemaker Court Project (*Hozhooji Naat'aanii*), and the Navajo Common Law Archive.

Use of the American Tribal Court Model in Institutions

One of the questions posed by the Commission is how the American experience with institutions can be used in Canada. A more specific question is whether Canadian Aboriginal communities or groups should have their own separate institutions or whether there should be provincial or regional bodies.

In 1984, leaders of the Federation of Saskatchewan Indian Nations (FSIN) envisaged an FSIN-operated justice body to serve all the bands of Saskatchewan. The major considerations were economy and unified control of the system. Likewise, the Manitoba Aboriginal Justice Enquiry concluded that a province-wide, Aboriginal-controlled body would be the best option. The Northwest Intertribal Court System of Washington state is a good model.[22] The Manitoba study also recommended a version of the Navajo Peacemaker Court.

The institution chosen by a given Aboriginal group should be at its sole option. Aboriginal groups should have the choice of a locally controlled justice system, one that fits the trial court model, the Navajo Peacemaker court model, or some other option. There are many models, but as the FSIN study of justice systems in Saskatchewan shows, Aboriginal peoples in Canada are quite capable of establishing their own systems.[23] A band, a group of bands and other Aboriginal groups can, if they choose, decide to form provincial or regional institutions.[24]

The guiding principle must be that if Aboriginal justice systems are to be effective, the system must not be imposed. Instead, it must honour and reflect group expectations of law. If American tribal courts are viewed as a failure by some, it is because the government of the United States has imposed non-Indian legal values upon tribes and failed to honour its trust obligation to provide adequate resources for tribal courts. Canada and other countries studying American tribal courts are not seeing them at their best, because of ignorance of how they actually operate and because of the refusal of the United States government fully to

recognize and respect Indian law and institutions (as mandated by international human rights law and American Indian Affairs law) or to honour the trust obligation to fund tribal courts fully.[25] To be in compliance with the *International Covenant on Civil and Political Rights*,[26] Canada must support Aboriginal groups in forming justice systems of *their* choice.

Adversarial Justice

Both Aboriginal leaders and members of the general society recognize the failures and shortcomings of the adversarial system. That is why there is such enthusiasm for alternative dispute resolution. What they fail to recognize is that they are really unhappy with state control of justice. That is, American and Canadian courts are a part of a vertical system of justice, which is a hierarchy of power and control.[27] The adversarial method is a necessary part of states and central authority. When there is an abuse of authority, we call it authoritarianism.[28] While judges and lawyers attempt to be as fair and objective as possible, they are still imposing their will and power on individuals. Courts work well when the people trust them.[29] When the people feel that their courts and judges are arbitrary or corrupt or that they disregard popular expectations, the people do not respect them. That is why the confrontational adversary system, which uses authority figures to sort out the facts as developed by (expensive and elitist) lawyers, is unpopular.

There is also a horizontal system of justice.[30] It is based on relationships. In the Aboriginal context, tribal clans and other relation or kinship systems are a horizontal system of justice. It is still largely in place, and it forms the basis for justice systems that use Aboriginal concepts of conciliation, mediation or arbitration.

However and again, the choice of the method of deciding disputes is a tribal one. In December of 1991 my wife, Elsie B. Zion, a Navajo lawyer, and I taught a course on federal grant and contract law in San Francisco. There were approximately 15 tribal leaders in the session. When we reached the subject of using Indian common law and traditional institutions, some participants from Washington state insisted that their tribe did not want to use traditional law and procedures. They were quite happy with their state-model tribal court system, thank you very much, and did not want to return to tribal traditions.

Likewise, some Aboriginal groups in Canada, knowing the possible choices, may choose adjudication in courts staffed by their own members or some regional arrangement.

The Role of Punishment

Punishment, force and coercion are another aspect of state justice in a vertical system of law. Power alone does not work.[31]

The focus of Aboriginal law must return to the original notion that the purposes of law are to make victims whole for their injuries and restore the parties to harmony with the group. Guilt and innocence have very little to do with traditional justice methods. Guilt was often found from the circumstances, given small communities. The emphasis was upon the injury caused by an act and how victims could be helped by their family and community. There were forms of absolute liability where fault or guilt were irrelevant.

To the extent that American Indian judges treat a case as a problem to be solved and not a person to be punished, they have been successful. To the extent that they have simply collected a fine or jailed an offender, without considering the needs of the victim, they have failed. In other words, where tribal courts follow the state model of punishment, they have violated Indian common law. There is a growing consensus in the United States and Canada that restorative justice and remedies that aid both victims and offenders are superior to punishment. The United States has the highest imprisonment rate in the world; it is followed by South Africa and Canada. There are alternatives to punishment in many cases, and those options are particularly appropriate in Aboriginal communities.

Administrative Aspects of the Existing System

The failure of existing state systems of law is self-evident. Aboriginal people are jailed at rates far higher than the general population; victims are left without remedies; non-Indian tribunals and institutions are often discriminatory.

The fault is not insensitivity to Aboriginal culture and perspectives alone. There is a great deal to be done to end discrimination and racism in policing, courts and corrections, but that is not the primary difficulty, which is that Aboriginal peoples are not allowed to solve their own problems in their own institutions, guided by their own perceptions of what is right or wrong.

Where Aboriginal peoples come into contact with state institutions outside their own jurisdictions, there must be attention to fairness and Aboriginal cultural perspectives. However, Aboriginal groups must have the ability to deal with their own problems, in their own ways, when they arise locally.

The Impact of Reforms

Vine Deloria, an American Sioux lawyer-philosopher, said it best: "We suggest that tribes are not vestiges of the past, but laboratories for the future."[32]

Traditional Indian justice rules and methods are not 'alternative dispute resolution'; they are the way things are done. They are a horizontal system of justice that works. They provide lessons for general methods of alterative dispute resolution.

Some may say that we cannot return to the past; that traditional Aboriginal justice methods are not possible in the twenty-first century. Some may accuse those who argue in favour of traditional justice methods of being romantics. The simple answer to these objections is that we have not supported traditional methods. Although the Spanish recognized the validity of Indian law – the laws of Indians – from 1555, and the English recognized it formally from 1763, they never followed through with that recognition. The Spanish formed the *Juzgado General de Indios* (General Court of Indians), a non-Indian body, out of ignorance of Indian law. Although the United States has consistently recognized traditional Indian law since 1883,[33] it has done little to effectuate that recognition. It imposed non-Indian methods then failed to allow them to work by giving tribes the resources to make them work. Canada took the simpler route of refusing to recognize tribal governments fully and pays the price in human destruction and denial of human rights.

One of the major problems with the poor, women and cultural minorities in North America is that they have no effective voice. Aboriginal people are the poorest of the poor, and although civil rights schemes to include them in state bodies are necessary, Aboriginal poor people can participate in their own tribal governments. In the United States, where Indian unemployment rates reach 70 per cent and higher on Indian reservations, poor individuals can get jobs in tribal government (including tribal courts). Women make up half or more of the American Indian judiciary[34] and have an effective voice in tribal government. Indians are not the minority in their tribal government. The solution to a glaring human rights problem is obviously the creation *and effective maintenance* of Aboriginal justice systems.

Canada has the opportunity to foster and nourish Aboriginal laboratories for change. In doing so, it will give the nation and the world the advantage of seeing other approaches to justice, law and government. A half-hearted or stingy approach to the human right of Aboriginal peoples to have their own law will only repeat the mistakes of the past. "Thou shalt not ration justice."

Separate Aboriginal Justice Systems

Separatism is a dirty word to some in Canada; some promote it. The issue for Aboriginal justice is *not* separatism; it is local choices to solve problems. There should be distinct systems of Aboriginal justice, chosen by Aboriginal leaders and created in the forms they want.

There are American mistakes to avoid when considering the relationship of Aboriginal justice systems with those of the state. First, the state (i.e., Canada and its provinces) must not impose non-Aboriginal laws and standards or measure Aboriginal justice activities using them. Second, the state (i.e., Canadian courts and legislatures) must not oversee or review Aboriginal justice decisions. In the United States, federal courts have review authority over tribal court criminal decisions, and increasingly, federal courts are assessing tribal government jurisdiction over particular areas of interest. That is a mistake, because outside review creates a chilling effect on tribal government.[35] It makes tribal governments adopt alien codes of law or make unjust decisions to pacify non-Indians.[36]

Aboriginal justice systems must have independence and the ability to operate freely. They will make mistakes. They will sometimes treat people harshly or make unfair rulings. Aboriginal people can do little if they are treated badly by a Canadian court. If they are treated badly by their own court, however, they have the options of moving away or participating in their own system of government to make changes. Aboriginal people cannot vote their member of Parliament or provincial legislator out of office, given small numbers. They can, however, vote their band council out of office or demand reforms.[37]

American tribal courts deal with the problem of relationships which each other using principles of comity. More important, tribal judges meet with each other in regional and national organizations and at legal education seminars to create personal bonds and ties to promote common efforts. The same can be done in Canada through provincial organizations of Aboriginal governments.

Criminal Jurisdiction

Aboriginal courts should have jurisdiction over all crimes, whether committed by group members, Aboriginal people from other groups or non-Aboriginals. There are obvious problems with offences such as murder, where the group may not have the resources to deal with a serious offence – either to try it or punish it.

The American criminal justice system has failed Indians. Often, federal prosecutors (who have jurisdiction) fail to respond to serious crimes. The Federal Bureau of Investigation and the U.S. Department of Justice often refuse to use evidence developed by tribal police. Congress refuses to appropriate adequate funds for tribal courts and police (as required by many treaties, the trust responsibility and the Snyder Act).

The answer to these problems lies in providing for maximum local flexibility in criminal law, backed up by adequate resources and intergovernmental relations. For example, where an Aboriginal court or government certifies a case to federal or provincial officials for action, that should be the triggering event for outside intervention.

Personal Criminal Jurisdiction

Canada may choose to determine jurisdiction by means of personal status. That is the situation in some countries, where the court that tries a person depends upon that person's racial or ethnic status (e.g., some African courts). In the United States (in the *Indian Country Crimes Act* and the *Major Crimes Act*), the court of exclusive or concurrent jurisdiction may depend upon the 'racial' status of the person as an 'Indian' or 'non-Indian'.

Aside from the law of race-based classifications, racial or ethnic jurisdiction disregards the central problem: communities are affected by crime, and they should have the ability to respond to it.

As a general principle, Aboriginal courts or justice bodies should have jurisdiction over all offences committed within the territorial jurisdiction or community.[18] That jurisdiction may be exclusive, as with offences the community has the resources to deal with, or concurrent, as with offences that require greater resources for trial or punishment.[19] Aboriginal courts should also have jurisdiction over offences based on tribal status. For example, I once saw the situation of a rape committed by a Navajo perpetrator against a Navajo victim. The prosecutor in the jurisdiction (Phoenix, Arizona) refused to act, and the federal courts did not have jurisdiction. Although the offence was completely Navajo, in the sense of the identity of the perpetrator, the victim and the setting (a conference for Navajo officials held in Phoenix), the Navajo courts could do nothing to address the situation, other than entertain a civil damage action.

Appeals and Reviews

As argued above, outside appeals and reviews inhibit and retard local initiatives rather than promote civil and human rights. When Big Brother sits and watches, the result is inaction, not action. United States federal courts do not understand Indian expectations, Indian common law or local needs. Non-Indians (and some Indians) manipulate the system to get away with crime or to exploit Indians. The issue is not necessarily cultural; bureaucrats often stifle local initiatives or inhibit innovative approaches. Most Indian courts are rural, and urban methods are inappropriate for them. Again, the problem is with vertical systems of authority and control, which do not respond to local needs and expectations. There should be no review of Aboriginal justice decisions, and non-Aboriginal principles of law (e.g., the *Canadian Charter of Rights and Freedoms*) should not be imposed on Aboriginal governments.

Constitutional Considerations

It is not my place to advise the Commission on Canadian constitutional law. However, I do suggest that Canada must honour the human right of Aboriginal

peoples to have, use, apply and be bound by Aboriginal law (which can include both statutory and common law). There is not sufficient space here to develop an argument that I am researching; that there is an international common law right, incorporated in the *International Covenant on Civil and Political Rights* (article 27), that supports Aboriginal common law and institutions.[40]

In summary, English colonial Indian affairs policy, incorporated in the Royal Proclamation of 1763, Privy Council decisions and policies of the Commissioner of Indian Affairs, required respect for Indian government and law. That policy is incorporated in the Indian Commerce Clause of the Constitution of the United States[41] and arguably it is a part of the Canadian constitution as well.

Something has been forgotten in the rights debate: equality before the law for Aboriginal peoples does not extinguish their Aboriginal right to determine their own futures, to solve their own problems. Equality is an assimilationist principle,[42] and both the American and the Canadian constitution recognize the special status of Aboriginal peoples. It is a political, not a racial status, so distinct systems of law and government are permissible. More to the point, they are required.

The solution to the dilemma posed by the existence of section 96 of the *Constitution Act, 1867* is that the Canadian government should not establish Aboriginal justice systems; it should recognize those established by Aboriginal governments. As for ousting the superior courts of indictable offences, the solution is the common law doctrine of abstention. A court that has jurisdiction over a matter may abstain from exercising it. One example is the U.S. federal Indian affairs law doctrine that courts should abstain from exercising jurisdiction where tribes have exclusive or concurrent jurisdiction. Another is the U.S. administrative law principle of primary jurisdiction, where a court will not exercise jurisdiction over a matter that is within the jurisdiction of an administrative agency. The answer, if there is in fact a problem, is to recognize tribal government competency over justice matters and to abstain from interfering with pre-existing jurisdiction.

The *Canadian Charter of Rights and Freedoms*

Again, although I am not competent to advise on the application of the Canadian version of constitutional civil rights, I do have views on the American experience. The *Indian Civil Rights Act* of 1968, which imposes most of the U.S. *Bill of Rights* on Indian tribes, was a mistake. It was a sincere but ill-conceived measure. First, Americans do not know how concepts such as due process or equal protection apply to tribes. Both ideas are culturally based. What is 'fair' and what process is 'due' in an Indian cultural setting? What distinctions among classes of people are permissible in the Aboriginal context? How do we treat

cultures that give women preference in child custody, property ownership or other special rights? How do we view matrilineal or patrilineal leadership arrangements? For example, in the Iroquois Confederacy, clan mothers chose male leaders.[43] Women had their role and preference in selecting leaders, and those leaders were (by law) male. On the other hand, criminal law civil rights protections are difficult to apply in a setting where judges have few resources. It is impossible for an American tribal judge to keep up with the latest nuances of the law of search and seizure.

Non-Aboriginal notions of civil or political rights must not be imposed on Aboriginal peoples. Anglo-European notions of fundamental rights are tied to mistrust of authoritarian rule and to private ownership of property. They may or may not apply in an Aboriginal context. More important, when imposed on Aboriginal governments and peoples, they are the product of one group of people forcing another to its will.[44] If Aboriginal peoples have no other right, it should be that they can decide their own civil and human rights values. The enactment of civil rights codes does not insure fair treatment. We need only look at American and Canadian discrimination law and the reality of discrimination to recognize that. Prior to the enactment of the *Indian Civil Rights Act*, American Indian tribes were already moving in the direction of protecting individual rights. The fault with tribal governments was in fact the fault of the United States government: it was the United States government that installed and supported the tribal leader who triggered the Wounded Knee incident; it was the failure of the United States government to give tribal governments resources that caused civil rights violations.[45]

Conclusion

These are the views of a non-Indian lawyer who has been active in the areas of civil rights, human rights and Indian affairs law for over 25 years.[46] They are the views of a person who has had the honour and pleasure of associating with Aboriginal leaders of the United States, Canada, New Zealand and other countries for almost 15 years. They are the views of someone who works with an American Indian court, lives in a native community and is part of a Navajo family.

In conclusion, I assert that the American tribal court system works and works well. It will work better, and for the benefit of all Americans, when tribal courts get the resources they need to tackle the serious problems they face. At the turn of the century, Clark Wissler, a leading American academic, made the first trek to observe Indian judges and courts in action. After visiting several reservations and talking with many Indian judges, he concluded: "If anything were to be inscribed on a stone or tablet to these Indian judges it should read: 'Of all men, masters in common sense.'"[47] Wissler saw natural justice and equity at work, and he approved what he saw. The same is true today.

Notes

1. Karen Large, "Navajo Tribal Courts Could be Adapted" and "Deprived of Traditional Laws", *Kainai News*, No. 1 (October 1983); Jennifer Westaway and Ric Dolphin, "Separate Courts for Separate Nations", *Alberta Report* (October 31, 1983).

2. The two field reports, "Peacemaking in Saskatchewan" and "Indian Common Law in Saskatchewan", are published in photocopy format in Joint Canada-Saskatchewan-FSIN Studies of Certain Aspects of the Justice System as they Relate to Indians in Saskatchewan (1985, cited hereafter as Field Reports). The Saskatchewan study is Reflecting Indian Concerns and Values in the Justice System (1985). See also Rick H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada Learning from the American Experience", C.N.L.R. 2/1 (1988); Bradford Morse, The Establishment of an Aboriginal Court System in Canada (1990); Ontario Native Council on Justice, Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past (1991).

3. Law Reform Commission, Parliament of the Commonwealth of Australia, *The Recognition of Aboriginal Customary Laws*, Report No. 31, Parliamentary Paper No. 136 (1986, cited hereafter as The Recognition of Aboriginal Customary Law).

4. *Report of the Aboriginal Justice Inquiry of Manitoba* (1991).

5. The best thing in print about American tribal courts, from both the American and Canadian point of view, is Bradford W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (1980).

6. The Australian Law Reform Commission ultimately rejected the American tribal court model (The Recognition of Aboriginal Customary Laws, vol. 2, pp. 62-64.) The Commission rejected the tribal court model as an imposed system with problems. The actual reasons for rejection have more to do with Australian attitudes toward Aboriginal people than with the failure of the American experience.

7. There were some military experiments with Indian justice systems. When the Navajo People were confined to a concentration camp at Bosque Redondo, New Mexico, United States Army officers conceived a court system for them. The proceedings of a board of officers at nearby Fort Sumner, New Mexico, held on April 26, 1865, show plans for a system of courts for Navajos whereby their criminal jurisdiction would extend to defined offences, with penalties to include death! Robert A. Roessel, Jr., *Pictorial History of the Navajo from 1860 to 1910* (1980), pp. 22-26.

8. Indian Bureau, Regulations of the Indian Department (1884) pp. 86-88.

9. The history of imposed codes for Indian tribes is traced in Russel Lawrence Barsh and J. Youngblood Henderson, "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy", in *American Indians and the Law*, ed., Lawrence Rosen (1976). See also Robert N. Clinton, "Tribal Courts and The Federal Union", in 1989 *Harvard Indian Law Symposium*, ed., American Indian Law Students Association (1990).

10. American Bar Foundation (1978). The report was relied upon heavily by the Australian Law Reform Commission and read uncritically by others.

11. I suggest, as I have suggested before, that Brakel's study is racist. He relates his trip to see the Blackfeet Tribal Court in Montana. He remarked that on the way to the Blackfeet Reservation, he saw productive wheat farms, but when he reached the reservation border, the land was not put to productive use. He did not bother to find out that many Blackfeet who hold allotted lands are ranchers, not wheat farmers. Brakel's text has several racist comments about the courts he visited.

12. In July 1983, American and Canadian tribal leaders met in Browning, Montana, to discuss Indian customary law. At the end of the two-day discussion, tribal judges realized that they were applying customary law every day without knowing consciously that that was what they were doing. Given the use of Aboriginal languages and the perceptions of growing up as Indians, the judges were actually applying traditional principles in their courts. That is why the methods observed by outsiders varied from imposed tribal codes. I have a transcript of the meeting's proceedings in my archives.

13. See 7 Navajo Tribal Code § 204 (1986 Supp.) for an adaptation of the BIA provision.

14. *United States* v. *Wheeler*, 435 U.S. 313 (1978). The Navajo courts use Navajo common law in criminal cases to extend additional rights to defendants. See *Navajo Nation* v. *Platero*, 19 Indian L. Rep. 6049, 6050, 6051 (1992); *Navajo Nation* v. *MacDonald, Sr.*, 19 Indian L. Rep. 6053, 6055 (1992).

15. Donald Juneau, "The Light of Dead Stars", *American Indian L. Rev.* 11/1 (1983), p. 13.

16. Recognition of Indian law is implicit in the Royal Proclamation of 1763. See, Robert N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs", *Boston U. L. Rev.* 69 (1989), p. 329. There is an excellent discussion of the development of the English rule of recognition in Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991), pp.83-96. The English courts recognized the validity of Indian common law in *Campbell* v. *Hall*, 1 Cowp. 204 (1774) (Lord Mansfield).

17. See the discussions in Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979), pp. 66-68 (cited hereafter as Special Rapporteur). See also José R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations* (1987), paras. 290, 613, 614. The Cobo Report, which many Aboriginal advocates reject because of its restrictive view of international law rights, recognizes cultural and linguistic differences in law and urges procedures to deal with them.

18. Chief Justice Robert Yazzie of the Navajo Nation Supreme Court insists that emotions are part of the definition. Given the emotional content of Navajo legal terms, he is correct. For example, on one level, the Navajo word for lawyer – *agha'diit'aahii* – means 'one who can never lose an argument'. In fact, the connotative meaning describes a bully who imposes his or her own value judgments on others. The Navajo word for restitution or reparation – *nalyeeh* – is a demand by a victim to be made whole for an injury by the offender or that person's clan. Navajo legal terms are difficult to translate, because they have extensive meanings in the Navajo cultural context. The same is true for many other Indian languages. In Plains Cree, the word for law is *ki-ah-m* – 'there are consequences'. It refers to a thought system that gives meaning to every human action.

19. When Judge Stump and I studied Indian common law in Saskatchewan, we found many informal band justice bodies, and some leaders did not know that they were actually serving as judges or applying their own common law. Zion and Stump, Field Reports.

20. I know three state judges who are Indians. None of them uses their tribe's perspectives as law, except perhaps unconsciously, as it is with some tribal judges. They generally apply state law. A friend in the U.S. Justice Department complains that his perspectives of Indian values are continuously rejected or ignored.

21. I observe that Indian litigants are often not satisfied with the outcomes in these bodies and attempt to assert Indian common law principles disguised as claims against an estate.

22. See the discussion in *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 (1991), pp. 317-321.

23. Judge Stump and I found several variations of justice systems in actual operation. See Zion and Stump, Field Reports.

24. The Bureau of Indian Affairs enthusiastically supports state-wide and regional consortia of tribes to form courts of appeals. Thus far, many tribes have not shared the enthusiasm by wholeheartedly embracing regional courts of appeals. Tribal leaders are as reluctant to surrender their sovereignty as the United States is. The United States refused to honour the (correct) decision of the International Court of Justice in the case of *Nicaragua* v. *United States* that the United States had violated its treaty obligations and international law by mining the harbours of Nicaragua and engaging in acts of war against it.

25. That obligation is in treaties, the trust obligation and the Snyder Act of 1924, 25 U.S.C. § 13.

26. Particularly article 27; See Capotorti, Special Rapporteur.

27. Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (1968), p. 16.

28. Eli Sagan, *At the Dawn of Tyranny: The Original of Individualism, Political Oppression and the State* (1985).

29. Wallace Notestein, *The English People on the Eve of Colonization* (1962), pp. 211-227. The English justices of the peace were successful because they were respected by their communities.

30. Barkun, *Law Without Sanction*.

31. Barsh and Henderson, *Tribal Courts*, argue this point well. They conclude that American tribal courts have failed because of the imposition of the criminal model of state control, including control of tribal justice by the U.S. government, influenced by the states.

32. Barsh and Henderson, *Tribal Courts*, p. 59.

33. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (the first U.S. Supreme Court decision to address the question directly).

34. Half the fourteen trial judges of the Courts of the Navajo Nation are women.

35. See the discussion in Barsh and Henderson, *Tribal Courts*.

36. A major example of this is dropping criminal charges when cases are taken into federal court. I once advised a tribal court to dismiss drug charges involving bales of marijuana to avoid a bad precedent in federal court. The defendants had a sophisticated drug sales operation where they took Canadian and American cash and *cheques* for drugs. The defendants got off when the tribal court dismissed charges; they also got their drug profits back.

37. That is precisely what the Navajo Nation did. The U.S. government refused to intervene when allegations of corruption against tribal chairman Peter MacDonald, Sr. arose. The Navajo Nation prosecuted MacDonald (see note 14, above) and revised its form of government without the help of others. Internal and popular reform is the best way to assure a government of law.

38. Geographic jurisdiction need not be tied to an actual political land base; tribal courts have jurisdiction over offenses committed in "Indian country", including "dependent Indian communities", e.g., 7 Navajo Tribal Code § 254 (1986 Supp.).

39. Interjurisdictional transfers of cases should be by agreement between the Aboriginal government affected and the relevant state body.

40. I will argue separately that the right began in the writings of Spanish cleric-lawyers, was incorporated in international law (which developed following the 'discovery' of America), and exists in the international law that comes from state practice. I will argue that the right of Aboriginal peoples to have their own laws and justice systems is a fundamental human right.

41. See Clinton, *The Proclamation of 1763*.

42. James W. Zion, "North American Indian Perspectives on Human Rights", in *Human Rights in Cross-Cultural Perspectives: A Question for Consensus*, ed., Abdullahi Ahmd An-Na'im (1992), pp. 191, 194.

43. Donald A Grinde, Jr., and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (1991), pp. 222-236.

44. Interjurisdictional transfers of cases should be by agreement between the Aboriginal government affected and the relevant state body. Forcing non-Indian norms on others violates Navajo common law and probably the common law of many Indian or Aboriginal groups (see note 18, above).

45. See Barsh and Henderson's argument in *Tribal Courts*.

46. They are not necessarily the views of the Courts of the Navajo Nation. I assume sole responsibility for the opinions in this paper.

47. Clark Wissler, *Red Man Reservations* (1971), p. 142.

Aboriginal Justice, the Distribution of Legislative Authority, and the Judicature Provisions of the *Constitution Act, 1867*

*Patrick Macklem**

This discussion paper assesses the extent to which provisions of the *Constitution Act, 1867*[1] authorize the establishment of a separate or parallel system of justice for Aboriginal people in Canada. Immediately relevant is the distribution of legislative authority that exists between Parliament and provincial legislatures and the related question of which level of government possesses the constitutional authority to establish an Aboriginal justice system. Also relevant are what are known as the "judicature" provisions of the *Constitution Act, 1867*. In my view, neither the current distribution of legislative authority nor the judicature provisions pose any serious impediment to the establishment of a separate or parallel system of justice for Aboriginal people, although federal-provincial co-operation may be required to vest Aboriginal courts with jurisdiction over certain subject matters.

This paper does not address the impact of section 35(1) of the *Constitution Act, 1982*,[2] which recognizes and affirms "existing aboriginal and treaty rights of the aboriginal peoples of Canada," although section 35(1) provides added support for the recognition of Aboriginal forms of justice within Canadian law. Nor does it assess whether the recognition or establishment of Aboriginal courts will run counter to the *Canadian Charter of Rights and Freedoms*. Both of these topics have been addressed elsewhere.[3] It is solely concerned with the current distribution of

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legislative authority between Parliament and provincial legislatures and the judicature provisions of the *Constitution Act, 1867*. The second part addresses whether and to what extent a province and Parliament respectively can unilaterally establish an Aboriginal court.[4] The third section is concerned with the effect of the judicature provisions on provincial and federal initiatives in this area.

Aboriginal Justice and the Distribution of Power

In this part, I first examine the scope of provincial legislative competence in relation to the establishment of an Aboriginal court system. In assessing this issue, two questions ought to be kept distinct. The first is whether the *Constitution Act, 1867* authorizes a province to enact legislation establishing an Aboriginal court. Assuming that a province is so entitled, the second issue is whether a province can vest such a court with jurisdiction to adjudicate matters involving Aboriginal people that fall under exclusive federal legislative competence. I then turn to whether Parliament is entitled to establish an Aboriginal court, and examine jurisdictional issues associated with a federally established Aboriginal court.

Aboriginal Justice and Provincial Power

Section 92(14) of the *Constitution Act, 1867* confers on provincial legislatures the authority to pass laws in relation to "the Administration of Justice in the Province". Section 92(14) goes on to specify that this authority includes power over "the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." Thus a provincial legislature, by virtue of section 92(14) and subject to the requirements of the judicature provisions discussed below,[5] is authorized to establish and maintain a court system throughout the province.

The Establishment of an Aboriginal Court

It is possible that a province could rely on section 92(14) to establish an Aboriginal court system operating within provincial territory. Constraining provincial authority in this regard is section 91(24) of the *Constitution Act, 1867*, which confers on Parliament exclusive legislative competence over "Indians, and Lands reserved for the Indians." Jurisprudence under section 91(24) provides that although a province in certain circumstances can regulate Aboriginal people by "laws of general application",[6] a provincial law, generally speaking, cannot single out Aboriginal people.[7] In *Kruger* and *Manuel* v. *The Queen*,[8] Dickson C.J. for the Supreme Court of Canada held that "the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application."[9] However, a provincial

initiative establishing an Aboriginal court, by necessity, would not be a law of general application and thus could be construed as a law in relation to "Indians, and Lands reserved for the Indians".

Despite this possibility, there are, in my view, strong arguments in favour of provincial authority to establish an Aboriginal court. In general, "[t]he words 'administration of justice' in section 92(14) are intended to have wide meaning."[10] In particular, the judiciary has held that section 92(14) entitles a province to create a court designed specifically for a class of persons who fall under exclusive federal jurisdiction without invading federal legislative power.

In *Reference re Young Offenders Act (PEI)*,[11] for example, the Supreme Court of Canada upheld a federal-provincial scheme for the establishment of a separate inferior court system to deal with young offenders.[12] At issue was an arrangement whereby federal legislation conferred jurisdiction on provincial youth courts to administer federal law governing young offenders.[13] The Court, per Lamer C.J., affirmed the constitutional validity of provincial participation in the following terms:

> With regard to the institutional aspect of the administration of the *Young Offenders Act*, the power lies with the provincial legislatures under s. 92(14) to constitute, maintain and organize the courts required for the application of the Act.[14]

Thus, *Reference re Young Offenders Act (PEI)* provides that a province is competent to establish a court aimed specifically at a class of persons who fall within federal legislative jurisdiction, namely, young persons charged with a criminal offence. On the strength of *Reference re Young Offenders Act (PEI)*, it seems likely that a province is entitled to establish an Aboriginal court, despite the fact that such an initiative is aimed at a class of persons who fall within federal legislative competence.

The analogy between a youth court and an Aboriginal court cannot be taken too far. One difference between the establishment of a youth court and the establishment of an Aboriginal court is that, unlike "Indians", young persons charged with a criminal offence do not constitute a class of persons explicitly named by the *Constitution Act, 1867*. Federal legislative competence over young offenders is a consequence of Parliament's authority to pass laws in relation to criminal law. Moreover, Parliament does not possess legislative authority to pass laws in relation to all aspects of the lives of young persons charged with a criminal offence, whereas Parliament, subject to the *Canadian Charter of Rights and Freedoms* and section 35(1) of the *Constitution Act, 1982*, does possess such authority with respect to "Indians." However, it is not immediately apparent why these differences possess any constitutional significance for the purposes of determining the scope of provincial legislative authority in relation to the administration of justice. If provincial authority over the administration of

justice supports provincial establishment of a court aimed specifically at young offenders, a class of persons who fall within federal legislative competence, it ought to also support the establishment of an Aboriginal court.

Much will depend on whether the provincial initiative can be characterized as a law ultimately in relation to the administration of justice. A provincial law establishing an Aboriginal court would present both federal and provincial "aspects".[15] Its federal aspect would be the fact that it singles out Aboriginal people. Its provincial aspect would be that it aims to administer justice within the province. If the provincial aspect of the law is "relatively more important" than the law's federal aspect, then it will be declared within the legislative competence of the province.[16] While it is difficult to assess the constitutionality of legislation in the abstract, a provincial law establishing an Aboriginal court likely would single out Aboriginal people in order to administer justice in the province. The federal aspect would merely be a means to achieve a valid provincial legislative objective, and thus it would be relatively less important than the law's provincial aspect.

Moreover, it is unlikely that there exists any means of administering justice to Aboriginal people that does not, in at least some respects, call for differential treatment. Differential treatment of Aboriginal people is increasingly being viewed as necessary to the administration of justice. In the words of Justices Hamilton and Sinclair, "[w]hen the justice system of the dominant society is applied to Aboriginal individuals and communities, many of its principles are at odds with the life philosophies which govern the behaviour of Aboriginal people."[17] If a province must differentiate between Aboriginal people and non-Aboriginal people in the provision of courts in order to administer justice within the province fairly and effectively, then it seems safe to conclude that such differentiation would be viewed by the judiciary as necessarily incidental to the administration of justice in the province.[18]

The Vesting of Jurisdiction

There is also support for the proposition that a province can invest a court of its own creation with jurisdiction over matters that fall within federal legislative authority. In *A.G. Ont.* v. *Pembina Exploration Canada Ltd.*,[19] for example, at issue was the constitutionality of provincial legislation conferring jurisdiction on a provincially established small claims court over all matters involving claims not exceeding $1,000. The case at hand raised issues of admiralty law, a field of law exclusively within federal legislative competence. La Forest J., for a unanimous Supreme Court of Canada, held that "the provincial power over the administration of justice in the province enables a province to invest its superior courts with jurisdiction over the full range of cases, whether the applicable law is federal, provincial or constitutional."[20] Justice La Forest also held that a province could confer general jurisdiction on a provincially established inferior court,

"including actions arising out of federal matters."[21] Unless the federal government has expressly conferred exclusive jurisdiction over the subject matter on a federally established court,[22] then a province is competent to confer jurisdiction over federal matters on provincial courts.[23]

Can a province go one step further, however, and establish a court aimed specifically at a class of persons who fall within federal legislative authority *and* vest such a court with jurisdiction to adjudicate matters that fall within exclusive federal legislative competence? The combined effect of *Reference re Young Offenders Act (PEI)* and *Pembina Exploration Canada Ltd.* suggests that a province may be so entitled. In *Reference re Young Offenders Act (PEI)*, the Court acknowledged provincial authority to establish a court aimed specifically at a class of persons under federal legislative authority; *Pembina Exploration Canada Ltd.* provides that a province can assign federal matters to courts of its own creation. Together they suggest that a province can establish an Aboriginal court and vest it with jurisdiction over matters relating to "Indians, and Lands reserved for the Indians."

Two cautionary notes ought to be sounded. First, the Court's reasoning in *Pembina Exploration Canada Ltd.* may have been affected by the fact that maritime law was only one element of a relatively wide-ranging set of matters conferred on the small claims court by the province. That is, *Pembina Exploration Canada Ltd.* provides support for the proposition that a province can confer *general* jurisdiction on provincial courts, including matters that involve federal law and federal legislative authority; however, can a province vest a court of its own creation *specifically* with jurisdiction to adjudicate matters that fall within exclusive federal legislative competence? Such an initiative veers dangerously close to infringing on federal legislative authority over "Indians, and Lands reserved for the Indians", and could well be declared *ultra vires* as a result.

Second, *Pembina Exploration Canada Ltd.* is difficult to reconcile with jurisprudence addressing the limits of provincial legislative authority over courts of criminal jurisdiction. Section 92(14), as stated, allocates to the provinces legislative authority with respect to courts of criminal jurisdiction. By virtue of section 91(27), however, Parliament possesses the authority to pass laws in relation to criminal law. Provinces have the authority to establish and maintain courts required for the application of criminal law, but some members of the Supreme Court of Canada have previously alluded to the possibility that only Parliament can specify that its law is to be administered by provincial courts. In *A.G. Qué.* v. *A.G. Can.*,[24] for example, Taschereau J. stated:

> It is also well established that although a Court may be provincially organized and maintained, its jurisdiction and the procedure to be followed for the application of laws enacted by the Parliament of Canada, in relation to matters confided to that Parliament, are within its exclusive jurisdiction.[25]

Similarly, Fauteux J. in *Minister of National Revenue* v. *Lafleur*[26] stated:

> The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction falls within the exclusive jurisdiction of the Legislature (s. 92(14)), but only Parliament can confer criminal jurisdiction on these Provincial Courts.[27]

Assuming that a province possesses the political will to vest an Aboriginal court of its own creation with jurisdiction to adjudicate federal matters, the risk that such an initiative will be declared *ultra vires* can be minimized to some extent by also conferring on the court in question jurisdiction to adjudicate matters involving Aboriginal people that fall within provincial legislative competence. As stated, the outcome in *Pembina Exploration Canada Ltd.* may have been affected by the fact that the court in question was assigned jurisdiction to adjudicate matters that fell within federal and provincial authority. If this is true, then a provincial law that establishes an Aboriginal court and vests such a court with jurisdiction to adjudicate federal matters is more likely to be upheld as a valid exercise of provincial legislative power if the court is also empowered to adjudicate disputes involving Aboriginal people and provincial laws of general application. This would make it easier to construe the enabling statute's federal "aspect" as relatively less important than its provincial "aspect".[28]

If such a characterization is not accepted by the judiciary, or if the judiciary adheres to the line of case law that suggests that only Parliament can confer jurisdiction on a provincial court over federal subject matters, then it may be that the judiciary will be hostile to a unilateral provincial attempt to vest a provincially established Aboriginal court with jurisdiction to adjudicate matters that fall within federal legislative competence. As a result, a province may well be advised to follow the model of federal-provincial co-operation utilized in the scheme at issue in *Reference re Young Offenders Act (PEI)*, namely, to seek federal co-operation in the vesting of a provincially established Aboriginal court with jurisdiction to adjudicate federal matters. A province could legislate for the establishment of a court devoted to Aboriginal matters and assign it jurisdiction over a range of matters that fall within provincial legislative authority but which nonetheless affect Aboriginal people. Federal co-operation could take the form of an explicit federal conferral of jurisdiction on such a provincially established Aboriginal court over matters relating to "Indians, and Lands reserved for the Indians". It is well settled that Parliament can stipulate that matters that fall within its legislative authority are to be adjudicated in a court of provincial creation.[29] Federal statutory directions to this effect can be found, for example, in the *Criminal Code*[30] and the *Divorce Act*,[31] as well as in the *Young Offenders Act*,[32] at issue in the *Reference re Young Offenders Act (PEI)*.

Summary

In sum, by virtue of section 92(14), a province, subject to the requirements of the judicature provisions, likely is constitutionally entitled to unilaterally create an Aboriginal court to administer Aboriginal justice within the province. It is more controversial whether a province is entitled to vest such a court with jurisdiction to adjudicate matters that fall under federal legislative competence. In so doing, it runs the risk of infringing federal legislative authority over "Indians, and Lands reserved for the Indians". Nevertheless, recent case law suggests that a province is entitled to vest courts of its own creation with jurisdiction over matters that fall within federal legislative competence. It is likely that the judiciary will look more favourably on a provincially established Aboriginal court that exercises relatively general jurisdiction over Aboriginal people, including jurisdiction over matters that fall within provincial, as well as federal, legislative authority, than it will on a provincially established court that is solely vested with jurisdiction to adjudicate matters that fall within exclusive federal competence over "Indians, and Lands reserved for the Indians."

A more cautious route would be for a province to establish an Aboriginal court and vest it with jurisdiction over certain matters that fall within provincial legislative competence. Parliament would then be free to vest the provincially established Aboriginal court with jurisdiction to adjudicate certain matters that fall within exclusive federal authority.

Aboriginal Justice and Federal Power

Parliament is also entitled to establish courts of its own making. Section 101 provides that:

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Section 101 is the provision that authorized the establishment of the Supreme Court of Canada, as a "general Court of Appeal for Canada."[30] Section 101 also is the constitutional authority for the establishment of the Federal Court of Canada, as a court "for the better administration of the Laws of Canada." The establishment of the Federal Court does not exhaust the authority of Parliament with respect to the creation of federal courts, however, as section 101 speaks of the establishment of "additional Courts" as falling within federal legislative authority. Subject to the requirements of the judicature provisions, Parliament could easily rely on section 101 and its legislative competence with respect to "Indians, and Lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act, 1867* as constitutional authority for the federal establishment of an Aboriginal court system.

Federal Aboriginal Court Jurisdiction: General Principles

Despite explicit constitutional authority for the federal establishment of an Aboriginal court, Parliament's ability to establish "additional Courts" under section 101 is limited to the creation of courts that will administer existing federal law. Section 101 provides that additional federal courts are to administer "the laws of Canada". While section 101 is open to the interpretation that Parliament is entitled to vest a court of its own creation with jurisdiction over any and all matters that fall within federal legislative competence,[34] the judiciary has interpreted section 101 in a more restrictive manner. In *Quebec North Shore Paper Co.* v. *Canadian Pacific*,[35] for example, at issue was whether the Federal Court could assert jurisdiction over a contractual dispute between two private parties involving the construction of a marine terminal to be used for the international transportation of paper, a subject matter over which Parliament enjoys exclusive legislative authority.[36] The contract itself stipulated that the parties were to be governed by the law of Québec. The Supreme Court of Canada held that the Federal Court could not assume jurisdiction over a matter not actually governed by an "applicable and existing federal law."[37]

Similarly, in *McNamara Construction* v. *The Queen*,[38] at issue was a contractual dispute between the federal Crown and certain private parties concerning the construction of a federal penitentiary. Although Parliament enjoys jurisdiction over the federal Crown and penitentiaries,[39] the dispute called for the application of the common law of contract, and thus there was no "applicable and existing federal law" governing the dispute. The Court therefore held that the Federal Court could not assume jurisdiction over the action.[40]

Assuming that the judiciary will continue to interpret section 101 along the lines of *Quebec North Shore Paper Co.* and *McNamara Construction*, the jurisdiction of an Aboriginal court established by the federal government will be constitutionally restricted to cases or disputes involving "applicable and existing federal law." This standard prevents Parliament from vesting an Aboriginal court with jurisdiction to adjudicate those disputes involving "Indians, and Lands reserved for the Indians" which do not raise questions concerning the application and interpretation of federal law. It also prevents Parliament from vesting such a court with jurisdiction over matters of relevance to Aboriginal people that fall within provincial legislative competence. Such matters would include issues involving provincial laws of general application that do not touch matters that are "inherently Indian" but which nonetheless apply to Aboriginal people.[41]

It should be noted, however, that certain provincial laws of general application that do touch on matters that are "inherently Indian" are incorporated by reference by section 88 of the federal *Indian Act*.[42] Matters that are "inherently Indian" fall within federal competence and provincial laws that regulate such matters are only applicable to Aboriginal people by virtue of section 88.[43] Presumably Parliament could vest an Aboriginal court with jurisdiction to

adjudicate disputes involving provincial laws incorporated by reference by section 88, as they address matters within federal legislative competence and section 88 would stand as an "applicable and existing law" as required by section 101 of the *Constitution Act, 1867*.

Jurisdiction over Aboriginal Title

The Supreme Court of Canada in *Roberts* v. *Canada*[44] recently held that the requirement that there be an "applicable and existing law" governing the dispute is met in cases involving the common law of Aboriginal title.[45] *Roberts* involved a dispute between two Indian Bands over the use and occupation of an Indian Reserve. The source of Aboriginal title did not lie in provisions of the federal *Indian Act*; instead the Act merely codified a common law entitlement. Thus it could not be said that there was an "applicable and existing" federal statute governing the dispute. Nevertheless, Wilson J., for a unanimous Court, held that the common law of Aboriginal title is federal common law for the purposes of section 101 and that the Federal Court can assume jurisdiction over the dispute.

Roberts significantly widens the scope of jurisdiction that can be conferred on a section 101 court. It suggests that Parliament need not have legislated on a particular subject matter before a court of its own creation can assume jurisdiction to adjudicate a dispute involving such a subject matter. If there is "federal common law" governing the dispute, then the section 101 requirement that there be an "applicable and existing law" will have been met. According to the logic of *Roberts*, Parliament could endow a federally established Aboriginal court with jurisdiction over disputes involving the common law of Aboriginal title.[46]

Roberts also indirectly provides insight into the scope of jurisdiction that a federal Aboriginal court could exercise over constitutional matters. The 1992 constitutionalization of "existing aboriginal and treaty rights" has elevated at least some elements of the common law of Aboriginal title to the status of constitutional right.[47] Section 101 of the *Constitution Act, 1867* has been interpreted as not authorizing Parliament to confer exclusive jurisdiction on the Federal Court to determine the constitutionality of federal laws.[48] By extension, Parliament could not confer on a federally established Aboriginal court exclusive jurisdiction to determine whether federal laws conflict with "existing aboriginal and treaty rights". Nonetheless, the Federal Court, and by extension a federally established Aboriginal court, would be obliged to interpret federal law in light of constitutional guarantees.[49] Moreover, Parliament presumably could confer on an Aboriginal court concurrent jurisdiction to adjudicate the constitutionality of federal law in light of constitutionally guaranteed Aboriginal and treaty rights.

Jurisdiction Over Criminal Matters

It is also probable, but not certain, that Parliament could endow a federally established Aboriginal court with jurisdiction to adjudicate criminal law

matters.[50] While section 91(27) specifically excludes "the Constitution of Courts of Criminal Jurisdiction" from federal legislative competence, the scope of federal authority in this regard has not been definitively defined by the judiciary.[51]

There are at least five reasons to favour the view that Parliament could confer jurisdiction to adjudicate criminal matters on a federally established Aboriginal court. First, the *Criminal Code* and other federal statutes creating criminal offences are "laws of Canada" and thus presumably fall within the meaning of section 101 of the *Constitution Act, 1867*. Second, while not dispositive of the constitutional question, it should be noted that Parliament has conferred on the Federal Court criminal jurisdiction over some matters.[52] Third, although section 92(14) confers jurisdiction over the "Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction," section 92(14) speaks of *provincial* courts of criminal jurisdiction, which would continue to exist despite a transfer of jurisdiction over Aboriginal criminal matters to a federally established Aboriginal court. Fourth, section 101 provides that Parliament, "*notwithstanding anything in this Act*," can create a federal court to administer the laws of Canada.[53] Presumably, this override clause refers to section 92(14) as well as other provisions of the *Constitution Act, 1867*. Finally, vesting an Aboriginal court a measure of criminal jurisdiction in addition to civil jurisdiction in relation to certain laws of Canada is a less dramatic assertion of federal legislative authority than the establishment of a federal court exercising criminal jurisdiction over all Canadians. Its provincial "aspect"[54] is relatively less important than its federal counterpart, certainly less so than the provincial aspects of a federally established court of general criminal jurisdiction. The combination of sections 91(24), 91(27), and 101, in my view, provide a relatively stable constitutional basis for a federally established Aboriginal court to exercise a measure of criminal jurisdiction over certain matters involving Aboriginal people.

