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IN SEARCH OF THE PATHWAYS TO JUSTICE: ALTERNATIVE DISPUTE RESOLUTION IN ABORIGINAL COMMUNITIES

MICHAEL JACKSON†

I. INTRODUCTION

Over the past several years the Aboriginal peoples' experience with the criminal justice system has been the subject of unprecedented public scrutiny. The Report of the Canadian Bar Association, the findings of royal commissions, public inquiries and task forces in the Maritimes, Northern Ontario, Manitoba and Alberta have identified the underlying problems and have made a wide range of recommendations to change the face of injustice which the criminal justice system represents for aboriginal peoples. The critical search here is for pathways to justice for aboriginal peoples.

Over the past few years there has also been a series of major commissions and inquiries which have addressed the directions which reform of the criminal justice system should take. Large questions have been raised regarding the heavy reliance on imprisonment in Canada compared to many other countries and the need to redefine the purposes of the criminal justice system so that the traditional emphasis on retributive goals is balanced if not replaced with restorative goals. The search here has been described as the articulation of a new paradigm for criminal justice. An important part of this agenda is the use of alternatives to the adversary model of court adjudication and the greater involvement of the community and victims in the resolution of conflict. As such this work is properly viewed as part of the Alternative Dispute Resolution movement.

Thus far the search for justice for aboriginal peoples and the search for alternatives to the criminal justice system which would lessen our reliance on imprisonment have proceeded in relative isolation from each other. This paper will explore the assumptions, values and processes underlying aboriginal justice systems on one hand and alternative dispute resolution based on restorative justice principles on the other. In so doing it will consider whether the recognition of aboriginal justice systems is not only one of the critical pathways for addressing the experience and meeting the aspirations of aboriginal communities, but

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may also be both a contributing and complimentary force towards the directions in which the reform of the criminal justice system is advancing.

II. ABORIGINAL PEOPLES AND THE CRIMINAL JUSTICE SYSTEM—THE NATURE OF THE PROBLEM

The over-representation of Aboriginal peoples in the criminal justice system, first documented in 1967 by the Canadian Correction Association's Report *Indians and the Law* and in 1974 by the Law Reform Commission of Canada's *The Native Offender and the Law*, has been confirmed as the most disturbing feature of the criminal justice system by the rapidly accumulating body of subsequent reports not only in Canada but in other countries with significant Aboriginal populations. A report of the Canadian Bar Association appropriately titled *Locking Up Natives in Canada* provides this dark overview of the situation:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Government figures which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native show that almost 10% of the federal penitentiary population is native (including about 13% of the federal women's prisoner population) compared to about 2% of the population nationally. In the west and northern parts of Canada where there are relatively high concentrations of native communities, the overrepresentation is more dramatic. In the Prairie region, natives make up about 5% of the total population but 32% of the penitentiary population and in the Pacific region native prisoners constitute about 12% of the penitentiary population while less than 5% of the region's general population is of native ancestry. Even more disturbing, the disproportionately is growing. Thus, in 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate of native communities.¹

Bad as this situation is within the federal system, in a number of the western provincial correctional systems, it is even worse. In B.C. and Alberta, native people, representing 35% of the province's population constitute 16% and 17% of the admissions to prison. In Manitoba and Saskatchewan, native people, representing 67% of the population constitute 46% and 60% of prison admissions.²

[A] Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the

highest risk of imprisonment). The corresponding figure for nonstatus or Métis was 34%. For a nonnative Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represents for the rest of us. Placed in a historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.³

The most recent figures received by the Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (the Cawsey Report) show that the Canada-wide experience of over-representation continues to apply in Alberta. Indeed, because Alberta has the second highest rate of imprisonment per persons charged in the country, over-representation has even harsher effects there than elsewhere. Moreover, the figures show that the situation has gotten worse in the last five years. Aboriginal men now comprise 30% of the provincial jail population and aboriginal women 45%. But the most alarming conclusion of the Report is that for Aboriginal young offenders "their over-presentation in the criminal justice system is even more dramatic" than it is for adults, and future population projections indicate that the situation will get much worse.

Projections indicate that by the year 2011, Aboriginal offenders will account for 38.5% of all admissions to federal and provincial correctional centres in Alberta, compared to 29.5% of all such offenders in 1989. . . . In same age categories, for example, the 12-18 years of age group, Aboriginal offenders are projected to account for 40%.⁴

Over-representation of this magnitude suggests that either Aboriginal peoples are committing more crimes or they are being subject to systemic discrimination. The recent studies and reports provide strong confirmatory evidence that both of these phenomena operate in combination.

Addressing systemic discrimination the Royal Commission on the Donald Marshall Jr. Prosecution concluded that

Donald Marshall Jr.'s status as a native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons within the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.⁵

A research study prepared for the Marshall Commission by Dr. Scott Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia*, found:

Systemic factors in Nova Scotia's criminal justice system lead to adverse effects for Aboriginal people because they live in or come from Aboriginal communities. Policing that has been designed specifically for Aboriginal communities is relatively ineffective. Justice processing, including legal

representation in courts, are often at considerable distance from native people both physically and conceptually. By the same token, a lack of understanding by many justice system personnel of Mi'kmaq social and economic conditions and aspirations leads to differential and often inappropriate treatment. Probation and parole services apply criteria that have built-in biases against natives by failing to allow for their unique social and economic conditions. Indigenous processes are officially by-passed, if not consciously weakened.⁶

The Cawsey Report also concluded that "systemic discrimination exists in the criminal justice system." The Report specifically dealt with the assertion of the police that discrimination on the basis of race did not exist in Alberta.