Provincial Co-operation

The possible establishment of a federal Aboriginal court raises a novel question of whether a province can vest such a court with jurisdiction to adjudicate matters involving Aboriginal people that fall under provincial legislative competence. As stated, provincial legislative competence in relation to Aboriginal people is fairly restricted; only provincial laws of general application which do not regulate matters that are "inherently Indian" apply, on their own accord,[55] to Aboriginal people. Can a province confer jurisdiction to adjudicate disputes involving such laws on a federally established Aboriginal court?

The closest doctrinal analogy that can be drawn to such a scenario is the law governing inter-delegation of legislative power. In *A.G. Nova Scotia* v. *A.G. Canada (Nova Scotia Inter-delegation)*,[56] the Supreme Court of Canada held that neither level of government can delegate legislative authority to the other.[57]

This holding has gradually been eroded over time, however, with the result that the Court has permitted Parliament to delegate to provincial marketing boards federal power to regulate interprovincial and international trade.[58] It has also accepted the power of one level of government to incorporate by reference existing[59] and future[60] laws of the other level of government. If one level of government can delegate its power of regulation to an administrative agency created by the other level of government, it may be possible for a province to vest in a federally created tribunal the power to adjudicate matters governed by provincial law. If this is the case, then a province may be able to vest a federal Aboriginal court with jurisdiction to adjudicate matters involving Aboriginal people and provincial laws of general application that do not touch on matters that are "inherently Indian".

Summary

In sum, and subject to the judicature provisions discussed below, Parliament is entitled to establish an Aboriginal court by virtue of sections 101 and 91(24) of the *Constitution Act, 1867*. However, Parliament is only entitled to vest such a court with jurisdiction to adjudicate matters involving an "applicable and existing federal law". This jurisdictional standard can include the common law of Aboriginal title, as well as matters governed by the *Indian Act*. It likely does not include issues governed by provincial laws of general application which do not touch on matters "inherently Indian" but which nonetheless are of relevance to Aboriginal people. It likely does include disputes governed by provincial laws of general application that do touch on matters "inherently Indian" which are incorporated by reference by section 88 of the *Indian Act*. It also likely includes criminal matters, to the extent that the *Criminal Code* and other federal statutes creating criminal offences are viewed as "laws of Canada" within the meaning of section 101 of the *Constitution Act, 1867*. It not known whether a province can vest jurisdiction in a federal Aboriginal court to adjudicate matters falling under provincial legislative competence.

Aboriginal Justice and the Judicature Provisions

In addition to distribution of powers concerns, the judicature provisions of the *Constitution Act, 1867* present potential obstacles to any provincial or federal law, or any federal-provincial co-operative initiative, establishing an Aboriginal court system. Sections 96-100[61] of the *Constitution Act, 1867* provide:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> 97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the

> Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> 98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.
>
> 99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
>
> (2) A Judge of the Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.
>
> 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

The meaning and effect of the judicature provisions turn in part on the court structure that historically existed in each province. At Confederation, each of the colonies possessed a court structure that included superior, district and county courts modelled after English courts and exercising general original and appellate jurisdiction.[62] A "superior" court included both a trial division and a court of appeal and possessed general "inherent" jurisdiction throughout the province. A "county" or "district" court possessed jurisdiction limited by territory and subject matter. Additionally, there were several inferior courts created by statute exercising specific jurisdiction over particular subject matters, such as Justices of the Peace, Stipendiary Magistrates, Commissioners' Courts, Division Courts, and Recorder's Courts. Both superior and inferior courts continued in force despite Confederation, by virtue of section 129 of the *Constitution Act, 1867*, which provides for the continuation of pre-Confederation law and of "all Courts of Civil and Criminal Jurisdiction." Most provinces have completed or are in the process of completing a process of "amalgamation" where the district or county court level is abolished and the superior court enlarged to address matters previously addressed at the district or county level.

In light of this historical judicial structure, section 96 of the *Constitution Act, 1867* provides that the federal government is empowered to appoint judges to the superior, district and county courts in each province. Sections 97 and 98 require that the federal government select candidates for judgeships with superior, district and county courts who are members of the bar of the province

in question. Section 99(1) requires that such judges can only be removed by the Governor General on address of the Senate and the House of Commons. Section 99(2) provides for mandatory retirement of superior, county and district court judges. Section 100 provides that federally appointed judges are paid from the federal treasury a salary "fixed and provided by the Parliament of Canada." The federal government is therefore responsible for appointing and providing salaries to judges of superior, district and county courts. In contrast, by virtue of section 92(4) of the *Constitution Act, 1867*, which authorizes provincial legislatures to pass laws in relation to the "Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers," provinces are entitled to appoint and provide salaries to inferior court judges.

Depending on the scope of the jurisdiction vested in an Aboriginal court system, the level of government responsible for its establishment may be required to conform to several of the judicature provisions. In the remainder of this part, I first examine the purpose behind the judicature provisions. I then discuss the impact of the judicature provisions on the ability of provincial legislatures and Parliament respectively to establish an Aboriginal court system.

The Purpose of the Judicature Provisions

One justification for the federal role in the appointment and remuneration of superior, district and county court judges is that it secures the independence and impartiality of the judiciary.[63] In the words of the Privy Council in *O. Martineau & Sons, Ltd.* v. *Montreal*, "the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary."[64] Similarly, it has been said that the judicature provisions are "principal pillars in the temple of justice, and they are not to be undermined."[65] More recently, Chief Justice Dickson stated that "the judicature provisions of the *Constitution Act, 1867*, especially ss. 96, 99 and 100, support judicial authority and independence, at least at the level of superior, district and county courts."[66]

Professor Peter Hogg has put forth a competing justification for the judicature provisions. In his view, the judicature provisions reflect the federal nature of the Canadian state. In light of a constitutional structure that divides legislative competence between two levels of government, the judicature provisions guarantee a federal role in the composition and tenure of superior, district and county court judges. Superior, district and county courts are courts of general jurisdiction, namely, they are constitutionally authorized to decide questions of federal, as well as provincial, law. In the words of Justice La Forest, "[f]rom Confederation to this day, the courts in the provinces, barring inconsistent federal laws, have decided every type of dispute imaginable."[67] Given the fact that superior, district and county courts administer federal, as well as provincial, law, the federal government has a valid interest in their composition and tenure.[68] According to this

line of reasoning, the underlying purpose of the judicature provisions is to secure a valid federal interest in the composition of superior, district and county courts.

Despite the fact that judicial independence is often cited as a reason for the judicature provisions, there are at least three reasons to question the persuasiveness of this justification and to prefer Professor Hogg's rationale. First, it may have been the case that prior to 1982 the judicature provisions were the only provisions that could provide textual support for claims of judicial independence. However, section 11(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees *inter alia* the right to a fair and public hearing by an independent and impartial hearing, and section 7 of the *Charter*, which guarantees rights to life, liberty and security of the person, now are the more appropriate provisions to look for constitutional support for the independence of the judiciary. Sections 11(d) and 7 speak directly to the values underpinning judicial independence, namely, the need for impartiality, security of tenure, financial independence, and freedom from political interference.[69]

Second, it is difficult to see why judicial independence is furthered by a federal, as opposed to a provincial, appointment power. Such a conclusion must ultimately rest on premises concerning the relative strengths and weaknesses of local versus national governmental accountability.[70] On the one hand, it could be argued that the federal government is more reflective of the diverse interests that comprise Canadian society and thus more removed from local political pressures that may threaten the independence of the judiciary. On the other hand, it could also be argued that provincial governments, by virtue of the fact that they are closer to the constituencies which they serve, are more accountable than a distant national government on matters of judicial appointment and tenure. Judicial independence, in other words, does not necessarily entail federal power.

Third, it is unclear why the judicature provisions only apply to superior, district and county court judges and not to inferior court judges. If it is true that provincial power would threaten the judicial independence of superior, district and county courts, then it is equally true with respect to the independence of inferior court judges. The provisions certainly specifically refer to only superior, district and county courts. However, there is no specific direction in the *Constitution Act, 1867* to interpret the provisions in an exclusive manner, and they can just as easily be read as providing a constitutional indication of how all courts, superior and inferior, ought to be treated by federal and provincial authorities.

Indeed, shortly after Confederation it was suggested by some that the judicature provisions extended to inferior courts and that the provinces did not have the legislative authority to appoint any officers with anything other than ministerial powers.[71] However, this view has since been firmly rejected by the judiciary. In *Re Adoption Act*,[72] for example, at issue was the constitutionality of four Ontario

statutes addressing family matters and conferring jurisdiction over matters relating to child protection on inferior courts presided by judicial officials appointed by the province. In upholding the statutory regime, Duff C.J. dismissed the view that all provincial courts fall within the scope of section 96. In response to the argument that a federal role in the appointment of inferior court judges is desirable to insulate them from provincial political pressures, the Chief Justice stated:

> it would be an extraordinary supposition that a great community like the province of Ontario is wanting, either in the will or in the capacity, to protect itself against misconduct by these officers whom it appoints for these duties; and any such suggestion would be baseless in fact and altogether fallacious as the foundation of a theory controlling the construction of the *B.N.A. Act*.[73]

Duff C.J.'s acceptance of provincial power over inferior court officials suggests that the justification for a federal role in the appointment of superior, district and county court judges lies not in the need to insulate the judiciary from provincial political pressures. If a province has a legitimate interest in protecting itself against possible judicial misconduct by inferior court judges that outweighs any countervailing interest in judicial independence, then it arguably also has a legitimate interest in protecting itself against possible misconduct by superior court judges.

The Judicature Provisions and Provincial Power

Either out of a desire to protect judicial independence or because of the need to protect federal interests in the composition and appointment of superior, district and county court judges, the judicature provisions have been interpreted to prevent a province from vesting inferior courts and administrative tribunals with jurisdiction typically enjoyed by superior, district or county courts. The specific reason most often provided in defense of this rule is that it prevents a province from gaining control of the process by which judicial appointments are made.[74] Without the judicature provisions, courts or tribunals could be created and vested with superior, district and county court jurisdiction without their members being appointed and paid by the federal government (as required by sections 96 and 100), or drawn from the provincial bar (as required by sections 97 and 98). In form, the province would not be violating the judicature provisions, in so far as existing superior, district and county court judges would still be appointed and paid by the federal government. In substance, however, the newly created courts or tribunals would be assuming traditional responsibilities of superior, district and county courts, and yet their members would not be selected or paid by the federal government.

General Principles

A relatively complex set of tests have been developed by the judiciary to determine when a province must conform to the judicature provisions when establishing a court or administrative tribunal. *Re Adoption Act*, discussed above, provides some insight in this regard. According to Duff C.J., by virtue of section 92(14) of the *Constitution Act, 1867*, which, as stated, authorizes the provinces to pass laws in relation to the administration of justice in the province, provincial legislatures acquired "plenary authority, not only to diminish the jurisdiction of [inferior] courts but also to increase it, subject to any qualification arising in virtue of s. 96."[75] Duff C.J. therefore rejected the view that "the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the *British North America Act* fixed forever as it stood at the date of Confederation."[76] However, a province is not entitled to usurp the federal power of appointment either directly or "indirectly by altering the character of existing courts outside that section in such a manner as to bring them within the intendment of it while retaining control of the appointment of the judges presiding over such courts."[77] Duff C.J. described the scope of provincial authority in the following terms: "does the jurisdiction conferred ... broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?"[78] He concluded that the matter at issue fell within the jurisdiction of inferior courts at Confederation.

In *Labour Relations Board of Saskatchewan* v. *John East Ironworks*,[79] the Privy Council extended the approach taken in *Re Adoption Act* to govern the effect of section 96 on provincial authority to establish and cloak an administrative agency with the power to administer and enforce provincial law. In *John East Ironworks*, the respondent company challenged the constitutionality of the Saskatchewan Labour Relations Board on the basis that it exercised jurisdiction analogous to a superior, district or county court and its establishment did not comport with the requirements of the judicature provisions. In dismissing the respondent's claims and allowing the appeal, the Privy Council held that the jurisdiction of the board "finds no analogy in those issues which were familiar to the courts of 1867."[80] Adopting a purposive approach to the judicature provisions, Lord Simonds stated:

> It is as good a test as another of "analogy" to ask whether the subject matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts.[81]

Because of the nature of industrial relations, Lord Simonds concluded that "it is essential that .. [the board's] members should bring an experience and knowledge acquired extra-judicially to the solution of their problems."[82]

The Court expanded on the above approach in *Reference re Residential Tenancies*.[83] The province of Ontario requested the Court to rule on whether the *Residential Tenancies Act*,[84] which conferred on a newly created Residential Tenancies Commission the power to make eviction orders and to require landlords and tenants to comply with obligations imposed by the Act, infringed the judicature provisions of the *Constitution Act, 1867*. In an effort to synthesize previous case law on the subject, the Court stated that the approach required by section 96 involves three separate inquiries:

> The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation....
>
> Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a "judicial" function.... Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a "judicial capacity"....
>
> [If] the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context.... It may be that impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal or the power may be necessarily incidental to the achievement of a broader policy goal of the legislature. In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal so that the tribunal can be said to be operating "like a s. 96 Court".[85]

The Court concluded that the power to order eviction was analogous to the traditional power of superior, district and county courts to order the ejectment of a tenant, and that the power to order compliance was analogous to the power of superior, district and county courts to award damages or specific performance or to grant injunctive relief. It also concluded that the impugned powers were judicial in nature and the character of such powers did not change when they were viewed in their institutional setting and that adjudication was the primary role of the Commission. As a result, the proposed powers were held to run counter to section 96 of the *Constitution Act, 1867*.

Subsequent jurisprudence has further refined the three tests articulated in *Residential Tenancies*. In *Sobeys Stores Ltd.* v. *Yeomans*,[86] the Court was faced with a

section 96 challenge to the statutory power of a provincial labour tribunal to rule on dismissal for cause of a non-unionized employee. The employer alleged that the impugned power in question conformed to a power exercised by a superior, district or county court at the time of Confederation. In upholding the tribunal's power to rule on unjust dismissal, the Court provided much needed insight into the nature of the first inquiry called for by *Residential Tenancies*.

More specifically, left unanswered in *Residential Tenancies* were questions surrounding the precise way in which the impugned "power" is to be characterized for the purposes of determining whether it is analogous to a power exercised by a superior, district or county court at Confederation. Wilson J., for a majority of the Court, captured succinctly the strategic consequences of the issue:

> The way in which the power or jurisdiction is characterized can have significant consequences for the historical inquiry in which the courts must search for analogous jurisdiction in inferior courts. Although in the present case both the Attorney-General and Sobeys saw an advantage for themselves in a narrow characterization, this is probably only so because of the unusual remedy at issue. In general, those challenging legislation will probably favour the narrower view as more likely to bring success through the historical test. Those supporting the legislation will no doubt advocate a more expansive view on the assumption that the broader the characterization the more likely it will be that at least some aspects of the jurisdiction will have been within the purview of inferior courts at Confederation.[87]

Wilson J. was of the view that section 96 was designed to protect the independence of the judiciary by preventing substantial expansion of inferior court jurisdiction, although it "should not stand in the way of new institutional approaches to social or political problems."[88] The former objective is served by a relatively narrow characterization of the impugned judicial power at the first stage of the *Residential Tenancies* test. In her words, "any other approach would potentially open the door to large accretions of jurisdiction and thereby defeat the purposes of the constitutional provision."[89] Additionally, the power ought to be characterized by the type of dispute to which it refers, and not by reference to the particular remedy it contemplates. Nonetheless, she stated that innovative remedies may well be factors when determining whether the grant of jurisdiction meets the second and third *Residential Tenancies* tests in so far as section 96 should not bar the development of new, innovative approaches to administrative regulation.

Wilson J. went on to hold that if the impugned power was exercised by both superior and inferior courts at Confederation, then a province may be entitled to vest an inferior court or a tribunal with the power in question. Such a result would not threaten the values underpinning section 96 in so far as the superior courts did not possess exclusive jurisdiction over the matter at Confederation and thus cannot be said to have suffered any significant diminution of jurisdiction by the

reform in question. Although a simple demonstration of some small degree of concurrent jurisdiction will not suffice, it is not necessary to establish concurrent jurisdiction in all respects. Wilson stated that the judiciary "must search for ... a general shared *involvement* in a jurisdiction."[89] In her view, the following questions will be relevant to the inquiry:

> (a) Was the inferior court jurisdiction geographically restricted? Was it confined to certain municipal or district courts or was it being exercised province-wide?
>
> (b) Was the inferior court jurisdiction limited to a few specific situations? For example, in the area of unjust dismissal, did only certain types of employees have recourse to the inferior courts?
>
> (c) Was the inferior court jurisdiction restricted by pecuniary limits so as to reduce its scope even after allowing for inflation?[90]

Wilson J.'s decision helped to clarify other matters relating to *Residential Tenancies*. She held that the historical inquiry required by section 96 should focus on conditions in the four originating provinces at Confederation at 1867 and not at some later date when newer provinces joined Confederation. If, by virtue of the fact that an equal number of original provinces both upheld and denied inferior court jurisdiction, there is no clear answer to the inquiry, then reference to jurisdiction in the United Kingdom in 1867 is appropriate.

Application of General Principles

Assessing whether a province is bound to conform to the judicature provisions in the establishment of an Aboriginal court system is a difficult task in the absence of specific legislation. The previous review suggests, however, that if a province vests an Aboriginal court with power or jurisdiction that "conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation"[92] then the province is *prima facie* bound by the judicature provisions. In determining whether the Aboriginal court's jurisdiction conforms to superior, district or county court jurisdiction at Confederation, the judiciary will be guided not by particular remedies that the court is empowered to order but instead by reference to the particular type of dispute to be decided.[93] Thus the possibility that an Aboriginal court will be endowed with the authority to consider and order remedies considered unique from the vantage point of superior, district and county court jurisdiction will be deemed irrelevant at this stage of the inquiry.[94]

Moreover, the judiciary will attempt to construe the type of dispute at issue in relatively narrow terms.[95] Thus, the judiciary will likely engage in the historical inquiry in relation to specific powers of the Aboriginal court as opposed to a general description of the court's overall jurisdiction. For example, despite the strategic advantages to a general description,[96] if there is a challenge to an Aboriginal court's jurisdiction over certain criminal matters, it will not suffice to

characterize the court's jurisdiction as including the power to adjudicate criminal offences. Instead, the judiciary will examine the specific power in question in the case before it and determine whether that particular power was one exercised by a superior court in 1867.

However, casting the issue in terms of the nature of the dispute does not fully resolve the issue. Within this inquiry, a choice can be made as to whether the definition of the dispute focusses on the party or on the act. If the focus is on specific acts, such as breach of contract, then it will be irrelevant that the party in question is an Aboriginal person and the search will simply be aimed at determining whether superior, district or county courts possessed jurisdiction to adjudicate the legality of the act in question. If, however, the focus is on the party, different considerations may arise. Aboriginal people enjoyed an ambiguous legal status at Confederation. At the time, federal law provided that many Aboriginal people did not enjoy certain attributes of legal status, such as the power to contract and hold property in certain circumstances, unless or until they could establish that they were "sufficiently civilized" to enjoy the rights and privileges accorded to non-Indigenous subjects.[97] This fact may complicate efforts to determine the scope of superior, district and county court jurisdiction with respect to Aboriginal people and could well result in an extremely limited application of the judicature provisions to an Aboriginal court system.

If the Aboriginal court's power at issue was one that was exercised by a superior court at Confederation, however, the next stage of the inquiry will be to determine whether it was exclusively exercised by a superior court or whether it was shared by superior and inferior courts at Confederation. Guiding this inquiry are a number of considerations outlined earlier, namely, whether inferior court jurisdiction over the matter was limited by geography, type of dispute, or pecuniary limits.[98] Again, answers to these questions cannot be provided in the absence of a specific definition of the jurisdiction of an Aboriginal court and a detailed analysis of superior, district and county court powers in the jurisdiction in question. It suffices to state that if a judicial power was generally shared between superior and inferior courts at Confederation, then a province can endow an Aboriginal court with such a power without having to conform to the judicature provisions. If the power was exclusive to a superior court, then the inquiry will proceed further to a more general examination of the institutional context in which the impugned power resides.

More specifically, assuming that an Aboriginal court is vested with powers that were exclusively exercised by a superior court at Confederation, attention will then focus on whether those powers ought to be characterized differently (1) when they are viewed in their institutional setting, and (2) depending on whether those powers are "subsidiary or ancillary to general administrative functions assigned to the tribunal or ... necessarily incidental to the achievement of a broader policy goal of the legislature."[99]

It is at these latter stages of the analysis where it is possible that the judiciary may declare that a province need not conform to the judicature provisions in the establishment of an Aboriginal court. It may well be that the power in question would remain a "judicial" power when viewed in light of its institutional setting and that an Aboriginal court would not be properly characterized as simply an administrative tribunal armed with ancillary judicial powers. Nonetheless, it is possible to characterize the establishment of an Aboriginal court and the transfer of superior, district and county court jurisdiction as "necessarily incidental to the achievement of a broader policy goal of the legislature."[100] This aspect of the inquiry is "designed to allow the courts to consider new approaches to old problems, approaches which are more responsive to changing social conditions."[101] The establishment of an Aboriginal court may well be tied to a broader policy goal of the legislature, namely, the objective of vesting Aboriginal people with greater control over matters of justice within their communities for the twin purpose of righting historical wrongs and ameliorating disadvantaged social, political and economic conditions faced by Aboriginal peoples in their daily lives. Presumably the establishment of an Aboriginal court system will also be tied to the policy goal of authorizing the consideration of unique remedies infused with the specific histories, traditions, customs, values and beliefs of particular Aboriginal communities.

It is useful to recall the approach taken in *John East Ironworks*.[102] As stated, Lord Simonds adopted a functional approach to the question whether the power in question was one that was "broadly analogous" to one exercised by a superior, district or county court. More specifically, he looked at the subject matter in question and asked whether its nature "made it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts."[103] As the previous review indicated, jurisprudence subsequent to *John East Ironworks* has refined the inquiry in such a way as to direct such functional considerations away from the initial historical inquiry of the scope of superior court jurisdiction at Confederation. Nonetheless, functional considerations will re-enter the analysis at the stage where the judiciary inquires whether the hiving-off of superior court jurisdiction is in furtherance of a broader policy goal of the legislature.

Ultimately underpinning this aspect of the inquiry is a deeper concern about whether, in light of the legislative objective underpinning the establishment of an Aboriginal court, it is necessary that the judges in question: be appointed by the federal government (section 96); be selected from the provincial Bar in question (sections 97 and 98); hold office during good behaviour but be removable by the Governor General on Address of the Senate and House of Commons (section 99(1)); be subject to mandatory retirement (section 99(2)); and be paid by the federal government (section 100). Put bluntly, Lord Simonds' approach in *John East Ironworks* is one that asks whether it is desirable, given the legislative objective, that the judicature provisions *not* be followed.

In my view, there are strong functional arguments against insisting on the application to a provincially established Aboriginal court of at least some of the judicature provisions. If the legislative objective behind the establishment of an Aboriginal court is to vest Aboriginal people with more control over Aboriginal justice within their communities, then extensive federal involvement and control over appointments and tenure is ill suited to the task. A federally appointed Aboriginal court, in many ways, runs counter to such an objective. Aboriginal people will not have greater control over matters of Aboriginal justice if the federal government is free to select and dismiss Aboriginal judicial candidates. With respect to sections 97's and 98's requirement that appointees be selected from provincial Bars, just as it was essential in *John East Ironworks* that board members "bring an experience and knowledge acquired extra-judicially to the solution of their problems,"[104] so too with Aboriginal judges. Presumably one expectation of an Aboriginal court is that it will enable Aboriginal communities to deal with wrong-doing in their communities in ways that do not conform to Anglo-Canadian legal conceptions of right and wrong, of remedy and redress. The qualifications necessary for an Aboriginal judge to engage in such a task no doubt ought to be strict, but it is not clear why membership in a provincial Bar ought to be part of the job description.[105]

The Judicature Provisions and Federal Power

The judicature provisions raise at least two questions with respect to federal legislative competence and the establishment of an Aboriginal court system. First, can the federal government confer superior, district or county court jurisdiction to adjudicate matters within federal legislative competence on a provincially established Aboriginal court that does not conform to the judicature provisions? Second, is the federal government bound by the judicature provisions when it establishes courts or tribunals to administer federal law? Each is addressed in turn.

Federal Vesting of Jurisdiction in a Provincial Aboriginal Court

The courts have made it clear that section 96 binds Parliament as much as provincial legislatures when Parliament seeks to vest jurisdiction in provincial courts to adjudicate federal matters.[106] In *McEvoy v. A.G. New Brunswick*,[107] for example, at issue was a federal-provincial agreement whereby the criminal jurisdiction of provincial superior courts to try all indictable offences under the *Criminal Code* was to be transferred to a new "unified criminal court" staffed by provincially appointed judges. In a strongly worded decision, the Supreme Court of Canada condemned the proposal, holding that it would "destroy superior courts, ... deprive the Governor General of appointing power, and ... exclude members of the bar from preferment for superior court appointments."[108] In its view, Parliament would be surrendering the power of the Governor General to appoint judges who try indictable offences while the province would be exercising

an unconstitutional appointing power. In the words of the Court, "[s]ection 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so."[109] The Court's decision in *McEvoy* has been criticized in some quarters for apparently failing to realize that the *Criminal Code* currently confers on provincial inferior courts jurisdiction over almost all indictable offences.[110] As a result of *McEvoy*, such provisions are now susceptible of constitutional challenge.

The Court's decision in *McEvoy* suggests that the judicature provisions would become relevant if Parliament were to vest in a provincially established Aboriginal court system jurisdiction to adjudicate matters falling under federal legislative competence that conformed to superior, district and county court jurisdiction at Confederation. However, an approach similar to that described in the previous section would be relevant to determining the actual application of the judicature provisions in this context.[111] That is, the judiciary would examine (1) whether the power or jurisdiction conferred by Parliament ought to be characterized differently when it is viewed in its institutional setting, and (2) whether such power or jurisdiction is necessarily incidental to a broader policy goal of Parliament. Arguments similar to those canvassed in the previous section could be brought to bear to minimize the effect of the judicature provisions on federal laws transferring superior court jurisdiction to a provincially established Aboriginal court system.

The Judicature Provisions and a Federal Aboriginal Court

Left unsaid by the Court's reasons in *McEvoy* is the extent to which section 96 constrains the federal government's ability to transfer superior court jurisdiction to an entity created not by a province but by Parliament. That is, *McEvoy* stands for the proposition that section 96 prevents the federal government from vesting a provincially established tribunal with superior court jurisdiction; it says nothing about federal authority with respect to federally established institutions. Can the federal government create a court or tribunal and vest it with jurisdiction traditionally enjoyed by superior, district and county courts? One view is that the judicature provisions do not apply to courts or tribunals established and vested with jurisdiction by the federal government.[112] The alternative view is that the judicature provisions bind Parliament in exactly the same way that they bind the provinces, with the result that federally established courts or administrative tribunals that exercise superior, district or county court jurisdiction as it stood at 1867 must conform to the judicature provisions.[113]

The Court recently declined to rule on this question. In *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*,[114] at issue was an assertion of jurisdiction by the federal Competition Tribunal over civil contempt for an alleged breach of an Tribunal order by Chrysler Canada. At common law, only superior courts have the power to punish for contempt ex facie curaie. Chrysler Canada alleged that

the assertion of a contempt power by the Tribunal usurped the jurisdiction of superior courts and ran counter to section 96 of the *Constitution Act, 1867*. After a brief review of the relevant jurisprudence, Gonthier J. stated:

> At the outset, the applicability to Parliament of the case law of this Court regarding s. 96 of the Constitution Act, 1867 comes into question. I will not rule on this point, since I am of the opinion that, even if s. 96 of the Constitution Act, 1867 limited the powers of Parliament in the same manner and to the same extent as it limits the powers of provincial legislatures, it would have been respected in this case.[115]

Whether the judicature provisions bind Parliament in this manner thus has yet to be decided.[116] Ultimately the question turns on how the judiciary will characterize the underlying purpose of the judicature provisions. As stated, there are two competing perspectives on the subject.[117] One perspective is that the judicature provisions are an expression of the value of judicial independence. This perspective supports the conclusion that the judicature provisions bind Parliament in the same manner and to the same extent as they bind the provinces. In the words of Professor Robin Elliot:

> the most important of our rights and obligations [ought to be] determined and enforced by persons learned in the law and independent of government and public pressure. If this value, which finds such clear expression in sections 96 to 100, is to be fully protected, Parliament must be held to the requirement that persons who execute the functions of a provincial superior court judge possess the characteristics defined by those sections.[118]

The competing perspective on the purpose of the judicature provisions is that, given that superior, district and county court judges are constitutionally authorized to exercise jurisdiction over federal as well as provincial law, the judicature provisions reflect and secure a valid federal interest in the appointment and tenure of those judges as against countervailing provincial power. Such a purpose would not be thwarted were Parliament to ignore the judicature provisions in the establishment of a federal court or tribunal to administer federal law, as there is no risk that a province will attempt to usurp federal authority in this regard.

Unfortunately, given the recent ambivalence of the Supreme Court of Canada on the subject, it is not possible to predict in advance which purpose will find judicial favour. As stated earlier, however, there are persuasive reasons to prefer the latter view that the judicature provisions are designed to secure a federal role in the appointment and tenure of superior, district and court judges given that such courts administer general jurisdiction.[119] Perhaps the most important of these reasons is that the value of judicial independence now finds full expression in the *Canadian Charter of Rights and Freedoms*, and, as a result, there may be less of a desire to view the judicature provisions as the means by which judicial

independence is secured. Provisions in the Charter speak directly to judicial independence and are a more apt source for the protection of the independence of the judiciary than the judicature provisions of the *Constitution Act, 1867*.[120] In addition, the judicature provisions ill serve the goal of judicial independence, both because they only apply to superior, district and county court judges, and because federal, as opposed to provincial, power over appointment and tenure does not necessarily further the objective of an independent judiciary.[121] In my view, the judicature provisions are best viewed as constitutional requirements that secure a federal role in the constitution of otherwise provincially controlled courts which administer federal as well as provincial law. This view in turn supports the conclusion that Parliament would not be bound by the judicature provisions if it legislated for the establishment of an Aboriginal court system.

Conclusion

Either a province or Parliament is entitled to legislate for the establishment of an Aboriginal court system. Provincial legislative competence in this regard stems from section 92(14) of the *Constitution Act, 1867*, which confers on provinces the authority to pass laws in relation to the administration of justice and the constitution, maintenance and organization of provincial courts. A province may also be entitled to confer on a court of its own creation jurisdiction to adjudicate matters involving Aboriginal people that fall under federal legislative competence. The risk that such a conferral of jurisdiction will be held to invade federal legislative authority can be reduced by also conferring on the court in question jurisdiction to adjudicate matters involving Aboriginal people that fall under provincial legislative competence. Federal-provincial co-operation would further reduce the risk of a provincial initiative being ruled unconstitutional.

By virtue of sections 91(24) and 101 of the *Constitution Act, 1867*, Parliament is also entitled to establish an Aboriginal court system. The jurisdiction of a federally established Aboriginal court likely would be limited to the adjudication of disputes involving applicable and existing federal law. Federal Aboriginal court jurisdiction could include disputes governed by federal statute, including the *Indian Act*, as well as matters governed by federal common law, including the common law of Aboriginal title. Federal Aboriginal court jurisdiction likely could include disputes governed by provincial laws of general application that are incorporated by reference by section 88 of the *Indian Act*. It also likely could include jurisdiction to adjudicate criminal matters.

If a province elects to confer on a provincially established Aboriginal court jurisdiction "broadly analogous" to the jurisdiction exclusively exercised by superior, district or county courts at Confederation, then Aboriginal judges who exercise such jurisdiction may have to: be appointed by the Governor General (section 96); be members of the provincial Bar in question (sections 97 and 98); be

removable by the Governor General on Address of the Senate and House of Commons (section 99(1)); be subject to mandatory retirement at the age of 75 (section 99(2)); and be paid by the federal government (section 100). These requirements can be avoided if it can be shown that avoidance is "necessarily incidental to the achievement of a broader policy goal of the legislature."[122] There are strong arguments in favour of such a conclusion, given that the requirements of the judicature provisions arguably are antithetical to the purpose and objective behind the establishment of an Aboriginal court system. A similar analysis will govern federal laws that purport to vest jurisdiction in a provincially established Aboriginal court system to adjudicate matters that fall within federal legislative authority.

With respect to a federally established Aboriginal court, a threshold question is whether the judicature provisions bind Parliament at all. In my view, federally established courts and tribunals should not be subject to the judicature provisions, as those provisions are best viewed as expressions of a valid federal interest in the composition of certain provincially established courts and tribunals. Such an interest is not threatened by the federal establishment of an Aboriginal court system. If the judicature provisions are seen by the judiciary as an expression of the value of judicial independence, however, then Parliament will be under the same strictures as those faced by provincial legislatures. Nonetheless, if it can be established that avoidance of the judicature provisions by Parliament is necessarily tied to the underlying purpose behind the establishment of a federal Aboriginal court, then the judicature provisions ought not to govern the appointment and tenure of Aboriginal judges exercising superior, district or county court jurisdiction.

Notes

1. (U.K.) 30 & 31 Vict. c. 3.
2. Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11.
3. See *Report of the (Manitoba) Aboriginal Justice Inquiry: The Justice System and Aboriginal People* (1991), volume 1, at 310-336. See also Patrick Macklem, *Aboriginal Peoples, Criminal Justice Initiatives and the Constitution* (1992), U.B.C. L. Rev. (forthcoming). For an extended analysis of section 25 of the Charter, see *Bruce Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).
4. I use the term "Aboriginal court" throughout to refer to an Aboriginal court system. I do not mean to imply that an Aboriginal court system will necessarily involve one single entity or tribunal. For a defense of a circuit court structure for Aboriginal people, see Rick Hemmingson, Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience, [1988] 2 C.N.L.R. 1. For a defence of a regional Aboriginal justice system, see *Report of the (Manitoba) Aboriginal Justice Inquiry, ibid*, volume 1, at 310-336. For the view that an Aboriginal court system ought to involve a plurality of different kinds of institutions of dispute resolution

tailored to the specific needs and beliefs of particular Aboriginal communities, see Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 13-23.

For ease of reference, I also refer to the "establishment" or "creation" of an Aboriginal court by Parliament and provincial legislatures. I do not mean to imply that Aboriginal forms of justice and dispute resolution do not exist independently of federal or provincial action. On the importance of recognizing inherent Aboriginal rights, see Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (February 1992). Parliament and provincial legislatures ought to be advised to draft statutory initiatives in this area in terms that recognize pre-existing forms of Aboriginal justice and that accommodate aspects of the Canadian judicial system in light of such pre-existing forms of justice.

5. See text accompanying notes 61-105, *infra*.

6. See, for example, *Kruger and Manuel* v. *The Queen* (1977), 75 D.L.R. (3d) 434; *R.* v. *Martin* (1917), 39 D.L.R. 635 (Ont. C.A.); *R.* v. *Hill* (1907), 15 O.L.R. 406 (C.A.). This approach ought to be contrasted with the "enclave" theory, which would regard Indian reserves as exclusive federal enclaves: see *Four B Manufacturing* v. *United Garment Workers*, [1980] 1 S.C.R. 1031, Laskin C.J dissenting; *Cardinal* v. *A.G. Alta.*, [1974] S.C.R. 695, Laskin C.J. dissenting; *R.* v. *Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.A.D.); *R.* v. *Hill*, [1951] O.W.N. 824 (Ont. S.C.); *R* v. *Rodgers*, [1923] 3 D.L.R. 414 (Man. C.A.); *R.* v. *Jim* (1915), 22 B.C.R. 106 (B.C.S.C.). For criticism of the enclave theory, see Dale Gibson, The *"Federal Enclave" Fallacy in Canadian Constitutional Law* (1976), 14 Alta. L. Rev. 167; for a defence of the enclave theory, see Bruce Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations* (1991), 36 McGill L.J. 308.

7. See, for example, *R.* v. *Sutherland* (1980), 113 D.L.R. (3d) 374 (S.C.C.) (provincial law regulating hunting and fishing held to be in relation to Indians and thus ultra vires the province).

8. *Supra* note 6.

9. *Ibid.* If the law is of general application, but touches on matters that are "inherently Indian" then it will be read down so as to not apply to Aboriginal people: see, e.g., *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285. However, section 88 of the federal *Indian Act*, R.S.C. 1985, c. 32 (1st Supp.), has been interpreted as incorporating by reference provincial laws to this effect so long as they do not conflict with treaty rights or federal legislation, or address a subject matter already dealt with by the *Indian Act* itself: see, for example, *Jack & Charlie* v. *The Queen*, [1985] 2 S.C.R. 332. For greater detail on section 88, see Leroy Little Bear, *Section 88 of the Indian Act and the Application of Provincial Laws to Indians*, in J. Anthony Long & Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988), at 175.

10. *Di Iorio et al.* v. *Warden of Common Jail of Montreal*, [1978] 1 S.C.R. 152, at 204-205, per Dickson C.J. Dickson C.J. went on to state that "[a]ny interpretation which would limit s. 92(14) to the setting up of the courts ignores the plain meaning of the words in the section and the plain meaning of the order in which those words appear as well as history and legislative intent"

11. (1991), 77 D.L.R. (4th) 492 (S.C.C.).

12. See also *Re Adoption Act*, [1938] S.C.R. 398.

13. *Young Offenders Act*, S.C. 1980-81-82-83, c. 110.

14. *Supra* note 11, at 499.

15. See, for example, *Hodge* v. *The Queen* (1883), 9 A.C. 117, at 130 (P.C.) ("subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91").

16. This formulation is William Lederman's. See Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at 244. It was affirmed by a majority of the Supreme Court of Canada in *Multiple Access* v. *McCutcheon*, [1982] 2 S.C.R. 161, at 181, per Dickson J. (as he then was).

17. *Report of the (Manitoba) Justice Inquiry*, volume 1, *supra* note 3, at 36.

18. See *R.* v. *Thomas Fuller Construction*, [1980] 1 S.C.R. 695, at 713 (federal law can incidentally affect provincial jurisdiction if it is "truly necessary for the effective exercise of Parliament's legislative authority") (emphasis in original).

    A weaker version of such a test is the "rational, functional connection" test, which would uphold provincial incursions into the federal sphere if there is simply a rational connection between the valid provincial objective and the incidental effect on federal authority: see *R.* v. *Zelensky*, [1978] 2 S.C.R. 940 and *Multiple Access* v. *McCutcheon*, [1982] 2 S.C.R. 161. In *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, at 670-71, Dickson C.J. held that the precise test to be applied will depend on the severity of the incursion; a more severe incursion will require a stricter test. Even on the stricter "necessarily incidental" formulation, it is my view that a provincial law establishing an Aboriginal court could withstand constitutional scrutiny.

19. (1989), 57 D.L.R. (4th) 710 (S.C.C.).

20. *Ibid.*, at 718.

21. *Ibid.*, at 725. The difference between superior and inferior courts is discussed at text accompanying note 60, *infra*.

22. In the case at hand, section 22 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), assigned concurrent, not exclusive, jurisdiction over admiralty matters to the Federal Court.

23. The *Federal Court Act*, *ibid.*, s. 17 currently purports to vest exclusive jurisdiction in the Federal Court to hear claims against the federal Crown. Without amendments to the Act, such claims, as well as other claims over which the Federal Court enjoys exclusive jurisdiction, thus could not be brought in a provincially established Aboriginal court. For an overview of the Federal Court's jurisdiction with respect to Aboriginal matters, see Jack Woodward, *Native Law* (Toronto: Carswell, 1989), at 398-402.

24. [1945] 4 D.L.R. 305 (S.C.C.).

25. *Ibid.*, at 327.

26. (1965), 46 D.L.R. (2d) 439 (S.C.C.).

27. *Ibid.*, at 443 (translation). This line of case law ought to be contrasted with a competing set of cases providing that if federal law is silent on the forum in which adjudication involving federal law is to occur, then the appropriate forum will be provincial courts: see, e.g., *Knox Contracting* v. *Canada*, [1990] 2 S.C.R. 338; *A.G. Ont.* v. *Pembina Exploration Canada Ltd.*, *supra* note 19; *Board* v. *Board*, [1919] A.C. 956.

28. See text accompanying notes 15-16, *supra*.

29. See, for example, *Reference re Young Offenders Act (PEI)*, *supra* note 11; *Papp* v. *Papp*, [1970] 1 O.R. 331 (Ont. C.A.); *Coughlin* v. *Ont. Highway Transport Board*, [1968] S.C.R. 569; *Re Vancini* (1904), 34 S.C.R. 621; *Valin* v. *Langlois* (1879), 3 S.C.R. 1.

30. R.S.C. 1970, c. C-34, ss. 426, 733.

31. R.S.C. 1970, c. D-8, s. 5.

32. *Supra* note 13, s. 2(1).

33. *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

34. See, for example, Bora Laskin, *Canadian Constitutional Law* (4th ed., 1975), at 972-93.

35. [1977] 2 S.C.R. 1054.

36. See ss. 91(2) (regulation of trade and commerce) and 92(10) (international transportation) of the *Constitution Act, 1867*.

37. *Supra* note 35, at 1065-66.

38. [1977] 2 S.C.R. 655.

39. See ss. 91(1A) (public property) and 91(28) (penitentiaries) of the *Constitution Act, 1867*.

40. This standard has recently been affirmed in *A.G. Ont.* v. *Pembina Exploration Canada Ltd.*, *supra* note 19, at 720, where Justice La Forest, for a unanimous Court stated:

> ... a court established by Parliament under s. 101 of the *Constitution Act, 1867* can only have jurisdiction where (a) Parliament has legislative authority over the subject-matter of the case; (b) the empowering statute confers jurisdiction over the case; and (c) the case is governed by 'existing and applicable federal law'.

See also *Northern Telecom Canada Ltd.* v. *Communication Workers of Canada*, [1983] 1 S.C.R. 733, at 740, per Estey J.; *C.N.L.R.B.* v. *Paul L'Anglais Ltd.*, [1983] 1 S.C.R. 147, at 156, per Chouinard J. *Wire Rope Industries of Canada (1966) Ltd.* v. *B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 54, at 70, per McIntyre J.; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at 70.

For criticism of this standard, see Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985), at 142-48; Steven Scott, *Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction* (1982), 27 McGill L.J. 137; John Evans, *Comment* (1981), 59 Can. Bar Rev. 124; Peter Hogg, *Federalism and the Jurisdiction of Canadian Courts* (1981), 30 U.N.B.L.J. 9; John Laskin and Robert Sharpe, *Constricting Federal Court Jurisdiction* (1981), 30 U.T.L.J. 283; Peter Hogg, *Comment* (1977), 55 Can. Bar Rev. 550.

41. See note 9, *supra*.

42. See note 9, *supra*.

43. Not all provincial laws of this type are incorporated by reference by section 88: see note 9, *supra*.

44. [1989] 2 C.N.L.R. 146 (S.C.C.).

45. See, generally, Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

46. *Roberts* ought to be contrasted with earlier jurisprudence suggesting that a claim of Aboriginal title to provincial lands could not be brought in Federal Court: see *Joe* v. *Canada*, [1986] 2 S.C.R. 145.

47. See *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075. For commentary, see Michael Asch and Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R.* v. *Sparrow* (1991), 29 Alta. 498.

48. See *A.G. Can.* v. *Law Society of B.C.*, [1982] 2 S.C.R. 307.

49. See, for example, *Northern Telecom Canada* v. *Communication Workers of Canada*, [1983] 1 S.C.R. 733.

50. For an overview of options in this regard, see Rick H. Hemmingson, *Jurisdiction of Future Tribal Courts in Canada*, *supra* note 4.

51. The issue to date has been cast in terms of whether Parliament could establish a court of criminal jurisdiction. For the view that the constitutional obstacles are "formidable", see *In re Board of Commerce* (1920), 60 S.C.R. 456, at 470, per Anglin J. (Davies and Mignealt JJ. concurring).

    For the view that Parliament is entitled to establish a court of criminal jurisdiction, see Hogg, *Constitutional Law of Canada*, *supra* note 40; see also Laskin, *Canadian Constitutional Law*, *supra* note 34, at 793; François Chevrette and Herbert Marx, *Le droit canadien en matière d'obscénité: aspects constitutionnels* (1976), 54 Can. Bar Rev. 499, at 536-541. But see B.C. McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 Can. Bar Rev. 161.

52. Section 3 of the *Federal Court Act* provides:

> The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and *criminal* jurisdiction. [emphasis added]

    For criticism of Federal Court criminal jurisdiction, see Paul Lamek, *Jurisdiction of the Federal Courts and the Superior Courts*, in Law Society of Upper Canada Special Lectures, *The Constitution and the Future of Canada* (1978), at 105-108.

53. Emphasis added.

54. See text accompanying notes 15-16, *supra*.

55. To reiterate, provincial laws of general application that do touch on matters "inherently Indian" apply to Aboriginal people by section 88 of the *Indian Act*, and arguably section 88 could constitute the "applicable and existing federal law" necessary for an Aboriginal court to assume jurisdiction to adjudicate matters involving such provincial laws. See text accompanying notes 6-9, 41-43, *supra*.

56. [1951] S.C.R. 31.

57. For more analysis of the law governing inter-delegation, see Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism*, *supra* note 6, at 346-51; Hogg, *Constitutional Law of Canada*, *supra* note 40, at 295-308; E.A. Driedger, *The Interaction of Federal and Provincial Laws* (1976), 54 Can. Bar Rev. 695, at 709; G.V. La Forest, *Delegation of Legislative Power in Canada* (1975), 21 McGill L.J. 131; Paul Weiler, *The Supreme Court and the Law of Canadian Federalism* (1973), 23 U.T.L.J. 307, at 316-18; K.M. Lysyk, *The Inter-Delegation Doctrine: A Constitutional Paper Tiger?* (1969), 47 Can. Bar Rev. 271; William Lederman, *Some Forms and Limitations of Cooperative Federalism* (1967), 45 Can. Bar Rev. 409.

58. *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392.

59. See, for example, *A.G. Ont.* v. *Scott*, [1956] S.C.R. 137.

60. See, for example, *Coughlin* v. *Ontario Highway Transport Board*, *supra* note 29.

61. Section 101 is also found under the "Judicature" heading of the *Constitution Act, 1867*. Its relevance lies in its conferral of authority on Parliament to establish a general court of appeal and federal courts, however, and therefore is excluded from the following analysis.

62. Circuit Court, until its abolition in 1953, was Québec's equivalent to the District Court, and was treated as such for the purposes of the judicature provisions by the judiciary: see *Séminaire de Chicoutimi* v. *Cité de Chicoutimi*, [1973] S.C.R. 681; *Reference re Jurisdiction of Magistrates Court Act (Qué.)* (1965), 55 D.L.R. (2d) 516, revd on other grounds [1965] S.C.R. 772.

63. This purpose was ascribed to section 96 by some participants in the Confederation debates: see *Parliamentary Debates on Confederation of British North American Provinces*, Third Session, Provincial Parliament of Canada, Québec, 1865, at 387 (Solicitor General H.L. Langevin), 447 (L. Burwell). See, generally, Robin Elliot, *Case Comment: Is Section 96 Binding on Parliament?* (1982), 16 U.B.C. L. Rev. 313, at 328, n.53.

64. [1932] A.C. 113, at 120.

65. *Toronto* v. *York*, [1938] A.C. 415, at 426.

66. *R.* v. *Beauregard* (1986), 30 D.L.R. (4th) 481, at 493 (S.C.C.).

67. *Pembina Exploration Canada Ltd.*, *supra* note 19, at 724.

68. See Peter Hogg, *Federalism and the Jurisdiction of Canadian Courts*, *supra* note 40, at 15 ("Since the courts would be deciding questions of federal law as well as provincial law, and questions of constitutional law as well as private law, some federal involvement in their establishment would not be unreasonable").

69. For jurisprudence on s. 11(d), see *R.* v. *Genereux*, [1992] 1 S.C.R. 259 (structure and constitution of General Court Martial created by federal law does not comply with s. 11(d) of Charter); see also *Valente* v. *The Queen*, [1985] 2 S.C.R. 673.

70. For more detail, see Richard Simeon, *Criteria for Choice in Federal Systems* (1982-83), 8 Queen's L.J. 131.

71. See, for example, the dissenting judgment of the Chief Justice and Duff J. of the Supreme Court of New Brunswick in *Ganong* v. *Bayley* (1877), 2 Cart. 509. This also was the view of the federal Department of Justice in the early years of Confederation: see *Re Adoption Act*, [1938] S.C.R. 398, at 405.

72. [1938] S.C.R. 398.

73. *Ibid.*, at 416.

74. See, for example, Peter Hogg, *Constitutional Law of Canada*, *supra* note 40, at 151. See also *Reference re Residential Tenancies* (1981), 123 D.L.R. (3d) 554, at 566-67.

    Again, one could justify this rule by reference to judicial independence. For example, in the words of William Lederman:

    > These provisions collectively make it clear that the B.N.A. Act contemplates the continued existence and functioning of superior courts on the English model as basic institutions of our form of government. This and nothing less is what calls for the necessary implication of a substantive separation of powers in favour of provincial superior courts. It would be absurd to permit such courts to be denuded of all substantial jurisdiction so that they would continue, if at all, merely as empty institutional shells.

    Lederman, *The Independence of the Judiciary* (1956), 34 Can. Bar Rev. 1139, at 1172. Alternatively, it can be justified by reference to the fact that superior, district and county courts administer federal as well as provincial law, and that provinces should not be able to erode the valid federal interest in the appointment process that flows from their jurisdiction.

75. *Supra* note 73, at 413.

76. *Ibid.*, at 418.

77. *Ibid.*, at 414.

78. *Ibid.*, at 421.

79. [1949] A.C. 134.

80. *Ibid.*, at 150.

81. *Ibid.*, at 151.

82. *Ibid.*, at 151.

83. *Supra* note 74.

84. R.S.O. 1980, c. 452.

85. *Supra* note 74, at 571-72.

86. (1989), 57 D.L.R. (4th) 1 (S.C.C.).

87. *Ibid.*, at 10-11..

88. *Ibid.*, at 11.

89. *Ibid.*, at 12. See also *Chrysler Canada Ltd.* v. *Canada* (Competition Tribunal), [1992] S.C.J. No. 64.

90. *Ibid.*, at 17 (emphasis in original).

91. *Ibid.*, at 17.

92. *Reference re Residential Tenancies*, *supra* note 74, at 571.

93. *Sobeys Stores* v. *Yeomans*, *supra* note 86, at 12.

94. See J. Anthony Long, *Political Revitalization in Canadian Native Indian Societies* (1990), 23 Can. J. Pol. Sci. 751, for a discussion of how traditional forms of Aboriginal justice differed from Anglo-Canadian conceptions of justice, including at the remedial stage. See also Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice*, *supra* note 4, at 6 ("The Aboriginal vision of justice .... is community-based, stressing mediation and conciliation while seeking an acknowledgement of responsibility from those who transgress the norms of their society").

95. *Sobeys Stores* v. *Yeomans*, supra note 86, at 12.

96. See, for example, *Reference re Young Offenders Act (PEI)*, *supra* note 11, at 501-502:

> if the power under scrutiny is defined as the power to adjudicate over murder, it would be more likely that the conclusion be that only superior courts were competent than if the power is defined in terms of power to adjudicate over criminal offences, those including the less serious offences as well as the most serious ones.

97. See *An Act to encourage the gradual civilization of Indians* (1857), 20 Vict. c. 26. For more detail on early legislation affecting Aboriginal people, see John S. Milloy, *The Early Indian Acts: Developmental Strategy and Constitutional Change*, reprinted in J.R. Miller ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 145. For a general history of Canada's assimilation policy, see John L. Tobias, *Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy*, reprinted in Miller, *Sweet Promises*, *ibid.*, at 127.

98. *Sobeys Stores* v. *Yeomans*, *supra* note 86, at 17.

99. *Reference re Residential Tenancies*, *supra* note 74, at 572. For a recent reiteration of this approach, see *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, *supra* note 89.

100. *Ibid.*

101. *Sobeys Stores* v. *Yeomans*, *supra* note 86, at 12.

102. See text accompanying notes 79-82, *supra*.

103. *Supra* note 79, at 151.

104. *Ibid.*

105. For the view that "[c]ommunities could develop the standards that they believe are appropriate" and that there ought to be "a conscious effort devoted to developing training programs for the new judges," see *Report of the (Manitoba) Aboriginal Justice Inquiry*, *supra* note 3, at 329-31. For the view that selection ought to occur by a Tribal Courts Judicial Council with representation from provincial band councils, and provincial, law society, and provincial court representatives, see Hemmingson, *Jurisdiction of Future Tribal Courts in Canada*, *supra* note 4, at 47-8.

106. See *The Queen* v. *Beauregard* (1986), 30 D.L.R. (4th) 481 (S.C.C.); *McEvoy* v. *A.G. New Brunswick* (1983), 148 D.L.R. (3d) 25 (S.C.C.).

107. *Ibid.*

108. *Ibid.*, at 37.

109. *Ibid.*, at 38. This holding ought to be contrasted with an earlier statement by Laskin C.J., dissenting in part, in *Reference re Section 6 of Family Relations Act*, [1982] 1 S.C.R. 62, at 76:

> Certainly, the Parliament of Canada is not inhibited by s. 96 in conferring upon any judicial officers jurisdiction in matters falling within federal competence: see *In re Vancini* (1904), 34 S.C.R. 621. Thus, it could properly assign jurisdiction under its *Juvenile Delinquents Act* to Juvenile Courts established by the Province and whose presiding officers were provincial appointees.

It also ought to be contrasted with an earlier decision of the Ontario Court of Appeal. In *Papp* v. *Papp* supra note 29, the Court of Appeal held that "section 96 does not inhibit the federal Parliament" (at 339). Neither *Reference re Section 6 of the Family Relations Act* nor *Papp* v. *Papp* was referred to in the Supreme Court of Canada's reasons in *McEvoy*.

110. See, for example, Hogg, *Constitutional Law of Canada*, *supra* note 40, at 154, 420-424.

111. See text accompanying notes 99-105, *supra*.

112. See Hogg, *Constitutional Law of Canada*, *supra* note 40, at 423-424. This also was the view of Bora Laskin. See, for example, *Reference re Section 6 of Family Relations Act*, *supra* note 109, Laskin C.J. dissenting in part ; and *A.G. Can.* v. *Canard*, [1976] 1 S.C.R. 170, Laskin C.J. dissenting. See also Bora Laskin, *Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case* (1955), 33 Can. Bar Rev. 993.

113. See William Lederman, *The Independence of the Judiciary*, *supra* note 74; Elliot, *Is Section 96 Binding on Parliament?*, *supra* note 63.

114. *Supra* note 89.

115. *Ibid.*

116. But see *Addy* v. *The Queen*, [1985] 2 F.C. 453 (T.D.) for the view that section 99 of the *Constitution Act, 1867* applies to both federal as well as provincial superior courts. *Addy* was not appealed by the federal government.

117. See text accompanying notes 63-73, *supra*.

118. *Supra* note 63.

119. See text accompanying notes 69-73, *supra*.

120. See text accompanying note 69, *supra*.

121. See text accompanying notes 70-73, *supra*.

122. *Reference re Residential Tenancies*, *supra* note 74, at 572.

Dancing with a Gorilla: Aboriginal Women, Justice and the Charter

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The purpose of this paper is twofold: to examine from Aboriginal women's perspective, first, the jurisdiction and structure of a parallel justice system, and second, the application of basic principles and legal rights found in the *Canadian Charter of Rights and Freedoms*.[1] This paper examines Aboriginal justice from a female perspective taking into account the current constitutional regime (pre-Charlottetown). There is no consideration of section 96[2] and its impact on establishing a parallel Aboriginal justice system as this is the subject of a separate paper. No examination is carried out with respect to the differences between Métis, Indian and Inuit systems of justice, nor is consideration given to the connection between multiple systems which may be established under the current constitution.

I take it as a given that there is a common goal among Aboriginal peoples and governments to establish some form of parallel Aboriginal justice system(s). What this paper examines are the basic requirements of a parallel Aboriginal justice system from a female perspective. I am going to begin by examining the current socio-legal context of Aboriginal women, and the impact of this upon justice reform. Next I will examine the Aboriginal women's view of participation in socio-legal reforms and how this will shape Aboriginal justice. I will examine the application of the Canadian Charter. Then I will consider questions related to jurisdiction and structure.

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What appears to me to be unique about feminist legal theory is the concentration on the value of individual experience and the way in which it can contribute to legal theory. This is particularly true in looking at necessary legal reforms to make them conform to female human experience. Some legal scholars ignore the female human experience and look at law as some kind of mathematical equation, or chemical formula which, with some adjustment, will suit any occasion. Catharine MacKinnon,[3] in writing on the interrelationship of practice and theory wrote: "[w]e know things with our lives, and live that knowledge, beyond anything any theory has theorized." Aboriginal women need to be involved in designing Aboriginal justice systems because of the lives they have lived, and because they live that knowledge. For that reason, Aboriginal women know with their minds and bodies what legal system will both deliver justice to the accused, and protect society, including women and children. In a system dominated with patriarchy, where law and justice are viewed through male eyes, I find myself explaining and being somewhat apologetic because there are those learned "men" who will wonder why there might be a Aboriginal feminist perspective to criminal justice administration.[4] Why is there a need to look at law from a female perspective? What is a female perspective? In my view, the two powerful driving forces which will shape Aboriginal criminal justice administration are first, the almost total victimization of women and children in Aboriginal communities,[5] and second, the 30-year struggle by Aboriginal women for sexual equality rights in Canada.[6] As the man sang in *Cabaret* while dancing with a gorilla, "if you could see her through my eyes, you would find her beautiful, too."

Women and Aboriginal Parallel Justice Systems

Before examining what jurisdiction and structure a parallel Aboriginal justice system would be endowed with, serious consideration needs to be given by governments to the involvement of Aboriginal women in the consultation process. Without equal participation, consultation and funding, Aboriginal women's organizations today would reject the establishment of an Aboriginal parallel justice system.[7] There are three driving forces for this premise. First, women are enraged with the Justice pilot projects which allow Aboriginal male sex offenders to roam free of punishment in Aboriginal communities after conviction for violent offenses against Aboriginal women and children.[8] Second, Aboriginal women oppose lenient sentencing for Aboriginal male sex offenders whose victims are women and children.[9] Third, Aboriginal women and their organizations have hailed as a victory the unanimous ruling by the Federal Court of Appeal on August 20, 1992 which declared that it was a violation of freedom of expression to consult mainly men on Aboriginal policies affecting all Aboriginal peoples.[10]

Violence against Aboriginal women has reached epidemic proportions according to most studies conducted[11] over the past few years. This violence includes the

victimization of women and their children, both of whom are seen as property of either their men (husbands, lovers, fathers), or of the community in which they live. To understand Aboriginal women and criminal justice reform, one must understand the cultural context of Aboriginal male violence. Cultural values of kindness, reconciliation and family cohesiveness may prevent some Aboriginal women from reporting violence in the home.[12] Social forces such as fear of child apprehension may prevent Aboriginal women from reporting violence in the home.[13] The threat of child apprehension comes not only from the Canadian state and provincial child care agencies.[14] Today that threat also comes from Chiefs, Councils and Indian Child Care Agencies controlled by Aboriginal men who view children as community property. The Aboriginal mother may flee male violence, but she may be asked to leave her children behind.[15] Although denial is rampant concerning Aboriginal male abusiveness, it is primarily men who have almost total power and control in Aboriginal communities (band councils and chiefs, male police, etc.).[16] These Aboriginal male leaders have protected each other, and have collectively or collusively contributed to the violence against Aboriginal women and children through their inaction, ineptness, ineffectiveness or neglect.[17]

Cultural defences by men will come under fire by Aboriginal women's organizations. Already, Aboriginal women oppose the use of cultural and racial considerations by law enforcers to mitigate sentencing of Aboriginal men convicted of violent sexual crimes against women and children.[18] Aboriginal men need not take the total blame for raising cultural defences. The primarily middle-aged, upper class, white male judiciary are also responsible for accepting these defences and remaining ignorant of the nature of sexual assault and rape.[19] Sexual assault is a violent crime. The case law shows that Aboriginal men have claimed in child sexual abuse trials that Aboriginal culture condones deviant sexual behaviour (incest, child sexual abuse).[20] There is a need to study the use of cultural defences used by Aboriginal men accused of the sexual violation of children and women. The criminal justice system, particularly in British Columbia[21] and the Northwest Territories, is beginning to be 'culturally-sensitive'. This is detrimental to women, particularly victims of sexual abuse. The introduction of cultural defences which condone incest and child sexual abuse among Aboriginal peoples has been rejected by Aboriginal women.[22] Such treatment by the court, which often results in lenient sentencing of Aboriginal males, reinforces the view that violence against Aboriginal women and children is acceptable in Canadian society. This kind of state action is racist because it accords a different standard of treatment to Aboriginals than to non-Aboriginals.

There needs to be a return to traditional ways, healing circles, and a sharing of power between men and the women. This is particularly true in reforms which will come about in the field of criminal justice administration in Aboriginal communities. Aboriginal women support the revival of traditions and cultural practises which recognized the equally valued roles, rights and responsibilities of

women. This was a common finding in studies under review. One reform which seems to be required is the need to place the punishment of sexual crimes in the control of Aboriginal women at the community level.[23] The use of elders' circles has not been effective in deterring violent crimes against women for three reasons: first, elders also abuse Aboriginal women and children;[24] second, Aboriginal community leaders do nothing to stem the epidemic violence against Aboriginal women and children;[25] and third, males do not understand the violation of a female body, and cannot determine appropriate forms of punishment and deterrence.

The federal *Indian Act* over the last century has completely deprived First Nations women of their property rights. Today, with the *Paul*[26] and *Derrickson*[27] decisions of the Supreme Court of Canada, First Nations women have no property rights at all on Indian lands because there is no federal law in the field, and provincial laws do not apply. As reported by Professor Mary Ellen Turpel:

> The consequence of the *Derrickson* and *Paul* decisions is that an aboriginal woman who resides in a home on a reserve with her spouse cannot make an application under provincial family legislation for occupation or possession of the home upon marriage breakdown or in the event of physical and emotional abuse from her spouse. There is no federal family legislation to govern these conflicts. In the *Paul* case, for Pauline Paul, this meant she was denied legal access to the matrimonial home of sixteen years which she herself helped to build. With the sanction of constitutional law, she was, effectively, left out in the cold.[28]

Professor Turpel reaffirms in her article that the *Indian Act* "does not provide for marriage breakdown, property division, or for situations of family violence and protecting the property rights of the abused in such situations."[29]

Poverty is rampant in Aboriginal communities and contributes to the sexual violation of women and children, child prostitution, runaways, throwaways, substance abuse, suicide, battered women and youth crime. The failure by governments to clarify jurisdictional issues which would ensure all Aboriginal peoples enjoy a standard of living comparable to other Canadians is racist, and a violation of the Universal Declaration of Human Rights. Until poverty is eradicated within the Aboriginal community, criminal behaviour will be engendered, and women and children will continue to be victimized. The control of Aboriginal justice, in this context, will simply mean more community police and the building of more jails. Law enforcement officials (police, judges, lawyers, Crown counsel, prison guards and parole officers) are likely to outnumber Aboriginal people in the absence of socio-economic programs to eradicate poverty.

The Indian residential school system over the last century contributed immeasurably to violence against Aboriginal women and children in modern Canadian and Aboriginal societies. One study found that the high incidence of

sexual abuse is rooted in the residential school experience 20 years ago.[30] Reports of sexual abuse within Aboriginal communities have increased since investigations of abuse in the schools were initiated in 1987.[31] Young Aboriginal boys were subjected to sexual abuse by religious men including ministers, priests, and brothers of Christian orders. This has led to suicide, paedophilia, homosexuality, and cyclical sexual abuse in modern Aboriginal society.

European religions set out to alter the roles of men and women in Aboriginal societies, and this was accomplished over a period of several hundred years. The traditional roles of men and women was displaced. Christianity and its values today keep Aboriginal women in violent situations because of their Christian marriage vows. Christian teachings of confession and forgiveness also condone Aboriginal male violence because it leads to increased tolerance for violence against women. The more Christianized an Aboriginal woman is, the more likely she is to remain in a battering situation because of her marriage vows.

The role of male elders as perpetrators of violence and arbitrators needs serious examination. Aboriginal elders today abuse women and children within the community. Some Aboriginal women have been subjected to sexual, physical, emotional and psychological abuse in the form of "teaching". An Aboriginal elder is a person in a trust position with children and women, particularly when the elder is a grand-parent to the child s/he abuses, or a spiritual adviser to women within the community. If elders are to have a role in ending sexual, physical, emotional and psychological abuse within Aboriginal communities they must speak out and take a leadership role. It is their role to advise chiefs and councils that the victimization of women and children must end. Elders should devise the punishment for this deviant behaviour, or allow the criminal justice system to take its toll within the Aboriginal community. "Elders should be involved in counselling those who batter their spouses."[32]

"The Chief and Band Council should take a greater part in publicly criticizing spousal assault."[33] It has been suggested that men who beat their wives should appear before the chief and council and explain their behaviour and be criticized for it.[34] Historically, among the Dene, any man who abused women, girls or children had to appear at a public community meeting and the medicine leaders would judge them. A first offender might receive a warning; a repeat offender sometimes faced death. The medicine for abuse was harsh.[35] The Manitoba Justice Inquiry Report stated that Chiefs and Councils have done nothing to stop the epidemic of spousal abuse within Indian communities. The leaders of First Nations governments and organizations must accept their responsibility to protect Aboriginal women and children from male violence.

Many Aboriginal women both fear and oppose Aboriginal self-government.[36] The women do not want to live under brown patriarchs who abuse power. The women are calling for a return to matriarchies where women had real political power and enjoyed individual human rights. Contrary to popular thought,

individual rights and freedoms were supreme within Aboriginal democracies.[37] It would not be too far-fetched to acknowledge that the Iroquois Confederacy was the cradle of democracy. The Iroquois political system fed the thought processes of leading western European philosophers who are attributed with inventing democracy.[38] As Gail Stacey-Moore has repeated over and over again, women owned all private and real property historically; they had control of the family and community governance; women both selected and deposed political leaders. Women sent men to war, sometimes for years.[39]

Racism contributes to abuse of Aboriginal women. The Aboriginal Justice Inquiry of Manitoba confirmed Aboriginal women are victims of racism, of sexism and of unconscionable levels of domestic violence.[40] On August 20, 1992, the Federal Court of Appeal held in *N.W.A.C. et al* v. *Her Majesty et al* that Aboriginal women are doubly disadvantaged by reason of race and sex within Canadian society, and by reason of sex within Aboriginal societies. This disadvantages result in discrimination in programs and services by the Government of Canada, and by Indian Act governments. It is clear from the decision that racism and sexism in federal government decisions violates the Charter rights of Aboriginal women, and contributes to the epidemic of violence perpetrated against them. The oppression of Aboriginal women results from patriarchy and colonialism, and it will not be eradicated without clear federal initiatives aimed at restoring the cultural, social, economic and political position of Aboriginal women within their societies.

Equal Participation and Consultation: Aboriginal Women

Aboriginal women as a collective will continue to resist any changes to laws and policies affecting Aboriginal peoples which have not resulted from equal participation, consultation and funding to their associations. What is evident over the past year is the desire of Aboriginal women, collectively and individually, to be involved in decision-making. The Native Women's Association of Canada has taken a strong stand on the issue of participatory democracy and there is no sign that they will back down from this stance. Their position is premised on four issues: first, freedom of political expression as females; second, sexual equality rights under sections 15, 28 and 35(4); third, equal Aboriginal and treaty rights with men; and fourth, possession of an equal right to self determination under international law.

Aboriginal women[41] have embraced individual rights found in the Canadian Charter because it aids their communal struggle for sexual equality and sexual freedom. One of those rights, freedom of speech, is recognized as a cornerstone of democratic government, and that right has been found by a Canadian court to have been denied to Aboriginal women and NWAC in this current constitutional round. That was the finding of the Federal Court of Appeal in *NWAC et*

al v. *Her Majesty et al.* Counsel, Mary Eberts of Toronto, told NWAC this court decision is the only one of its kind in the world because it recognizes freedom of political expression for women. This is the first time a Canadian court has ruled on the right of women to freedom of speech in a political process, and it has recognized that this right has been infringed by Canada.

In a decision 20 August 1992, the Federal Court of Appeal ruled in favour of the Native Women's Association of Canada stating that by funding the participation of the Assembly of First Nations, Métis National Council, Native Council of Canada, Inuit Tapirisat of Canada in the current constitutional review process and excluding the equal participation of NWAC, "the Canadian government has accorded the advocates of male dominated Aboriginal self-governments a preferred position in the exercise of an expressive activity....It has thereby taken action which has had the effect of restricting the freedom of expression of Aboriginal women in a manner offensive to ss. 2(b) and 28 of the Charter. In my opinion, the learned trial judge erred in concluding otherwise," said Justice Mahoney on behalf of the Federal Court of Appeal.

Counsel Mary Eberts of Toronto put forward the legal arguments that Charter rights of Aboriginal women and the Native Women's Association of Canada have been infringed by the government of Canada. First, she argued that freedom of expression rights must be read together with section 28 of the Charter which guarantees men and women have equal rights. Second, she alleged violations of sections 15 and 35(4) sexual equality rights. Third, arguments were put as to whether a relief or remedy could be sought under the *Federal Court Act*. Finally, the parties argued as to whether this was a legislative process barring review by a court.

The Court of Appeal and the Trial Division did not address the meaning of section 35(4). The purpose of section 35(4) was to guarantee treaty and Aboriginal rights equally to male and female persons. The delineation of the purpose of section 35(4) must take account of the struggle by Indian women since 1967 to achieve juridical equality in the federal *Indian Act*. Its relationship to the now defunct sections 37 and 37.1 would show the wilful infringement of Aboriginal women's rights because they were not made equal participants in the constitutional renewal process from 1982 to 1987 under those sections. Aboriginal women were excluded. Sections 37 and 37.1 were placed in the 1982 document to establish a process to define treaty and Aboriginal rights as they will be enjoyed by Aboriginal peoples. By excluding Aboriginal women from the definition process, the sexual equality rights of women under section 35(4) are effectively denied. There is ample precedent that courts must look to the purpose of the constitutional provision, and the effect of the denial of a guaranteed constitutional right such as section 35(4). The Supreme Court of Canada has also mandated courts to give a broad liberal interpretation to constitutional provisions affecting Aboriginal peoples, and interpret the provision in the manner understood by, in this case, Aboriginal women.

There is an obligation upon Canada (and its agencies) to provide equal consideration (in consultation and dollars) to Aboriginal women as to male-dominated organizations. The Court held that Canada can fund or not fund, but "it is bound to observe the requirements of the Charter." The government is bound by the Charter. The Court said:

> I should think a decision to fund will be made on the basis of need to permit effective and informed expression by an otherwise handicapped and particularly concerned interest group. A proper decision to fund one group but not another should be readily justifiable under s. 1 of the Charter.

The Court found NWAC has justification to complain that its constitutional right to freedom of expression was infringed when Canada chose to fund only male-dominated organizations.

The Native Women's Association of Canada and its affiliates – which have a twenty-year history – were found to be the bona fide organization representing the interests of Aboriginal women.[42] The Court found that no Aboriginal group in the constitutional process represents the constituents of NWAC. Justice Mahoney said it is open to the courts to make a declaration to Canada and governments that "the federal government has restricted the freedom of expression of Aboriginal women in a manner offensive to ss.2(b) and 28 of the Charter." In this way, the Court has said we have rights, individually and collectively, as Aboriginal women (as represented by NWAC) and those rights have been violated by Canada.

There is a dishonest and mistaken belief on the part of Canada that it need only consult Aboriginal men and their organizations to establish a Aboriginal justice system. That view has been rejected by the Court of Appeal. The Court recognized that the AFN and the former National Indian Brotherhood have "vigorously and consistently resisted the struggle of Aboriginal women to rid themselves of the gender inequality historically entrenched in the Indian Act." This opposition took the form of adverse interventions before parliamentary committees and legal proceedings, including opposing repeal of section 12(1)(b), and the section 35(4) amendment. The Court rightly found that none of the Intervenants – Assembly of First Nations, Native Council of Canada, Métis National Council and Inuit Tapirisat of Canada – represent the interests of Aboriginal women and went so far as to find that AFN was likely to take a constitutional position harmful to Aboriginal women. The judgement is clear in stating that it is NWAC which represents the interests of Aboriginal women. The history of the organization and Aboriginal women's struggles shows that and it was reflected in affidavits filed by Gail Stacey-Moore and Sharon McIvor, Executive of the West Region. Justice Mahoney stated, "it is clear AFN is not addressing their [Aboriginal women's] concerns."

The case against Her Majesty was brought by the Native Women's Association of Canada, and by individual Appellants, Gail Stacey-Moore, a Mohawk of Kahnawake, Quebec, and Sharon McIvor, Executive member of the West Region and Member of the Lower Nicola Indian Band of British Columbia. The Court found the women represented by NWAC collectively and Stacey-Moore and McIvor presented ample evidence of discrimination on the basis of sex and race in Canadian society, and on the basis of sex in some Aboriginal communities.

I review this decision because it will be important for governments and Aboriginal organizations to come to the realization that women must be part of the decision-making process. The victimization of Aboriginal women, as well as their success in receiving some court recognition of the need to involve them in decisions which affect them, will affect Aboriginal justice reform. Such involvement can only strengthen Aboriginal justice administration, particularly if it results in the feminization of a new system.

Aboriginal Women and the Canadian Charter

> Aboriginal women are at a watershed: taking action now under the *Charter* provides them with perhaps their only opportunity to secure a future in which they will have available at least some tools with which to fight the massive, persisting systemic discrimination, on grounds of gender and of race, which they face at every turn.[43]

The recognition of parallel Aboriginal justice systems for Canada's Aboriginal peoples must include consideration of 100 years of statutory sex-based discrimination against Aboriginal women. This approach is necessitated by the existence of the *Canadian Charter of Rights and Freedoms*[44] and the recognition in international law of the special rights of colonized populations to self-determination. While there is increasing recognition of race bias in justice administration among legal scholars who specialize in indigenous law,[45] most cannot make the quantum leap to recognize that the British-based legal system is rampant with sex bias against women. Justice has not been blind to race or sex, and this is evident when one views the legal history of Indian women and the law in Canada. The purpose of this section is to discuss the role and treatment of women in the context of Aboriginal justice and Aboriginal self-government.

Aboriginal women claim a constitutional right to juridical equality. The *Constitution Act, 1982* contains three provisions guaranteeing sexual equality rights to, inter alia, Aboriginal women. Section 15(1) states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national

> or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> Section 28 provides:
> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
>
> Section 35(4) provides:
> Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35(1) recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including "rights that now exist by way of land claims agreements or may be so acquired." There is some notion that these sexual equality rights do not exist in and of themselves, but are mere empty-shell rights until ruled upon by a court. In fact, the exercise of these rights are twofold: first, no law may be passed which infringes these rights except under section 1; and second, women may assert these rights in policy discussions with governments bound by the Canadian Charter.

The Supreme Court of Canada has not yet commented upon the meaning of sections 28 and 35(4), but this does not mean Canada, in establishing an Aboriginal justice system, can ignore the equality rights of Aboriginal women. The Supreme Court of Canada has expounded upon the meaning of section 15 in its landmark decision of *Andrews* v. *Law Society of British Columbia*.[46] In *Andrews*, the Court rejected the "similarly situated" test for determining when there was a violation of the right to equality before and under the law. The similarly situated test, in fact, was used in the *Lavell* case by the same Court in dealing with a conflict between the *Canadian Bill of Rights* and the federal *Indian Act*. An Indian married woman was treated the same as a Canadian married (white) woman and therefore she was not discriminated against. This faulty reasoning, however, should have resulted in an analysis which held that similarly situated Indian women were not treated the same as Indian men in similar situations, namely, intermarriage with whites. *Andrews*, fortunately, killed the similarly situated test which had had devastating effects upon Aboriginal women in 1974. "The idea underlying this approach was the Aristotelian concept of formal equality: things that are alike should be treated alike while things that are unalike should be treated in proportion to their unlikeness."[47] The section 15 right to sexual equality was also decided in *R.* v. *Turpin*[48] where Madame Justice Wilson, as she then was, described the intended beneficiaries as "discrete and insular minorities". It is the power structure within Aboriginal communities dominated by men which transforms women as a collective into an insular minority according to Eberts.

> Aboriginal women may thus be described as one discrete and insular minority within another: they suffer the systemic disadvantages of

> gender discrimination in and by an Aboriginal society that itself must cope with the results of racism. While women as a whole are disadvantaged within Canadian society, Aboriginal women like all Aboriginal people must contend not only with that sexism but also with the adverse economic, social and political consequences of living in a profoundly racist society.[49]

Aboriginal women have been denied access to power and decision making federally, provincially and within their own communities. Pushed down by Aboriginal male violence in the home and community, women have not risen to positions of power and control within the community. Race and sex have played prominent roles in ensuring the suppression of the female voice within the Aboriginal community. As concluded by Mary Eberts:

> [T]hey have access to power within neither the non-Aboriginal society nor the Aboriginal society; when Aboriginal groups deploy their own power as a countervail to federal government power, men dominate on both sides of the encounter and Aboriginal women have no voice.[50]

Eberts takes the position that this case shows that the Court "tries to balance individual aspirations and group identity: the two ideas are not contradictory."[51] She concludes that "an approach to representation which focuses only on the group rights of Aboriginal people and takes no account of the individual rights of Aboriginal women, or the group interest of such women, would be contrary to the Charter."[52]

Eberts suggests the history of this analysis means the courts have a role in protecting the Charter rights of those disadvantaged whom the elected officials have no interest in protecting, like Aboriginal women. The historical struggle by Aboriginal women to end sex discrimination in the Indian Act makes it evident the Canadian state had no intention of addressing their concerns until forced to do so by the Canadian Charter. This must be avoided in seeking to establish a parallel Aboriginal justice system.

Section 15 Applies to Indian Women

The anniversary of the *Canadian Charter of Rights and Freedoms* will always coincide with the effective date of Bill C-31 [An Act to Amend the *Indian Act*] and represents an individualistic female victory for sexual equality. In discussing the application of the *Canadian Charter of Rights and Freedoms* to Indians on Indian lands,[53] it is evident there was a clash between Indian collective rights to self-government and feminist ideals of individual rights. I am adopting the individualistic feminist perspective to argue for application of the Charter to First Nations governments and their justice systems. During the 1970s and 1980s, the only secure knowledge that Aboriginal women activists have had is the notion that it is unacceptable and contrary to the Universal Declaration of Human

Rights to discriminate against individuals, including against women on the basis of sex.

The *Canadian Charter of Rights and Freedoms* is apposite to the collectivist aspirations of some Indian leaders who find themselves supported by legal theoreticians like Boldt and Long, and to a certain extent, Professors Doug Sanders and Mary Ellen Turpel. Their theories, in my view, are largely influenced by American Indian policy and case law and perhaps their own reading of international law and colonized peoples. To a certain extent, Boldt and Long are influenced by the Rousseauian 'Noble Savage' philosophy, and Sanders and Turpel are influenced by the international concept of 'self-determination'. Some of these theoreticians and some male Indian leaders have argued that sovereignty would put Indian governments outside the reach of the *Canadian Charter of Rights and Freedoms*.

The legal theoreticians say the Canadian Charter does not belong in Aboriginal communities because their concern for the collective overrides concern for individual rights. In my view, they forget that the collective is made up of "little Indians",[54] and they should take time to remember the history of sexual oppression of Aboriginal women. Each and every individual comprises the collective; there is no collective without them. Aboriginal women need to remember the history of our extinction in this country. Aboriginal people numbered in the millions before smallpox, influenza, measles, sexual diseases, alcohol and self-destruction. If Aboriginals do not protect the individual, the First Nations will vanish like the Beothuk Indians of Newfoundland. What are collectivist theorists and Aboriginal leaders doing to ensure that this does not happen to other First Nations? There is a duty to protect each and every individual.

To understand the coming struggle over Aboriginal justice, attention must be paid to the 30-year struggle by Aboriginal women for sexual equality rights. The battle between individual and collective rights emanated in three fora: the Parliamentary Sub-Committee on Indian Women and the Indian Act;[55] the 1970s struggle for Indian self-government;[56] and events leading to the adoption of the *Constitution Act, 1982*. In each case, the male Aboriginal leadership argued in favour of sexual equality for women, but only in the context of collective rights. They argued that Aboriginal governments must be established and recognized first, and sexual equality would follow. The evidence before the two parliamentary committees confirms this contention.

As long the dominant forces within the Canadian and Aboriginal patriarchy continue to use the prism of collective rights to denigrate the Aboriginal women's struggle for sexual equality rights as a dichotomy of individual/collective, women will be unable to capture popular support inside and outside the community. The double suppression of Aboriginal women – race and sex – make their struggle difficult, if not impossible for three reasons: first, Canadians want to do the right thing by Aboriginal peoples, namely give them self-government,

whatever it means; second, Canada, as a male state, does not care what happens to women, and, more particularly, does not want to set too high a standard of sexual equality for Aboriginal women because 'white women' might want 'similar treatment'; and third, Aboriginal women are a sub-species not deserving of consideration. In fact, most Aboriginal women leaders would deny they are engaged in an individual/collective struggle.

Aboriginal women, as a group within the group, support collective rights of Aboriginal Nations and they demand the right to define their own place within the group. More than Aboriginal male leaders, women accept that individual rights precede collective rights and would argue that the collectivist governments have no rights except those freely given to them by individual members. An Aboriginal government is not an entity in and of itself; it cannot create itself; it cannot be born from the federal *Indian Act*; it is not a self-generated creature; it is not a motherless beast. It is nothing until it is created by the people.

What Aboriginal women have said in their historic struggle is they have the right to give birth to the new government along with men. Aboriginal governments and Aboriginal justice will have a mother and a father, or it will be an abomination rejected by women. The individual/collective dichotomy is not an appropriate way of describing the Aboriginal women's struggle for sexual equality.

The struggle for sexual equality by Indian women, in particular, has more to do with women trying to regain their place within the community, then simply trying to be 'men'. It has nothing to do with being 'men' in the Aboriginal context; after all, men are not so well off either in the Aboriginal world. They have the high unemployment rate; they suffer the same poverty; they suffer higher suicide rates; and often find themselves in conflict with the law. What the law has done to women, which it has not done to men, is to exclude women from the community. In fact, women were banished from the community and were legally required never to return; to give up their benefits; and to give up family property if given to them in a will. Aboriginal women were engaged in this struggle in the courts and in political action, including in the constitutional discussions, from which they were excluded. The records of the first ministers' conferences[57] on treaty and Aboriginal rights in the 1980s confirmed the concern of Indian women for sexual equality. This item remained the top priority of Indian women from 1971 until 1985. These dates are important because they overlap with two First Ministers' Conferences on Aboriginal and Treaty Rights – 1983 and 1985. At both meetings, the Indian women were represented by their organizations and each time they were assigned solely to take care of the 'equality' issue. In 1983, the Native Women's Association of Canada received their accreditation through the Native Council of Canada to attend the meeting and represent the sexual equality issue. In 1984, section 35(4) was added to the *Constitution Act, 1982* to ensure gender equality to Aboriginal and treaty rights.

In 1985, NWAC received accreditation from the Assembly of First Nations. The timing of that meeting coincided with passage of Bill C-31, but still Indian women were at the First Ministers' Conference to represent the sexual equality issue.

Stripped of equality by patriarchal laws which created 'male privilege' as the norm on reserve lands, Indian women have had a tremendous struggle to regain their social position. It was the *Canadian Charter of Rights and Freedoms* which turned around our hopeless struggle. It has been argued that the equality provisions of the Charter would not apply to the *Indian Act* and it would not have resulted in the Supreme Court of Canada overturning the *Lavell* decision.[58] I would argue that the government of Canada believed the Charter did apply to the *Indian Act*; would have overturned the *Lavell* decision; and this thinking resulted in the passage of Bill C-31.

Jurisdiction and Structure: Aboriginal Justice System

Jurisdiction, without doubt, is where the battle will be fought between Aboriginal people and governments. It will determine whether or not we will have a parallel justice system within Aboriginal communities. The decolonization of the criminal justice system within Aboriginal communities will be a long, slow and painful process, which will be like watching paint peel off the walls. With the defeat of the Charlottetown Accord, this immediate period will be a time for navel-gazing and soul searching by governments. What kind of reform is likely to be sought by governments which have been overwhelmingly rejected by the Canadian public?

The direction of a parallel Aboriginal justice system may lead either to decolonization or to the entrenchment of neo-colonialism by brown patriarchs. By decolonization I mean the adoption and enforcement of 'customary' law within a traditional Aboriginal justice system with no outside interference. Interference includes overlaying customary law with the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*. It means the creation of enclaves of physical territory within the boundaries of Canada where federal and provincial laws do not apply unless adopted by the Aboriginal government. Will these be the territories where cigarette smuggling, drugs, and gaming may run amuck the Canadian legal system as encouraged by some Aboriginal leaders after the rejection of the Charlottetown Accord? Such decolonization is likely not in the minds of federal officials post-Charlottetown. It is likely never to be condoned by provincial governments, either, because it means lost revenue for the Treasury (particularly in the cigarette trade). I think the system will look like the neo-colonial regime already rejected by Aboriginal women. By neo-colonial I mean taking colonial suppressive practices and placing their care-taking in the hands of brown patriarchs (usually men, although maleness is not a requirement of patriarchy).

Allowing Aboriginal people to administer their own oppression is not freedom from colonization; it is brown oppression. Taking courts and handing them over to brown patriarchs, or creating brown police forces is not Aboriginal justice. It is the involvement of Aboriginal people in their own colonization. Handing sentencing over to patriarchs with no concern for female victims of crime places the suppression of Aboriginal women closer to home; it does not end female oppression. If neo-colonialism is the next stage in Canadian-Aboriginal development, Aboriginal women want that process de-sexed. This means involving Aboriginal women and their own organizations in the development and execution of plans to establish parallel Aboriginal neo-colonial institutions of justice. Justice as we know it is not for the protection of Aboriginal societies; it is for the protection of white people's property, including their women.

Legal theorists to date have not written anything impressive about Aboriginal justice, and few, if any, have proposed any worthwhile changes or reforms that do not smack of paternalism and colonialism. There has been some suggestion that Aboriginal people be allowed to administer their own 'by'-laws. And there's a sense that these aren't real laws. Real laws include the *Criminal Code*. When we look at the jurisdiction of an Aboriginal justice system, some Aboriginal people might take offence at being compelled to administer the *Criminal Code* in the community. Others might take offence at not being considered responsible enough to administer the Code.

With the death of the Charlottetown Agreement, we are back where we were before – in a state of confusion. The Law Reform Commission was asked by the Minister of Justice to examine Aboriginal and criminal justice administration. With respect to the *Canadian Charter of Rights and Freedoms* and its application to an Aboriginal justice system, the LRC said the matter should be referred to the Supreme Court of Canada! It suggested that Aboriginal peoples may not need the same legal rights other Canadians enjoy; for example, sections 7-14 of the Charter. There was a suggestion that Aboriginal peoples may not need a "right to counsel" and may not need a "right to silence". *Report 34* is likely to go the way of the Charlottetown Agreement if Governments accept recommendations that deprive Aboriginal peoples of legal rights guaranteed to other Canadians. Personally, I found the Report confusing, misleading, and without imagination.

If we are to learn something from the death of the Charlottetown Agreement, it should be that there is a requirement to respect individual rights. There is a need to accommodate group rights within the collective, including the rights of women, of children, and of those among us who come into conflict with our collective social values and social harmony. Women, youth and elders must be accommodated within the Aboriginal justice system. Their advice must be sought and followed. They must have a voice in determining the kind of criminal justice administration which we want and need within our communities.

The jurisdiction of a parallel Aboriginal justice system will necessarily be a blend of federal, provincial and tribal laws. In the two-tier government system now in place in Canada, the federal government passes the criminal laws and the provinces administer those laws. I think we have to recognize that we have a collective foggy memory of Aboriginal customary law, and even among laws which can be recalled, we may not want them put into effect. Do we want to cut off the ear of a woman who commits adultery? Why the ear? Punishment by physical mutilation may not be an acceptable form of punishment today. Nevertheless the jurisdiction is likely to be a mix of the Code and customary law and, I will later say, with the Canadian Charter thrown in for the benefit of those who disturb our social harmony.

There needs to be a holistic approach to jurisdiction and structure, and it will necessarily mean defining the whole range of powers of the Aboriginal state. If you looked at Nunavut, for example, it would not make sense to define jurisdiction and structure as having the ability to pass the laws and administer the laws, without also both enforcing the law and punishing offenders. What would be the sense of fly-in justice, or deporting prisoners to southern Canada from Nunavut? That is what I mean by holistic. It means prevention, enforcement, administration, punishment and rehabilitation, as well as community healing.

Among the First Nations there is a need to define the meaning of 'nation'. A nation is not an Indian Band as defined in the *Indian Act*. Yet there will be those – likely many – who will resist the restructuring of Aboriginal nations because it means some Chiefs will be out of a job, or will have a new and less powerful job. As Ovide Mercredi said, there are regional chiefs and then there are "powerful chiefs". The need for definition is practical as well as necessary. Today there are over 2,000 Aboriginal communities in Canada and 566 Indian Bands. Yet there are only 52 Aboriginal languages. If, as has been suggested by the Aboriginal Languages Steering Committee, each nation has one language, then the definition of Aboriginal nations should not be difficult.

There is a need to define the meaning of 'crime' and 'punishment' within a cultural context. This debate must involve women. Over the centuries, the *Criminal Code* evolved mainly as a tool to control men and men's crimes with little consideration for women, as criminals or victims. This debate will involve a consideration of culture, tradition, language and the roles of men, women and children. Is incest a crime? Is incest deserving of punishment? Is homosexual paedophilia a crime? What is the role of women within the Aboriginal community? Do we want to make and administer criminal laws and send our, mainly, men to foreign prisons? What is to be done about staffing prisons outside the Aboriginal communities with Aboriginal prison guards?

The young people need to be involved in defining crime and punishment, and they need some forum for getting control of their lives. The lesson we learn from Canadian society is that leaving children out of the criminal justice system

is not the answer. This is true partly because there are those who will exploit the young and drive them to lives of crime for which there is no punishment. On the other hand, children and young offenders also need a supportive environment if it is not found in the home. Like education, that responsibility rightly rests with parents.

Institutionalization is not the answer, although the death penalty may be appropriate in certain cases. Incest, child sexual abuse, physical violence against women and children, rape, homosexual paedophilia, and domestic violence are likely to be the crimes of most concern to women, youth and children, and elders. The nature of the relationship between criminal and victim and the crime are such that institutionalization will be a second choice after simply asking the perpetrator to stop the criminal behaviour. Children actually want a loving relationship with their parent, and prefer it to abandonment or the imprisonment of a parent. The Aboriginal state, however, has a duty to stop the abusive behaviour.

Enforcement within the community is an Aboriginal responsibility. No one wants chiefs and councils to have 'goon squads' in the form of Aboriginal, usually male, police forces. There is some question whether it is advisable to have police come from the same community because there is room for favouritism and selective enforcement. There is a question of balance between male and female police. There is also the consideration of how many police are too many. Do we want the best police enforcement in the world, or do we want to live in harmonious communities?

Legal Rights

The legal rights[7] contained in the Canadian Charter will apply to parallel Aboriginal justice systems in the absence of Aboriginal charters which guarantee individual rights within Aboriginal collectivities. Without setting out the legal and constitutional arguments, I accept that the inherent right to self-government is contained in section 35(1) of the *Constitution Act, 1982* as an existing Aboriginal and treaty right. This right predates Confederation and exists in and of itself without the need for further entrenchment. It is an unfettered right to the extent that it has not been infringed, abridged or regulated by law. Nevertheless, in the current constitutional framework, Indian governments today receive their authority from federal legislation, namely, the *Indian Act*. This law sets out all the powers which may be exercised by chiefs and band councils, and governs the lives of Indians from birth to the grave. It is in this context which parallel Aboriginal justice systems will be born. They will be creatures of federal and provincial law, and as such, will be subject to the *Canadian Charter of Rights and Freedoms*.

The Canadian Charter will apply because Aboriginal women through their associations have adopted a strong position on this point. They have lobbied governments and the Canadian public, and they have succeeded in their argument that it is inconceivable that only Aboriginal peoples should be deprived of Charter rights. For those who have said Aboriginal women should abandon the Charter because it is no good anyway, I know the reply has been, fine, abolish the Charter for all Canadians. Are Canadians willing to abandon their individual rights and trust governments not to abridge their rights willy-nilly? It is a foregone conclusion that unless Aboriginal women and their associations are willing to throw their individual rights out the window, the Charter will apply. If it does not apply, a stringent justification will be required under section 1.[60]

Let us suppose the federal and provincial governments agree with Tribe or Nation "X" that it may establish a parallel justice system to which the Charter does not apply. What kind of justification would be required under the *Oakes* test? It has been suggested that the Supreme Court of Canada has adopted a less stringent and a two-tier test for section 1. The less stringent test is reserved for those cases involving socio-economic issues where there are competing claims by different groups in society. The more stringent test may be used where the state is the antagonist against an individual.[61] I would argue that neither of these tests would be appropriate in a situation where the group rights of women and children are impaired to the point of obliteration. Depriving Aboriginal individuals of all legal rights under an Aboriginal justice system which likely will administer federal and provincial laws (for example, the Code) will not meet the "minimal impairment" test. Nor will it meet the proportionality test. What is the choice here? Maximum collective rights versus minimum individual rights? To establish a parallel Aboriginal justice system in a Charter vacuum is taking nonsense too far. Who can conceive of such a world? Mad[wo]men!

The *Oakes* test requires governments federally and provincially to adopt laws which impair Charter rights as little as possible. Courts are also required to keep in mind the objective of Government action. What would be the objective of Canada in seeking to deprive individual Aboriginal people of all of their legal rights under the Charter? To respect Aboriginal collective rights? If the Charlottetown Accord has taught us anything, it is that governments have no respect for collective rights of Aboriginal peoples. What was the purpose in imposing peace, order and good government on governments acting under the inherent right to self-government?

The objectives of Aboriginal peoples and the objectives of governments in establishing a parallel justice system are likely to be at odds. It is conceivable that governments will want Aboriginal peoples to administer Canadian laws like the *Criminal Code*. The Oka Crisis made it abundantly clear that the Rule of Law must prevail, and that Rule is White Rule. Although the *Criminal Code* makes some allowance for protecting property with arms, this went by the

wayside in dealing with armed Mohawks at the Kahnesatake barricades and on the Mercier Bridge. While the Mohawks argued sovereignty and bargained to have the Code not apply, governments argued stringently and with force that the *Criminal Code* applied to Indians on Indian lands, sovereignty aside. Sovereignty is never an issue. The establishment of a parallel Aboriginal justice system in Canada is going to come with a big price.

Not only the Charter will apply to parallel Aboriginal justice systems, but also the *Criminal Code*. What will be left to Aboriginal governments is what is left to provincial governments, and that is the right to administer the law. This may be accompanied by a right to establish the machinery of justice administration (police, courts, jails(?), probation(?)). Like provinces, Aboriginal governments can add their "laws" to the list of laws to be enforced. One woman has already asked: Does this mean we will have thousands of police in Aboriginal communities enforcing the law(s)? Jurisdiction, in this context, would seem to be the least negotiable item. Perhaps the battlelines will come mainly over structure and process.

It is over structure and process where conflict is most likely between male-dominated Aboriginal governments and women's groups locally, regionally and nationally. There is an assumption deeply engrained within the federal public service and among ministers that once the men are at the table, that is sufficient to negotiate. It is not sufficient or acceptable. The victimization of Aboriginal women and children so rampant within Aboriginal communities today at the hands of Aboriginal men will not be tolerated within the Aboriginal criminal justice system. Nor is it acceptable to simply consult Aboriginal male elders and expect Aboriginal women to fall in line, setting aside the desire to respect elders.

One of the most important struggles by Aboriginal women in the 1990s will be their resistance to the establishment of parallel Aboriginal justice systems which do not involve them equally in planning, design and execution. Aboriginal women already have their bodies on the line, and they are being beaten in incredible numbers by Aboriginal men in their homes and in their communities. This will not spill into the criminal justice system without female war cries. The choice is clear for governments: either involve Aboriginal women, or let the courts decide on the meaning of equality in this participatory democracy. It is participation which has been demanded by the Native Women's Association of Canada. It is participation which has been denied. That case is on its way to the Supreme Court of Canada, if not the Privy Council.

In conclusion, the basic principles and legal rights protected in the Charter will apply with full force to any parallel Aboriginal justice system. There is no justification possible under the current constitutional framework. What Aboriginal women have shown over the past 18 months is their preparedness to mount a full-scale assault against anyone wishing to deny individual rights and establish totalitarian regimes. To be an Aboriginal woman in Canada today is a disgrace to this nation. I would not push the women to the wall on Aboriginal justice.

Notes

1. Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereafter referred to as the *Charter*).
2. *Constitution Act, 1867*.
3. Catharine A. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" *Yale Journal of Law and Feminism* [1991] 4:13 at 14.
4. I discussed over lunch with John Briggs, then of the Law Reform Commission, whether he would consider the Native female perspective in preparing what is now Report #34 of the LRC. He and his fellow colleagues at lunch wondered what a Native feminist perspective might be. In fact, the LRC did solicit some input from Professor Mary Ellen Turpel and Professor Patricia Montour.
5. See the attached Bibliography for a list of studies on Aboriginal male violence against Aboriginal women and children.
6. See a speech by Mary Two Axe Early, 82, of Kahnawake, given at the Annual General Meeting of the Native Women's Association of Canada on file with N.W.A.C. The AGM was held at the Citadel Inn Ottawa, October 22, 1992.
7. In August, 1992, the *Victoria Daily Colonist* carried a series of articles on alternative Native justice systems, sentencing, sexual assault and Aboriginal women. In news reports, as well as verbal reports at meetings, Aboriginal women have voiced their opposition to Native law and Native justice because it is insensitive to the needs and views of Aboriginal women. It also does nothing to curb Aboriginal male violence against women and children.
8. Verbal complaints have been made increasingly at meetings of Aboriginal women during 1991-2.
9. These complaints have been raised in Saanich on Vancouver Island where Aboriginal sex offenders have been sentenced to the "Longhouse" The Longhouse is a physical and spiritual structure which has been ineffective in curbing sexual violence against women, children and elders in the affected communities. In the Maritimes where convicted men are serving alternative sentences in Aboriginal communities, some women have voiced their opposition to this practice as too dangerous. "It took us a long time to get rid of these men." Pauktuutit is taking a Court Challenge against the northern judiciary for lenient sentencing of Inuit sex offenders.
10. See press releases and statements by Gail Stacey-Moore, Speaker, Native Women's Association of Canada after August 20, 1992, including her Statement at Charlottetown, August 27, 1992. On file with N.W.A.C.
11. This part of the paper dealing with violence against Native women and children was completed jointly with Sharon McIvor, B.C. lawyer and Executive – West Region, Native Women's Association of Canada.
12. *Squamish Family Violence Prevention and Treatment Model Project* submitted to the Health and Welfare Canada/Indian and Northern Affairs Canada Advisory Committee on Family Violence, March 12, 1991: 82.
13. Sharlene Frank, *Family Violence in Aboriginal Communities: A First Nations Report* (Victoria, B.C.: Minister of Women's Equality, 1992): 16.
14. In a study conducted in Washington, D.C., the author wrote to State Governors asking for a report on numbers of Canadian Indian/Native children sent to their State for adoption. As many as 300 Native children from Winnipeg were sent to Louisiana in one year. No large scale study has been done on Indian child apprehension and adoptions by non-Natives.

15. Reported by the Indigenous Women's Collective, Manitoba, 1991.
16. Affidavit of Gail Stacey-Moore filed with the Federal Court - Trial Division in *N.W.A.C. et al* v. *Her Majesty et al*, March 1992.
17. *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991). See other studies included in the Bibliography.
18. Materials on file with Pauktuutit for a proposed Court Challenge against Her Majesty for lenient sentencing of Inuit sex offenders in the Northwest Territories.
19. See generally Inuit sexual assault cases, Northwest Territories 1986-1990.
20. Ibid.
21. See materials with the Provincial and Federal Minister of Justice on Native Justice Projects, particularly at Saanich, Vancouver Island, B.C. 1991-92.
22. Reported by the *Victoria Daily Colonist*, July 1992.
23. It is reported by Gail Stacey-Moore, Speaker, Native Women's Association of Canada, that domestic violence on the Kahnawake Reserve is sometimes effectively controlled by women as a collective. The offender receives his punishment at the hands of women.
24. Reports on file with the Aboriginal Women's Circle, Canadian Panel on Violence Against Women, Ottawa.
25. As reported by the *Aboriginal Justice Inquiry of Manitoba* 1990.
26. *Paul* v. *Paul*, [1986] 1 S.C.R. 306.
27. *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285.
28. Mary Ellen Turpel, "Home/Land", (1991) *Canadian Journal of Family Law* 17.
29. Ibid., 35.
30. Dumont-Smith, 27; Frank, 4.
31. Nl'Akapamux, *Family Violence Project: Final Report*, 1992.
32. Patterson, 62.
33. Patterson, 64.
34. Ibid.
35. *Communities Voice on Child Sexual Abuse* (Yellowknife: Native Women's Association of N.W.T., 1989): 5.
36. See press releases and position papers of the Native Women's Association of Canada responding to recommendations of the Ministerial Multilateral Meetings on the Constitution 1992.
37. Speech made by Sharon McIvor to the B.C. Indian Homemakers, Vancouver, 1992 on file with the Native Women's Association of Canada.
38. Ibid.
39. Speech on Native Women's Political Rights given on numerous occasion by Gail Stacey-Moore, Speaker, Native Women's Association of Canada. On file with N.W.A.C.
40. *B.C. Task Force Report*, 192.
41. I am speaking of the 120,000 Aboriginal women represented by the Native Women's Association of Canada, and its thirteen representative organizations.

42. The NWAC recognizes the interests represented by Pauktuutit (Inuit Women's Association), the National Metis Women's Association headed by Marge Friedel of Alberta, and the Indian and Inuit Nurses.

43. Mary Eberts, Memorandum of Law to Native Women's Association of Canada, 19 December 1991: 3 [hereinafter Eberts].

44. Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982* Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11, [hereinafter the Charter].

45. Kent McNeil, "Striking a Blow for Native Land Rights", *Globe & Mail*, 15 July 1992: A5.

46. [1989] 1 S.C.R. 143.

47. Eberts: 4.

48. [1989] 1 S.C.R. 1296 at 1332.

49. Eberts: 8.

50. Eberts: 12.

51. Eberts: 13.

52. Id.

53s. 91(24), Constitution Act, 1867.

54. I borrow this term from Senator Guy Williams, now retired from the Senate of Canada. A leader for forty years of the Native Brotherhood of British Columbia (a fisherman's union originally), he devoted his life to finding equity and justice for the "little Indian" "Who's looking out for the little Indian?", he often asked throughout the 1970s.

55. See Note 13.

56. Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 8 July 1980, 11:6.

57. Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, (Kingston: Queen's University, 1986).

58. Sanders, Note 4.

59. The legal rights contained in the Canadian Charter are:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> 8. Everyone has the right to be secure against unreasonable search and seizure.
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
> 10. Everyone has the right on arrest or detention
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
>
> 11. Any person charged with an offence has the right
> (a) to be informed without unreasonable delay of the specific offence;
> (b) to be tried within a reasonable time;
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
> (d) to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal;
> (e) not to be denied reasonable bail without just cause;
> (f) except in the case of an offence under military law tried before a military tribunal,

to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the commu nity of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

60. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

61. *Irvin Toy*, [1989] 1 S.C.R. 927, 993

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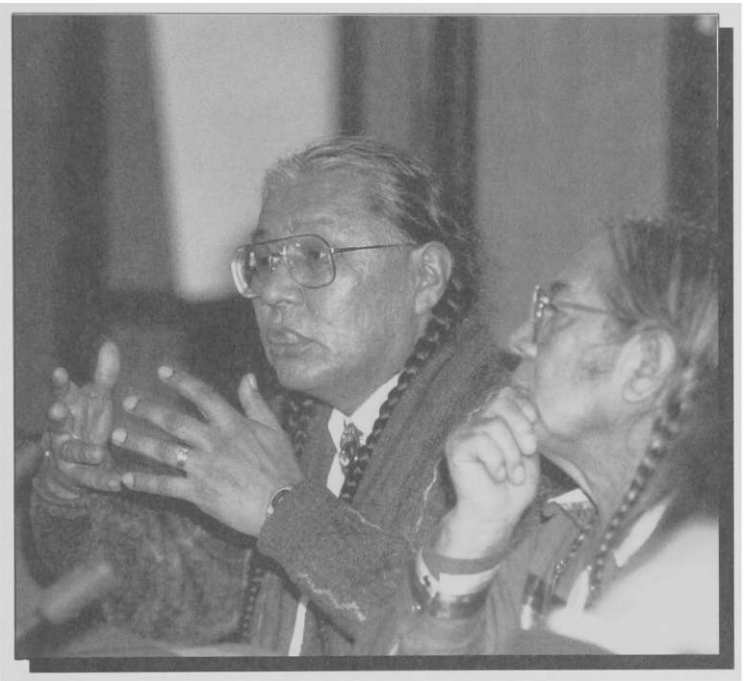
Six Aboriginal Community Justice Pilot Projects



Round Table participants: Joe Morrison, Justice of the Peace (Ontario), and Elder Ernie Benedict.

Northwest Territories Community Justice of the Peace Program

*Samuel Stevens**

Goal of the Initiative

The goal of this Territory-wide initiative is to improve the way that the justice system works at the community level. At the same time the government is encouraging communities to develop their own way of handling justice in their community.

Reasons for the Initiative

The justice system has been criticized by aboriginal people for a number of reasons. First, it is a "fly-in" court system. Most of the key justice personnel such as the judge, prosecutor, defence lawyer, clerk of the court and court reporter, usually fly in from outside the community. Second, the system is seen by many communities as not reflecting the procedures, values and principles that are important to them. Nor does it appear to do anything to change the accused person for the better. For many of the accused, the reverse in fact appears to be true. Finally, the communities feel that the system does not account to them, nor does it involve them in deciding the outcome of any change or what should be done with offenders from the community.

* For further information about this project, the contact person is Samuel Stevens, Yellowknife, Northwest Territories (403) 920-6439.

Strategy for Achieving the Overall Goal

Improvement to the Present System

The government is approaching the improvement to justice at the community level in two ways.

First, the government is trying to improve the way that the system delivers justice at the community level. Many of the communities are predominantly Aboriginal. For these communities the system is trying to respond more appropriately by respecting many of the principles that Aboriginal people feel are important and integral to their continued existence. Such principles as dealing with offenders in a more holistic way; i.e., looking at how to "rehabilitate" the offender with the help of the community by looking at what needs to be resolved in his or her mental, physical, emotional and spiritual self, and by getting the offender to right the wrong done to the victim and the community.

This approach emphasizes treatment, counselling, restitution of damaged or stolen property and compensation for injury to the victim or the community, rather than using a fine or incarcerating the offender. It also means encouraging communities to be involved in determining what should happen with offenders, including suggesting be involved in determining what should happen with offenders, including suggesting the resources that should be used in "rehabilitating" the offender and involving the community in supervising and administering various aspects of the disposition.

Second, the government is giving the communities the option of having more of the justice system based in the community. A major part of this is to develop a community based court that has the capability of resolving most of the justice related matters in the community. The Justice of the Peace Court provides an opportunity for this to happen. It allows a community to deal with criminal offences, of a summary nature, in ways that make sense to that community. It also allows the community to conduct interim child custody hearings under the *Child Welfare Act* and to issue peace bonds under s. 810 of the *Criminal Code*.

This means appointing Justices of the Peace from the communities who would preside over the court, using the RCMP as the prosecutors and court workers as paralegals to assist the accused. In all cases, the Justices of the Peace are appointed on the basis of recommendations from the community. Once the Justices of the Peace are appointed they are given in-depth training on how to carry out their responsibilities within the present system. Part of this training also focuses on respecting the values within the present system. Part of this training also focuses on respecting the values and principles that are important to Aboriginal communities and part relates to developing ways of being able to facilitate community involvement and taking into account the needs of the community.

Some of the things which the community can be involved in with the Justice of the Peace Court or the Territorial Court are:

- Elders assisting courts in sentencing – recognized leaders or elders would be invited to assist the courts in determining the appropriate disposition for offenders.
- Elders assisting in fact finding in trials – elders and recognized leaders could be of assistance to the courts in judging the credibility, facts, guilt or innocence of accused person.
- Alternative measures programs – communities could manage alternative measures or diversion projects, involving young persons or adults.
- Pre-sentence advice – communities could select persons to provide pre-sentence reports or pre-disposition reports to the courts for adults or young offenders who are being sentenced.
- Probation projects – communities could manage probation projects for adults or young offenders.
- Victim-offender reconciliation – communities could manage victim-offender reconciliation projects, either instead of prosecution or as part of post-conviction dispositions.
- Fine option and community service programs – communities could manage fine-option or community service programs for adults or young offenders.
- Life skills, substance abuse or bush camp programs – communities could manage rehabilitative programs for adults or young offenders in matters such as alcohol, drugs or other substance abuse, life skills or on-the-land programs.
- Bail supervision – communities could manage judicial interim release projects instead of an individual acting as surety in recognizances.
- Victim or offender advocates – communities could offer spokespersons for victims or offenders before the courts, or as independent friends of the court to describe individual or collective views on the seriousness of offences, the impact on victims and on appropriate sanctions which the communities would support.

A Justice System for the Community

At the same time as the government is working at improving the response of justice system at the community level, it has also been encouraging communities to look at developing their own unique justice system. A number of communities have begun to do this. Usually this process begins with the community inviting various justice system and government officials to the community to discuss justice issues and to give the community some ideas about the opportunities that are possible.

Fort McPherson is an example of a community that has taken the opportunity to assume some responsibility of dealing with justice matters in their community. As a result of some initial meetings between Judge Bruser and some interested

members of the community, a justice committee was formed. The justice committee, composed of a broad spectrum of people, including elders, began to come to court to say what they felt should happen to offenders from their community. Before the court arrived in the community each month, the justice committee was provided with a docket of the offenders who were to appear before the Territorial Court. The committee would then decide which, if any, of the matters before the court that they wished to make representations on.

Fort McPherson wants to continue to use the vehicle of the committee to improve the way the system decides justice issues in their community, but they also want to move more and more matters out of the present system back to the community through their justice committee. They view the committee as a first step toward self-government and a separate justice system and believe that working with the system is the logical next step in assuming greater and greater control and responsibility over justice matters.

What Works Well?

Many communities now have presiding Justices of the Peace who come from the community and who understand what will work and what will not. At this point approximately 40 per cent of the Justices of the Peace are Aboriginal. A number of these are unilingual. As well, approximately 40 per cent of the Justices of the Peace are women. The plan is to continue to give the Justices of the Peace ongoing training so that communities can assume greater jurisdiction within the present system. This would mean jurisdiction, for example, to deal with young offenders, child custody matters, some family matter and some civil jurisdiction. This approach gives the communities the capability of far greater control over how justice matters are handled than what has happened in the past. It also allows, to the extent that this is possible within the present system, for the court to respect the values and principles that are important to the community.

Second, the approach that the government is taking in encouraging communities to develop their own justice systems is consistent with the recognition that the community has the right to govern itself. This then allows for the community to develop a justice system that makes sense to it, to establish its own priorities, and develop at a pace that it feels comfortable with. It allows for the community, rather than the government, to have control from the beginning. The government's role is then to assist the community in putting in place the system of justice that the community wants.

Difficulties Experienced with the Initiative

In some of the communities we have difficulty in getting Justices of the Peace who are prepared to "judge" people from their own community. As a result, it is not always possible to establish a community-based court within the present system.

Second, the development of community-based justice will require resources. Although the government realizes that financial resources must be made available if the initiative is to be successful, it also realizes that one of the restraints on the immediate full development of justice systems for communities will be the lack of financial resources.

The success of community-based justice rests, to a large extent, with the communities. Until such time as communities indicate that they are prepared to get involved and take on some responsibility over justice matters, the government can only make those changes to the present system that seem to make sense for that community.

South Vancouver Island Justice Education Project*

*Tom Sampson***

Concepts of Aboriginal Law

The communities and tribal governments lived by a code of laws that eventually became known as "Indian Family Law". These Aboriginal common laws contributed to the development and harmony of our people for hundreds of decades and many generations.

Indian Family Law provided very advanced laws to govern the people and regulate family and community. The centre of judicial authority centres around the "longhouse and our Elders".

Salish Family Law is a code addressing standards of behaviour. Our traditional laws are not based upon punishment. The Aboriginal common laws of our land focus upon reconciliation, rehabilitation, and education. These standards of behaviour further address community, family, conservation, spirituality, economics and the environment, to name but a few areas of Aboriginal law.

Salish Family Law is a long-standing institution of our unique and distinct culture and heritage. According to our oral history, it is a gift from HALS, the Creator. This hereditary system has since time immemorial acted as the guideline to community behaviour and conduct.

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* The future of the South Vancouver Island Justice Education project is uncertain because of a loss of the support of some of the bands within the tribal council.

** For further information about this project, the contact person is Tom Sampson, Mill Bay, B.C. (604) 743-3228.

These laws governed our relationship with the land, the environment as well as with community and family. These natural laws defined our ties to the land and the obligation of the Aboriginal people to protect the land.

The laws of Aboriginal nations tie us to the land. In accordance with our heritage and beliefs, we do not own the land, the land owns us, and the First Nations have been placed upon this land as protectors of the land.

Our system of law was well advanced in terms of the present justice system. Aboriginal law includes the use of precedent, orally preserved.

However, these laws almost fell by the wayside. The arrival of the non-Aboriginal society saw the imposition of European laws, education and the disruption of our traditional governments and societies. The non-Aboriginals, through regulation and legislation, asserted controls and restrictions over our lifestyle – spirituality, political assembly, legal suit. In essence, a system of apartheid and a policy of assimilation were established with the ultimate goal of eradicating First Nations as entities in Canada.

Although many decades have passed, our system continues to survive. Our elders, in the traditions of our forefathers, have been handed down the knowledge of traditional law.

The Elders

The elders of First Nations have exercised traditional roles in our villages since time immemorial. The elders are today and have been traditionally the Teachers, the Lawgivers, and the Counsellors.

These roles have been well exercised even to present day in South Island. The Councils seek to apply cultural and traditional approaches to dealing with present day problems of youth, individual, family and community.

The elders have addressed personal, family, and property offences as well as many of the issues that arise in a court of law today.

Many have queried in the present day, "Do they exercise their authority and resolve without prejudice or bias?" Our elders, as do judges of the present day dominant society, levy their decision in an impartial but sensitive manner. It is difficult to maintain the appearance of impartiality but as a social obligation and responsibility to self, family and First Nations, our elders have acted in accordance with heritage, our teachings and with discipline.

As a means to address present day problems, our tribes are calling upon our elders to re-affirm their place in our villages in the capacity of adviser to youth, family, community and to our governments.

They deliberate over problems arising from causing offence to or violation of the community standards of behaviour. The elders are assisted by spokesmen who act as advocates. The affair is observed by witnesses whose function it is to relate the events and proceedings to the families and communities. They act as clerk of the court and as our historians in this regard.

Our system contains an appeal process. The stages of appeal are:

- appeal to Assembly in Council of the Chiefs and Elders;
- appeal to Assembly in Council of the families and membership.

The spokesmen and witnesses have functions at all levels of the process.

The Law

Aboriginal common law addressed many aspect of our daily lives:

- membership;
- adoption;
- marriage;
- family relations;
- conservation and management of natural resources;
- issues that would be addressed by the courts today.

One outstanding service of the Elders' Council is the mediation process to resolve disputes; i.e., child custody and access, property dispute, personal offences.

Punishment was never the theme of Indian Family Law. Rather our code was standard of behaviour addressed to the needs of individual, family and community. The considerations entertained the following concepts:

- maintenance of dignity;
- re-introductions
  - to self
  - to family
  - to community;
- apology and, from time to time, compensation;
- education;
- crime prevention;
- counselling (individual and family);
- rehabilitation.

Process

The Council of Elders convenes to hear matters that involve members of the First Nations of South Vancouver Island. Criminal and provincial offences are

diverted to the Council of Elders from the provincial court after consultation and consent for the diversion occurs between the offender, Crown Attorney, and chairman of the Tribal Council. The charges in the provincial court are stayed when the matter is diverted to the Council of Elders.

The Council of Elders applies cultural and traditional approaches in determining the appropriate disposition with the intention of procuring the rehabilitation of the offender and seeking reconciliation between the offender, with the involvement of his or her family, and the community.

In relation to family law matters, the Council of Elders convenes with the family members of the parties to determine what are the best interests of the child on child custody matters and the terms of separation and maintenance on spousal separation matters. The final determination of the Council of Elders is culminated into an agreement between the parties and is considered a consent agreement under the *Family Relations Act*. The provincial court judge endorses this agreement in his or her final decision.

Conclusion

Tribal justice functions may in general be applied under:

- alternative measures;
- diversion;
- dispute resolution mechanisms;
- family counselling.

Our studies to date indicate that our hereditary system may be applied to current justice issues.

The application of non-Aboriginal laws has placed many of our people in a adversarial position. With the assistance of our elders, the First Nations hope to reduce confrontation in the courts. As an alternative, under the guidance of our elders, we hope to avoid or reduce individual, family and community crisis.

The number of Aboriginal people in conflict with the law will be reduced if our elders are once again allowed to exercise significant influence our First Nations' daily affairs.

Aboriginal Legal Services Community Council of Toronto

*Jonathan Rudin**

The Community Council project allows the Aboriginal community of Toronto to take a measure of control over the manner in which the criminal justice system deals with Aboriginal offenders. The project is a variation on the diversion concept in use with young offenders. With diversion, an accused person who admits their guilt with respect to the charges they face does not go to court or get a criminal record for the particular offence; rather they receive an alternative type of sentence, such as restitution, community service, etc.

The Process

The Community Council project takes the diversion concept and applies it to adult criminal offenders. The system works as follows: The Aboriginal Legal Services Toronto (ALST) criminal court workers at College Park and Old City Hall approach the Crown Attorneys when they see an Aboriginal accused person they feel is an appropriate candidate for the Community Council. The decision by the court worker on whether a person can be helped by the Council depends on the resources available to the Council in light of the specific offence rather than on any particular characteristic of the offender.

* For further information about this project, the contact person is Jonathan Rudin, Toronto (416) 408-3964.

The Crown reviews the facts of the case and determines whether it is appropriate that the case go before the Council. Decisions by the Crown are made on a case-by-case basis, but the fact that the accused person might well go to jail if convicted of the offence will not prevent the matter from being diverted. In fact, individuals who have already been to jail are one of the Council's target groups.

If the Crown consents to the diversion, the offender is approached and asked if they wish to go before the Council. Since the Council cannot decide guilt or innocence, the accused person must first admit that they are guilty of the offence that they are charged with (or some lesser charge). Before the individual decides whether or not they wish to go before the Council, they consult with their lawyer or with Duty Counsel.

If the accused person agrees to go before the Council, the charges against him or her are stayed or withdrawn by the Crown Attorney. There is then no need for the person to go to court, nor is there by any record of the charges on the person's criminal record.

A Council hearing will usually have four people sitting. The Council reaches its decision by consensus. Lawyers may attend the Council hearing with their clients if they wish, but they cannot speak to the Council – it is the individuals who are involved with the offence who discuss their cases with the Council. Where the offence involves a victim, every effort is made to encourage active victim participation in the Council hearing.

Objectives

The role of the Council is to begin the healing process necessary to reintegrate the individual with the community. In determining how best to accomplish this healing, the Council will make a decision requiring the individual to do certain things. Any option is available to the Council in making this decision, including fines, restitution, community service, treatment suggestions or any combination of these – the Council cannot require a person go to jail. If an individual does not comply with a decision of the Council they are asked to reappear before the Council to explain themselves. In addition, a person who fails to comply with a Council decision will not be allowed to use the Community Council if they are again arrested on another charge. Charges will not be laid again if a person does not comply with a Council order, other than in exceptional circumstances. Charges can be brought back by the Crown Attorney if the individual fails to appear for the Council hearing.

The project has been operational since March 1992 and has, to date, diverted 41 cases. The Council now hears between eleven and thirteen cases a month. Although it is very early to draw any firm conclusions, it does seem that the program is successful. Attendance at hearings is very good – over 90% of those

diverted attend their Council hearing. This figure is particularly significant as many of those diverted have been convicted previously of failure to attend court. Compliance with Council decisions is also quite high. Statistics to the end of September 1992 indicate that over 87% of people coming before the Council have either complied or are in the process of complying with the Council's decision.

Teslin Tlingit Justice Council

*David Keenan**

Historically, Aboriginal people possessed accountable systems of governance for their communities. The systems were accountable to one another and were accountable to the people. The processes used today are somewhat different than those used by our ancestors; however, the standards and moral philosophies used historically and today are the same. Aboriginal people once possessed a system of maintaining order and harmony in their communities. Today, Aboriginal people must build on these standards and morals to create and design systems of governance for their communities which will restore the order and harmony they once enjoyed.

Aboriginal people have values in common with other Canadians; however, Aboriginal people prioritize their values differently. The Tlingit Council adheres to the philosophy that there is no dispensable person, especially a dispensable Tlingit person in their community. Further, the Council maintains that the members of the Tlingit community must possess the balance of power within the governing structure. Working under this philosophy, the Tlingit Council has attempted to define a process for the delivery of justice which the Tlingit people will accept and that all members of the community could adhere to.

* For further information about this project, the contact person is David Keenan (403) 390-2007.

The Process

The judicial powers of the Teslin Tlingit First Nation are vested in the Teslin Tlingit Justice Council. The Justice Council is composed of the five Clan leaders who sit in on the circuit court hearings and make sentencing recommendations. The Council establishes its own procedures and exercises its authority and responsibilities in accordance with the traditional principles of Tlingit customary law.

The five Clan leaders are all men. However, the women of the community appoint the men who sit on the Council. In this manner the women of the Tlingit community are involved in this justice initiative.

The five Clan leaders or their designates sit with the Provincial court judge and act as advisers in sentencing. The Clan leaders do not read case reports or personal histories of the offender, since the Clan leaders are acquainted with the members of their community.

The Clan leaders consider the personal background of the offender in the determination of his or her final disposition. The offender will speak of their personal history as to why he or she has breached the law. In this regard, the offender may speak of the physical and sexual abuse suffered in the high schools or the residential schools or what else may be the source of their personal problems. In this method, the Clan leaders assess the real underlying problems effecting the individual who is before them. The Clan leaders will then determine an appropriate disposition which will positively assist the offender and benefit the community as a whole.

Conclusion

This renewed prominence of the Clan leaders is breeding in the community a respect for the traditional ways and the traditional values. In this manner the Elders have acquired the balance of power within the Teslin Tlingit community.

The process of empowering the people has created a community circle. The community members have shown a respect for the Council and a support for the justice initiative. The whole process has involved the entire community. The concept of the community circle is a very powerful tool; the offender does not feel that he or she is being punished or coerced, but rather the offender feels the positive support of their community.

The Council believes that sending people away to jail is futile. Rather, the Council believes the community has a better solution to offer. The philosophy developed by the Tlingit community is a philosophy of healing, which generates the creation of a healing process that doesn't concentrate on the offender exclusively, but also includes the offender's family and the peripheral problems of the offender's family and the community as a whole.

Attawapiskat First Nation Justice Pilot Project

*Reg Louttit**

Attawapiskat First Nation is located on the west side of James Bay approximately 850 air miles north of Toronto, Ontario. It is a remote, isolated, Cree-speaking community of approximately 1,300 residing people. Access is by air year round, as well as by the winter road in the winter and boat in the summer.

The pilot justice project arose as a result of discussions in the Working Group on the Administration of Justice in the Remote North (now the Working Group on Justice in Nishnawbe-Aski Nation). In 1989 the then Attorney General of Ontario, Ian Scott, invited Nishnawbe-Aski Nation to provide two proposals for community-based justice projects in Nishnawbe-Aski communities and provided funding for the development of two proposals.

Attawapiskat First Nation was one of the two communities invited by Nishnawbe-Aski Nation to prepare proposals.

Fletcher and Fletcher Association of Moosonee, Ontario, prepared a report which was submitted to the Attorney General. The Ministry of the Attorney General and Attawapiskat First Nation entered into a contract for fiscal year 1990-91 which was then renewed for 1991-92 to develop and implement a justice project in Attawapiskat.

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* For further information about this project, the contact person is Joe Louttit, Attawapiskat, Ontario (705) 997-2276.

The Ministry and the Attawapiskat First Nation had an agreement to conduct an evaluation; Obonsawin-Irwin Consulting, Incorporated of Toronto, Ontario, was awarded the task, which was finished on June 1992. Both the Ministry and the Attawapiskat First Nation are implementing the Evaluation Report's recommendations.

Staff from the Ministry of the Attorney General, the Office of the Co-ordinator of Justices of the Peace and the local Justice of the Peace provided educational assistance to the Elders' Court, staff of the project, and the Chief and Council of the Attawapiskat First Nation.

The Co-ordinator and other staff of the project are members of the Attawapiskat First Nation and are appointed by the Chief and Council.

The project commenced on April 1, 1990. The Elders' Court is composed of a panel of three elders appointed by the Chief and Council. The panel for the project was formally sworn in by His Honour Senior Judge Michel on October 22, 1990, and the Attawapiskat Elders' Court commenced formal hearings on December 6, 1990.

With respect to the results of the Obonsawin-Irwin Evaluation Report, the Attawapiskat First Nation is in the process of appointing three additional elders as well as forming a justice steering committee.

The Process

The Elders' Court hears cases involving members of Attawapiskat First Nation in relation to offences committed on Attawapiskat First Nation territory that would otherwise be heard by the regular circuit court in Attawapiskat.

Adult and youth cases are diverted to the Elders' Court from the regular court system following consultation between the Coordinator and the Crown Attorney. Criminal and Provincial charges are diverted after charges are laid. *Indian Act* by-laws charges are diverted either before formal charges are laid or following formal charges. Before a case is diverted, formal charges in the regular court system are stayed.

Currently, most criminal and by-law charges are being diverted to the Elders' Court. Charges that are not diverted are more serious offences such as attempted murder, sexual assault, aggravated assault, and cases generally where the Crown Attorney and the Co-ordinator agree that the accused will not benefit from appearing before the Elders, Court or where it appears that jail is the most appropriate sentence to be asked for in the regular courts.

An accused may refuse to be diverted to the Elders' Court. He or she also has access to legal advice before any diversion occurs. Once the Elders' Court has heard a case, the option lies on the accused of complying with the elders' panel or with having the case returned to the regular court system.

The Elders' Court has handled over 330 cases since December 1990, of which approximately 22 have been returned to the regular court system.

The Elders' Court conducts public hearings entirely in the Cree language, unless there are persons involved in the process who wish to speak in English; then a translator is provided.

There is no prosecutor or defence counsel in the Elders' Court. The First Nations constable who laid the charge will advise the Elders' Court why he laid the charge and provide relevant information surrounding the charge. The accused, any witnesses, and any family members who wish to address the Elders' Court, will then discuss the case with the elders.

The Elders' Court has the authority to decide all matters relating to the cases before it, including whether or not the individual is responsible for the offence.

The Elders' Court applies community values to make a determination of what measure is appropriate for assisting the offender, his or her family and the community. Such measures could include community service, counselling, restitution, or a monetary payment.

The Co-ordinator oversees completion of these measures by offenders.

Sentencing in the Ontario Court (Provincial Division)

The provincial court is a circuit court sitting approximately four times per year in Attawapiskat.

When the provincial court presides in Attawapiskat, the elders' panel sits as an advisory sentencing panel with the provincial court judge.

Court of Kahnawake

*Winona Diabo and Joyce King Mitchell**

History

The Court of Kahnawake has been in operation at the present level for approximately twelve years, since 1980. For several years previous to this time, a Justice of the Peace did hear some traffic offences and minor offences, though not held on a routine basis. The need to have a more structured or formalized court was evident in 1979. At this time, the community as a whole wished to have an Aboriginal policing body formed, which is called the Kahnawake Peacekeepers. In turn the court system was formed to process ticket infractions and criminal offences which occur within the Territory. Only indictable offences and cases not within our jurisdiction are being heard in the Longueuil Municipal Court.

Given the increase in community population, the increase in non-Aboriginals travelling within the Territory, and our own drive for self-determination, our court is now striving to attain more jurisdiction and upgrading the services which are required in our community.

In the past, court sessions were held once a week. There was one court clerk and one Justice of the Peace, Mr. John Sharrow. He travelled to Kahnawake from Akwesasne weekly in order to hear traffic and criminal offences. Since 1985,

* Joyce King Mitchell is a justice of the peace with the Court of Kahnawake. For further information about this project, the contact person is Winona Diabo, Court Administrator, Kahnawake, Quebec (514) 638-5647.

there has been a need to hold court sessions twice a week. Two more Justices of the Peace had been appointed and began sitting in March 1985; Mr. Michael Diabo and Mr. Samuel Kirby. An assistant court clerk was also appointed to assist the senior court clerk. (Mr. Sharrow retired at this time.)

Since 1991, we have been requiring the services of Ms. Joyce Mitchell, Justice of the Peace from the Mohawk Territory of Akwesasne. She sits with a woman's touch and provides easy access and understanding to our Aboriginal women who may appear as an accused or a victim.

All court personnel are Aboriginal; only the Prosecutor, Mr. Pierre L'Ecuyer is not. There has been an increase in defense attorneys coming to our court; in the past, there may have been one or two attorneys interested. Since 1988, there have been approximately 25-30 defense attorneys on record, with many being paid by Legal Aid. The community also has the services of an Aboriginal court worker of the Native Para-Judicial Services of Quebec. She assists the accused and refers them to attorneys. The Aboriginal court worker has become very important to the community and the court system in Kahnawake.

Objectives

Because the Court of Kahnawake does not receive any funding, all salaries and operational costs are covered through the tickets and fines collected. Our main objective would be to receive adequate funding in order to cover all salaries and operational costs.

Another objective would be in the area of jurisdiction and growth. The court needs to provide more services to the community, such as Youth Court, Small Claims Court, Community Works, and a Mediation Court. The desire to solve our own problems and deal with issues from an Aboriginal view is more evident today.

Because of the needs mentioned and the increase in caseloads, we require the services of two additional Justices of the Peace. The documents required have been sent to Ottawa, and we are still awaiting the appointments.

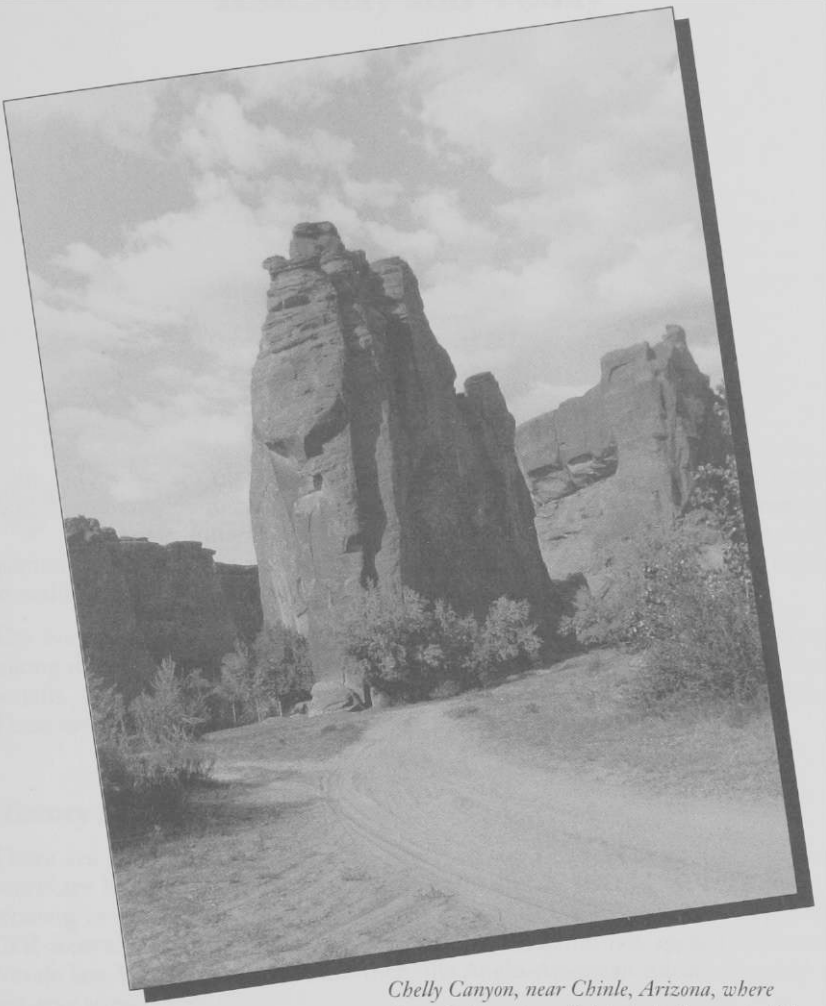
The desire to implement traditional values within the court system is also of great importance. Our Justices of the Peace have instituted traditional values within their sentencing (i.e., assaults, property damage), but this is difficult to implement exclusively as non-Aboriginals are not subject to these sentences. Our court roles contain both Aboriginal and non-Aboriginal people and set procedures are followed. A mediation court system would be beneficial for Aboriginals, provided set criteria are adhered to.

Concerns

- The will of the community has been to return to traditional values and a traditional way of life. Our court has been subject to some ridicule because of the implementation of the *Criminal Code* of Canada and Quebec *Highway Safety Code* (incorporated within our Traffic By-Law). We also have a set of by-laws which are presently being amended. A set of traditional laws and a framework for court proceedings would have to be formalized.
- Should the above traditional aspect become reality, how would the Court handle the non-Aboriginals? Of all traffic infractions, 90% are committed by non-Aboriginals – 90% of all criminal or by-law offences are committed by Aboriginals. Two sets of laws and procedures cannot be followed or we would be judged as being unfair and prejudiced. Our present system ensures that all offenders are treated equally, and sentencing is uniform.
- The Court of Kahnawake must become recognized as a role model by the Department of Indian Affairs. We have been the only Aboriginal court system functioning within Canada, and we take pride in our accomplishments. We have been successful and are ready to undertake more responsibility concerning Aboriginal issues and justice.

There are many issues and concerns facing us that need to addressed. Our desire for self-determination and the ambition to achieve will always exist within our community and other Aboriginal communities as well.

Navajo Justice Experience – Yesterday and Today



Chelly Canyon, near Chinle, Arizona, where Commissioners travelled to study the courts of the Navajo Nation.

Navajo Justice Experience – Yesterday and Today

*Robert Yazzie**

The Navajo Nation has a formal court system that uses judges, juries and lawyers to resolve disputes. It is based on the adversarial system of the Anglo-American model. The Anglo-American model relies on confrontation and coercion to control people and to force them to do or not to do something, according to a court decision.

The Navajo Nation also has a traditional peacemaker system, which involves talking things out. It uses no judges, no juries, no lawyers, no police officers, and no jails. To restore peace and harmony, consensus is used for dispute resolution. These are Navajo ways and they still have a place in the modern world.

History of the Navajo Courts

There are approximately 170 tribal courts in the United States. The Navajo courts are 100 years old. They were first established in 1892 by the federal government as the Navajo Court of Indian Offenses, or CFR courts. They applied CFR federal regulations and CFR court rules. They did not apply traditional Navajo law. With regard to the law then, the Anglo-American culture was only a one-way street.

The intent of the CFR courts was to destroy the traditional Navajo legal system and destroy both Navajo values and the Navajo way of life. Fundamental Navajo

* Chief Justice, Navajo Nation, Window Rock (Arizona).

laws and practices were outlawed. For example, traditional Navajo marriage and divorce proceedings were prohibited. The ultimate goal of the CFR courts was to 'civilize' Navajos, i.e., to think, speak, and act like Anglos.

Today, the CFR courts no longer exist. In 1959, the Navajo Nation Council created the Navajo Tribal Courts to keep the states from asserting jurisdiction over the Navajo Nation.

In 1985, the Navajo Nation enacted the *Judicial Reform Act*, which defines the Navajo court system today. There are seven tribal courts located throughout the Navajo Nation. These courts have four divisions:

1. District Court
2. Family Court
3. Small Claims Court
4. Peacemaker Court

The Navajo Nation courts serve a Navajo population of 200,000 within 25,000 square miles of Navajoland within the states of Arizona, New Mexico, Utah, and Colorado, (roughly the size of the State of West Virginia).

There is one appellate court, the Navajo Nation Supreme Court, located in Window Rock, Navajo Nation (Arizona). One Chief Justice and two Associate Justices sit on the Supreme Court. We hear appeals from the trial courts on questions of law.

The Navajo Nation has no constitution. We have a three-branch government. The Navajo Nation Council is the legislative branch, which makes laws. The executive branch carries out the laws, and the judicial branch interprets and applies the laws. Under this form of government, there is a separation of powers, with checks and balances.

How Are Cases Decided in the Navajo Courts and What Laws Apply?

Navajo Nation courts are courts of record. Trials, hearings and proceedings are recorded.

The Navajo courts apply criminal laws enacted by the Navajo Nation Council and civil laws of the Navajo, federal, and state legal systems. The courts apply the Navajo law of statutes, case decisions, and Navajo common law. Where no Navajo law exists, the courts may apply federal or state law. (only as *guidance, **not binding***)

Navajo courts today are being pressured to become mirror images of the state courts. Even then, we survive and continue to operate with strong Navajo influence evident in our courts.

We have extensive court rules governing how cases are handled and decided. Court rules are designed to ensure fundamental fairness and assure that cases are decided in a fair and impartial manner.

What Types of Cases Are Heard?

Navajo courts hear criminal cases involving a maximum sentence of no more than six months in jail and/or a $500 fine. Serious offences are tried in both the Navajo and federal courts. Navajo courts hear all civil cases, ranging from torts to contracts to consumer, probate, and domestic relations. Children's cases are handled with care.

Our 1992 court statistics show that the Navajo courts had a caseload of 85,198 cases. Of these, 16,840 were criminal cases; 422 were civil cases; 24,075 were traffic cases; 1,380 were family court cases; and 22 were Supreme Court cases.

The Navajo Supreme Court issues written opinions on questions of law, with preference in applying Navajo law. In certain cases involving issues of first impression, trial judges issue written opinions. Twenty-three years ago, in 1969, the Navajo Court of Appeals, now the Navajo Supreme Court, issued its first opinion. Today, all Navajo court opinions are reported in the *Navajo Law Reporter* and the *National Indian Law Reporter.*

What is the Jurisdiction of the Navajo Courts?

The Navajo courts hear cases filed against any Indian who commits a crime within the Navajo Nation. There is no criminal jurisdiction over non-Indians who commit crimes within Navajo territorial jurisdiction.

Navajo courts are courts of general jurisdiction in civil matters. They can hear cases involving any type of civil claim, and the amount in controversy is unlimited. Although there is no criminal jurisdiction over non-Indians, Navajo courts can hear civil cases filed against non-Indians.

Territorial jurisdiction is defined by Navajo and federal statutes. Boundaries include all reservation lands (25,000 square miles), all allotted lands, all fee lands, and all dependent Indian communities.

Navajo Judges

There are seventeen Navajo judges. Of these, three sit on the Supreme Court as justices, and fourteen are trial judges. Seven of the judges are women. Three judges are law school trained.

The judicial branch employs approximately 140 persons, including court clerks, bailiffs, secretaries, probation and parole officers, and peacemaker liaisons. There are five court staff attorneys, the majority of whom are Navajos.

How Are Navajo Judges Selected?

The Navajo Nation chooses to appoint its judges rather than elect them. When a judgeship vacancy occurs, Navajo candidates who meet the qualifications submit an application, which is reviewed and screened by the Navajo Judiciary Committee, a standing committee of the Navajo Nation Council. The committee evaluates each applicant based on educational attainment, professional experience, and knowledge of Navajo culture and the Navajo language. The top qualifying candidates are recommended to the Navajo Nation President. The President makes a final selection, which is submitted to the Navajo Nation Council for confirmation.

Navajo Bar Members

Only members of the Navajo Nation Bar Association are allowed to practise before the Navajo courts. Currently, there are 450 Indian and non-Indian bar members who reside in Arizona, New Mexico, Utah, and Colorado. To become a bar member, a person must pass the Navajo Nation bar examination. The exam takes up to eight hours to complete the test on Navajo law.

Right to Counsel

The 1968 *Indian Civil Rights Act* provides that a person has a right to be represented by legal counsel in a criminal trial at his or her own expense. Where appropriate, the Navajo Nation courts may appoint legal counsel to represent indigent defendants. Members of the Navajo Nation Bar Association are obligated to represent indigent defendants on a *pro bono* basis.

Court proceedings are conducted in both Navajo and English. Court interpreters are used to ensure that Navajo-speaking litigants understand what is being said in court proceedings.

Jury Trials

Jury trial is allowed as a matter of right in criminal cases, but is not an absolute right in civil cases. Both Indians and non-Indians serve as jurors. Jurors are selected in accordance with court rules. They are a fair cross-section of the community. Six jurors sit on a case.

The Navajo Peacemaker Court: Contrasts of Justice

The adversarial system of the Anglo-American courts is a 'vertical' system of justice. In this vertical system, judges sit at the top over lawyers, jury members, parties, and all the other participants in court proceedings. Judges possess a tremendous amount of power to affect human lives, either to harm them or bring goodness to them. The parties involved in the dispute do not have as much power. Someone from on high dictates how the dispute must be handled, and everyone must obey the judge's order. This vertical system relies on coercion to control and force people to do or not do something, according to the judge's decision.

Navajo Supreme Court Justice Homer Bluehouse always said that when someone prevails in the adversarial system, he or she walks out of the courtroom with "tails up", and the loser walks out with "tails down". It is a win/lose situation, a zero-sum game. It is not a win/win situation. The adversarial system is a system of absolutes. One party is the 'bad guy', and another is the 'good guy'. One party is wrong, while the other is right.

In the adversarial system the goal is to punish wrong-doers and teach them a lesson. In a criminal case, the defendant is usually punished by serving a jail term or paying a fine. It is punishment for the sake of punishment, but nothing is done to solve the underlying problems that caused the dispute in the first place. Victims in criminal cases are essentially without power, having little or nothing to say about what relief the court should grant. The real rights and needs of the victim may be ignored, and the end result is that little or no real justice is done. In this system, there is not just one victim, but many victims: family members, relatives, and the community are all affected by the dispute and the decision. They go to court without a voice, and they leave the courtroom empty-handed.

What is the Navajo Peacemaker system? Traditionally, Navajos used a peacemaker, called a *naat'aanii*, to restore peace and harmony. Peacemakers helped preserve ongoing relationships, within both immediate and extended families. The parties settled their disputes by talking things out and settling their problems by consent. Today, the Navajo courts are reviving these methods of dispute resolution. The Navajo Peacemaker system has one purpose: to allow people to solve their own problems without interference of judges or attorneys.

Is the Peacemaker System Better than the Adversarial System of Justice?

Let us make some comparisons. In the Anglo-American vertical system of justice, human beings are placed in ranks from top to bottom. In the Navajo Peacemaker system, all human beings are treated as equals. This is a 'horizontal' system.

While the vertical system uses judges, lawyers, parties, bailiffs, and police officers, the peacemaker process does not divide people into divisions, much less rank them. Anglo-American courts rely on control and force. Cases are resolved by rules and regulations. In peacemaking, there are no rules to dictate how proceedings should be controlled. Force, coercion, and control are completely left out.

In the Anglo-American courts, parties are always labelled as being on one side or the other. In the peacemaker process, parties are not labelled as plaintiffs or defendants. No one is treated as the good guy or the bad guy. Rich or poor, educated or not, everyone is treated as equal. Social and economic status has no place in the peacemaker process.

In the Anglo-American courts, justice can sometimes be bought with money. Money buys lawyers, and the best lawyers cost the most money. The party with the most money can 'buy' justice because he can afford the best lawyer and legal procedures money can buy. In the peacemaker process, legal fees are not needed because lawyers are not hired to represent parties. Rather, a peacemaker works so that justice can be done for everyone involved in the dispute. Another difference is that in Anglo-American courts, parties may not communicate freely with judges. To do so might prejudice the rights of the other party. In the peacemaker process, you can speak with the *naat'aanii* to help you work out the dispute and come to a solution. He or she does not to act as policeman.

In the Anglo-American courts, when justice is rendered, it is 'blind' justice. It is not true justice that repairs damaged relationships and restores harmony to the family, community, and society. Adversarial court systems promote greater adversarial relationships and disharmony, rather than true justice. For example, a husband and wife may divorce. They fight more after their divorce, and in the process, their children are forever wounded from the experience.

In the peacemaker process, the *naat'aanii* aims at one goal, and one goal only – restoring true justice among individuals, families and the larger community and society. This is done by allowing the wrong-doer and victims to talk things out. 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 *k'e bil nil*, or harmony. The ultimate goal of the peacemaker process is to restore the minds, physical being, spirits, and emotional well-being of all people involved.

Today, peacemaking is being revived. Peacemakers are chosen by each chapter. We have a total of 110 chapters throughout the Navajo Nation. Currently, 114 peacemakers have been selected from 54 chapters. The selection of peacemakers is based upon the respect, integrity, and good character of an individual who lives in the community. When a chapter does not elect a peacemaker, the Navajo court may appoint one.

The peacemaker does not have to possess any special knowledge, position in society, or education degree to be a maker of peace. He or she need only possess the skill of being able to get people to talk out their problems with one another. In the Peacemaker Courts, peacemakers help resolve all types of cases, both civil and criminal.

Does the Navajo Peacemaker System Really Restore Peace and Harmony?

The adversarial system does not solve people's problems. Imposed methods that are not in harmony with people's notions of right and wrong do not enforce right or deter wrong. Navajos deal with the same problems as the general American society – domestic violence, gang activity, fighting, disorderly conduct, public intoxication and driving while intoxicated. The general society attempts to deal with these problems by using force (in the form of jails). That does not work, and it will not work for Navajos. Rather, if the Navajo courts institutionalize Navajo justice concepts – equality, talking things out and consent – that will respond to expectations that Navajos already have.

Adversarial methods of adjudication ignore concepts of harmony and the restoration of ongoing relationships. They represent conflict that is suppressed by force. As it was with the Rodney King situation in Los Angeles, injustice fuels underlying problems and sparks the discontent that comes from ignoring real problems. As Navajos, we say we must work to solve problems among individuals so that they can resolve the problems that affect the community.

Conclusion

The Commission invited the Navajo Nation delegation here to tell you how our justice system works. We ask these questions: Does native justice work? The answer is yes. Does it work well? The answer is again, yes.

We began with the American state adversarial method. Navajo judges in the early imposed courts used their own law when the Bureau of Indian Affairs wasn't looking. About ten years ago, Navajo judges decided openly to use our values as law. We are in a process of rebirth, and it is exciting. We find that we must modify the state system to fit our values, needs and hopes. In our Native tongue, *hozhojii*, means peace and harmony. This is the root to our system of justice. The key to the process for us Navajos is using our people's beliefs and a system of Navajo plan.

We have been asked to advise Canada from our experience. There are challenges. The process is not easy. Navajo elders say, "Getting something good is hard. It requires struggle and hardship."

You will ask basic questions: What is 'law'? What is 'justice'? Who are we as Aboriginal peoples? If given the choice of solving our own problems, what will we do?

First, have no fear! Justice is serious work. You have the will and the knowledge to make it work.

Second, give Aboriginal peoples the freedom to make justice work.

Third, support Aboriginal government – give it the resources necessary to solve local problems.

Fourth, support the process. Identify and recognize your conflicts. Then work together to solve them.

Most of all, Canadian government leaders, do not try to dictate justice. Do not tell us our law. We are Navajos. We are Diné. We have our own law – we've had it for centuries. We intend to continue as Navajos. We will use our own law and justice methods, whether you like it or not. Don't try to stop us. Simply join us. You will learn something about yourself along the way.

Daily Summaries of Proceedings

Commissioner Bertha Wilson, Commission Co-Chairs Georges Erasmus and René Dussault, and Commissioners Viola Marie Robinson and Paul Chartrand.

Opening the Round Table on Aboriginal Justice Issues: "A New Partnership Based on Mutual Respect"

Round Table Chair Murray Sinclair called the meeting to order and asked Elders Ernie Benedict and Flora Tàbobondung to say the opening prayer. Royal Commission Co-Chair Georges Erasmus welcomed the participants and reminded the gathering of the importance of "a system of law for Aboriginal people, who have started to reassert their own self-determination."

Mr. Erasmus recalled that the face of justice in this country was always evidence of the authority of a system foreign to Aboriginal people. "If Aboriginal people are to assert authority over their lives, justice is one area that we will have to take very seriously," he said. Struggles for Aboriginal self-determination that centre on self-government do not always encompass control over justice systems, but the subject warrants a full exchange and debate. Control of justice is necessary if Aboriginal people are to become caretakers in their own land. He concluded by asking if the present justice system could be modified to reflect the needs of Aboriginal people.

Co-Chair Judge René Dussault noted that the Royal Commission has been able to take advantage of many past inquiries into Aboriginal justice issues, and "we are conscious that many questions have to be defined." Some of the first questions to be addressed are the five fundamental questions included in the Round Table agenda, but these questions are not the only ones. "In part, we have to see if the present system could be changed," and whether the changes needed are merely administrative or more fundamental.

Mr. Dussault asked how the adversarial nature of the justice system would fit into an Aboriginal value system. "We have to come up with a better understanding of what's at stake." The Round Table on Justice Issues is part of a series of round tables which the Royal Commission hopes will help develop policy on critical issues. Any solutions or recommendations about the justice system must be seen to be feasible to Aboriginal people and also be accepted by the ministries of justice across the country.

Commissioner Bertha Wilson recalled that as the Royal Commission travelled the country, visiting Aboriginal communities and hearing from the grass roots, she has come to understand that there are at least two dimensions to the issue. The first is that justice must be the yardstick of a relationship between Aboriginal and non-Aboriginal peoples, a new partnership based on mutual respect. Second, justice, in the narrower and more technical sense, is the aspect that is not being provided for Aboriginal people in the existing system.

"Aboriginal people find the justice system alien to their ways," Ms. Wilson continued. They have difficulty with the adversarial, confrontational nature of the process and they view the objectives of punishment and rehabilitation as incompatible. "Many people in white society share that view," she added.

Canada has more people behind bars, proportionate to its population, than almost any other western country, and years behind bars do not rehabilitate. Many incarcerated people find new ways to channel their anger and frustration – committing more serious crimes. "We all know the revolving door syndrome," Ms. Wilson recalled.

"Now is an opportune time to view the justice system through Aboriginal eyes," to learn how Aboriginal people would deal with anti-social behaviour in their communities, she continued. Aboriginal people are disproportionately represented in prison, and "our system has not worked for them any more than it has worked for non-Aboriginal people." The purpose of the Round Table is to consider why this is the case. Ms. Wilson concluded with her hope that this meeting might lead to a transformation of the process and "bring about a deeper and more profound understanding of what the concept of justice is all about."

Panel Presentation of Discussion Papers

Moderator Vina Starr said that perhaps the failed Charlottetown Accord was indicative of efforts undertaken to forge a new social compact between the new Canadians and the old Canadians – Aboriginal people. She hoped the efforts would lay the groundwork for Aboriginal people and others to work towards developing "a justice system that represents us all." She introduced Ms. Deborah Hanley, the first of the five panellists.

Ms. Hanley, Royal Commission Co-ordinator of Women's Issues, presented the first paper, "Aboriginal Justice Inquiries, Task Forces and Commissions: An Update," a review of eight studies initiated by federal and provincial governments in response to a growing recognition that the existing criminal justice system has failed to meet the needs of Aboriginal people. More than 30 government-sponsored justice studies have been undertaken since 1967, and the studies have led to numerous recommendations, many of which have not been implemented.

"The fact that these recommendations are repeated reinforces the awareness of the inadequacies of the existing system, as well as the need for immediate action," said Ms. Hanley. All the inquiries concurred that Aboriginal people who encounter the justice system are confronted with both overt and systemic discrimination and that this discrimination is one reason why many Aboriginal people have not received due justice. The majority of the reports focus on reforms to the existing justice system, but at least two specifically advocate separate Aboriginal justice systems.

Recommendations have not been implemented because of a lack of political will, or because the initiatives are impeded by lengthy bureaucratic process and funding constraints. Priority is often given to reforms that do not require significant structural adjustments, transfers of control or consensus of all parties. Critics note that these reforms do not address the heart of the problem: the marginal socio-economic position of Aboriginal people in relation to the dominant society.

The majority of reforms have focused on the police, and police forces have responded by initiating cross-cultural training, affirmative action programs and Aboriginal liaison positions. But, Ms. Hanley noted, "the fact that some programs existed prior to the release of inquiries which recommended that they be established raises doubts over their previous effectiveness."

Many people believe that major social and economic reforms are necessary before significant change can occur. The existing system treats crime and the administration of justice in isolation from other issues. It will not be until the definition of justice itself is altered to include an Aboriginal perspective that it will be able to meet the needs of Aboriginal people.

Many Aboriginal groups have expressed dissatisfaction with the lack of government response to recommendations for justice reform. For example, the Manitoba Metis Federation felt that one of the most important recommendations of the Aboriginal Justice Inquiry was the establishment of a Métis Child and Family Service Agency, but this recommendation was not carried out. Métis control over child welfare addresses a persistent problem area of Métis involvement with the justice system, and would ultimately reduce the number of individuals who subsequently come into conflict with the law.

Aboriginal women's groups have also expressed concern over both the effectiveness and validity of community reforms. There is some concern that some reforms favoured by both Aboriginal and non-Aboriginal leaders will actually worsen conditions which many Aboriginal women and children currently face in their communities.

Ms. Hanley concluded by stressing the need for a constitutionally recognized, inherent right of self-government, which would have significant impact upon the structure and implementation of community justice initiatives and set the stage for the development of parallel Aboriginal justice systems. "Solutions have been identified and are within reach; it is now time for these solutions to be acted upon and put into place."

Building a Justice System From Aboriginal Values

The next two panellists looked at the fundamental Aboriginal values, norms and concepts of justice. James Dumont, a Professor of Native Studies since 1975, introduced his paper, "Justice and Aboriginal People." He explained that he could not explore the issues in the 10 minutes allotted and began by questioning his capacity for speaking on behalf of Aboriginal people. "If you really want to know how Aboriginal people think about things, the last person you should ask are Aboriginal professors and lawyers," he said. Aboriginal people in these positions have often achieved their status by separating themselves from their cultures and communities, and he "had to set aside Aboriginal thinking in order to think in western concepts of law, an incredible leap for Aboriginal people."

His paper explored Aboriginal values in general, not just how Aboriginal values relate to justice. Any society has certain core values that influence all behaviour and responses to circumstances. "If we can determine what the values are, we can determine what motivates people, what causes them to respond to situations in a particular manner," Mr. Dumont said.

When Mr. Dumont began his research into Aboriginal values, he thought that Aboriginal people and non-Aboriginal people seemed to be operating by different value systems because their behaviour and responses to situations were different. This perspective assumed that the core values were different, or that perhaps people from both groups draw from the same basic values but priorize these values differently.

Over the years, as he studied traditional Midewiwin teachings, he began to change his perspective. He learned about the four colours of man, from which all people originated. "One particular colour came here and then proceeded to dominate the situation," he said. This teaching is similar to the Iroquois teaching of the two roads, in which fundamental values were given to the people of two colours. His traditional teacher said all four colours of people had similar values: kindness, honesty, sharing and strength. However, the core of each

colour group is different, and it is this core which determines how the values are understood.

"At the core of Anishinabe is fire," but the white man's core is something similar to law, the need to impose a system of order and control. Understanding the two groups depends on understanding these core differences. "With us, it's not clear – how can we understand fire?" More years of traditional teachings have made him understand that there is a vision or a spiritual centre at the heart of Aboriginal people.

This vision, in its purest sense, involves more than just being able to see into the future; it is an all-around, peripheral vision. This vision generates the value of respect. "When you see more, you respect people, and this respect governs how you use your vision," Mr. Dumont said. At the core of the white man is motion, and "what motivates all his activities is movement and activity." Therefore, the two groups approach similar values in a different way. "Yes, Aboriginal people do prioritize values differently, but this is because they understand them differently," he said.

In his paper, Mr. Dumont set up several tables contrasting the values of Aboriginal and Euro-Canadian cultures. He tried to show how the contrast, rooted in hundreds of years of oppressive history, ends up in a zone of conflict when Aboriginal and non-Aboriginal people interact. "Because of our history, it's automatically going to be a situation of conflict," he said.

Mr. Dumont concluded by questioning how and why the Royal Commission came into being. He felt that its approach assumed the present justice system to be reflective of justice and that the values behind this assumption were not made clear. "If we are in the system, we are caught up in it," and justice is therefore defined by the system's values. He said moderator Vina Starr's comments about a social compact were reflective of a non-Aboriginal value system. "For Aboriginal people, the issue is not a social compact relationship but a government-to-government relationship," he said. Similarly, any justice system that is not based on healing is not Aboriginal. In his language, justice means "straight and respectful judgement," with the emphasis on respect. The ultimate goal of any justice reform should be to bring harmony among the different peoples and to re-establish good relationships.

"An Utterly Foreign System of Justice"

Zebedee Nungak, Chairman of the Inuit Justice Task Force, presented his paper, "Fundamental Values, Norms, and Concepts of Justice." He began by noting that the radical transformation of Inuit life in the Arctic over the past 40 years can lead people to believe that the Inuit did not possess a justice system before contact with European civilization. Contrary to a 1939 report which said that "Eskimos are more wild and untamed than any of the other savages," the Inuit

did possess a sense of order and right and wrong. However, the way it was practised and implemented was not compatible with European concepts of justice.

Mr. Nungak explained that in the pre-contact period, the Inuit lived in camps dictated according to seasons and availability of life sustaining wildlife. The overriding concern was the sustenance of the collective. Any dispute among the people was settled by the elders and leaders who had the respect of the group, and their decisions were always respected. The bulk of disputes handled in traditional ways mostly involved giving practical advice for proper behaviour. In more serious cases, offenders were ostracized or banished from the clan or group.

"Survival and sustenance of the collective was the primary factor which dictated the decisions of a justice and dispute resolution," Mr. Nungak continued. "There was no question about who had the responsibility to make such decisions. The elders and the most able providers were the undisputed leaders and arbiters of resolving conflict."

When the Government of Canada, represented by the RCMP, became the chief arbiter of justice among the Inuit, traditional methods and customs of dispensing justice were completely displaced by the new order. There was no place for Inuit traditions, and no regard for how things were done before. "An utterly foreign system of justice was imposed upon the Inuit, and the role of the elders and leaders was rendered useless." The new justice system clashed violently with the traditional concepts of the Inuit notion of justice. Dispute resolution was now handled by foreigners who spoke in a strange language, and justice was now dispensed by people who showed up so infrequently that it was difficult to maintain a sense who these remote authorities really were. Although Inuit eventually became involved in the outer periphery of the Canadian legal system, the system is still essentially completely foreign to Inuit values.

The lack of Inuit control is a fundamental flaw in the system, Mr. Nungak continued. "What is the use of studying values that were discarded, ignored as irrelevant, and otherwise completely swamped by the imposition of a totally foreign justice system if that system will continue to operate and exist under the complete and total control of the dominant society?" The Inuit have to be wary about getting drawn into an exercise which will "come to naught if the administration and implementation of the system remains firmly in the hands of foreigners who will never have an adequate appreciation and respect for these values."

The cultural differences between Inuit and western society will raise questions about whether Inuit traditional law can be applied in the modern and contemporary world. Mr. Nungak explained that if the Inuit had a written legal code, sections of the code relating, for example, to wife procurement, would have contained at least two activities considered criminal in the European system. On the other hand, Inuit adoption practices are much less complicated. He wondered if the present system was flexible enough to allow for cultural incompatibilities or if the answer was a separate justice system for the Inuit.

Before the Inuit are asked what fundamental values norms and concepts of justice should be included in a reformed justice system, they must first be shown "by what means we would be empowered to put them into practice. Don't ask us to bare our cultural soul for something that may never become." Mr. Nungak concluded by saying the Inuit may be a square peg "unable to fit into your round hole, and unless we can make a hexagon, you may have to contemplate making a square hole for our square peg."

"As I Come to Understand It"

Patricia Montour-OKanee, a Professor of Law at the University of Ottawa, was asked to speak about how Aboriginal women's interests were reflected in the fundamental values, norms and concepts of justice that Aboriginal people hold. Her paper, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s," began by locating Aboriginal thought in mainstream academia, and Ms. Montour-OKanee began her presentation by expressing her discomfort at standing before the gathering. She pointed out several elders in the audience; "I see teachers in the audience, yet it's me up here," she said. She described herself as a storyteller, someone who negotiated contradictions, negotiated truth. All her words are "as I come to understand it."

Ms. Montour-OKanee grew up in the city, the daughter of a white mother and a Mohawk father, and it was a while before she began to explore her cultural roots and understand that "there were many people in the middle." Before talking of how to build an Aboriginal justice system, the question of different values must be discussed.

The meaning of equality must also be discussed. In the Euro-Canadian legal system, equality is a component of the "rule of law", a phrase that "makes Mohawks shiver – as a Mohawk woman, that's not even close to my concept of equality." There will always be problems relying on the law to define equality, she said.

"We need to understand otherness," Ms. Montour-OKanee continued. It is only by understanding otherness that the many and varied experiences of people will be addressed, and true equality can be understood. "I can't stand before you just as a woman or a Mohawk. My understanding of who I am is filtered through my experiences of both."

Justice reform must begin by addressing values. What motivates her is not the indiginization of the justice system, "with brown people enforcing foreign laws;" what is needed is a two-pronged approach. While discussion is taking place about justice reform, the people who are suffering under the current system should not be forgotten.

Ms. Montour-OKanee finds the Canadian justice system "very offensive," because it is based on punishment. The root of punishment is violence, and a justice system based on violence is a contradiction in terms. Such a system will

never result in true equality. The notion of coercive enforcement replaces the Aboriginal notion of community and collectivity; the notions that a true justice system should be based on.

Turning her comments to feminism, Ms. Montour-OKanee said she can't embrace mainstream feminism because it places too much emphasis on the patriarchy and not enough on colonialism. Historically, Aboriginal justice systems were based on kinship, on family. "Where do we all come from? – women. Women were the first teachers. We all have mothers. That is the commonality among us." Justice should be based on balance and harmony. "If we can't find harmony, we have failed in our task," she concluded.

Pilot Project Presentations

Northwest Territories Community Justice of the Peace Program

Sam Stevens, Administrator for the Justices of the Peace in the Northwest Territories and representing the Northwest Territories government, spoke on the government's community justice initiative. The territory's population is 64% Aboriginal people and growing rapidly. A rapid increase in the crime rate has led to a dramatic increase in the criminal justice system, but this expansion has not solved the problem. One year ago, the N.W.T. government consulted Aboriginal communities, and the result has been a community justice initiative.

The program's underlying principle, Mr. Stevens said, is the recognition of Aboriginal people's inherent right to self-government. Nunavut will determine its own justice system; other Aboriginal peoples have yet to decide how to exercise this right. The province also negotiates the administration of justice at the community level, recognizing community rights.

The government wants the justice system to respect the Aboriginal principles of justice and has welcomed community involvement and suggestions, Mr. Stevens said. A justice system must make sense to the communities, including a parallel but separate justice system.

But the current system needs immediate improvement as well. Currently, the justice system is increasing community involvement, Mr. Stevens reported. Judges involve community groups with offenders. Community-based courts are taking on responsibility for resolving community disputes, using Justices of the Peace. These JPs are usually local people, some of them elders, with special training.

In Fort McPherson and other communities, Mr. Stevens told the audience, a local Justice Committee allows a broad spectrum of groups and interests to have input into developing a local justice system, with assistance from provincial and law-enforcement agencies. Elders and other groups are involved both in planning

and in mediating between offenders and the law. The community itself defines what it wants and when it wants it; the government's role is to support these initiatives with training, resources, and funding. Funding, at the moment, is the limiting factor. But communities want to take on this responsibility and a number have set up Justice Committees of their own. This is a first step towards an Aboriginal justice system and increases the community's control and responsibility.

Obviously, strong community involvement is essential, Mr. Stevens observed. The community must set its own priorities and pace, determine what steps it wants to take, and control the entire process. Mutual respect between Aboriginal communities and government is essential.

Aboriginal Legal Services, Community Council of Toronto

Jonathan Rudin, Executive Director of Aboriginal Legal Services of Toronto (ALST), described a pilot project for urban Aboriginals in trouble with the law. ALST provides a legal clinic and court and liaison workers, aiming to develop alternatives for Toronto's Aboriginal population, estimated at 70,000 and probably the largest Aboriginal community in the country. About half the status Aboriginals in Canada live off-reserve, as (for obvious reasons) do almost all non-status Aboriginals. "We can't leave these people out," Mr. Rudin stated.

The Community Council Program (CCP) works as a post-charge diversion project for Aboriginals convicted of offences, Mr. Rudin told the group. Clients must take responsibility for their own misdeeds. The CCP is not interested in guilt or innocence; it asks the client: "What will we do with you?" The client meets with a small group to discuss his or her behaviour and the causes for it. The approach is holistic. After consultation with the legal system, the client, the victim (when apposite), and any other relevant bodies, the CCP decides on appropriate recompense for the offence – drug treatment, restitution, community service, or a letter of apology to the victim, for example. The program has only been in place since March 1992, but preliminary results seem promising.

The program was designed in consultation with elders and the Toronto Aboriginal community, and Mr. Rudin sketched its history. It stresses understanding the offender's history and teaching him or her to take responsibility, and integrating the offender into the community.

South Vancouver Island Justice Education Project

Tom Sampson, Chairman of the First Nations of South Island Tribal Council, asked three fellow members of the South Vancouver Island Justice Education Project (SVIJEP) to speak on his behalf. Judge Doug Campbell, Crown Attorney Bob Gillen, and Parole Officer Cathy Louis described the project, which co-ordinates the justice system with tribal authorities, including elders.

Originally set up as a result of criticism of the justice system by both Aboriginal and non-Aboriginal leaders to educate South Island's Aboriginal population about the justice system, the project now also uses Aboriginal advice, diversion projects, and input to deal with offenders. Thus far, it has handled 188 cases. Judicial outcomes for offenders likely to be convicted are made in consultation with elders and the victim.

Judge Campbell's and Mr. Gillen's presentations stressed a secondary benefit of the project: increased cross-cultural understanding and trust. Both are white members of the Canadian justice system who have had their attitudes turned around by exposure to Aboriginal culture and values. The project has turned into a bridge between the two solitudes. Education by itself is not enough; personal ties and knowledge develop deeper understanding, friendliness, and good faith between the two peoples.

The Canadian justice system's attitudes are rigid and structured and need time to adapt, Judge Campbell said. In this process for South Island, Salish attitudes have been instrumental, showing the judiciary that talking to one another does not compromise one's integrity and that Aboriginal culture has values and concepts to offer the judicial system – a major breakthrough in attitude.

Mr. Gillen noted the media coverage of South Island's handling of sexual assault. Of the 188 cases diverted from the criminal justice system by the SVIJEP, only one has involved a sexual offence; this was a special case and was accepted for alternative treatment with the consent of the elders.

Violence is endemic in Aboriginal communities, Ms. Louis said. The residential schools made for dysfunctional families which have caused criminal behaviour. The project does not tolerate violence, but feels that the underlying causes of violence must be dealt with. Sexual violence against women is a particularly difficult issue. Women and children need protection, advocacy, and support, and the community must immediately develop structures to help them and deal with offensive behaviour. "We have to change their life circumstances," said Ms. Louis.

Elders, both men and women, are an essential part of the program and need support for prevention and treatment, Ms. Louis continued. The project needs funding for essential components such as education, training, and services. Aboriginal people are willing to take risks and be vulnerable; they have the courage to speak out, to share, to be loving, to show respect, she concluded.

Tom Sampson, thanking his fellow presenters, stressed the need for the dominant culture to accommodate the Aboriginal viewpoint and values, and for personal ties and relationships between Aboriginal leaders and the justice system – the basis for trust and mutual reliance. Aboriginal and Eurocanadian world views are very different, and the latter should learn from indigenous peoples. The elders say that the two systems are different, and the difference goes back to language.

When bridges are built between the two cultures, neither needs to surrender anything, but the two must share power to make any justice system work. "Coexistence won't happen until the dominant culture moves over and accepts the way we have lived for centuries," Mr. Sampson said.

Discussion

Cathy Louis of the South Island project is also a member of the National Parole Board, and said that both sides need to take the risk to get to know the other; cross-cultural education and awareness build respect and trust. When non-Aboriginal people are exposed to such Salish customs as the Big House and the sweat lodge, their attitudes change. White society has much to learn from Aboriginal peoples.

Elsie Zion, a Navajo professor at the University of New Mexico and Chief Justice of the Pueblo Zuni Nation, said "my heart is enlightened by these speakers." She stressed respect for each other's values; "we must listen and respect each other's words, whether we agree or disagree with them."

Ontario JP Joe Morrison said that he has tried to use the same methods as the Toronto project and asked what feedback the Community Council was receiving. Little as yet, responded Jonathan Rudin, as the project is so new; but his impressions are that the project is doing well. Mr. Rudin spoke of the problem of getting the victim's consent for alternative handling of sexual assault cases. Often the victim simply wants the offender to be punished and won't consent to diversion treatment until she realizes that she won't necessarily see the outcome she desires.

Zebedee Nungak, following up on discussion of his morning's presentation stated that he does not refuse to work within the system. The Nunavut Justice Task Force, which he chairs, will be recommending improvements to the justice system in consultation with Canadian justice workers and elders. "We socked Inuit values to justice people to change their attitudes." But Mr. Nungak takes no "stonewall, them-or-us" position. His committee will be presenting a report recommending improvements and reforms to make the system more relevant to the Inuit.

Carol Montagnes, Executive Director of the Ontario Native Council on Justice, is involved in cross-cultural training of justice workers such as correctional staff, Crown attorneys, and (soon) the OPP. She asked the South Island representatives whether they were quite certain that their cross-cultural work was really changing the attitudes of Eurocanadian justice workers. "Are we just creating culturally aware racists?" she asked. In response, Cathy Louis said that racism exists, but changing attitudes does have an effect on the treatment of Aboriginal offenders, as when staff begin to understand the anger many Aboriginal people feel. She has confidence that the change is doing good.

Also responding to Ms. Montagnes, Doug Campbell told of a cynical friend involved in an Aboriginal consciousness-raising program. After day one, the friend said, "interesting." After day two, the friend said, "okay, but I'm not convinced." Something happened, however, on day three, and the friend's response was, "How could I have been so blind?" Bob Gillen spoke of his own experience – how, dragged reluctantly to a program in Kamloops, he found himself dumping his old assumptions and came away "not right, but less wrong." Moderator Brad Morse said that cross-cultural awareness was not a single entity.

Commissioner Mary Sillett referred to Mr. Nungak's comments that morning on Inuit wife procurement customs, reporting that these had created a real stir after the meeting. Mr. Nungak said that he had merely mentioned these as an example of the value differences that will have to be integrated into any new justice system. A bad example, he said, but illustrative of what was accepted before contact and not acceptable now. Such values were based on community agreement and on a survival lifestyle. As the justice system opens to accommodate Aboriginal values, things may be discovered that don't fit, Mr. Nungak noted; hence a separate Aboriginal justice system may be needed.

Leroy Littlebear spoke of the need for increased awareness of Aboriginal culture, value, and practice in law schools. "The justice system has made honest attempts to respond to Aboriginal needs," he said, but we will need changes in attitude and teaching in preparing law students. "Legal education must be brought to account for its product," he concluded.

James MacPherson responded that law schools are improving, and that the increased number of Aboriginal law students and lawyers will make a difference; he sympathized with the difficulties Aboriginal law students faced. He also asked about the Aboriginal community in Toronto, in particular how one defines an Aboriginal community in a major city. Definitions are simple in small settlements or on reserves, but not in major urban centres.

Mr. Rudin responded that his constituents define themselves. The Aboriginal community in Toronto is dispersed; agencies operate on the basis of their clients' self-identification as Aboriginal people. Whatever their origins, Aboriginal people share common values and recognize each other; the focus may not be obvious, but it is there. The community does not resemble a reserve community, partly because many urban Aboriginals can't or won't return to their homes.

Urban agencies also must operate rather differently from on-reserve ones, Mr. Rudin reported. On reserves, processes are public, which is appropriate. The Community Council Program takes a more confidential approach, since clients often need to confide personal matters. In their home communities, victims of abuse may feel unable to speak out and may therefore choose to leave, but in the city they still want fellowship with their own people.

Teressa Nahanee, Constitutional Adviser for the Native Women's Association of Canada, asked the Commissioners to keep sexism in mind and remember the problems Aboriginal women face. She mentioned the media coverage of the South Island sexual assault case, in which the offender was diverted from the justice system, and stated that this was not an appropriate response. She also queried the involvement of women in the South Island project. In the South Island video, one woman elder told of returning to her home after being abused by her husband, saying that Christians must forgive and that she had to go back for her children. Ms. Nahanee questioned the message that this was sending out to the general public.

In response, Judge Campbell said that the involvement of Aboriginal women in the South Island project had high priority. He had attended a major conference in Saskatoon with a special women's panel and deeply appreciated the women's frankness. "I don't understand Aboriginal life and therefore don't judge their presentation," he said. "We don't choose who comes forward." The woman elder in the film had been talking about the importance of her family life to her, how it excluded every other consideration. The terrible example the woman had spoken of was evidence of the strength of her beliefs. "I wouldn't question those beliefs," Mr. Campbell ended.

Tom Sampson said that translation often led to problems; what this woman elder had said and what was translated were not identical. She had, Mr. Sampson said, been talking about women's power and strength, their ability to survive.

Ms. Sillett reiterated the point that the message given by images like these is important. Trying to educate the Canadian justice system in traditional culture and values, Aboriginal elders may (for example) say that in traditional life, men were allowed to beat women, and women would keep silent. This gives judges the impression that physical or sexual violence is culturally accepted.

Gerry Morin said that language is an important factor. Changing the mechanisms of the justice system is one step, but content is the other half. "It's not just how you teach, but what you teach," Mr. Morin stated, warning of the danger of separating the two issues. In his language, the word for "judge" is literally "set things right", but it is close to the word for "to lose things."

Education leads to the loss of some things, Mr. Morin said, but one can keep one's inner self. "We have to walk in two worlds"; his eight years at university are balanced by 31 years in his own community. Aboriginal and white cultures must each teach and give, but also learn and take. Common law, which developed over years without Aboriginal input, must begin to take Aboriginal peoples into account.

Zebedee Nungak quoted Mr. Sampson as saying "we have to hear what people say raw." A raw enumeration of Inuit customs would include two (wife procurement and killing individuals by sanction of leaders) from another time. These customs weren't pleasant, but they did exist. A new code would not include these

but would include, for example, customary adoption and provisions for justice proceedings in Inuktitut, as 60% to 65% of his people are unilingual Inuit.

Brad Morse summed up by noting that the two hours had one common thread: Aboriginal justice initiatives walk on the edge of the Canadian justice system, but not outside it. "We must go past the important but easy sharing of information to sharing insights" and facing tough issues such as traditional practices that don't fit with the current justice system. There are conflicts in values and linguistic gaps, Mr. Morse said; genuing cross-cultural understanding will be needed for true debate.

Navajo Nation: The United States Experience

The Royal Commission invited Chief Justice Robert Yazzie of the Navajo Nation to deliver the keynote speech. Mr. Yazzie began by explaining the importance of mothers in Navajo society. "We have great respect for mothers," he said. He thanked the commissioners for the invitation to Canada and expressed his gratitude for the Commission's recent visit to the Navajo Nation.

When Mr. Yazzie was confirmed as Chief Justice earlier this year, he was asked: "What is your concept of Navajo justice?" – and he has been thinking seriously about the issue ever since. Some people see Navajo courts as copies of the American justice system, but many of the similarities are not there by the free choice or will of his people, he said. The Navajo Peacemaker system demonstrates how the Navajo sense of justice can be different.

Anglo American justice is based on an adversarial system, but the Navajo Nation has moved to a different system. The Peacemaker system involves "thinking things out," and the process does not use judges, juries or jails to reach a resolution by consensus decision. The Peacemakers system is proof that Navajo ways are still in place today.

There are 170 tribal courts in the United States today. The first Navajo courts were Courts of Federal Regulation (CFR) which did not apply traditional laws. In fact, the CFRs were established "to destroy the Navajo legal system and way of life." For example, traditional Navajo marriage and divorce procedures were prohibited. The American government wanted to force the Navajos to "think, speak and act like Anglos," Mr. Yazzie stated.

CFRs no longer hold court on Navajo land. Tribal courts were established in 1959 to prevent state jurisdiction over Navajo land and in 1985, the system was reformed. The present system includes seven judicial courts, such as district, family, small claims – and Peacemakers, which has been developed at the grassroots level.

The Navajo Nation has no constitution, and its three branch governments develop, pass, and administer laws after careful review and deliberation. The

system has checks and balances, and all court proceedings and decisions are duly recorded. Where no Navajo law exists, the courts may apply state and federal law, but the purpose of the Navajo courts is also to develop new case law. "The court is fair and impartial," said Mr. Yazzie.

The court hears cases for which the maximum sentence is six months in jail or a fine; more serious charges are dealt with in both Navajo and federal court. The court load is 85,000 cases, of which 24,000 are traffic violations. The Navajo Supreme Court has heard 30 cases, and the trial courts also issue decisions. The courts hear cases against any Indian on Indian jurisdiction and have no criminal jurisdiction over non-Indians.

There are 17 Navajo judges: three sit on the Supreme Court and 14 on district courts. Seven judges are women and three have been trained in law school. The court system employs 140 personnel. The Navajo Nation appoints only Navajo Nation Bar Association members as judges; currently there are 140 Bar members, both Indian and non-Indian. The Bar examination includes a test of more than eight hours on Navajo law.

Courts are conducted in both the English and Navajo languages, and interpreters are used when necessary. The accused has a right to a jury trial in criminal cases but not necessarily in civil cases. The Navajo system is a horizontal system of justice. In contrast, the Anglo system is vertical, its hierarchy topped by judges who "possess tremendous power to affect human lives," said Mr. Yazzie.

The Anglo system relies on coercion and control to force people to do or not to do something, he continued. "It's a win-lose, not a win-win situation. One party is wrong, one is right. The goal is to punish, to teach a lesson." In this system, the accused is powerless and victimized. The end result is that "little or no justice is done and nothing is done to solve the underlying causes of the problem." Family members of the accused also become victims and are left without a voice in the process.

The Peacemaker system is radically different from the Anglo system. Peacemakers help preserve the ongoing relationships in the immediate and extended families. They talk out problems, consent with all parties involved in the conflict, and restore harmony. The core idea of the program is to "allow people to solve their own problems without interference from judges or attorneys," Mr. Yazzie stated.

"Is the Peacemaker system better?" Force, coercion and control are left out, and cases are resolved according to individual needs. Nobody is labelled the "good guy" or "bad guy" and all parties are treated equally. While the Anglo system offers justice at a price – people with money can afford the best lawyers – the Peacemakers are not for sale. Legal fees are not needed and Peacemakers represent all parties in the dispute. "It's justice for everyone," Mr. Yazzie said. Peacemakers restore true justice among individuals and restore harmony to families, communities, and the society.

Recalling the riots in Los Angeles that followed the acquittal of police officers accused of beating Rodney King, Mr. Yazzie noted that injustice fuels the underlying problems in disadvantaged communities and sparks discontent. "People in communities can solve their own problems," he said.

Based on his experience with the Navajo justice system, Mr. Yazzie offered four recommendations to the Royal Commission:

- Have no fear. Aboriginal justice works, but justice is serious work.
- Give Aboriginal people the freedom to make their justice systems work.
- Support Aboriginal government by providing the resources necessary to perform its tasks.
- Support the process and help identify conflicts.

"Do not try to dictate justice and tell the Aboriginal people about your laws," Mr. Yazzie concluded. "We intend to continue as Navajos and will use our own justice methods whether you like it or not. Don't try to stop us. Simply join us. You will learn something about yourself along the way."

Panellists Explore Community-Based Models of Aboriginal Justice

The afternoon session began with an unscheduled presentation by Justice Minister Kim Campbell, who reaffirmed her commitment to promoting Aboriginal justice reform in partnership with First Nations. Recent setbacks in the area of constitutional development "must not be permitted to divert us from the importance of this task," she said. "I am confident that the work you are doing here will be of great value in helping to identify the pathways to justice which we must travel together in finding our way" toward a more just society.

Ms. Campbell said her term as Minister of Justice has enabled her to find out more about Aboriginal peoples in Canada. "I have learned a great deal about the hopes, the needs and the expectations of Aboriginal people," she said. "I have also come to appreciate that, for me, the process of learning has only just begun."

From this experience, she reviewed a series of issues that are likely to arise along the road to meaningful change. "It has not been easy for me to accept that, for some, our laws and our courts are viewed as instruments of oppression, rather than as mechanisms for the preservation of justice," she said. "I have come to learn that the administration of justice, despite the good intentions of most of the people who work within it, has often failed to meet the needs of Aboriginal people who, all too frequently, come into contact with our courts as offenders, as victims and as communities....I have learned that Aboriginal people are too often alienated by, and from, the existing justice system, and that many feel

powerless even to participate in determining what will happen to people from their communities who have found themselves in conflict with the law."

The Minister also acknowledged that "too many Aboriginal people are incarcerated in federal, provincial and territorial institutions," often because they didn't have the money to pay fines. "I am deeply troubled that there may be some Aboriginal people serving sentences in jail because they didn't have the will, or access to the means, to offer up a defence to charges brought against them. If there is even one such person, it would be one too many." She expressed concern that many justice professionals "know very little about the Aboriginal people and Aboriginal communities which they purport to serve," and show little inclination to learn more. "This too must change," the Minister stated. "We must work diligently and faithfully to make it happen."

The most important insight of all, Ms. Campbell said, is that "the time has come to get beyond talk. We have an obligation to take the things we have learned and to build upon them." Some Aboriginal communities, like South Island, "have already come a long distance in attempting to define new relationships based upon trust and partnership," and have learned along the way "that Aboriginal justice reform will at times be held to an exacting standard which even the existing justice system could not meet."

The Minister quoted the words of Chief David Keenan of the Teslin Tlingit First Nation, a panellist in the afternoon session who had also appeared at a 1991 Aboriginal justice conference in Whitehorse: "When we look to the future, the future is undefined. [We] do not have a road map to the future. There is not a blazed trail so you can look on both sides of the tree and see which way you are going, and which way you are coming from. The future is up to Aboriginal people to define, and that's what they have to do." Ms. Campbell closed with the suggestion that "people in the communities are the ones best able to blaze the trail as we travel together in new directions, and in some old ones which call out to be re-explored. The people who follow those pathways, and those who search for new ones, should not underestimate the importance of their role as we move towards change."

Teslin Tlingit Justice Council

Chief Keenan, the first scheduled panellist for the afternoon, began by emphasizing the need for change. "We know why we're here," he said. "We know the present system hasn't been working. We know that assimilation of our people in the last 500 years hasn't been working," despite the legacy of mission schools and unjust incarceration.

Recovery from this history must be based on a return to Aboriginal heritage, Chief Keenan said. "We must recognize that we have traditional ways of doing things. We had those ways in the past. Now we have to build on them." He also

noted that First Nations have basic values in common with other Canadians, even if they set their priorities in a different way. Once non-Aboriginal people recognize this, "you will start to see that, my gosh, these people weren't just savages deep in the forest".

A central tenet of traditional law is that people are accountable to one another, and to the community at large. "You must understand that our processes were somewhat different...but the standards are the same today as they are in Canadian common law." The Tlingit favour healing over incarceration, while providing for banishment or death when a severe punishment is warranted. But "if you can accept the process, accept the philosophy that there is not a dispensable person, especially a dispensable Tlingit, then we can go on from that point."

The challenge today is to bring together people with the moral authority to act on Aboriginal justice issues, rather than bogging down on issues of jurisdiction, Chief Keenan said. Ultimately, that authority must flow from the communities involved. "You can't empower the leadership," he stressed. "You have to empower the community. You have to empower the people, and that's what we must concentrate on doing....For me and my people, that process is in the context of self-government negotiations."

Citing the late Elijah Smith, an elder who led the self-government movement in the Yukon, Chief Keenan suggested that the laws are sometimes less of a barrier than the people who administer them. "What's not changing in a lot of cases is the attitudes," he said, noting that he had been upset to see the federal government disclaim any responsibility for the views expressed in the Yukon report on Aboriginal justice.

Among the Tlingit, the five clan leaders or their designates sit with the judges and provide advice on sentencing. The sentencing panels have no need for detailed case histories "because they know the community inside out," he said. "Their presence in the courtroom is just like a jury," and "starts to breed in the community a sense of respect for traditional ways and traditional values. The elders are starting to control the balance of power, which is very good." When authority is shared more broadly, "the community starts to show not only the power, but the support that can be initiated. Everyone is a policeman." Ultimately, an interest in and responsibility for justice is "entwined into the community...where it should be. That circle is a very powerful tool, very powerful, because you don't feel you're being picked on. You feel you're being supported."

One of the problems with the present system, he said, is that there are no resources to create alternatives to sentencing. Sexual abuse in the mission schools may be the root cause of an alcohol addiction that leads to wrongdoing, yet the justice system only provides for incarceration, not counselling services. "We need the

resources," he said. "We can't simply send people away, and we can't simply send them back to the community."

The Tlingit are developing an alcohol treatment centre in Teslin, so that community members can get the help they need without going outside and entering a different Aboriginal culture. Meanwhile, a new correctional centre in the community will create local jobs, within a philosophy of healing that makes no provision for prison guards. Chief Keenan said the centre will often work with entire families, rather than individuals, so that a complete process of correction and healing can take place.

Court of Kahnawake

Winona Diabo, Court Administrator for the Kahnawake First Nation near Montreal, described the development of her community's independent court system over the past 12 years. "We have no funding," she said. "We've been doing it on our own. Our funding has been generated by the tickets given out by our own Kahnawake peacekeepers." Revenue from salaries and fines pays the salaries of 33 officers, including four women, as well as a number of court officials. Ms. Diabo said the community is working to update and revitalize the traditional values embodied in the Great Law of Peace, to recognize new challenges that didn't exist in the early years of Mohawk civilization. In those days, there was no need for harsh punishment for breaking the law. Now, however, the community must deal with new types of crime that reflect more recent influences.

The Court of Kahnawake originally grew out of the community's interest in having all law enforcement and offences heard locally, by an institution staffed entirely by Aboriginal officials. The prosecutor is the only non-Aboriginal employee, and a bailiff firm is contracted to serve documents on people from surrounding communities. Kahnawake has its own stenographic equipment, interpretation from English and French to Mohawk is available upon request, and the Court has the ability to hold trials entirely in Mohawk. The Court regularly hears cases related to common assault, disturbing the peace, assault on a police officer, resisting arrest, driving offences, theft under $1,000, property damage, and traffic offences under community bylaw or some provincial laws.

In addition to funding problems, Ms. Diabo said the Court has had difficulties providing an appropriate range of services. There is an immediate need for an expanded youth court, a small claims court, a community worker program, and a mediation service. On the other hand, the judges at Kahnawake have been able to apply traditional principles to resolving cases of property damage, assault, and impaired driving. Many disputes have been settled through unconditional releases, with provisions for the offending parties to seek counselling through Kahnawake Social Services. Ms. Diabo said the judges have also provided a good deal of informal guidance and support in chambers.

At present, the Court of Kahnawake hears cases involving Aboriginal and non-Aboriginal litigants in the same session – partly because 90% of traffic offences are committed by people from outside the community. At times, the Court has been criticized by community members as a white man's system. But Ms. Diabo said there has been a strong move to build a community-based justice system around the idealism of the Great Law. "If everyone lived in a truly traditional manner," she said, "there would be no need for a court system at all, and no need to have policing enforced."

Joyce K. Mitchell, a Mohawk from Akwesasne who serves as a part-time Justice of the Peace at Kahnawake, said her responsibilities in court include swearing information, issuing statutory declarations and search warrants, remanding individuals to custody, hearing preliminary motions, issuing summary convictions under the Criminal Code, and enforcing band and Mohawk Council by-laws. She said her position allows for a great deal of flexibility in sentencing: judgement can be postponed pending an addiction assessment, or to allow an individual to show they can keep the peace and maintain good behaviour in the community. "A lot of the time, that works," she said. "I don't see them again."

A lack of back-up services is a recurring problem. Judge Mitchell said community works programs are inconsistent, although peace bonds do allow her to undertake direct mediation. "The parties are called in, they deliberate what happened, they offer their suggestions to me, and I will make a recommendation," she said. Two of Judge Mitchell's decisions have been appealed over a three-year period, but both were sent back for retrial within the community.

One difficulty with the present system is that non-Aboriginal people from outside Kahnawake often refuse to recognize the community's authority to regulate its own affairs. This attitude can extend to administration of traffic rules, even though the basis is the Quebec Highway Traffic Code. "When this argument is brought into political forums, it creates tension and they start mistrusting the system," she said. "Within the community, sometimes political forces don't agree.... It's all right to have your view. I respect that, and you have to respect mine. I think that's really important within our community."

Judge Mitchell said a traditional justice system would allow for mediation between parties, and allow for community service or other forms of restitution. "A jail term for a Mohawk or an Aboriginal person is really hard. They don't understand the system, and sometimes they say 'guilty' (and) don't realize what that may hold for them. So I try not to do a jail term, because it's not very good for our people. But in the end, if the person is in denial, doesn't realize that he has an addiction and won't keep off the streets, sometimes there's no alternative." Mohawk tradition also provides for a three-warning system, with banishment imposed after the third warning.

Attawapiskat First Nation Justice Pilot Project

Reg Louttit, former Chief of the Attawapiskat First Nation in Northern Ontario, described the development of an elders' panel as a model for Aboriginal justice in his community. The project, now in its second year, was inspired by local residents who were facing the pain of incarceration in Toronto or Sudbury, and by family members trying to cope in their absence. The project received provincial funding in 1990 and was renewed in 1991, although "the government was very reluctant to continue the program" because the community could not produce written documentation of traditional law.

"In our past, we were not writers," Mr. Louttit said. "We were hunters, fishers, trappers, gatherers," and laws were handed down orally. The community has now begun the process of writing out its laws, including the range of sentences that might be imposed on people accused of wrong-doing.

A key priority in the Attawapiskat First Nation Justice Project is to replace incarceration with community services. "We said, why take people out? What is the purpose of taking people and putting them in jail? They came back from these places more bitter than ever," and kept breaking the law. Now, a convicted offender may be sentenced to cut wood for the elders for a month, carry drinking water from the river, do housework around the community, or trap furs to cover the cost of a broken window or door. The sentence is tailored to the severity of the crime and the age of the offender.

In addition to keeping people out of jail, this form of alternative sentencing can introduce community members to useful skills and occupations. Instead of doing damage or "hanging around the community doing nothing," Mr. Louttit said, "they'll be making their own money" on the trapline or with traditional crafts. The community is also trying to deal with offences as soon as they occur, rather than waiting until the court can convene. For a broken window, for example, a decision the next day can be as simple as requiring the offender to replace the glass.

The non-Aboriginal justice system has been supportive of the Attawapiskat model, Mr. Louttit said. When Criminal Court convenes every three months, elders are invited to join the judge in deciding cases. This is an improvement on earlier practice, when jail sentences were handed down by judges who didn't know the background of the accused or his or her family.

In closing the session, moderator Rachel Qitsualik noted the common theme of people in Aboriginal communities grappling with issues of fundamental justice. She said the panel presentations had highlighted the existence of two systems of justice – one which is alien to people and doesn't work, and one that attempts to incorporate the meaning of life into an approach that works.

Final Plenary Reviews Pilot Project Models

In the final session for the day, participants and panellists engaged in a wide-ranging discussion of the community-based Aboriginal justice initiatives at Teslin, Kahnawake and Attawapiskat.

A delegate asked for details of the two Justice of the Peace decisions at Kahnawake that had been appealed to outside courts. Winona Diabo said the cases had involved technicalities, not challenges to Kahnawake's authority. Both cases were sent back to the community, to be heard by a different JP. "We were very happy about that," Ms. Diabo said.

A participant commented on the dearth of questions from "some of the pre-eminent administrators of justice throughout this country". She asked whether non-Aboriginal participants were feeling the same sense of personal uncertainty experienced by every Aboriginal person who decides to enter the legal profession. "It requires a deliberate decision, a very private, personal decision, long before the initial act, which entails wiping clean our Indian brains and our Indian hearts of every value that had been taught to us, that we held and will always hold dear." She said it was necessary to have "that whitewashed brain and that whitewashed heart" and be receptive to common law values, "so that today we can stand here, because we've been successful at being deliberate schizophrenics on a daily basis." The participant described herself as having her right foot "firmly planted on the white justice side", while knowing that her left foot "was born and will be buried on the Indian side".

The next speaker asked Chief David Keenan to comment on the process of bringing traditional law forward into contemporary society, and on ways of involving younger and older generations in the process. Chief Keenan responded that there are three bodies of law involved – Indian law, contemporary law, and contemporary Indian law. "We're not going to codify our Indian law," he said. "It must not be put to paper, because it must remain flexible." This reflects the uniqueness of a system that is based on individual circumstances, rather than the precedents set by past case law.

The process of involving young and old people began with the development of the Tlingit constitution, which returned elders to their traditional place of pre-eminence. Six years later, Chief Keenan said Tlingit youth are taking more care to listen to the elders. "Sometimes you have to slow down and think a little bit, so it's teaching them some of the patience that our people traditionally have."

Reg Louttit agreed that traditional laws should not be codified. He explained that his community has begun drafting general legal guidelines, "but we feel that we'll be diverse enough to be able to change midstream" and reflect unique circumstances. This will be particularly important when Aboriginal and non-Aboriginal people are tried for the same offence. "I hope to see our system

follow that route, where we can be so flexible that no guidelines or regulations will keep us down to a one-track mind," he said.

A participant from the Ontario Ministry of the Attorney General noted that the Attawapiskat First Nation Justice Project was an example of communities taking charge of Aboriginal justice reform. He recalled the case of a legal aid lawyer who dropped in to take a look at the system, to see whether a client would get a fair trial. The lawyer couldn't follow the proceedings, because they were taking place in Cree. However, he could tell that the young people who stood before the elders were taking the process very seriously, "in marked contrast to the attitude the people had before the fly-in court". From this experience, the lawyer concluded that the Attawapiskat project was an important experiment.

"Beyond that, what's probably important for the Royal Commission is how this project came about," the provincial official continued. A project proposal was submitted to the Ministry in response to an invitation from then Attorney General Ian Scott, and in-house review was initiated. "While all this was going on, they just went ahead, had the panel there, and said 'what do we do now?'...What they're doing there has absolutely no relation to what the original proposal was, and for all I know there are lawyers in the Ministry who are still scratching their heads over it. That's the importance of tearing ourselves away from this paper exercise."

Another participant asked for details on the structures and procedures of the Attawapiskat elders' panel. Mr. Louttit said three elders are appointed to hear cases and pass judgement, after hearing evidence from a special constable and from the community members who are directly involved. Sessions take place in Cree, and are open to the public. When Criminal Court convenes and the judge consults with elders, their deliberations are also open to interested observers.

A delegate asked the panel to comment on the tradition of banishment, noting that the practice had been challenged in Manitoba under the Canadian Charter of Rights and Freedoms. Judge Joyce Mitchell of Kahnawake said her community's membership code, incorporating a traditional three-warning system, had been approved by the Department of Indian Affairs and Northern Development. Chief Keenan said his community has adopted a "tough love approach", in which people are encouraged to stay in the community and change their behaviour. Tlingit clans range in size from 25 to 300 people, and Chief Keenan's is the largest. "If I shame myself by committing a crime, then not only myself is responsible – my whole clan is responsible. When you have 299 big Tlingit people breathing down your back, you certainly tend to shape up, or ship out voluntarily." Mr. Louttit said his community is hesitant to banish members, although outsiders who live at Attawapiskat can be asked to leave by band council resolution if they have ignored prior warnings.

The "Just-us" System

Manitoba Justice Minister James McCrae said that he was moved by Chief Keenan's presentation; power, he said, comes from the people. When people make demands, government finds out what they want. In Manitoba, the St. Theresa Point Youth Justice Program is an example; the government added input and funding to a project arising in the community. "We can't stop people," he said, noting that projects like this save the province money and work well in the community.

He identified one problem: when the federal, provincial, and Aboriginal governments are partners in the process, it could be a problem if one wants out. Funding can also be limited; Aboriginal communities have contributed resources both of money and time. The St. Theresa program is entirely volunteer, but Aboriginal communities should contribute their resources if possible. The three parties must be partners, sharing responsibility.

Mr. McCrae asked Reg Louttit for data about funding and the population served by the justice project he had reported, as well as the types of offences the program dealt with. Mr. Louttit had no hard figures, but said that the project had cost approximately $100,000 in its first two years and served 1,340 people.

One participant brought up the problem of non-Aboriginal peoples' disrespect for the Mohawk court system. The Canadian justice system is a "just-us" system, she said. "Moral authority is what it boils down to....A strict law bids us dance," she said. "What does this have to do with where we are?" In her law practice, she knows of wholesale guilty pleas by Aboriginal defendants, and dozens go to jail for insufficient defence. On reserves, however, people can rely on their own tradition and sense of right. Non-Aboriginal people in the Mohawk court are like Aboriginal people in the Canadian justice system. "We want justice, not just-us, in our time."

Chief Keenan said that moral authority is inherent in Aboriginal tradition. It isn't easily defined or explained, but includes a holistic respect for others that must be grounded in respect for oneself. Often, individuals and communities need a turning point. In his own community, getting their own constitution was followed by a sober, hard look at the problems the community faced. "We identified our own weaknesses and strengths; what did people expect? We had a cry-out" – a meeting at which pent-up feelings overflowed and the problems came out. "This brought the leaders to their knees," Chief Keenan said, and their humility restored their moral authority.

It's wrong to ask First Nations for money, Mr. Keenan continued, when they have nothing but their people. Canada has the resources; it should channel them better. If community justice saves the system money, that money should be channelled into the community. He finished by pointing out that his community justice program could not have happened without the Northwest Territories government, which has no responsibility for Aboriginal justice.

Alberta Crown Prosecutor James Langston asked, "Are we chasing our tails?" He thought that the answers to questions 1 and 2 were self-evident. The Canadian justice system says "you can have any justice system as long as it's ours." But now, Mr. Langston said, "We're realizing that there are other and better ways." The message has to go out to white society: the justice system doesn't work for it, either. Aboriginal justice can benefit all Canadians. "Just do it!"

Structures can be implemented by communities without their waiting for authority, Mr. Langston continued. Confronted by the example of the Peacekeepers, police asked "why can't we do this instead?" Ask the right questions, Mr. Langston concluded, and the answers will be obvious.

Sam Stevens discussed the option of banishment: Could this be challenged under the *Canadian Charter of Rights and Freedoms*? Banishment could be seen in two ways: as permanent exclusion from the community, or as exile to a specific place for a specific time. In the Northwest Territories, banishment is used rarely and requires consent from the accused and community and is coupled with probation.

Mr. Stevens pointed out that a system with no legal status can present problems and cited an instance in which a Justice Committee had dealt with an offender using probation and restitution. Later, people in this community asked whether these measures were legal. One caller asked the provincial justice department about the Charter. Community authority is fine until someone questions it, Mr. Stevens noted. The Canadian justice system should have been involved in this case. "You can't ignore the present justice system," Mr. Stevens said; cooperation between the two is essential.

Jon Rudin said that resources were a problem. Putting justice and social services in separate compartments is against people's interests. His program saves the Correctional Service of Canada a great deal of money, but this doesn't come back to Aboriginal organizations for the services their clients need. Healing, for example, comes under "social services," not "justice," for all his clients need a holistic approach, Mr. Rudin said. His organization can't handle wife assault cases because it lacks the resources. Compartmentalization won't work; neither will money for justice issues alone. The community knows its own needs best.

Tom Sampson returned to the issue of banishment. South Island revived this measure some years ago, instituting indefinite banishment with the support of the Canadian justice system. Police, the tribe, and the judge concurred in the elders' decision to banish an abusive husband and father. The man's wife protested, and was told that if she wanted to stay with her husband, she too could leave. The man, who could not face losing his children, got proper help for his problems.

Mr. Sampson reiterated the need for trust between Aboriginal and white justice workers – a difficult process, he acknowledged, because of the past and present.

There is still hostility on both sides, he said, but "we must overcome our own attitudes" and get away from statistics and dollars.

Mr. Sampson also added to his previous presentation, saying that the South Island program appointed three people to the Education Committee, who would reach out to the different communities and ask for help. In their hearings, the elders follow three principles: spirituality, conservation, and economic questions. They talk to people, identify the problems, and bring in someone for the person to talk to about the problem (discipline, child custody, etc.). "We're doing the justice system's job for them," Mr. Sampson said, "but the individuals in the system don't want to let go." Bureaucrats have a vested interest in the present system.

Judge Graydon Nicholas believed that the speakers were addressing the crux of the problem: Why is there abuse and criminal conduct? What is moral authority? Where do military courts get their authority, when they serve only a fraction of the population? Provincial judges don't always have jurisdiction in certain cases; this depends on provincial regulation. If responsibility for trying juvenile offenders could be taken away from superior courts, Judge Nicholas felt that a similar arrangement could be made for Aboriginal people. Precedents exist.

"Tom made an important point," Judge Nicholas said. The source of Aboriginal rights, and the source of all moral authority, is the Creator. "Our elders' laws don't need to be codified," he said. The Aboriginal moral code should be acknowledged by white society.

One speaker pointed out that if Aboriginal justice officials take on cases over which they have no legal jurisdiction, they can be stripped of office. Mr. Nicholas responded that the two systems can work together, as they do for young offenders.

Elsie Zion said that it was essential to listen to elders; they may not come to the point quickly, but everything they say is worth attending to. "They are the keepers of your tribal encyclopedia." Take time for active listening, she urged. "These talks from the heart have been wonderful," Ms. Zion continued. Paper knowledge can't be taken to heart as experience and personal testimony can. White and Aboriginal people must talk and listen and start helping each other, Ms. Zion said.

Talking about bureaucratic inertia, Ms. Zion told a story: General Custer, just before his final trip west, decided that he was bound to be the next president and appointed his cabinet beforehand. He told the Bureau of Indian Affairs (BIA) not to trouble themselves about the Sioux: "I'll deal with them. Just wait till I get back."

The BIA is still waiting.

Reg Louttit mentioned that a report about his community's justice initiative had been published in an in-flight magazine. Moderator Donald Worme said that he

was inspired by the "take power" message, and thanked the presenters and commissioners. Judge Sinclair said that it had been "a tremendous day" and praised the fortitude and courage of those who had spoken, thanking them for their good, strong comments and open sharing.

After announcements, Elders Ernie Benedict and Flora Tabobondung covered the council fire and closed the day in prayer.

Panel Reviews Arguments for Parallel Justice System

The second day of the National Round Table on Justice Issues began with a recap of the first day's discussion by Commissioner Bertha Wilson, who referred to the "excellent discussion of the values held by Aboriginal people which would have to be reflected in an Aboriginal justice system. We learned that many initiatives have been undertaken in Aboriginal communities to deal with offenders in ways that reflected and gave expression to those values, and that these initiatives, many of them undertaken without government funding, were working well."

Ms. Wilson said the various pilot project models could be seen as reforms to the existing justice system or as the foundation for a parallel Aboriginal justice system. "Today, we are going to address head-on the question of whether the existing justice system can be adapted to fit the needs of Aboriginal people, or whether it is so alien in its fundamental features that a separate or parallel system needs to be put in place."

An incidental question "is whether reform of the existing justice system should not take place in any event, because it's not working well for non-Aboriginal people either," she said. "Would the existing system not benefit from the injection into it of some of the Aboriginal values we have discussed yesterday? In other words, is it not possible to open up the existing system to a broader, more caring, and more culturally sensitive concept of justice? These are the important questions that we have to deal with today."

A 'Three-D' Vision

The first panellist, Professor Mary Ellen Turpel of Dalhousie University, began by reframing the debate over a parallel criminal justice system. Rather than seeking to justify greater reliance on Aboriginal legal traditions, it is more appropriate to ask why the existing system was ever imposed on Aboriginal peoples. "The duty to explain that is on the other side," she said.

Ms. Turpel contrasted her own practice in the field of Aboriginal and treaty rights with the work of the five other lawyers in her Halifax firm. Her colleagues are all white women and feminists; she described herself as half-white noted that "I'm probably also half-feminist, in the sense that I see gender oppression as only one part of the problem that Aboriginal peoples experience." Because of her interest in Aboriginal law, Ms. Turpel said she spends a lot of time pursuing "pretty overgrown legal pathways", conducting historical research and arguing with government officials.

"What I find repeatedly in my work...is that what these European colonial officials thought about Aboriginal people is very important, and in fact how they thought is often more important than what they thought." The legal view of Aboriginal people as "beasts in the field" with no concept of property is "of central importance when we deal with Aboriginal legal problems," she said, and was reaffirmed as recently as 1991 when Justice McEachern ruled on the Delgamuukw case in British Columbia.

A measure of these attitudes was provided in Ms. Turpel's own firm when she produced a memorandum of law pertaining to section 35(1) of the *Constitution Act, 1982*. In the dictation, she made frequent reference to Aboriginal peoples' rights; the draft transcript referred to "average little peoples' rights". While the story is amusing, "the irony of this miscue is more profound than it is comic," she said. "Replacing 'Aboriginal people' with 'average little people' is exactly the problem we have in Canadian society," and reflects "the historical views that are still very much with us – we're seen as below-average little people."

Ms. Turpel said her own approach to the criminal justice system has been influenced by a passage from the Report of the Royal Commission on the Prosecution of Donald Marshall, Jr., which stated that:

> Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.

She said this citation introduces the concept of dual respect, recognizing that the system must be respectful in dispensing justice to people whose respect it enjoys. It also suggests that the criminal justice system must be consistent and sensitive to Aboriginal peoples' human rights, including the basic right of self-determination. Ultimately, the concept of dual respect provides a benchmark for

evaluating the present system, and for assessing the value of local reforms. Ms. Turpel took the concept one step further by proposing a "3-D vision" of Aboriginal justice: difference, diversity and destruction.

On the question of difference, "although many Canadians think Aboriginal people simply imagine it, Aboriginal people are in fact different culturally, politically, spiritually and linguistically. The difference is profound, and it does vary" from one community to another. The difference is cultural, not biological, Ms. Turpel said, in contrast to 19th century definitions of race based on blood quantum. But efforts to assert Aboriginal peoples' difference usually run into one of two judicial attitudes: that Indians are too Indian, in the sense that their legal systems are allegedly primitive and uncivilized, or that they aren't Indian enough, in the sense of having lost their distinctiveness. "You must be forgetting that British law itself has been described as a mere 'thing of shreds and patches' and a 'jumble' of disconnected elements," she said.

The reference to diversity arises from the range of Aboriginal experience and history that would have to be reflected in a renewed criminal justice system. But Ms. Turpel said the third 'D', destruction, is the most difficult one to experience and to talk about.

"The current legal and political system which has been imposed on Aboriginal people has had incredibly destructive impacts," she said. The Indian Act "has taken power and decision-making out of the hands of Aboriginal people and placed it in others who supposedly know better... This power-over relationship is fundamentally a racist relationship. It's fundamentally a colonialist relationship," and it cannot be justified.

The legacy of the *Indian Act*, she said, is that "Aboriginal peoples' forms of decision making, Aboriginal culture and tradition, have been dramatically undermined in Canadian society." The saddest part of this destruction, and the most difficult to deal with, "is the fact that many Aboriginal people have in fact taken on some of the modes of thinking of being colonized, namely that people now believe that they are inferior...These destructive aspects are very important, and the criminal justice system is fully implicated in that system in my view." She listed seven fundamental elements of the criminal justice system that are at odds with Aboriginal tradition: the notion that crimes are committed against the state, the adversarial system, the provision of formal written offences and defences, the notion of a professional class of lawyers and judges, the involvement of jury members who are strangers to the litigants, the notion of impartiality, and concepts of punishment.

Ms. Turpel concluded by asserting that administrative problems with the criminal justice system are generally superficial concerns. The more serious issues have to do with the fundamental assumptions that have shaped the system itself. She urged that the "broadest possible scope be given to options that enable

Aboriginal people to establish systems based on their values," recognizing that there is no obligation on the part of First Nations to justify the creation of a parallel system.

A "Conversation Through Time"

Professor Jeremy Webber of the McGill University Faculty of Law focused on the common objections to a parallel system that are often brought forward by non-Aboriginal Canadians. He said his paper had been an attempt to present three central paradoxes that arise in discussions of whether a separate Aboriginal justice system is justified:

- Most Canadians recognize the importance of maintaining cultural contact. "But at the same time, all of us who think about our cultures realize those cultures are not closed, are not rigid, are not frozen in time." The question is how to combine the things we value with constant criticism and appropriate reform.
- The language of individual rights doesn't seem to match with Aboriginal practices. But while Aboriginal justice systems place strong emphasis on collective rights, it is equally clear that individual autonomy is absolutely fundamental to Aboriginal cultures.
- Canadians care about norms of equality, and become nervous about divisions of authority based on race. Yet it is clear from recent developments in race relations in the United States that the concept of 'separate but equal' does not equate to equality. This must be reconciled with Aboriginal demands for a parallel justice system that draw heavily on the language of equality.

Much of the problem can be traced back to the inadequacy of our language, Mr. Webber said. But if non-Aboriginal people were to explore their own legal experience, they might be surprised at the degree of support for a separate system. Nervousness about Aboriginal justice reform often flows from a misunderstanding of existing non-Aboriginal structures of justice, and more important, from a misunderstanding of the culture that is embedded in those structures.

Mr. Webber said these questions could be addressed by considering the underlying issues involved in being faithful to one's culture, then dealing with specific objections to a parallel system. On the first point, he stated that culture has very specific values, principles, rules, and sets of beliefs "that make it look very static and, I think, unfortunately static". In fact, cultures are much more dynamic, and "are perhaps best thought of as a conversation through time that still has its own particular character".

Cultural points of reference are based on distinctive historical experience, he said, but cannot be frozen in time. Cultures have their own internal resources for change, "and in fact the important value in maintaining one's culture is

exactly that continuity" with the discussion that has gone on before. This is vitally important because we understand our cultural identities and roles "by placing ourselves within our stories, by placing ourselves within time", and attaching ourselves to something that went before.

The cutting-off that has been attempted with Aboriginal cultures is objectionable "because of its effect on the understanding of who Aboriginal people are as people, their ability to understand themselves within the context of what's gone before, the breaking of those stories."

The first specific objection to a parallel system is that it would subject individual rights to collective rights. Mr. Webber put forward two responses, beginning with the observation that a concern for individuality is not the only influence in the British legal system. "I don't think that's true of any legal system that has ever existed," he said. European legal systems have also found a number of mechanisms for tolerating diversity while respecting individuality. "We are often blind to the very diversity within European-derived legal traditions," such as the difference between the common law and the continental European approach to criminal procedure. The other argument is that protection of individuality depends on historical context, so that "arguments that individual rights might be endangered often come down to issues of institutional trust" and safeguards.

The other main set of objections is based on equality, or "the idea that Aboriginal people are getting away with something" by establishing a separate justice system. Mr. Webber said we don't often see the more visceral objection, which "simply says that, to have a country, the same rules must apply to everyone. So it isn't a real measuring of individual welfare – it's more an issue of nationalism, a conception of nation that has to be confronted directly."

To the extent that Aboriginal justice systems are seen to be based on race, Mr. Webber said the central importance of cultural differences must be "addressed head-on and addressed honestly". One of the keys to the argument is that, despite a "substantial coincidence between Aboriginal ethnicity and Aboriginal culture today", it can be demonstrated that Aboriginal societies have always been open, and that a parallel justice system would be based on territorial considerations as well as ethnicity.

In concluding his presentation, Mr. Webber stressed the importance of a separate justice system in re-establishing cultural continuity for First Nations. The extent to which separateness is required depends on whether a particular society can find a place within the existing system, so that some communities might not need a completely parallel system.

"Emergence": Communities Are Already Taking Charge

John Giokas, a private consultant and former staff member with the federal Department of Justice, discussed the mechanics of adapting the current justice system to accommodate Aboriginal peoples' concerns. "The basic theme that I'm setting out can be summarized in one word, and that is *emergence*," he said. "I believe a new order is emerging in Canada," covering all aspects of the relationship between Aboriginal peoples and non-Aboriginal Canadians. The shape of this new order is not yet entirely visible, but First Nations are beginning to see the general lines while "the rest of Canada is trying to catch up".

Mr. Giokas said the main question from his perspective is what role the government can play in facilitating change within the current constitutional framework. That role should be based on recognition that:

- The current justice system has failed Aboriginal people;
- The solution is increased Aboriginal responsibility for defining and resolving justice issues in their own terms;
- Definitions and solutions in different communities will reflect the diversity of Aboriginal peoples; and
- Aboriginal definitions and solutions cannot exist apart from the current justice system, at least not at the outset.

Mr. Giokas identified three themes that underlie the difficulties that have emerged in Aboriginal justice: the disproportionately high rates of arrest, conviction and imprisonment; the prevalence of overt and systemic discrimination; and the profound and growing alienation of Aboriginal people from current justice systems. Community alienation is the most serious problem from a government perspective, particularly because it has been linked to the political struggle for a new power-sharing arrangement for First Nations.

There is agreement that criminal justice problems in Aboriginal communities are linked to socio-economic factors, he said. While there has been much discussion of the causes of and precise relationships between legal and social issues, it is generally understood that increased Aboriginal responsibility for justice is part of the solution. "It's inevitable, given the mobilization of Aboriginal peoples throughout the world and in Canada since the end of the Second World War," and in light of growing recognition of human rights issues at home and abroad. "We speak this language now, we've become somewhat familiar with it," and a concern for human rights is beginning to dominate the debate.

Mr. Giokas said a key impediment to increased Aboriginal responsibility is the need to link the more abstract human rights debate with the day-to-day criminal justice issues facing Aboriginal communities. In recent discussions, a false dichotomy has emerged between the human rights track, sometimes referred to as a political agenda, and a more empirical, community-based approach. "All action has been arrested while the debate plays itself out."

The real issue, Mr. Giokas suggested, is that there can be no single blueprint for action. The starting point for reform within either track will always be at the community level – indeed, many communities are simply moving ahead, rather than waiting for the debate to conclude. The Department of Justice knows of 100 or so community-based justice projects, but Mr. Giokas estimated that several hundred are now in progress. Many communities are already practising Aboriginal common law, he said, with or without the knowledge of the federal government.

Even so, "we have to pay attention to both poles of the debate, and I suggest that government can only play a useful role if its initiatives and efforts are tied in to the ongoing agenda of aboriginal communities." In order to facilitate community-based change, he said, Ottawa must approach Aboriginal people in a spirit of partnership, and amend its cost-sharing formulae to allow for longer-term funding. New fiscal arrangements will also play an important role in convincing provinces that the federal government is serious about working together – at present, he said, the government "is just no longer a credible partner in some of these cost-shared areas".

Mr. Giokas also called for broader use of alternative dispute resolution mechanisms, to build on the flexibility that exists in the current system. A similar approach can be applied to sentencing. "The criminal justice system is nothing if not open and flexible," he said. "It can be exploited." Practitioners also have an important role to play: if the defence bar were doing its job, he said, judges would be hearing more about issues of cultural difference, lack of fairness, and inappropriate bail conditions.

Ultimately, the government must be prepared to move forward on two simultaneous reform processes. The first would involve repairing the existing system, while the other would provide open-ended opportunities for community initiative. The government would have to let go of the worry involved in not knowing exactly where the community systems are going, Mr. Giokas said, while recognizing that "it's an inevitable movement towards new power-sharing arrangements".

Benefits for Non-Aboriginal Populations

Roderick A. Macdonald of McGill University addressed the benefits of criminal justice reform to specific groups within non-Aboriginal society, including women, poor people, and members of visible minorities. He stressed the importance of understanding the difference between concepts of justice and law, noting that "especially in the professional legal community, it's very easy to equate the two". In the search for justice through a recognizable system of law, he said access to justice has tended to be the most important issue. This concern has contributed to a "surrogacy of form", where the design of structures like the courts and legal aid has taken precedence over the accessibility of basic concepts of justice.

Once the theories of justice are dissociated from concepts of law, "a much broader place is opened up for ordinary peoples' concept of justice," and the focus shifts from a universal, monolithic approach to different forms of "local justice". Similarly, it's important to understand how much our critique of the legal system has been driven by a criminal justice agenda. As chair of a Quebec task force on access to civil justice, Mr. Macdonald said he had noted that "most peoples' experience with justice is in the day-to-day interactions they have with each other" within families, neighbourhoods and communities. "In fact, the notion of access to justice, the preoccupation with the criminal justice system in understandings of justice, is one more symptom of the surrogacy of substance."

Mr. Macdonald also noted that the framing of the debate over access has a built-in bias toward solutions "which we, I, as a university professor and as a lawyer, would tend to recommend". He noted that the "instrumentalist metaphor" of removing concrete barriers to access implies that perfect access is possible, even though the Quebec task force recognized early on that the key barriers are in the realms of knowledge and psychology. "When one considers failings of the legal system for Canadians generally, and for particular groups and segments of society in particular, one has to realize that the principal failings are not failings that institutional redesign and money are going to fix. They are fundamentally failings of attitude, perceptions and knowledge."

A final insight from the Quebec task force was the recognition that access issues are most important at the points where law is generated and administered. This suggests that alienation from political, administrative and executive processes is "much more profound than alienation and inaccessibility to courts and other dispute resolution tribunals". This perception means that Canadians are intimidated when their problems are defined in legal terms, tend not to trust the logic of a legal system that stands outside their socio-economic and cultural circumstances, and are disheartened by a system that they find remote and uncomprehending.

The system itself, meanwhile, "responds to a logic which favours a certain class of citizen over others. Women, cultural communities, the disabled, the young, the old, the poor – as well as Aboriginal peoples – all find the system unresponsive to their particular circumstances, be this in regard to its substantive rules, its institutional structures, its procedures, its remedies, or its monolithic and universalist conception of justice."

In addressing these issues, Mr. Macdonald concluded, it is important to recognize that what we call disputes and alternative dispute resolution mechanisms "are in fact constructions of the legal system". In reality, most people understand their own conflict long before the system calls it a dispute.

In a brief question-and-answer period, a participant asked Mr. Macdonald to expand on his position that the state is not the only source of law and legal

normativity in modern society. Mr. Macdonald said the Quebec task force had uncovered a high level of public alienation, springing from the unresponsiveness of the justice system to people's experience. This becomes an important access issue, particularly if you believe that justice is the official product of the state. Any sociologist or anthropologist can cite multiple normative systems that are already in place to deal with interpersonal relationships in society. "The question is the extent to which access to justice is an issue of legal systems that are in themselves an artful construction," he noted. From a perspective of legal pluralism, "you may find that inaccessibility to the formal system is a bonus." He stressed the importance of recognizing and legitimizing the multiple systems that already exist, and nurturing the resources that people have to establish their own systems.

Judge Alf Scow concluded the session by expressing confidence in the Royal Commission process. He said the discussion had addressed many of the problems of a justice system that has not accommodated cultural differences. Governments and legal systems have failed to pay attention to problems that First Nations have been raising for years. But he said he was encouraged that the Commission had taken up the same issues, and that Justice Minister Kim Campbell had "implied yesterday that something is going to be done".

Judge Scow also stressed the importance of situating the discussion of justice issues within the context of the Indian Act. The Act "contains so many unjust provisions, so many draconian provisions, that it's led to almost a total destruction of the foundations of the cultures of the First Nations people of this country," he said. Among other things, a provision of the Act outlawed Aboriginal ceremonies over a 75-year period, thus preventing the transmission of oral history and values. "The issue of self-government is very relevant to the deliberations of this Commission, because self-government means we will have responsibility for where we go from here."

Round Table Discussion of Fundamental Questions

Question 1 (a) Reforming the Existing System

Round Table Chair Murray Sinclair explained the format of the three Round Table discussion sessions to be held during the conference. Thirty-six participants, twelve per session, were selected by the Royal Commission to discuss the fundamental questions outlined in the agenda. The first Round Table, moderated by Marc LeClair, Executive Director of the Métis National Council, explored the question of whether the present justice system could be adapted to reflect the needs of Aboriginal people. He began the discussion by noting that a problem identified in previous sessions was the adversarial nature of the justice system.

Leroy Littlebear, Professor of Native American Studies at the University of Lethbridge, said the question is whether or not the system can be adapted to take into account Aboriginal notions of law and justice. He believed that Aboriginal and non-Aboriginal people had fundamentally different approaches to each.

Every society has mechanisms of social control to resolve its disputes, he said, and the Aboriginal people have internalized these control mechanisms. Because the methods of social control are within themselves, Aboriginal people "have no need for elaborate, complex, external control mechanisms." On the other hand, non-Aboriginal people do not internalize social controls and their societies are characterized by elaborate external mechanisms of social control such as police, courts and corrections systems. The question, therefore, is if the external, adversarial system can be adjusted to take into account the fundamentally different approach to justice of Aboriginal people.

Mr. Littlebear explained the "fight theory of justice," in which a verbal battle precedes the decision of guilt or innocence. In this system, each tribesman involved in the dispute will tell a story which favours his version of events and attempts to discredit his opponent's version. After all the stories are told, a shaman applies traditional codes to reach a decision. The shaman, or judge, "miraculously avoids the mistaken application of facts – from the two sets of lies told by either side, the judge is supposed to come up with the truth." Mr. Littlebear asked: "In this system, can we ever get at the truth?"

The adversarial system is geared toward determining guilt; the accused is found either guilty or not guilty. No allowance is made to somehow mitigate the notion of guilt, and the judge is not in a position to consider the contextual situation of the offence. If this is the system that Aboriginal people are being invited to help reform, the answer is no. "You have to have a separate justice system to cater to the very different needs of Aboriginal people," Mr. Littlebear concluded.

"We Don't Feel Comfortable With the Adversarial Process"

James Langston, Chief Prosecutor for the Lethbridge and Macleod Judicial District, Alberta, told the Round Table that at a recent meeting of an Aboriginal police force, an officer told him that he and other officers felt uncomfortable giving evidence in court. "The Native constable was saying that 'we don't feel comfortable with the adversarial process,'" recalled Mr. Langston.

"We don't understand your culture," he told the Aboriginal participants, adding that non-Aboriginal people can come to understand the differences. He told another story, in which a victim in an assault case was unable to point out the accused to the court because the accused was a revered spiritual elder. Aboriginal and non-Aboriginal people move to the beat of a different drum, said Mr. Langston. The two groups might be using the same words but the meanings are different.

Mr. Langston said he was respectful but "terrified" of one elder on a justice panel on the Blood reserve. He is learning a lot from the woman, who often points out what he is doing wrong. Another elder on the panel waited until several meetings had passed before telling Mr. Langston that the two had met in court more than 15 years ago, when Mr. Langston prosecuted the elder for cutting down willow trees for a sweat lodge. "Had I known then what I do now, he wouldn't have been prosecuted," said Mr. Langston.

The adversarial process is not appropriate, he continued, and the system should be adapted to find other ways of settling differences. He suggested that many reserves could take responsibility for dealing with disputes in the community, calling in outside help from the mainstream system when necessary. Mr. Langston concluded by recalling a moment when he stood in awe before a Sundance Lodge. "Any society that can build a Sundance Lodge can govern themselves," he said.

Joanne Barnaby, Executive Director of the Dene Cultural Institute, recalled being summoned as an expert witness in a case involving an elder accused of assault. She has a special interest in the culture of her people but does not consider herself an "expert," and she tried to get out of the situation, to no avail. To prepare herself for court, Ms. Barnaby spent a few days with the elder to discuss the circumstances of the incident. She discovered that the man was depressed and had feelings of worthlessness and little self-respect. He had spent 40 years living a traditional life on the land before moving to an urban area 20 years ago. In town, his life began to fall apart; he lost his role as a leader, he had no status in his new community, and he felt he had nothing more to give. The elder was striking out in anger, and he did not hesitate to acknowledge his guilt in the assault.

At the hearing, "the kinds of questions asked were totally irrelevant," Ms. Barnaby said. The questions did not address the elder's depression and need for healing. It was in question whether the elder would continue to receive a licence for firearms, and even his own lawyer misunderstood the elder's continued need to hunt and trap on the land.

After that experience, Ms. Barnaby was asked for help to set up a judicial education program, but she and her organization decided the time would be better spent working in the communities. "I'm convinced the only ones who could benefit from education is our own people. We should decolonize ourselves and deal with the symptoms of our oppression."

James McCrae, Minister of Justice and Attorney General of Manitoba, was initially hesitant about participating at the Round Table but after one and a half days, he said: "I belong here and need to be here – no question." Mr. McCrae doubted there was anybody in the room who would not acknowledge that the justice system has fallen far short of meeting the needs of Aboriginal people, and

he believed that "thanks to Aboriginal people, we may end up some day with a justice system that will serve us all better."

"It must be kept in mind that this is not a regional but a national problem, and the solutions will be as diverse as the First Nations themselves," Mr. McCrae continued. Justice cannot be separated from other aspects of society, and justice problems cannot be resolved without addressing the broader socio-economic issues; focusing only on reform of the justice system is a poor way of dealing with these broader problems.

He was uncomfortable with the wording of the first question, which separated the fundamental elements of the existing justice system from its administrative aspects; the two must be addressed at the same time, he said. The first step to reform is to merge the Aboriginal and non-Aboriginal approaches to justice and remove the system's adversarial nature. He hoped the Royal Commission would consider its recommendations about reforms and parallel systems very carefully.

The focus of change should be the development of community justice programs, Mr. McCrae said. All the constituencies within the Aboriginal and non-Aboriginal communities must be involved in the process. What must be avoided is a never-ending discussion, taking place while Aboriginal communities are crying out for justice. "We have to start delivering now," he stressed. He did not want to scuttle the debate about parallel systems of justice, but the urgent situation in communities needs immediate attention, and he believed the practical route was through reforming the existing system.

Mr. McCrae believed strongly that the solution lay in community based, community developed, models of alternative dispute resolution.

These models represent ways a community can develop approaches to justice tailored to its individual needs. He pointed out that the model program at St. Theresa Point reserve has dealt with hundreds of cases over the past few years but referred only six children to the outside justice system. The models are out there, he said; less time should be spent studying the problem and more spent on developing practical solutions.

Mr. McCrae said justice reform can't go ahead without federal, provincial and Aboriginal participation; "a tripartite process is best." He added that the political will for reform must also be found in Aboriginal communities.

Family Violence: A "Desperate Area" of Need

Mr. McCrae stressed that a "desperate area" of need was family violence, adding that after learning about two distinct approaches to the issue, he supports the proposals of Aboriginal women. "I want to see this crucial issue discussed," he said, adding that Aboriginal women must be involved in all stages of justice reform. He concluded that the justice system must be adapted to make it far

better, and the adaptation process must be done with the full participation of Aboriginal people.

Alain Bissonnette, Gordon F. Henderson Human Rights Chair at the University of Ottawa, said it was important to look at the fundamental myths upon which the justice system is based. For example, he asked where the justice system was located within the justice paradigm. "Where is the border between justice and injustice?" he asked.

There are at least two models of justice that can be applied to both Aboriginal and non-Aboriginal societies. Mr. Bissonnette noted that in Europe before the 11th century, communities were an important part of the justice process. Individuals were perceived to have more of a responsibility to their communities and vice versa; social cohesion was paramount.

In the other model, justice comes from the outside. The best example is the Supreme Court. "Everyone can make a mistake except the Supreme Court," Mr. Bissonnette noted. In this system, the individual is alone. The notion of punishment is linked to the model of religious hierarchy; the accused faces God for judgement. There is always an elite to interpret the rules and regulations.

Every society experiences the pull toward both these systems, and Mr. Bissonnette insisted that Aboriginal people don't have to choose one or the other model of justice. Dealing with the conflict between the systems means being involved in a continuous process of negotiation and discussion about justice issues. As well, Aboriginal people who choose to use their own justice systems may sometimes call upon people from outside their community for assistance.

He noted that at the initial stages of the present legal system, the mechanisms of social order within communities did not have to be recognized by the state. "Now, there are Aboriginal communities who claim to not need recognition from the state." Mr. Bissonnette believes that the issue of justice is always linked to authority, and to what extent the parties involved in conflict recognize the authority.

Réjean Paul is Judge of the Quebec Superior Court. As Chair of the Cree-Naskapi Commission, he has served for the past six years as a mediator in conflicts arising between federal, provincial, Cree and Naskapi parties. He believes his intervention has been successful because the mediations are informal and sensitive to the needs of all parties.

In his role as Supreme Court Judge in the Northwest Territories, "I feel useless in the communities," he revealed. He told the Round Table of holding court one day in a small community of 125 residents. The case involved a minor crime, and the evidence was clearly against the accused. He explained to the jury about the burden of proof in the case, but after his address of at least one-half hour, the jury sat for only a minute before reaching its decision: they found the

defendant not guilty. Mr. Paul was stunned and spoke to the Chief. "Did I miss something?" he asked. "No," the Chief replied, "the guy was not guilty. We knew that well in advance." Everybody knows what's happening in their community, and Mr. Paul said they don't need him to tell them what to do.

"The time has come for changes," he continued. He suggested amending the *Criminal Code* to allow for a Council of Elders in each community to apply the system needed within that community. If necessary, the Council could ask outside judges for assistance. The Council system could be set up immediately in remote communities, but urban communities are another matter. Mr. Paul has given the problem a great deal of thought but could offer no solutions. Meanwhile, "we're trying the best we can to work within the existing system," he concluded.

The Cheapest Form of Justice Possible

Teressa Nahanee is Constitutional Adviser for the Native Women's Association of Canada. She began by saying that in her criminal law course at the University of Ottawa, she finds it painful to hear the non-Aboriginal students discuss Aboriginal people as a lower class of people.

"There's nothing wrong with the justice system," Ms. Nahanee stated. The system was designed to protect "people like them from people like us," and that's why so many Aboriginal people are in jail right now. In this system, Aboriginal people plead guilty. The system delivers the cheapest form of justice possible, providing Aboriginal defendants with Legal Aid lawyers who encourage guilty pleas so everybody gets processed quickly. The efficiency saves administrative costs. "What is the purpose of criminal law in Canada?" she asked. The system has never protected Aboriginal people.

Ms. Nahanee was particularly concerned with the plight of Aboriginal women facing violence in their own homes. "Aboriginal women want the violence to stop," she said. It has been claimed that punishment is not a traditional Aboriginal concept, but Ms. Nahanee pointed to several Aboriginal cultures where banishment and death sentences occurred. Pretending that punishment is not an element of Aboriginal justice is living with an idealized concept of Aboriginal justice. "For Aboriginal women and children, we are not living in an idealized time. It is the worst of times."

Aboriginal women do want violent crimes punished, she continued. The Inuit Women's Association currently is working with the justice system in the Northwest Territories to make judges hand down heavier sentences for violent crimes, sentences similar to other areas of the country. Currently, the common sentence for a violent crime against a person is two years less a day. Heavier sentencing would mean sending the offender to federal institutions outside the N.W.T. The Native Women's Association of Canada, however, believes heavier sentences are the best way to protect many women in their communities.

She related that in Sweden, the Cantons have put an end to fly-in judges for remote communities. Judges are now elected by the community, and community members have more control of the process. Ms. Nahanee repeated that the problem is not the system, but added that while still within it, one must play by the rules, and try to change the rules. For example, the Criminal Code could be amended to better protect Canadian and Aboriginal women, she concluded.

L. Jacques Auger is Co-ordinator for Native Affairs at the Department of Justice in Quebec. He has worked for many years as an intermediary between Aboriginal groups and the government. He focused his comments on the importance of communication. Communication problems are at the heart of every problem, Mr. Auger claimed. He wondered what the situation would be now if Europeans and Canadians had listened more to Aboriginal people over the years.

His government has grappled with the issue of Aboriginal people and the justice system for years now and has come to essentially the same conclusions as governments across the country. He noted recent attempts to remedy problems, including a Justice Summit in February which featured a panel on justice and the administration of justice for Aboriginal people. Quebec's Minister of Justice has said the justice system does not meet the needs of Aboriginal people.

The system should be improved to the greatest extent possible, and "we should work with Aboriginal people in partnership" to develop community justice models that take into account the socio-economic factors underlying the problems. Mr. Auger concluded that a justice system should meet the needs of both Aboriginal and non-Aboriginal people.

Chesley Anderson, Vice-President of the Inuit Tapirisat of Canada, told the Round Table of his peoples' history of contact with Europeans. In the 1700s the Moravian Church arrived and began to influence the social structure. The Church brought contact with the outside – education, trade, and goods for trade. At the time of the Moravian Church's arrival, problems in the communities were dealt with by community elders. The new justice system was introduced to the communities by the RCMP.

The role and influence of elders eroded and now there are communities in the area with the highest suicide rates in Canada. The court dockets are constantly overloaded. His people have reached the breaking point. "The Inuit have gone far enough. We want no more outsiders," said Mr. Anderson. His people must take the long, hard road back to health.

"Obviously, the system has not worked for us," he continued. Justice must be controlled at the community level and use traditional ways of healing. There will be an overlap of systems and mediation will be needed, but such a system can work, he said. "We have to take over the justice system ourselves in order to make it work for us."

Mr. Anderson noted that the main focus for self-determination has been land claims and at the moment, the process is stalled. But something must be done to alleviate the situation now. The high suicide rate indicates that people are falling between the lines, and many of the victims are people who are not sure how to adapt to the new ways. He is aware of cases of Inuit youth who "beat the system" by planning to go to jail for the winter. "Punishment means some place warm in the winter," he noted.

Referring to Ms. Nahanee's comments about Inuit women advocating for harsher jail sentences, Mr. Anderson said that maybe a stronger punishment would be to have the offender go back to the community, face the problem, and deal with it. "We need a healing process," he said. His people have traditionally valued collective rights, now the focus is on individuals. Problems will not be solved by only considering individuals; the community must be examined to understand why the problems exist.

Moderator Marc LeClair, noting that time was running out on the session, invited AFN National Chief Ovide Mercredi to speak to the issue of reforming the justice system. "I thought that by saying nothing, I was saying something," Mr. Mercredi responded.

The fundamental question, he continued, is if Aboriginal people want to revise the status quo as an alternative to their parallel system. There is no question that the system is capable of changing; the question is if the political will is there. He wondered if adapting the present system meant "more assimilation for the people I represent."

His people have always asserted their authority over jurisdiction, making changes to structures within communities even when outside bodies have said changes were impossible. Over time, the changes become permanent. It's a question of deciding where to focus your energy, Mr. Mercredi said, and his people have decided to focus on "the restoration of our jurisdiction over the administration of justice." The AFN is waiting for a policy announcement from the federal government that advocates real reform and recognizes First Nations' jurisdiction over justice.

Mr. Mercredi explained that healing, punishment and guilt are all features of justice systems. Every society has concepts of punishment, and "we live in small communities where people know exactly what's going on – there's little privacy." Reform to the system begins with the political will to develop a justice system that reflects community needs. "Any functioning justice system must have the consent and support of the people," he said.

An Aboriginal justice system would have evolved from a system that recognized that people want the inherent right to govern themselves, he said. "Our people are more inclined to pursue our own inherent paths than to be told what to do to reform the current system that has caused a lot of agony in our lives."

Marc LeClair noted that the participants had stressed the need for community based justice systems and asked if it was possible to begin a dialogue that would move the issue along. James McCrae said he would insist on three parties at the negotiating table; a tripartite process is necessary because of funding realities. He does not see anything wrong with having the ultimate goal of a separate justice system for Aboriginal people but the needs in Aboriginal communities now are great, and community members "can't wait for Ovide Mercredi and I to talk."

Mr. Mercredi restated his point that the route for justice reform could be federal recognition, through ordinary legislation, of the inherent right to self-government. The existing system does not serve his people, and offering them a branch of that system to work within is misplacing their energies. He suggested that if gaming regulations were lifted, for example, the friction around the issue would be eliminated and a climate would be created for constructive dialogue. The government could "vacate the field" of administration of justice to Aboriginal communities, creating an opportunity for Aboriginal people to fill the vacuum with their own systems. Other legal avenues exist, he said, adding that "our reading" of some existing treaties show First Nations' jurisdiction over justice.

Moderator Marc LeClair summed up the answer to the question of whether the system can be adapted as: "Yes and no." There is agreement that justice should be repatriated to Aboriginal people, but the means to achieve it are very important.

Round Table Discussion of Fundamental Questions

Question 1 (b) and 2: Reforming the System

Judge Murray Sinclair opened the meeting by introducing the participants. "Can the criminal justice system be reformed?" he asked.

Moderator Donald Worme made the comment, "No matter how far you travel, you won't get to the place you want if you take the wrong road." Fundamental change is necessary, Mr. Worme went on. It may be too early to map the precise mechanisms for change yet, but we must "add more flesh to the skeleton."

Gerry Morin brought up the issue of policing. Only recently has the justice administration system begun to include Aboriginal people; up to now, "we were not represented within that framework." The problem is that the RCMP both investigate and prosecute cases; this does not equal impartiality. Recent cases such as those of Donald Marshall and David Milgaard suggest that the police aren't as impartial as they claim and can ignore or suppress evidence weakening their case. He also spoke of racism in correctional centres. "How can people correct themselves when they hear racist language used around them?" Aboriginal prison staff, he notes, will not call in the union shop steward when non-Aboriginal staff will.

Mr. Morin brought up the shooting of Leo Lachance and the subsequent inquiry. In dealing with the informant issue, the court ruled that the public's interest overrides other interests. But if questions can't be answered, "why are we here?" Mr. Morin asked. "Aren't Aboriginal people also part of the public, and shouldn't their interests be represented?" The prosecution doesn't want the truth. "They hide behind the law and don't look at justice," he stated.

The problem goes back in part to the nature of common law, developed over the centuries with no Aboriginal input. Only since the 1960s have Aboriginal people even had the right to vote.

Mr. Worme reminded the audience that Canadian courts were courts of law, not courts of justice, and invited Gilles Favreau, RCMP Deputy Commissioner of Operations, to respond. Mr. Favreau said that the RCMP has been trying for some years to better its relations with Aboriginal people. "Can the system be reformed?" The criminal justice system is not serving the public well and has become too complex; even lawyers agree with this. Mr. Favreau noted that several diversion programs in Aboriginal reserves are working well, with RCMP involvement as well.

"We have to move ahead for immediate solutions; the long-term will come later," Mr. Favreau said. He acknowledged that the force had made mistakes in the past and looked ahead to better cooperation with the community, more sensitivity, and alternative justice programs. On the other hand, Mr. Favreau believed that it must be acknowledged there are real criminals; "it's not all just graffiti and broken windows." Everyone working in this imperfect system must realize that there are serious cases which must be addressed differently. On one reserve with 700 people, there are 800 arrests per year – a fact that reflects deep problems.

Frank McKay, President of the First Nations Chiefs of Police Association, said that Aboriginal communities had developed their own police forces because they were not satisfied with the RCMP; they had seen too many cross-cultural problems. He referred to Ovide Mercredi's comments on the need for political will. "We had that will," Mr. McKay said, but funding is an ongoing problem.

In treating offenders, Mr. McKay has found that prayer and counselling by elders work; the young people do listen, although it takes lots of talk and time for change to happen. His force does counselling as well. Aboriginal police are part of the community and provide whatever they can, given financial limitations. In answer to a question from Mr. Worme on violence against women, Mr. McKay reported that spousal assault is a serious problem, usually alcohol-related. His force works with counsellors and social services on the reserve. "Would reform mean going beyond enforcing the law and taking on other roles?" Mr. Worme asked. "Whatever Aboriginal people want," replied Mr. McKay. "The police are members of the community; we'll do whatever is necessary."

Mr. Favreau agreed that the RCMP had failed for a long time to recruit Aboriginal members for on-reserve service. "We'd walk into a village, or we'd have a constable there for two years and pull him out, or we'd be in and out." Now, Mr. Favreau reported, the force has more than 400 Aboriginal members and is aiming for 1,500. But the RCMP should have seen these problems coming.

Judge Allan Cawsey, Chairman of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, said that his province has had little experience with Aboriginal law enforcement. He thought that people would like the police to show more cultural sensitivity, but had also heard young people in correctional centres say "We don't want band police; we want real police."

Frank McKay spoke up in defence of Aboriginal police in Alberta, in response to Judge Cawsey's remarks, pointing out that underfunding is chronic and leads to problems with recruitment and training. He has no problem with the RCMP's Aboriginal recruitment, but he believes that many of these constables are uncomfortable with RCMP policy, which affects their performance. He found it offensive that anyone could question the power of prayer to turn wrongdoers around; this scepticism, he felt, is a vote of non-confidence in the Aboriginal way of life.

"Who Knows the Realities of a Community? Those Who Live There"

Jean-Charles Coutu, who co-ordinates the court circuit in Northern Quebec, mentioned the varying distribution of Aboriginal populations in Quebec. "In my area, we have over 30 Aboriginal communities," he said. He asked why, given all the efforts made in the past, little progress has been made. The answer, Mr. Coutu believes, lies in lack of political will and ignorance at the higher levels of the public service. In Quebec, the small Aboriginal population (50,000) is politically not profitable. We need to change attitudes, Mr. Coutu stated, and perhaps this report will make the decision makers open their eyes and ears.

He believed that a separate Aboriginal justice system is not immediately possible. Aboriginal communities need time to develop new systems, first identifying the problems they face and looking at underlying causes. Aboriginal people surrendered social control, first to the church, then to the RCMP, then to the Sûreté; it will be a long process for the community to regain this control, he said, and the justice system can't solve social problems.

Régis Larivée, Legal Adviser to the Deputy Minister of Public Security in Quebec, noted the large gap between the relatively high number of Aboriginal police in Quebec and the lower numbers elsewhere in the country. "Should we have a parallel Aboriginal justice system?" Mr. Larivée thought this might be difficult to achieve, given the small size of Aboriginal communities. Highly specialized areas will need analysis. Perhaps an autonomous Aboriginal system working in tandem with existing police forces would allow these forces to bring

their experience and expertise. Aboriginal people should control their own police, Mr. Larivée stated. "Those who know the realities of a community are those in the community. We must give them the necessary resources."

In the far North, Mr. Larivée continued, police are first on the spot and have far greater responsibilities. Political will is needed to give the police the tools they need, adapting the Canadian justice system to fit Aboriginal needs. "If justice comes from the outside, not the inside, the police are useless."

Forgotten People: The Métis

Sheila Genaille, President of the Metis National Council of Women, Research Director to the Metis Nation of Alberta, and an Adviser with the Constitutional Reform Committee, stated strongly that there are three Aboriginal peoples in Canada: Indians, Inuit, and Métis. "We are excluded from the Royal Commission," she said, "and we will no longer tolerate being overlooked." The Métis people want change immediately and have listened to too many promises. They have been the forgotten people of Canada: no more. "The Métis may be a young Aboriginal nation, but we are part of the country and nation builders."

To the question of adapting the present system, Ms. Genaille responded: "Yes and no." Short-term change is necessary, but the problems the Métis have with the current system go far beyond simple remedies. Whatever happens, Métis people will continue "to come in contact with the justice system." While an Aboriginal justice system should exist, "we have to deal with existing reality." Previous recommendations – and there have been many – should be implemented "to save those Métis we might otherwise lose. But short-term adaptive changes...must be made...with the consultation and approval of the Métis."

As for question 2, the inclusion of Métis "holistic, culturally appropriate modes of dispute resolutions" will improve the position of people like children, the elderly, the poor, Métis and non-Métis included. Ms. Genaille brought up the example of the Métis Settlements Appeal Tribunal, which uses techniques to diffuse tension between parties, achieve balance between parties, and restore harmony. This community-based system allows for individuals' differences instead of imposing uniformity and remains flexible and adaptable. This model, Ms. Genaille concluded, could be of real benefit to Canadian society as a whole.

Larry Chartrand, Director of the Indigenous Law Program at the University of Alberta, added that the Tribunal includes Métis and non-Métis and has a broad jurisdiction, including social behaviour.

The recruitment of Aboriginal police, Mr. Chartrand said, is a good development. But it is not enough; cross-cultural awareness must also be increased. "Don't create more conflict than you solve," Mr. Chartrand warned. For example, having Métis police on an Indian reserve is no solution. As for Aboriginal people in police forces, "what of their relations with fellow officers?" He cited the

instance of one Aboriginal officer who quit because his colleagues said he was "over-arresting" when he charged as many white people as Aboriginal people. Mr. Chartrand also called for recognition of the cultural difference among Indigenous nations; the suitability of officers and their "fit" in the community is important.

Mr. Chartrand saw alcoholism as a symptom of underlying powerlessness as the result of values imposed by a foreign culture. He wondered what programs would restore power to the community – some communities may not have an answer and should not be encouraged to jump into reform until they are ready. Process and empowerment are key words.

Mr. Chartrand mentioned the concept of circle sentencing, in which a judge allowed the community to form a circle and pass a sentence, a technique that gave the community a sense of power and ownership over justice. It should be up to the community to decide how to take and use power. The Canadian state was built on the exclusions of Aboriginal peoples; now, "how can it help these people to regain the status they deserve?"

Mr. Worme asked Judge James Igloliorte of Newfoundland and Labrador: "You're a judge. Can we live with the criminal justice system?" The final answer, Mr. Igloliorte believed, is self-government. "A profound problem requires profound change." For now, any changes will have to be stopgaps; the end is self-government. "Any mistakes in self-government, compared to the problems and mistakes in the Canadian system, just won't match up," Mr. Igloliorte declared.

The message must go to one body: the Crown. "The Crown" is impossible to translate into Aboriginal language, but it is the Crown that has to be told what Aboriginal people require. What we must do now, he said, is to decide what we want the Crown to hear.

James Graham, Assistant Deputy Minister of B.C.'s Corrections Branch, said that the present justice system is in trouble. The challenge is for Aboriginal people to help the system find better ways of dealing with Aboriginal and non-Aboriginal people alike. This could be of benefit to all, he thought. The system faces its greatest challenge in urban areas. Mr. Worme asked if perhaps the justice system would work better if it were operated exclusively by Aboriginal people.

Defining Justice

Gerry Morin said that the problem with justice is to define it. He and a friend had tried once to find an Aboriginal translation for the word "hippopotamus" and came up with the equivalent of "From the land of the black people, a wide-footed, big-assed, big-mouthed underwater pig." We've figured out the hippo, Mr. Morin concluded; now let's figure out what justice means.

Responding to Mr. McKay, Gilles Favreau said that hard-core criminals don't believe in the power of prayer; they will not respond to it. He also detailed

programs that the RCMP is putting in place to increase Aboriginal recruitment and to sensitize other staff to Aboriginal concerns, including waivers for entrance requirements, programs for cross-cultural awareness and sensitivity to Aboriginal spirituality, and an advisory body to correct policy. While Aboriginal RCMP officers do have to follow policy, they have discretionary areas in which they may "go talk to an elder and find a solution." Mr. Worme remarked that Mr. Favreau seemed to feel that administrative change is enough, but doubted if everyone would agree.

Judge Coutu stressed the search for a new justice model, which will involve the transfer of power. "Anyone in power makes mistakes," he said, "and the important thing is to recognize and learn from these mistakes." He agreed with the assumption of self-government at the local level, with increasing power as necessary, and called for the active participation of women and youth in new initiatives. Youth live in a different context, one that elders may not always understand.

Judge Coutu appealed for all to look at similarities, not merely differences. The white system also wants harmony and reconciliation, he said. "We all want the same thing;" the problem is that white society is caught up in codes. "We've woven a straitjacket for ourselves, imprisoned ourselves," he said. "We must break through this straitjacket together." We must come back to basics, the judge concluded, and "find the harmony we all seek."

Afternoon Circle Explores Fundamental Issues

The second day of the Round Table concluded with a talking circle, in which participants discussed issues and concerns that had arisen in the course of the earlier sessions.

Judge Allan Cawsey shared the knowledge he had gained as chair of a provincial task force on Aboriginal justice. "We took the view that government wanted to know how the existing system did affect the Aboriginal people," he said, noting that he had personally seen the impact of the present system from the perspective of a judge, a prosecutor and a police officer. "The only part of the Aboriginal culture that I haven't been associated with is being sent to jail by a racist policeman."

One participant addressed his first remark to the Royal Commission. He urged members to bear in mind that every reserve has unique needs, and that 60 per cent of Aboriginal people live in urban centres. "As far as I'm concerned, no one system can be established to serve them all equitably."

Second, he pointed out "that most of the offenders we deal with are young. They're children. They're kids. If we don't handle them properly, they come back as adult offenders." At the same time, he said people are rarely sent to jail for breaking a window or writing dirty words on a wall. "They have committed

an offence against society, either theirs or society at large, which requires a sanction," and "at the moment all we have is jails." In all its travels, he said, the Alberta task force heard that alternatives to incarceration are desperately needed.

The participant also said policing, education, corrections, and other aspects of Aboriginal justice must be community-based "with full community support, and with no initiatives being forced on the community by the outside culture. Everything that's worked when we're dealing with Aboriginals has come from the Aboriginals. I don't know of anything that's worked that has been foisted on them from above." At present, Alberta has a community-based correctional system on the Blood reserve and a community-based penitentiary at Hobbema.

He also suggested that bail provisions will still be needed in a traditional system, if only to ensure that people appear as required before an elders' panel or a community council.

The participant concluded his remarks by addressing the question of benefits to non-Aboriginal communities. "Of course, any change to a system designed to serve Victorian England in 1900 will be valuable to the whole society," he said. Reconciliation and rehabilitation are both extremely important, and "what greater objective of sentencing is there than to return a whole person to the community after they have committed a crime?" More specifically, he said any reforms that benefit Aboriginal communities will be helpful to poor people and cultural minorities.

The next speaker addressed the basic purpose of the criminal justice system. "Many of us who work in that environment may have our own preconceived ideas, and I would bet that they are very formalized ideas," he said. But another view would present criminal justice as just one element of social control, "not the key element, and not the only element." This shift in perspective "opens up a whole horizon of other agencies that equally can react in the environment of social control." From that point, it's not a quantum leap to say that police can exercise a degree of discretion that was more acceptable 50 years ago than it is today; the overall result is a more community-based, holistic approach.

At the same time, he warned that best intentions can be misguided. For example, a judge might recognize that intermittent sentencing is a less punitive approach, without realizing that the accused lives 50 miles from jail, has no car, and can't meet the conditions of sentencing. In this scenario, a relatively minor offence is compounded by a failure to appear, "and now he's become a tremendous offender simply because he was caught up in the system. We have to ask the right questions, and the answers will follow."

The speaker said a first step is to take some risks. "We all acknowledge the system isn't working very well, so what's the answer? We have to be innovative in our approach to changing it...and we're going to stub our toes and not be perfect at it." When the community comes forward with a better idea, "maybe we

don't need a formal structure of judicial committees. Maybe we need a little common sense....If we've learned anything from the people at this table, from the elders, they take a more broad, holistic view, and that's what we have to adopt."

Where Were The Elders?

Joe Morrison, a Justice of the Peace and Ojibwa elder from Northwestern Ontario, said he had not yet heard any discussion of the place of Aboriginal tradition in the justice reform process. There are traditional people across Canada whose people have recognized them as elders, but they were not invited to the Round Table to share their wisdom. "They're the ones that have the knowledge and the oral history of their communities on how things are done." Instead of involving elders, the Royal Commission invited academics to take part in the discussion, and "you're trying to make a decision on the best way for Aboriginal people."

Ideally, he said, "we shouldn't all be sitting here. We should be out in the community, talking to the people that are really affected by the decisions that you will be making here." He also suggested changing the laws to recognize healing lodges as an alternative to jail, since most Aboriginal people in prison were involved in alcohol-related offences.

Elder Flora Tabobondung called for a more forgiving approach to people who have broken the law. "We shouldn't put anyone down that did something wrong," she said, noting that the traditional way is to respect and help each other. "It's up to us as elders, as mothers and fathers, to teach our children how to respect life, how to respect everything that the Great Spirit gives us in this land." She also stressed the importance of cross-cultural understanding between Aboriginal people and other Canadians. "Our forefathers shared, and this is why I think we have to share our feelings towards you, so that you understand our ways and we understand your ways," she said. "Our best way is to work together and build a nation [where] we can raise our children and have good communication. We have the same heart and body and mind," and "we have to understand that we are one."

Daring to Sit in Judgement

Elder Ernie Benedict said he was pleased with the dialogue that had taken place in the course of the Round Table, noting that he had seen many instances where the law had been enforced unequally. Among First Nations, he said, past experience with the justice system has generated a feeling of "who is it that dares to sit in judgement upon the Aboriginal people, when they themselves are interlopers on our own land." There is an expectation that everyone will come into a court of law "with clean hands", Mr. Benedict said, but "I have seen instances where a judge has rented a piece of Indian land and then prosecuted the Aboriginal

people for fishing in that same lake where he has his summer camp. This has not been considered in the statements that have been made so far, and that's why I bring it up now."

The current justice system refers to judges as lords and jury members as peers, based on traditions that originated in Europe. But such references are contradictory and confusing for many people, "and I hope in time they will be outlawed as inappropriate," Mr. Benedict said. "If it is true that all people are created equal, and are equal in the responsibility they have for their own actions, their own bodies, whatever is in their control, that equality should then extend to the court system. Those who would pass judgement must be people who are alike," and even the accused should have an equal say in the court's decision, based on the traditional Iroquois system of justice.

Mr. Benedict cited a case in New York State, where a member of the Onondaga Nation was found guilty of murder. The community asked that he be given a year to put his affairs in order; in addition to providing for his family, he was able to send gifts to the victim's family. He gave himself up voluntarily at the end of the year, and was executed in the county's first hanging. "There must come a time when the equality that we talk about will be an equality of all people, even those that we consider wrongdoers," Mr. Benedict concluded.

"Arrest the System"

Renée Taylor, an Aboriginal lawyer from British Columbia, took up the issue of punishment that had been discussed in the morning session. She said many Aboriginal women have a need for protection from violence, which can take the form of longer jail sentences for offenders. Describing herself as an individual who "lives constantly in the buffer zone between worlds", she noted that "most people would fundamentally agree that for non-violent crimes, for crimes of property, jail is not appropriate". But for certain forms of anti-social behaviour, "certainly something more is needed".

A number of alternative sentencing models have been successful in the U.S., the speaker said. And "something remarkable is happening" in Canadian communities like Round Lake, where abusers and their victims have been involved in healing circles, even though no charges have been laid. In these situations, professionals with the duty to report are asked not to attend the sessions, so that problems can be dealt with within the community. Incarceration is sometimes an effective response to serious offences, but offenders sometimes come back as "crazy, crazy, crazy people", she said. Part of the problem is that appropriate rehabilitation programs are rarely available in prison settings.

The speaker also cited the case of a client who had been charged with various offences, after finding a gang of bikers swimming naked on his land and trying to get them to leave. She said she had called the arresting officer to find out

what had really happened, "because there's all this discretion that we're talking about." His response was that Indians "get liquored up" and don't know what they're doing; later, the prosecutor described Aboriginal people as "nice people when they're sober, kind people, simple people." The speaker said she had seen dozens of similar cases.

"I'm not trying to criticize efforts that have been made," she concluded. "I think anything anyone can do to help people has to be welcome. But ultimately, the question before us is whether this system can be adapted. I don't think so, because so many people in the system don't come from a position of malevolence, they don't come from a place of hating Indian people...but they do not have the history or the cultural perspective." She said every department head in government has to make a commitment to changing attitudes, noting that "if anything needs to be arrested, it's the system."

Another participant said Aboriginal and non-Aboriginal people must continue to work together "because, ultimately, we're all related in the circle of life". She said she had seen minds and attitudes changed through a process of cross-cultural education, in which people were willing to take risks and examine their own beliefs and values.

Judge Joyce King Mitchell of Kahnawake and Akwesasne returned to the issue of banishment, expressing pity for a participant who had been unable to understand the concept. "I wonder how many other words of ours are not understood by non-Aboriginals," she said. She explained that banishment is a system of values in which people are asked to take their own values elsewhere if they can't respect the standards of the community. "We don't want to dump anybody," she stressed. "We just want them to go where their values are appreciated."

Vina Starr shared a personal dream, in which all Canadians "can in our lifetime be proud of what we can share, and can truly be entitled in our lifetime to hold our heads high internationally with something new. That newness can be to replace community for social control, because the social control only becomes necessary when the individual human doesn't start out whole and is not nurtured to be whole. The only thing worth working for is something that takes risk and work. I believe we're all prepared to do that."

Moderator Rachel Qitsualik thanked circle members for the privilege of facilitating the session, noting that she had "alternated between wanting to cry and wanting to cheer" all day. Round Table Chair Murray Sinclair said the day had been a roller coaster and thanked participants for taking part, "some of you for causing the peaks and some of you for causing the valleys". He noted that delegates had covered a number of extremely difficult questions, and suggested there was strong support for reform of the existing justice system.

In answering whether the system should be reformed, the Chair said: "clearly, the answer has to be yes, for all the reasons that have been discussed here

today." Turning to the underlying question of whether the system can, in fact, be reformed, "we leave that for the Commissioners to contemplate". The day ended with prayers from Elders Ernie Benedict and Flora Tabobondung.

Presentation of Discussion Papers

After opening prayers by Elder Ernie Benedict and Elder Flora Tabobondung, Commissioner Bertha Wilson said that, in discussing whether the existing criminal justice system can be adapted, the Round Table had identified basic elements of the system that will need radical change. Some change is already happening through culturally appropriate dispute resolution mechanisms, which are working well and are accepted but which stay within the existing justice system. Now, Ms. Wilson said, we must look at a different approach: the creation of a separate justice system. She asked what a separate system would look like, how it would tie in with the Canadian justice system, if Aboriginal women would be better served by an Aboriginal justice system, and if a separate Aboriginal justice system was constitutionally possible. These were complex issues, she concluded. Vina Starr, the moderator for the next session, introduced the participants.

Mandamin: Relationships

Tony Mandamin of the Odawa Nation is a barrister and member of the Edmonton Police Commission. In preparing his presentation, he found it difficult to describe the relationship between the current justice system and an Aboriginal system. What we call the Canadian justice system is a huge assortment of arrangements for dealing with criminal behaviour; not a monolith, but a complicated assortment. But when it comes to describing an Aboriginal justice system, he found himself in real trouble. He had his own knowledge of Aboriginal justice systems but could not identify a formal structure.

Mr. Mandamin agreed with Leroy Littlebear's description of Aboriginal law as the "internalization of social control." Aboriginal peoples were governed by their upbringing, the example of others, and social pressures. Rarely did they take a criminal justice approach to deviations from the norm. When an individual caused harm, their energies went into restoring the norm. An Aboriginal justice system is actually a new development, formalizing something that didn't exist in the past, while drawing on what did exist as an alternative to the criminal justice system.

Quoting the definition "culture is a conversation through time," Mr. Mandamin made his own definition: culture is the experience of people travelling through time, and it changes with changing experience. As an example of change in Aboriginal culture, Mr. Mandamin alluded to marriage customs: his own grandmother entered an arranged marriage when she was 16, but when, years later, another woman approached her to arrange a marriage for Mr. Mandamin himself, his grandmother said that "things are different now." Cultures change, adjust, and evolve; this does not mean the "downward slide into assimilation," Mr. Mandamin said. Donald Marshall was convicted of murder because he was an Aboriginal person, but his people have been in contact with Eurocanadians for 400 years. The fact that he is still Micmac says much about the tenaciousness of Aboriginal culture.

Mr. Mandamin pointed to the complexity of the current justice system; the federal government makes laws which provinces administer, while the federal government appoints provincial judges. The provinces run police systems – except, of course, that the federal government is responsible for the RCMP, which may contract to act as provincial police while staying under federal jurisdiction. Provincial rules are similar but may vary – something that may interfere with treaty rights. "We're talking about a complex of interlocking federal and provincial jurisdiction, with a little common law thrown in," Mr. Mandamin stated.

In discussing Aboriginal justice systems, we should begin by discarding the word "system," Mr. Mandamin continued. Aboriginal peoples are as diverse as all the nations in Europe combined. Different systems will prevail in different areas, as provincial authority stays within provincial boundaries. He expects Aboriginal justice to be community-based and to develop from the ground up, staying within community limits.

Mr. Mandamin said that ties to the Canadian justice system would provide useful resources and stability. Essentially, the two systems would administer broadly similar laws with some variations. The *Criminal Code*, he pointed out, is a collection of offences, and most cultures show a good deal of overlap in their definition of criminal behaviour. Assault is assault, whatever the culture.

He envisages tie-ins like Alberta's tripartite agreement between the federal, provincial, and Aboriginal governments. Concurrent exercise of justice is one

possible mechanism. This can, of course, lead to problems; the Alberta Crown refused to prosecute under Blackfoot traffic by-laws under the Indian Act, although Mr. Mandamin found ways of getting around this problem.

In Alberta, Aboriginal courts (equivalent to Justice Committees) are acting as sentencing panels, and are effective because they are close to traditional methods. In the criminal justice system, attention focuses on guilt or innocence, and sentencing is almost an afterthought. In traditional Aboriginal justice, on the other hand, the individual's word was too important to allow lying about guilt; by the time the community was involved, the offender had already recognized his or her wrongdoing and explained his or her reasoning, and the focus then was on determining what to do with the person. A sentence that takes five minutes in a Canadian court might take two hours in an Aboriginal setting.

Mr. Mandamin observed that the Canadian justice system had taken away the community's say in its own affairs and had lessened the authority of leaders and elders, destroying the community's ability to control its own members. In Alberta, judges are beginning to give back what they had taken. If the judge respects these elders and leaders, so will the people, and this leads to community empowerment. As communities handle small matters, they will develop the power to handle larger ones, but the pace and rate of this process must be up to the people.

As for the relations among Aboriginal justice bodies: "We are used to consensus," Mr. Mandamin said. He expects Aboriginal justice systems to converge and become broadly similar, as provincial laws are similar. Eventually, Aboriginal law would cover all crimes, with the specific exception of treaty rights, which should be dealt with in specific courts.

Mr. Mandamin believed that the Canadian justice system was flexible enough to empower Aboriginal justice; whether or not it will do so is another matter. He expects Aboriginal justice to have common values and involve elders, but with different structures; he anticipates an interlocking system. But "we can't negotiate without authority, and the only authority we have now is our people's misery." Aboriginal people need "cards to play in negotiation," Mr. Mandamin said. We've heard many fine words; now we need results.

Zion: The Navajo Experience

James Zion, solicitor to the Navajo tribal court and former assistant Attorney General of New Mexico, began by defining the Navajo word for lawyer: "one who never loses an argument." The Navajo's fine gift for irony gives this an underlying meaning: "pushy bossyboots," someone with no Navajo manners.

Mr. Zion traced the post-contact history of Aboriginal law and institutions. Early Spanish decrees commanded colonial bureaucrats to follow Indigenous

laws and customs, and Mexico had Aboriginal courts until the 19th century. The Royal Proclamation of 1763 implicitly recognized the validity of Aboriginal governments and law, which underpin the American Constitution. Additional 18th and 19th century case law supported this approach. The American Congress regulates relations between Aboriginal nations, but not their internal affairs. "Historical precedent recognizes Indian common law as the basis for the fundamental human right of Aboriginal people to maintain their own justice systems," Mr. Zion said.

But factiousness over jurisdiction has led to a generalized breakdown. Mr. Zion cited the case of a Montana tribe; the lack of funding for tribal justice, coupled with government non-intervention, had led to the return of the old system of vengeance – "but now the people have guns." Mr. Zion has seen Aboriginal justice systems still operating in Saskatchewan, without "legal" authority. These systems work. Communities hide problems from external authorities and resolve them themselves, calling in outside law only when necessary.

Mr. Zion asked a fundamental question: "What is law?" He defined it as "norms – ought, ought not – and values, principles, and emotions, picked up by institutions and applied to given problems." This is, he pointed out, a two-pronged approach: values, and institutions. "Whose values? Whose institutions?" he asked. The state invited Aboriginal people to come into its values and institutions, an assimilationist approach. There are problems with funding and the availability of education for Aboriginal lawyers, but, more deeply, these people have problems with values. The system does not allow them to apply their own standards.

Other institutions, such as boards, may permit more Aboriginal representation, but they still use non-Aboriginal values. Tribal courts have been misperceived as assimilationist because they follow American institutional procedures and (technically) non-Aboriginal values, but in fact, they throw these values away and use their own. At the same time, traditional institutions using traditional values – perhaps slightly adapted – are surviving.

The lesson of history and present-day reality, Mr. Zion said, is simple: Thou shalt not ration justice. Take from the white system what suits Aboriginal people, but abandon the quest for control and the squabbling over jurisdiction. If an Aboriginal justice body cannot solve a serious problem, then, and only then, should it call in outside forces. This requires a working arrangement with the Canadian justice system. He added that Navajo courts recognize other tribal courts, creating commonality among Nations.

Mr. Zion was touched by the personal level of the discourse at this meeting. He lives in a small community; when he first moved there, he was told that one of his neighbours was a burglar. Given distances, he wondered how to protect his home; his solution was to get to be friends with the burglar. Situations such as these can be resolved. He called for an end to stereotypes about Aboriginal men

as violent brutes and women as passive victims, and for the recognition, not the devolution, of the rights and authority of Aboriginal peoples to govern their own affairs.

Nahanee: Dancing with a Gorilla

Teressa Nahanee, Constitutional Adviser to the Native Women's Association of Canada, opening by thanking those who had helped her in forming her presentation. She asked two essential questions: What would be the jurisdiction and structure of Aboriginal justice systems, and would they be subject to the Canadian Charter of Rights and Freedoms? Since the failure of the Charlottetown Accord, we will have to live within the current legal and constitutional regime for the next few years, Ms. Nahanee said.

In her experience, among Aboriginal organizations "feminism is an F-word." Women value individual experience, knowing things with hearts and bodies and minds. This knowledge must be brought to bear in any consideration of Aboriginal justice or self-government, a fact recognized by last August's decision of the Federal Court of Appeal that Aboriginal women's organizations must be consulted in constitutional negotiations.

Aboriginal women have deep concerns about justice proposals. Of some 500 pilot projects thus far, only 40 have had active participation by women. Community-based justice programs often enrage women, especially when they divert sexual offenders. Aboriginal women oppose giving lenient sentences for the sexual abuse of women and children.

"We've heard a lot of talk about cultural differences and the need for sensitivity in the criminal justice system. But who's defining justice?" Ms. Nahanee asked. Women should be consulted in defining cultural practices. Women have been subjected to statutory sexual discrimination and deprived even of the vote and property rights. The last 20 years have seen a "tough struggle" to end discrimination, Ms. Nahanee stated. She made it clear that women do not endorse traditional practices such as polygamy and wife procurement.

Current sentences for sexual offenders show gross insensitivity to women and are an outrage. It may not be an Aboriginal tradition to require punishment, but crimes against women and children should be sentenced according to the Criminal Code, which is often not applied. Sentences for Aboriginal sexual offenders should be the same as for non-Aboriginal men. Let the healing take place *outside* the community, but get the offenders out.

Inuit women ask for harsher sentences for these crimes, Ms. Nahanee reported; a letter of apology and a one-week sentence are no deterrent to sexual abuse, and some men enjoy spending the winter months in jail. At present, victims suffer more than their victimizers. It is also outrageous to remove the victim from

the home when abuse occurs, as in incest; remove the abuser, but don't punish the victim.

In the Canadian justice system, Aboriginal women are treated as less than human. This too must end. There are two views of Aboriginal justice: the male view, that Aboriginal men have been victimized by the criminal justice system; and the female view, that Aboriginal women have been victimized by Aboriginal men. "Don't condone light sentences that don't give justice to women who must stay in their communities," Ms. Nahanee warned. She called for an end to patriarchy. "Women must be given a voice in the future and in decolonizing society. Don't sacrifice security of the person and *women's* life in social harmony."

As for the dichotomy between individual and collective rights, Ms. Nahanee denied that women care more for their rights than for the collective. Most Aboriginal women in urban centres cannot return home, and they face a struggle to be allowed back into their communities, to help establish justice systems and community structures.

In the last three days, Ms. Nahanee observed that the meetings were predominantly male, with few Aboriginal women represented. Women must be part of the decision-making process, both for themselves and for the next seven generations. In future, forums should be 50 per cent women. Women were silenced and excluded in the constitutional process; "hear our voices," Ms. Nahanee said.

In Aboriginal justice, the principles and legal rights guaranteed under the *Canadian Charter of Rights and Freedoms* must apply; without these rights, women cannot endorse an Aboriginal justice system.

Ms. Nahanee spoke of NWAC's role in righting past injustices to women, particularly of the long struggle for Bill C-31, and expressed her chagrin about women's treatment in the past.

Macklem: Legislative Authority

Professor Patrick Macklem of the Faculty of Law, University of Toronto, introduced himself, with deference to Mr. Zion, as a pushy bossyboots. He has examined both the *Constitution Act, 1867* and the *Constitution Act, 1982* to determine whether the establishment of an Aboriginal justice system can be done within current constitutional provisions. His examination excluded both s. 35 of the 1982 Act and the *Canadian Charter of Rights and Freedoms*, which have been discussed elsewhere.

The defeat of the Charlottetown Accord means that reform will involve the courts, treaty negotiations, other negotiations, and statutory initiatives. We will need laws to accommodate the criminal justice system and Aboriginal justice,

Mr. Macklem said. The emergence of Aboriginal justice will require the federal and provincial governments to vacate the field, something that will need legislation and jurisdictional transfers. He wondered how flexible the current constitutional framework would be.

Mr. Macklem believed that constitutional reform is unnecessary for the establishment of Aboriginal justice. The powers already exist; the issue is one of political will, not constitutional restraint. Macklem defined two questions: first, what level of government, federal or provincial, has the authority to give jurisdiction to Aboriginal courts? And second, what would be the effects of the judicature provisions of the Constitution? He made it clear that "establishing" an Aboriginal justice system is a misnomer; the system would be based not on Canadian law but on Aboriginal right. Implementation and connections with the criminal justice system, however, would require new laws.

The provinces have jurisdiction over the administration of justice under s. 92(14) of the Constitution. The question is whether provincially established Aboriginal courts would have authority in matters under federal law, such as provisions of the Indian Act. Current case law trends are favourable, and a general conferral of jurisdiction would probably be accepted by the courts. The cautious route would be for the province to vest jurisdiction over provincial law and for Parliament to vest jurisdiction for federal law in Aboriginal courts.

The federal government has constitutional authority to establish its own courts, but could only vest jurisdiction for applicable and existing federal law. This could include Aboriginal common law, the Indian Act, criminal matters, and other federal statutes, but not provincial laws of general application.

The judicature provisions of the Constitution make the federal government responsible for the appointment, pay, and dismissal of judges at the higher levels of the provincial courts (superior, district, and county). Two possible interpretations: either the provisions are framed to preserve judicial independence from provincial interference; or they exist to give the federal government a voice in provincial courts administering federal law.

If provinces convey to Aboriginal courts jurisdiction equivalent to superior, district, or county courts, then technically judges must conform to the judicature provisions, including being members of the provincial Bar. These requirements can, however, be avoided if the appointments conform to a broader policy. Probably, the provinces will not have to be bound by these provisions. If, however, the federal government establishes Aboriginal courts, the judicature provisions should not apply, since the government thereby has its voice in the court, and since the Charter covers judicial independence.

Mr. Macklem concluded that the current Constitution can accommodate the inherent right to Aboriginal justice; the sole constraint is lack of political will.

Final Round Table Discussion:

Questions 3 – 5: Separate Aboriginal Justice Systems

Moderator Brad Morse, Professor of Law at the University of Ottawa, told the 13 participants at the final Round Table Discussion that many of the issues had already been discussed in great detail, and he wanted a "free-for-all" exchange with intervention limited to three minutes.

Graydon Nicholas, Provincial Court Judge in Woodstock, New Brunswick, began the session by displaying an eagle feather given to him by one of his sisters in the struggle for Aboriginal rights. "This is where the answers lie," he said. He stood, and holding the eagle feather aloft, said he wanted to "offer you my silence" for the remainder of his allotted time.

After three minutes of silence, Lorenne Clark, Deputy Minister of Justice in the Yukon said it was the responsibility of governments to try to find accommodation for Aboriginal people. Justice programs must pass the test of lived Aboriginal experience before anyone can say whether they will work. In this development phase, it is important to think of the diversity of environments in which Aboriginal people live.

Ms. Clark believed it was crucial to build a strong infrastructure, a process in which discussions and negotiations could take place in safety. She cited the recent tripartite agreement between her government, the federal government and the Council for Yukon Indians as a safe process. "Once the agreement is in place, we can move into implementation," she explained, but most important is a strong infrastructure.

Mary Ellen Turpel, a law professor at Dalhousie University, said the present justice system means two levels of victimization for Aboriginal people. The first level is discrimination and racism, the denial that Aboriginal people are different and need different treatment. This level of victimization can be addressed immediately, but the second level is more difficult to deal with. Within Aboriginal communities, there are serious problems of violence and criminal behaviour, especially male violence against women. Aboriginal people are not more likely to commit crimes than non-Aboriginal people, but they are showing the result of hundreds of years of victimization. These two levels of victimization must both be addressed, she said.

"If the Canadian justice system is to respond to that, we must acknowledge that the victims must be involved in the process," Ms. Turpel continued. "The response cannot be sending more people to jail." Incarceration only undermines self-esteem and heightens feelings of victimization. In traditional Aboriginal justice systems, everyone, at every level, is involved in the healing process. Women in particular have a special knowledge of justice which cannot be

ignored, she added. The challenge for the Canadian Justice system will be to include these voices in developing solutions.

Cynthia Desmeules-Bertolin, Associate with Biamonte, Cairo and Shortreed, said the issue of jurisdiction had not yet been adequately addressed. Most of the discussion about parallel systems had assumed jurisdiction based on land, but the Métis as a community of people have been displaced and marginalized and have no land base. Criminal justice statistics do not keep track of the number of Métis people charged, but she believed there were many.

Ms. Desmeules-Bertolin said an Aboriginal justice system should be a branch or function of Aboriginal government. Métis people who live in cities are not any less Aboriginal than the people who live on reserves. "Jurisdiction must be implemented based on the status of the person," she concluded.

Robert Mitchell, Minister of Justice and Attorney General for the Province of Saskatchewan, recalled that at the most recent constitutional talks, several governments "were hung up on the idea that they have the power to legislate only if they were connected to a land base." He wondered why, speculating that the idea was based on European notions of sovereignty based on ground: when a person left one territory, they were assumed to have moved to another's territory. He would prefer to think that governments are responsible to people, no matter where they live. There are problems to this approach, but "they are not beyond our ingenuity to solve," he said.

"We must decide at the beginning that the concept of an Aboriginal justice system does not have to be tied to an Aboriginal land base," Mr. Mitchell continued. "If not, we're not including half the Aboriginal people in Canada."

Charlene Belleau, Family Violence Co-ordinator at the Canim Lake Band, said that as a front-line community worker, she spends her days holding the victims of residential schools together. "If we go through a process where these victims are further traumatized, it won't work," she said.

Developing new forms of justice will mean risk-taking for the government and all those working within the system. She recalled her experiences delivering cross-cultural seminars to organizations. In time, she began to insist that the top people must be the first ones to undergo the training; her insistence had a powerful effect. "The opportunity to participate changed a lot of attitudes – change has to start from the top down," she said.

"I want to encourage you to allow us to make some mistakes," Ms. Belleau continued, adding that she wanted to see decision making regionalized, not left in Ottawa or provincial capitals.

Brad Morse noted that decision makers often say change has to come from the bottom up, an approach that lets those at the top sit back and do nothing.

Roger Tassé, former federal Deputy Minister of Justice, said that the "system" speakers were referring to was both very complex and very informal. He has always been puzzled by the way change has come about, and he was "astonished at the difficulty of making change." He noted that "it is not necessary to change the laws to make change."

The justice system is a broad system made up of many sub-systems that are informal and have their own cultures, he continued. These sub-systems are based on people, and "people who believe in change will start to make it happen."

Mr. Tassé noted that the justice system is the system of last resort; people find themselves there because other systems have failed them. He added that people living in Aboriginal communities are hoping for change and are aware of the cause of their sorrows.

The Systems Must Be Compatible

Cynthia Desmeules-Bertolin continued her thoughts about justice for Métis people. A justice system for Métis people would be based on status of people, would use mainstream justice principles such as concepts of law to determine whose laws apply, and would apply the conflict system for resolution.

She saw a danger in how the relationship between the two systems was defined. This relationship should be defined through negotiations. It would come down to questions of authority; what must be avoided is a superior court telling an Aboriginal court that its rules are not valid. The systems must be compatible, she added.

Sharon McIvor, Justice Co-ordinator for the Native Women's Association of Canada (NWAC), said that the approach of longer sentencing, and sending more people to jail, is not working. "But as long as we're in the mainstream system, as long as our women and children are being violated and the men are being given less severe punishment," the message is being sent to Aboriginal and non-Aboriginal people that the crimes perpetrated against Aboriginal people are somehow less important. NWAC wants the laws applied equally to Aboriginal and non-Aboriginal people. "Treat us fairly as victims," she said.

Native Council of Canada President Ron George said the overall theme of the conference has been the need to heal. Most Aboriginal justice systems have a traditional approach to dealing with problems. For example, his own Gitksan-Wet'suwet'en traditional system, which protects individual rights and collective rights, is focused more on prevention of disputes.

He noted that the military system of justice, which has jurisdiction over people, has been operating for many years alongside the mainstream system with few difficulties. There are many other examples of parallel systems of authority, such as off-reserve governments, which could serve as models for a justice system for people without a land base. "It's not a question of *if*, but *when* it should happen."

Michael Jackson, Professor of Law at the University of British Columbia, continued Mr. Tassé's theme of how to bring about change in the system. He said it makes sense to start with the people involved in pilot projects on sentencing; their recent experiences with new approaches makes them well positioned to tell us why the system is not working.

Parallel justice systems must recognize and work with each other, Mr. Jackson continued. The relationship must be based on respect and a willingness to accommodate differences. Aboriginal justice must be based in communities, he stressed.

Justice reform must be systematic. Many pilot project initiatives for justice reform have fallen through when the people supporting the projects were transferred and their replacements had to learn from scratch.

Mr. Jackson told the commissioners of proposed legislation currently before Parliament that would, for the first time, put forth in the Criminal Code a statement about the meaning of the criminal justice system. He suggested the RCAP could intervene by recommending the statement reflect Aboriginal concepts of justice. "The government should make acknowledgement of the enormous contribution of Aboriginal people," he said, adding that such small steps are not difficult but require political will.

Brad Morse referred to a justice conference in 1975 which issued a report with many recommendations endorsed by the government. "Seventeen years later, they're still saying the same thing, and getting it wrong."

Harvey Longboat is a Hereditary Chief in the Haudenasaunce Six Nations Confederacy. He said that in 1664, his people signed an international treaty with the Dutch government, and later the British government, which was characterized by the Two-Row Wampum. The treaty was based on peace, righteousness and respect.

The Canadian government has never acknowledged that treaty, he said, and the Confederacy has been uprooted, by RCMP gunpoint, from its traditional seat of power. However, it has continued to function and continued to maintain its belief in the Two-Row Wampum. "We are on two roads, working side by side with respect," Mr. Longboat said.

"Only the Creator Has the Power to Judge"

His traditional government is a matriarchal system, in which "women are very important in all aspects." Only the Creator has the power to judge people, he said, adding that in the years following European contact, the Confederacy handed over to the non-Aboriginal people all Confederacy members guilty of murder, theft and rape.

A land base is very important, Mr. Longboat continued, noting that the Round Table sessions started with a prayer to Mother Earth. "How do we respect our Mother if we are not rooted in land?"

The Two-Row Wampum sets out the relationship of two people, side by side, he continued, explaining that his grandmother told him the story of what would happen to people who had one foot in each canoe. One day, a storm will come up, separating the boats. Those with a foot in each canoe will be lost to the waters, lost to their Aboriginal roots. "Keep your feet in your canoe. It's from there you'll gain the insight to continue to work with non-Indian people," Mr. Longboat said.

He wondered how it was possible to speak of justice in isolation from everything else, because it is "everything else" that causes misbehaviour. He added that economic development was not happening in Aboriginal communities because non-Aboriginal people "fear losing control over our people."

Norm Inkster, former RCMP Commissioner, said he was "always worried when we talk of systems." Systems prescribe rules; he would rather talk of "communities." For many years, the RCMP has lived in its own house, building walls around itself, Mr. Inkster said. "There was a time when we worked closely with Aboriginal people, but there was also a time when we worked in disharmony." At one time, the RCMP considered itself responsible for policing "to" Aboriginal people; then it became policing "for" Aboriginal people. It is now time to talk of policing "with" Aboriginal people, he said. The RCMP has begun to talk with people in Aboriginal communities about "taking the walls down."

Mr. Inkster spoke of the "justice community" which can act as a catalyst for change. "We must find a way as a community to address the way that problems occur," he said. The justice community is a continuum that lends itself to change. He noted that the country is becoming more, not less, diverse in its cultural and ethnic make-up, and said that all members of the justice community must work together, thinking ahead and not focusing on the past.

Barry Stuart of the Territorial Court of the Yukon said he had good and bad news for the Justice Round Table. "The good news is that communities are already doing it (using their own justice systems); the bad news is that they did not need a lot of lawyers and professionals to figure out how to do it."

"We've taken away from communities their ability to deal with conflict," Mr. Stuart continued. In the past few years, he has been involved in about 50 talking circles, processing about 150 offenders. Community input has been crucial in these circles, and community members are more interested in talking about underlying problems than the particular offence. In one case, Mr. Stuart walked away from the process without dealing with the offender, and sometimes he is thankful that the offence has raised the opportunity to talk about the real problems.

In the past, communities relied too much on professionals and outside intervention to solve their problems, and now there is recognition that solutions start with people who understand the real problems. He stressed the need to allow communities to change at their own pace. "If we move too quickly, and not allow time for the community to do it their way, they lose the ability to solve the problem in a fundamentally different way."

Robert Mitchell said the role of governments and professionals was not necessarily to establish a system of justice in a community; their role was to find a way to support and encourage the change communities make themselves. "We must resist the urge to get in there and impose our solutions. We have to let the communities do it," he said. Change is a long process that will not happen overnight.

He agreed with AFN National Chief Ovide Mercredi that the root solution is recognition of the inherent right of self-government, but also agreed with Manitoba Justice Minister James McCrae's comment (the previous day) that something needs to be done right away. "We must be flexible and be prepared to get out of the way," he said.

Charlene Belleau echoed the need for governments and professionals to support community initiatives. She added that many non-Aboriginal people are interested in a healing process in their own communities. Brad Morse noted that the newest "jargonistic" labels in the Canadian mainstream, such as "healing," flow from traditional Aboriginal ways.

"Don't Renovate the System With Colonial Architecture"

Mary Ellen Turpel was troubled with several ideas expressed at the table. Referring to Mr. Inkster's metaphor about rebuilding the RCMP's house, Ms. Turpel said it was important that "we don't renovate the system with colonial architecture." She wondered who would be doing the renovations and making the decisions on what needed renovation.

She asked Barry Stuart about his role in the talking circles, whether he had the authority to override decisions made by the communities. Mr. Stuart clarified that initially, he was able to – and did – override community wishes, but now it is a consensus process. A delegate from the floor asked Mr. Stuart: "If you're not the judge, then why are you there?" To which he responded: "Good question." Brad Morse said the future success of the talking circles depended on the willingness of the existing system to step back.

Ms. Turpel said a critical point was ensuring institutional, not just individual, change. Initiatives must be supported by institutions; if not, the initiatives will end when the supportive individuals working within the institutions are no longer there. She called it a "miracle" that more than 400 community initiatives existed, given the lack of institutional support. Brad Morse added that there were many more pilot projects that disappeared when the money ran out.

Cynthia Desmeules-Bertolin brought up the "exhausting" process of "continuously having to justify our existence" to the existing system. The system's demands are paternalistic, she said. She often tells communities that the simplest way of dealing with disputes is not to call the police but to handle it themselves. Communities can handle their own problems, but they need structures to support their efforts, she said.

Ms. Desmeules-Bertolin believed there was enough justification in the current Constitution for Aboriginal people to establish jurisdiction over justice, and added that s.101, the power to create courts, could be used in specific instances. She noted that the government spends $50,000 to $60,000 per year to keep one Métis person in jail, and suggested the government instead transfer the amount direct to communities to fund justice initiatives.

Michael Jackson said he believed many individuals were "willing, in their hearts, to renovate and change," but the reality is that change cannot rest with individuals. At the moment, the extent to which an Aboriginal community is able to take back control of its justice responsibilities depends entirely on individuals. "For every supportive judge, there are 100 who have not learned the lessons of colonialism," he said. He is heartened that many individuals support change, but noted that the great advantage of the Navajo system in the United States was that its authority was institutionalized. Community control over justice must be a recognized right, and governments must commit the resources necessary to make it work.

Barry Stuart said there are hundreds of judges across the country looking for a way to do things differently. Brad Morse said that maybe there were good people in the system now, but there was nothing to guarantee continued goodwill in the future.

Norm Inkster said justice initiatives can't wait for confirmed government resources; the problems must be handed back to the communities. "We can't wait for money," he said. Charlene Belleau noted that governments have always given the excuse that there is no money for programs. She asked the RCAP to recommend that for every person a community keeps from going to jail, the government transfer to the community the amount saved from its corrections budget.

From the floor, retired Judge Alf Scow said the solution was not simply to turn all the problems over to Aboriginal people. As Aboriginal people continue to progress on all fronts, there will be a need for real economic development in communities, and more and more contact with the business world. It is important to build into the system protection measures that reflect Aboriginal ethics, he said.

Mr. Scow continued that more than 80 per cent of members of his own hereditary community live off-reserve and "are no longer recognized as having an

Aboriginal voice. We are disenfranchised. I don't accept the idea that off-reserve people don't have a say in directions for the future." Brad Morse added that a problem not yet addressed was what to do with non-Aboriginal people living on Aboriginal land.

From the floor, NWT Justice administrator Sam Stevens asked Norm Inkster if he would, tomorrow, instruct his officers to enter into a memorandum of understanding with communities to cover the relationship between the community and police, a written agreement on policing and resource needs. Mr. Inkster replied that it was consistent with the standing instructions of the officers to discuss these issues with communities. However, "I refuse to take a template designed in Ottawa and snap it over each community we have to police," he said. Mr. Stevens insisted a written agreement was necessary, and Mr. Inkster said he was reluctant to agree to the same arrangement for all communities, but "if your community wants a memorandum of understanding, sit down and write one."

From the floor, Ontario Judge Joe Morrison commented on the issue of non-Aboriginal people living in Aboriginal communities. In traditional Aboriginal culture, he noted, in the case of marriage of people from different communities, one partner would agree to move to a new community and abide by its rules. Today, in northern areas, non-Aboriginal people are not living by the rules of the Aboriginal communities in which they live. "An Aboriginal community is a separate city and has its own laws," he observed. He would like the RCAP to address this issue directly.

Mr. Morrison added that a major problem with the existing justice system was that the authority was outside the communities. When people are controlled externally, they feel they can no longer control their own communities. "We can't continue to impose one's will on another person," he said. Many treaties were signed with the understanding that Aboriginal and non-Aboriginal people would work together to solve problems, he said, and it was time to end unilateral decision making and begin a process of sharing power.

From the floor, Provincial Court of Saskatchewan Judge Patricia Linn told the Round Table that many, many judges are sensitive to Aboriginal concerns and want changes at the community level. After the conference, Ms. Linn would be returning to her province to "do what I can on a personal level to work with communities." She added that all the justice reform initiatives cannot continue without concrete infrastructures for support.

"It Takes Courage on Both Sides"

A speaker from the floor, referring to Mr. Longboat's comments about the Two-Row Wampum, said the goal was to return to the original conceptual framework for a relationship between Aboriginal and non-Aboriginal people.

The two communities need to be separate but have equal respect. "It takes courage on both sides to create new relationships," he said. "Leadership comes from both sides." He added that new initiatives must be allowed to make mistakes. The first steps to reform will be faltering, and maybe they will not be the steps everyone wants to see, but "the goal is to support the first steps and allow them to work."

Graydon Nicholas said he hoped the references to resources were meant to mean human, not financial, resources. He would not like to see new justice systems depend on fines for survival, or see the new structures "needing to be propped up at the expense of our fundamental rights." He recalled that he first became involved in Aboriginal justice issues in 1967, and in 25 years, major strides have been made. He hoped that in another 25 years, "non-Aboriginal people will be coming to us to say 'what can you give to us?'"

Jonathan Rudin of Aboriginal Legal Services in Toronto said that the issue of control is paramount; "we cannot rely only on goodwill and trust." He believed that institutional support for programs and initiatives was necessary, because if that support is not there, the minute there is a mistake, there will be a demand to shut the programs down. "There will be mistakes made by Aboriginal-run programs," he said. Governments are happy to give up responsibility, but not to give up control. Ms. McIvor said the assimilation of Aboriginal people is still happening, but it has gone underground; the government is still trying to control Aboriginal people.

From the floor, law professor Patricia Monture-OKanee said she was "getting impatient" with the discussion. "I don't like what I'm hearing; the vision is too narrow," she said. She objected to words such as "diversion" and "alternatives" because they were not words of substance and mean nothing. "The system still maintains control; we're only moving from overt to covert colonialization," she said.

Real change will mean moving away from fundamentally coercive relationships, Ms. Monture-OKanee continued. Aboriginal people are picking up the pieces of their sisters and brothers destroyed by the current system, she said, recalling her "friends and sisters" who died in prison.

"We knew why there wasn't battering and sexual abuse in traditional communities – it was because women had power," she continued. The words "alternatives" and "diversion" are symptomatic of a failure to recognize the power and authority of women.

In the 1970s, Ms. Monture-OKanee was the only Aboriginal person in law school, and she experienced alienation and lack of support. Now, there are 35 Aboriginal students in the law school where she teaches, and a recent survey showed that all 35 experienced alienation and lack of support. "If we don't start talking about fundamental change, about respecting women, then we're not going to change a thing," she concluded.

Charlene Belleau commented on a remark made the previous day by a Round Table participant, to the effect that crime cannot be fought with prayers; she found the remark hurtful. "Prayers are an important part of the healing process," she said. "I pray to the Great Spirit for guidance. I pray to feel good in my heart. Prayer is so important to who we are and what we do."

Ms. Belleau said her elders foresaw that she and her colleagues would be devoting much of their lives to working with non-Aboriginal people to change the system. Sometimes she sits and wonders why she has to go through the process, and remembers that her elders said that "we're the ones with the strength to go through the hard times, to work to make sure that we won't have to suffer in the future."

From the floor, Al Hamilton from Manitoba said he was frustrated with the lack of acceptance, in the Canadian community, of the situation the Royal Commission has been called to address. Canadians are "unwilling to accept the hardship caused by the justice system to Aboriginal people," he said. Mr. Hamilton listed several of these hardships, adding that it was possible that Aboriginal people would have to be treated differently in the justice system in order to achieve real equality.

"I don't think it is a complex situation that will take years of debate to solve," he continued. The solution is to recognize that Aboriginal treaty rights have never been destroyed, and that s.35 of the Constitution recognizes Aboriginal rights. From there, "it's not a very big step to say that Aboriginal people have the right to control a justice system." It would be up to the governments and the legal community to step back and allow Aboriginal people to institute their own justice system, he concluded.

From the floor, Clem Chartier, representing the Métis National Council, expressed his disappointment that the Round Table had marginalized the concerns of Métis people. "I felt I was an intruder here," he said. He did make an attempt to place himself on the agenda the previous day to voice his peoples' concerns but was told there was no room. However, when the federal Minister of Justice arrived, "everything was dropped and she made her presentation." He was asked to participate in one of the Round Table discussions but refused because he felt insulted.

Mr. Chartier referred to Commission Co-Chair Georges Erasmus's comments in the day's *Globe and Mail* about the possibility of a separate inquiry into Inuit issues and asked: "Why not us?" He said that if the Royal Commission did not take Métis people seriously, it should consider returning to the Prime Minister to ask for a different mandate that does not include Métis people.

He added some personal observations: "This was supposed to be a Round Table on justice issues, but the focus has been on criminal justice. We have to go beyond just dealing with Aboriginal people as criminals."

"Who is the real criminal?" Mr. Chartier asked the Round Table. He listed a number of actions undertaken by the federal government, including creating the Northwest Mounted Police to control Métis people and occupy their lands; initiating a military attack on Batoche; hanging Louis Riel for fighting for the rights of his people. "Until decolonization takes place, the solutions that you're attempting to address in this forum will be limited. Are we addressing the real criminals?"

Ron George noted that in preparation for the Round Table, he had received a stack of studies and papers to review, and there was "nothing that Métis and off-reserve people could contribute to the stack of papers." Métis people are always marginalized, he said. Programs for Aboriginal people are almost always designed for on-reserve groups.

Mr. George wondered why discussions about self-government usually ended with the government asking, in an accusatory way: "How much is it going to cost?" This question is only asked "when self-government is considered for brown peoples," he said. Nobody asked how much it would cost, for example, to support the fishermen in Newfoundland when the cod moratorium was imposed.

The root of the problem is people's attitudes, and solutions that don't address attitudes will simply be damage control. The education system must change, because the problem will remain "until children start learning the truth about Aboriginal people," Mr. George said. "Why are questions about the capability of Aboriginal people even asked? The question is not *can* we to it but *when* can we do it."

Report from the Rapporteur

James MacPherson, Dean of Osgoode Hall Law School, York University, accepted the role of rapporteur, summarizing the themes presented during the three days of discussion. Mr. MacPherson began by thanking the elders for their prayers. His first experience with the term 'rapporteur' came in Vienna, when the rapporteur in question took three hours to regurgitate the proceedings of the conference. He complimented all those who had made presentations, verbal or written, to the Round Table.

Mr. MacPherson identified nine distinct themes that emerged from the proceedings, and made eight recommendations for further research. The themes identified were as follows:

- The current justice system, especially the criminal justice system, has failed Aboriginal people. The principle reason for this failure is the fundamental difference in world views between Euro-Canadians and Aboriginal peoples as to what constitutes justice and the process for achieving justice. Europeans

define justice as fairness; Aboriginal people define it as restoring harmony, peace, and balance. The Euro-Canadian system is adversarial, and does not reflect the way Aboriginal people think or resolve problems. For an illustration of this difference, Mr. MacPherson referred to the "Zone of Conflict" chart in James Dumont's submission.

The justice system, especially the criminal justice system, is too centralized, too legalistic, too formal, and too removed from the Aboriginal communities it is supposed to serve. Mr. MacPherson referred to Leroy Littlebear's contrast between externalized and internalized social control. He noted Judge Mitchell's observation that her training involved formal, technical, and procedural matters, while her on-the-job training involved techniques like counselling, mediation, and suicide intervention.

The time for major reform is now.

There is no jurisdictional problem in implementing reform (witness Mr. Macklem's submission on the Constitution and jurisdiction), and mechanisms exist; the rapporteur referred to Mr. McCrae's discussion of tripartite agreements. This point applies to Aboriginal health, social services, and education, as well as justice.

While the majority of those present believe there should be a separate Aboriginal justice system, not all agree. One view (e.g., Ovide Mercredi) is to establish self-government, from which justice systems would arise. A second view favours a radical but planned and concerted reform of the current system, which might lead to separate systems. A third view calls for encouraging grassroots, eclectic local reform and waiting to see what transpires.

The theoretical arguments in favour of a separate Aboriginal justice system are convincing (cf. Turpel); those opposing it are not (cf. Webber's discussion of the objections on the basis of personal liberty and equality). Mr. Mandamin pointed out the confusion of the existing system. Will jurisdiction be based on the status of the accused, on the status of the complainant, on the choice of the accused, on the nature of the offence, or on the territory in which the offence occurred? "All of these options already exist in the current justice system," as Mr. Mandamin says.

It will be separate justice *systems*, in the plural. This plurality is dictated by history. As Mr. Giokas noted, "Aboriginal cultures are often as or more different from each other as those of the countries of Europe." Moreover, as Mr. Mandamin pointed out, "Aboriginal justice initiatives have commenced in different communities across Canada. It would be unrealistic and counterproductive to expect these community-based initiatives to give way to a single Aboriginal justice system."

There are excellent initiatives in Aboriginal justice throughout Canada. The need is to identify these, analyze their strengths and weaknesses, and develop those that work well. As Chief of Police McKay said, "It's time to turn pilot projects into permanent ones" and to extend them into other communities.

- Reform comes from conversations and negotiations between governments and nations. As Judge Cawsey said, "Everything that has worked for Aboriginal people has come from Aboriginal people." Non-Aboriginal people and institutions must understand that Aboriginal justice is developing with or without their endorsement; they must "plug into" these initiatives, learn about Aboriginal societies, and understand and support Aboriginal justice.

Mr. MacPherson continued with his recommendations for further investigation:

- Aboriginal justice needs a research methodology, examining practical rather than theoretical solutions. The theory exists already. What needs investigation are practical applications.
- The Royal Commission should document existing initiatives and experiments, creating detailed case studies. General principles should then be drawn to determine what works and what are the important features – territory, population, point of intervention, process, organization, substantive decisions, links with other areas, other factors. For example, some years ago the Assembly of First Nations published a study on Aboriginal education. Mr. MacPherson recommended that the Royal Commission review the first volume, describing community-level education projects, and analyzing what was wrong and right with these initiatives.
- Aboriginal justice should concentrate more on early intervention, working on crime prevention and using police and prosecutorial discretion. Mr. MacPherson was surprised by the Round Table's emphasis on trials and sentencing; he had been expecting instead to see more focus on community education and early intervention. Referring to Judge Paul's tale of having sentenced a graffitist to repaint the community school, Mr. MacPherson noted that the elders would probably have taken this action if Judge Paul had not arrived on the scene. Partnership should occur earlier in the justice process.
- The resource problem should be tackled head-on. Few presenters had brought up this problem until Ron George of the NCC discussed it. When governments say that they have no available funds, "We should identify several good initiatives and cost them specifically," Mr. MacPherson said, "and then compare them to the costs for one submarine, or for sending MPs and MLAs to warm countries in January and February, or for contract services for lawyers, media consultants, ad agencies and the like."
- Mr. MacPherson said that we must recognize the tension between some proponents of Aboriginal self-government and some Aboriginal women, who are fearful of the consequences of self-government. He used the example of a wave and undertow; the strong, visible, unidirectional movement or wave is towards rehabilitation, restitution, reconciliation, and harmony in dealing with offenders; the equally strong but less visible antithetical movement, or undertow, is towards ensuring the protection and safety of women and children in their communities. "There needs to be research and recommendations on

the gender dimensions of Aboriginal justice systems," Mr. MacPherson said, just as there needs to be in the mainstream Canadian system.

- We also need research on ways to move away from the adversarial system for Aboriginal offenders, both in their communities and in urban centres. Judge Paul had suggested that the Criminal Code could be amended to allow communities to opt in or out of the Code. In urban centres, we could establish pilot projects involving police, prosecutors, defence counsel, and social service staff. Elders could be used earlier in the justice process, not just at the time of sentencing.
- Research and recommendations on separate Aboriginal justice systems will also be necessary, Mr. MacPherson said. He noted muted disagreement at the Commission's hearings, as well as disagreement in previous reports, on the question of a separate system. The Royal Commission was well-suited to address this question.
- Finally, we will need research on implementation, he said. As Judge Cawsey had noted in a private conversation, "implementation requires so much more concentration and effort" than recommendations. In 25 years, the relationship of Aboriginal people and the law had been the subject of 30 studies, but there had been a general failure to implement these findings. The Royal Commission should describe more models of implementation and negotiation and make recommendations for effective implementation strategies. Two possible models he suggested were tripartite negotiations, conducted on an equal basis, and reporting mechanisms, in which the outcome of recommendations could be monitored on an annual basis by Parliament. Implementation must be pursued aggressively, Mr. MacPherson believed.

He concluded by telling the participants to keep listening, thinking, and trying to understand. Language does create problems, he said, referring to Gerry Morin's definition of the hippopotamus (see previous day's summary). The Aboriginal word for "to judge," Morin had said, meant literally "to set things right" but was close to the phrase "to lose things." On the other hand, Canada has a history of overcoming linguistic problems. Our goal, Mr. MacPherson concluded, was twofold: a better justice system; and less need for a justice system at all.

In response to the rapporteur's presentation, one woman stated her disappointment that women's concerns had received so little attention in the report. "Our time and energy went into making sure that women didn't take a back seat," she said, but Mr. MacPherson's only mention of women had been as victims of violence, not as equal participants. She asked the rapporteur why women had not been thought worthy of inclusion. Mr. MacPherson responded that he thought women's participation was crucial, and that his report was not intended to deny their role.

Closing Remarks

Commissioner Bertha Wilson praised those who had contributed to the conference. She thanked in particular all who had submitted papers, noting the high quality of these documents. She expressed her gratitude to Judge Murray Sinclair, the moderators, panellists, and round table participants, Elders Ernie Benedict and Flora Tabobondung, the rapporteur, those who had spoken from the floor and those who had listened, and finally the Royal Commission staff.

Commission Co-Chair Georges Erasmus added his thanks and said that he had learned much. He recognized the courage of those who had spoken out, saying that the level of exchange was rare in his experience. "We have much to do," he said; as Patricia Monture-OKanee had said, we are at the beginning of something new. Mr. Erasmus expressed hope that change will come "soon enough to salvage Aboriginal people" at risk. He saw in this conference the beginning of openness and trust and perhaps of a new partnership in Canada.

Mr. Erasmus acknowledged the grievances of women and Métis peoples, saying "We can do better." The failure to invite Métis leaders, he said, was an unfortunate oversight. Responding to the comment on women in the report, Erasmus said that Aboriginal societies have adopted male roles from white society that are not traditional. Aboriginal people support change to restore women's power in their communities; this will require change in both Aboriginal and non-Aboriginal society. "We must change if we are to go back to the fundamental things that make Aboriginal people different, including power-sharing between men and women, adults and children" – sharing, not misusing.

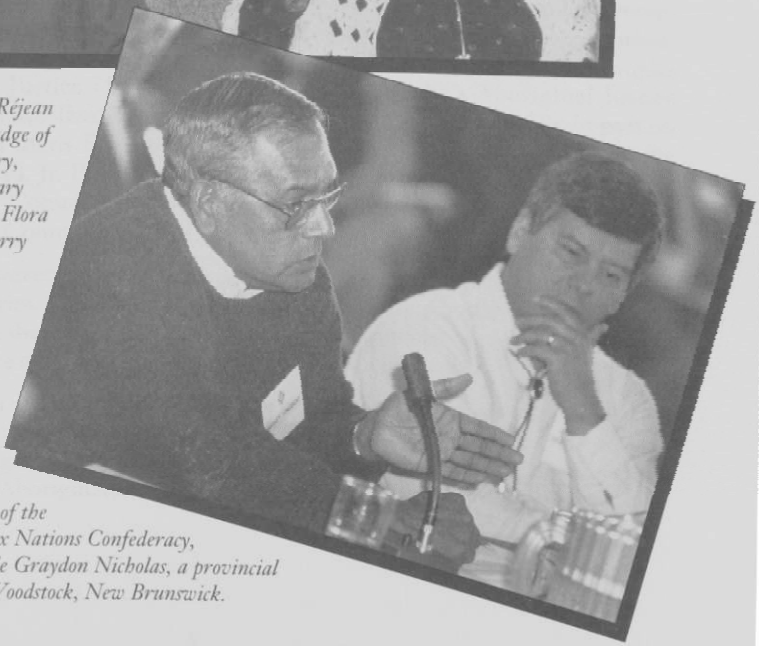
RCAP Co-Chair René Dussault stated that he shared Mr. Erasmus's views. "Even a Royal Commission is no royal road to learning," he said. The commission has a two-fold task; to go through the participatory process in order to get grassroots thinking and community knowledge, and to obtain scholarly expertise. The challenge was to blend these two streams to produce a report that would make sense and be meaningful. The words the Commission would choose should give ownership to Aboriginal people, creating a new consistency and leading to implementation of reform.

Mr. Dussault said that the Commission would publish the proceedings of the Round Table on Aboriginal Justice Issues, including the rapporteur's report and daily summaries. This document should send a message to those who could not attend the Round Table, to heighten awareness of Aboriginal justice issues and to ensure the maximum impact of the message. Justice was only part of the whole picture, Mr. Dussault concluded, and the RCAP hoped to show the interrelations among all topics.

Murray Sinclair thanked all concerned, especially the elders, who, during sometimes difficult discussions, had provided a calming influence and shared their courage and kindness. Elders Ernie Benedict and Flora Tabobondung closed the meeting with prayer.

Appendices

The Honourable Réjean Paul, a Quebec judge of Algonquin ancestry, Commissioner Mary Sillett, and Elder Flora Tabobondung (Parry Island, Ontario).



Harvey Longboat, of the Haudenasaunee Six Nations Confederacy, and the Honourable Graydon Nicholas, a provincial court judge from Woodstock, New Brunswick.

Round Table Program

Introduction

Many studies have been conducted and many recommendations made in recent years on the criminal justice system and its impact on Aboriginal people, including the report of the Law Reform Commission of Canada on Aboriginal Peoples and Criminal Justice (1991), the Report of Manitoba's Aboriginal Justice Inquiry (1991), the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (1991), the Royal Commission on the Donald Marshall, Jr. Prosecution (1989), the Report of the Saskatchewan Métis Justice Review Committee (1992), and the Report of the Saskatchewan Indian Justice Review Committee (1992).

In general, however, little has been done to implement the recommendations of previous inquiries. This failure has been criticized by Aboriginal people, who made it clear in their representations to the Royal Commission that they continue to see the justice system as inadequate to address their needs.

Many Aboriginal people believe that the present system discriminates against them and fails their communities, that it does not reflect their cultural values, and that its negative impact on Aboriginal accused is disproportionate to its impact on non-Aboriginal accused.

Aboriginal people see the present system as alien, imposed by the dominant white society, and deeply insensitive to their traditions and values. Aboriginal people account for approximately four percent of the population of Canada, yet twelve per cent of the federal penitentiary population is Aboriginal. In the prairie provinces, while the population of Aboriginal people is approximately 15 percent, the percentage of Aboriginal people in the prisons is as high as 60 per cent. These facts speak to the need for fundamental change in a system that is clearly inappropriate when it comes to serving Aboriginal people.

Among governments there is growing acknowledgement of the need for a system of criminal justice that is consistent with the cultural needs of Aboriginal people. Whether this can be achieved through changes to the existing system or whether it requires a seprate criminal justice system for Aboriginal people is the central question that the Royal Commission wants to see debated and answered at this Round Table.

If a separate system is thought to be necessary, what such a system would look like remains unclear. Past studies and inquiries have not given explicit content and meaning to the concept of a separate system of Aboriginal justice.

This Round Table will solicit the views of both Aboriginal and non-Aboriginal people with acknowledged expertise in the field of criminal justice.

On Day 1 of the Round Table participants will examine the extent to which recommendations of previous inquiries have been implemented, as well as the justice pilot projects of a number of Aboriginal communities. Day 2 and Day 3 will be devoted to focused discussion on several fundamental questions (see below) about the nature and extent of changes required to achieve a justice system consistent with the needs of Aboriginal people.

Goal of the Round Table

The Round Table will facilitate discussion directed at the development and implementation of a justice system to overcome the failures of the present system with respect to Aboriginal people. The Round Table is founded upon the analysis and recommendations of previous inquiries and will provide an opportunity to consolidate valuable information that may be used in the formulation of practical solutions.

A report will be produced to synthesize and analyze discussion at the Round Table and develop a series of questions to help guide future discussion in this area. Daily summaries of the discussion will also be available to participants. The results of Round Table discussions will contribute to the development of the Royal Commission's final recommendations.

Round Table Advisers

Judge Douglas Campbell (British Columbia), Justice Jean Charles Coutu (Quebec) and Associate Chief Judge C. Murray Sinclair (Manitoba) advised the Commission on the process, format and mechanics of the Round Table.

Round Table Participants

Round Table participants were invited to attend based on the following criteria:

1. Participants, from both the Aboriginal and non-Aboriginal communities, who are expert and knowledgable in the area of justice.
2. Those who have experience in the creation and implementation of systems of justice for Aboriginal people.
3. A balance in gender, age and Aboriginal identification was sought.

Fundamental Questions

The fundamental questions presented for discussion at the Round Table are as follows:

Question 1

The present justice system has failed Aboriginal people. (See previous justice commission reports.) Can the system be adapted to correct its shortcomings?

a) Does the difficulty of adaptation lie in fundamental elements of the existing system such as

   i) the adversarial nature of the process, including the method of assessing credbility?

   ii) the emphasis on punishment as opposed to healing? and the concepts of guilt and innocence? or

b) Do the difficulties lie instead in the administrative aspects of the existing system, such as policing, the correctional system, bail, the attitude of people working with the system, etc.?

Question 2

Would the process of adaptation of the existing system involve reforms beneficial to

a) society as a whole, such as a greater emphasis on restitution, reconciliation and rehabilitation? and

b) to segments of society such as the poor, women and cultural minorities?

Question 3

If the present system cannot be adapted to correct its shortcomings, should one or more separate Aboriginal justice systems be established?

a) How would Aboriginal justice system(s) relate to or tie in with the existing system?

b) What would the relationship be among the various justice systems in the different Aboriginal communities?

More specifically,

c) Would an Aboriginal justice system(s) have jurisdiction over some crimes? All crimes?

d) On what basis would the jurisdiction of Aboriginal justice systems(s) be invoked?

i) when the accused is Aboriginal? non-Aboriginal?
ii) when the complainant is Aboriginal? non-Aboriginal?
iii) when a certain type of offence is committed?
iv) when the offence is committed on a certain territory?

What happens when one of the accused is Aboriginal and the other is non-Aboriginal?

e) Would the decisions of an Aboriginal justice system be made subject to appeal to a higher court in the existing justice system?

Question 4

Under the present constitution does the concept of a separate system or systems raise any constitutional questions? For instance, one impediment to the establishment of an Aboriginal justice system of criminal jurisdiction may be section 96 of the *Constitution Act, 1867*, which prohibits the federal or provincial governments from establishing court structures that oust the jurisdiction of superior courts for indictable offences.

Question 5

How would the basic principles and legal rights found in the *Canadian Charter of Rights and Freedoms* be applied in an Aboriginal justice system(s)?

Round Table on Aboriginal Justice Issues

Program

DAY 1
WEDNESDAY, NOVEMBER 25

8:30 - 8:45
Round Table Opening

Call to Order
Associate Chief Judge C. Murray Sinclair, Round Table Chairman
Opening Prayer
Elders Ernie Benedict and Flora Tabobondung
Welcoming Comments
Georges Erasmus and Judge René Dussault
Co-Chairs, Royal Commission

8:45 - 9:00
Round Table Objectives and Introduction of Panel

The Honourable Bertha Wilson, Commissioner, Royal Commission

9:00 - 10:30
Panel Presentation Of Discussion Papers

Discussion Paper A
A consolidation of the work and recommendations of previous inquiries and studies and the extent of their implementation.
Discussion Paper B
What are the fundamental values, norms and concepts of justice that Aboriginal people hold?
Discussion Paper C
How are Aboriginal women's interests reflected in the fundamental values, norms and concepts of justice that Aboriginal people hold?
Discussion Period
Moderator: Vina Starr

10:30 - 10:45
Break

10:45 - 12:45
Panel Presentation of Pilot Projects

Presentation of models/experiments with Aboriginal justice initiatives.
1. NWT Community Justice Program: Samuel Stevens
2. South Vancouver Island Justice Education Project: Tom Sampson
3. Aboriginal Legal Services Community Council of Toronto: Jonathan Rudin

Discussion Period
Moderator: Brad Morse

DAY 1
WEDNESDAY, NOVEMBER 25

12:45 - 14:30

Luncheon - Keynote speaker, Chief Justice Robert Yazzie, Navajo Nation

Presentation on the United States experience.

14:30 - 16:30

Panel Presentation of Pilot Projects

Presentation of models/experiments with Aboriginal justice initiatives.

4. Teslin Tlingit Justice Council: Chief David Keenan
5. Attawapiskat First Nation Justice Project: Joe Louttit
6. Kahnawake Mohawk Court:
   Winona Diabo and Federal Justice of the Peace Joyce K. Mitchell

Discussion Period

Moderator: Rachel Qitsualik

16:30 - 17:30

Plenary Session

Discussion of pilot project presentations.

Moderator: Don Worme

17:30

Closing prayer by Elders

18:00 - 20:00

Reception

DAY 2
THURSDAY, NOVEMBER 26

8:30 - 8:45

Day 2 Opening

Call to Order

Associate Chief Judge C. Murray Sinclair, Round Table Chairman

Opening Prayer

by Elders

Outline of Day 2 Agenda and Objectives

The Honourable Bertha Wilson

DAY 2
THURSDAY, NOVEMBER 26

8:45 - 10:15

Panel Presentation Of Discussion Papers

Discussion Paper D

An assessment of the fundamental justifications for a parallel Aboriginal justice system.

Discussion Paper E

Can the existing justice system be adapted to correct its shortcomings with respect to Aboriginal people in such areas as policing, corrections, bail, the attitude of people working within the system, etc.?

Discussion Paper F

Would the process of adaptation of the existing system involve reform beneficial to

- society as a whole, as a result of a greater emphasis on restitution, reconciliation and rehabilitation? and
- to segments of society such as the poor, women and cultural minorities?

Question Period

Moderator: Brad Morse

10:15 - 10:30

Break

10:30 - 12:30

Round Table Discussion of Fundamental Questions

Format: Round Table of twelve selected participants will be invited to address Fundamental Question 1 (a) in light of Discussion Paper D. Places at the Round Table will be rotated among all participants in subsequent Round Table sessions.

Moderator: Marc LeClair

Question 1 a)

Does the difficulty of adaptation lie in fundamental elements of the existing system such as

- the adversarial nature of the process, including the method of assessing credibility?
- the emphasis on punishment as opposed to healing? and
- and the concepts of guilt and innocence?

12:30 - 13:30

Buffet Lunch

DAY 2
THURSDAY, NOVEMBER 26

13:30 - 15:30

Round Table Discussion of Fundamental Questions

Format: Same as for morning Round Table Discussion, with twelve different discussants selected from among participants.

Moderator: Don Worme

Question 1 b)

Does the difficulty of adaptation of the existing system lie in its administrative aspects, such as policing, the correctional system, bail, the attitudes of people working within the system, etc.?

Question 2

Would the process of adaptation of the existing system involve reforms beneficial to

a) society as a whole, such as a greater emphasis on restitution, reconciliation and rehabilitation? and
b) to segments of society such as the poor, women and cultural minorities?

15:30 - 15:45

Break

15:45 - 17:00

Plenary Discussion of Fundamental Questions

Format: Discussion by all participants of three fundamental questions: 1(a), 1(b), and 2.

Moderator: Rachel Qitsualik

17:00

Closing Prayer by Elders

DAY 3
FRIDAY, NOVEMBER 27

8:45 - 9:00

Day 3 Opening

Call to Order
Associate Chief Judge C. Murray Sinclair, Round Table Chairman

Opening Prayer
by Elders

Outline of Day 3 Agenda and Objectives
The Honourable Bertha Wilson

DAY 3
FRIDAY, NOVEMBER 27

9:00 - 10:30

Panel Presentation of Discussion Papers

Discussion Paper G

Would a separate Aboriginal justice system mean a single system or would it be composed of many systems?

a) How would Aboriginal justice system(s) relate to or tie in with the existing system?

b) What would the relationship be among the various justice systems in the different Aboriginal communities?

Discussion Paper H

Under the present constitution does the concept of a separate Aboriginal system or systems raise any constitutional questions?

Discussion Paper I

The Aboriginal women's perspective on the jurisdiction and structure of an Aboriginal parallel justice system(s) and how the basic principles and legal rights found in the Canadian Charter of Rights and Freedoms would be applied in a parallel justice system(s).

Question Period

Moderator: Vina Starr

10:30 - 10:45

Break

10:45 - 12:45

Round Table Discussion of Fundamental Questions

Format: Same as for previous Round Table discussions, with twelve different discussants selected from among participants.

Moderator: Brad Morse

Question 3

If the present system cannot be adapted to correct its shortcomings, should one or more separate Aboriginal Justice systems be established?

a) How would a separate Aboriginal justice system(s) relate to or tie in with the existing system?

b) What would the relationship be among the various justice systems in the different Aboriginal communities?

Question 4

Under the present constitution does the concept of a separate system or systems raise any constitutional questions? For instance, one impediment to the establishment of an Aboriginal justice system of criminal juris-diction may be section 96 of the *Constitution Act, 1867*, which prohibits the federal or provincial government from establishing court structures that oust the jurisdiction of superior courts for indictable offences.

Question 5

How would the basic principles and legal rights protected in the *Canadian Charter of Rights and Freedoms* be applied in an Aboriginal justice system(s)?

DAY 3
FRIDAY, NOVEMBER 27

12:45 - 13:45
Buffet Lunch

13:45 - 14:45
Plenary Session

Format: Plenary discussion of fundamental questions 3, 4 and 5.
Moderator: Don Worme

14:45 - 15:45
Report From Rapporteur

James MacPherson, Dean of Osgoode Hall Law School, York University
Rapporteur's Presentation
Plenary Discussion
All participants
Moderator: Marc LeClair

15:45 - 16:00
Closing of Round Table

Concluding Remarks
The Honourable Bertha Wilson
Closing prayer
by Elders

Round Table Participants and Observers

Elders

Ernie Benedict, Traditional Mohawk Elder from Akwesasne, Ontario

Flora Tabobondung, Elder, Chief of Parry Island First Nations for 26 years

Chairman of Proceedings

C. Murray Sinclair, Associate Chief Judge, Provincial Court of Manitoba

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Donald E. Worme, Wardell, Worme and Piché, former President of the Indigenous Bar Association

Rapporteur

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Honourable Thomas Goodson, Provincial Court Judge of Alberta

Honourable James J. Igloliorte, Provincial Court Judge of Newfoundland, Circuit Judge for Labrador

Honourable John Joe, Provincial Court Judge of British Columbia

Honourable Joyce King Mitchell, federally appointed Justice of the Peace for Akwesasne, Ontario and Kahnawake, Quebec

Honourable Joe Morrison, Ontario provincial Justice of the Peace

Honourable Graydon Nicholas, Provincial Court Judge, Woodstock, New Brunswick

Honourable Réjean Paul, Judge of the Quebec Superior Court, Deputy Judge of Northwest Territories

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regarded as unacceptable radical surgery? These are questions for which there will have to be answers. Whatever the nature of such changes may be required to arrive at an acceptable co-existence, it is certain that a fundamental reform is necessary in the relationship between Inuit and non-Inuit society. If tinkering with the existing system cannot satisfy identified needs, then a thorough, fundamental reform has to be contemplated. For this, a bold will and willingness will have to be mustered by the powers of the dominant society, qualities which it has yet to demonstrate towards the Aboriginal people. The Aboriginal Constitutional Conferences of the 1980s, the debacle of the Meech Lake Accord, and the failure of the Charlottetown Agreement all attest to this.

Conclusion

Fundamental values, norms, and concepts of justice of Inuit? Let us first be shown by what means we would be empowered to put them into practice before we volunteer these to you. We may be a square peg unable to fit into your round hole. We should then agree to embark on an exercise of restructuring the system into a hybrid that is neither a square nor a circle, perhaps a hexagon, designed to be mutually accommodating. Failing that, you should be prepared to agree that a new and entirely separate square hole has to be cut and hacked out to fit our square peg.

Appendix A

The Courts and Alternative Dispute Resolution Mechanisms: Findings of the Task Force

As part of the consultation activities undertaken by the Task Force during 1991 and 1992 in the communities of Nunavik, the Task Force specifically consulted the population of Nunavik on alternative dispute resolution mechanisms. Alternative dispute resolution mechanisms are mechanisms or procedures which people can use to resolve their legal disputes (civil and criminal) without having to use the current formal court system.

As everyone knows, the role of the courts is to provide a fair and equitable solution of the various legal problems and conflicts that are brought before the courts. Whether people come before the courts by way of a civil law dispute (i.e., one person suing another for breach of contract or for delictual damages) or by way of a criminal law prosecution (i.e., murder, assault, theft, etc.), the courts are supposed to resolve these disputes through impartial proceedings which follow