In their briefs, policing services in Alberta generally express the same response: we do not treat or police people differently on the basis of race, or: race is not a fact in policing functions. On the surface, this may seem satisfactory. However, it does not address systemic discrimination. System 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. . . .

It is clear the operational policies applied uniformly to aboriginal people sometimes have unjust or unduly harsh results. The reasons may be geographical, economic, or cultural. However, it must be acknowledged that the application of uniform policies can have a discriminatory effect.⁷

As to the assertion that aboriginal people commit more crime, the most recent statistics contained in the Department of Indian and Northern Affairs Report *Indian Policing Policy Review* revealed the disproportionately high incidence of crime in Aboriginal communities. The Report found that;

- (1) The crime rates for on-reserve Indians are significantly higher than the over-all crime rates;
- (2) The average number of on-reserve crimes per 1,000 is approximately 4 times the national average; and
- (3) The rate of on-reserve violent crimes per 1,000 (crimes against "persons" is 6 times the national average, for property crimes the rate is 2 times the national average and for other *Criminal Code* offences the rate is 4 times the national average.⁸

Here again, however, as the Cawsey Report found, the problem of systemic discrimination affects the high crime rate of native people. The Report cites from an article by Tim Quigley, presented at the Western Judicial Workshop in 1990 entitled "Introducing Cross-Cultural Awareness," where the author expresses this view:

The commonly held view is that there is more criminality among Native people than among non-Natives, but is that true? . . . The apparent differences are more explainable by the police conduct than by anything else. . . . Police use race as an indicator for patrols, arrests, detentions etc. . . . For instance, police in cities intend to patrol bars where Native people congregate, rather than private clubs frequented by businessmen. Remote Native communities by comparison with largely white communities, tend to have more policing.

Does this indicate that police are invariably racist? Not necessarily, since there is some empirical basis for the police view that proportionately, more Native people are involved in criminality. It is just that the police view then becomes a self-fulfilling prophecy . . . they tend to police areas frequented by groups they believe are involved in criminality.⁹

A similar point is made in a important New Zealand Report dealing with the effect of police perception of the high rate of Maori crime on crime control strategies.

Individual police, both as officers and as members of society, are aware of the high rate of Maori offending. . . . Individual police officers, subject to those perceptions, become susceptible to beliefs that Maori men are more likely to be criminal, or that certain types of conduct are more likely to be associated with them. Such beliefs unavoidably, if often unconsciously, effect the exercise of discretionary powers.

These individual perceptions and stereotypes are reinforced by the intrinsic attitudes of the police institution which is constantly aware of the wider society's concerns and values. Thus for example, a social perception of increasing gang or street crime, apparently disproportionately committed by Maori offenders, will lead to an increased allocation of police resources to those areas of activity. Such a concentration leads to a greater number of arrests of mainly Maori people which in turn will maintain the perception of Maori criminality. The likelihood that this perception will bias future use of discretionary powers by the police is thereby increased as well. It is a cyclic process of "deviancy amplification" in which stereotypes and perceptions help stimulate policies in a self-fulfilling weave of unfairness.¹⁰

Alarming as the figures of over-representation in the criminal justice system are, they are but part of a larger pattern of social disorganization and economic deprivation that characterizes life in many Aboriginal communities. The rest of the list makes for grim reading indeed. The infant mortality rate among Indian children is 60% higher than the national rate; Indian children who have survived their first year of life can expect to live ten years less than a non-Indian Canadian; the rate of violent death among Indian people is more than three times the national average; the rate of suicide, most disturbingly among young people, is six times the national average; the likelihood of Indian children being taken

out of their family and community and placed under the care of a child welfare agency is five times higher than for non-Indian children.¹¹

While the mere recitation of these horrendous figures should be sufficient to fuel fundamental changes, in order to chart the pathways to such change it is necessary to critically explore the underlying causes of what the Canadian Human Rights Commission has described as "a national tragedy" (*Annual Report* (1988), at 11). Misunderstanding the roots of the problem can lead to solutions that provide, at best, temporary alleviation of the pain and, at worst, deepen the undermining of the strength and spirit of Aboriginal communities.

A review of the literature reveals a variety of explanations for both the over-representation of Aboriginal peoples in the criminal justice system and the general larger pattern of social and economic disadvantage. One powerfully persistent explanation for the special problems Aboriginal peoples face is that of cultural difference between Aboriginal peoples and other Canadians. The cultural explanation was invoked most recently by Chief Justice McEachern in his judgement in the *Gitksan-Wet'Suwet'En* case where the following explanation is offered for Indian disadvantage:

For reasons which can only be answered by anthropology, if at all, the Indians of the colony, while accepting many of the advantages of the European civilization, did not prosper proportionately with the white community as expected. . . . No-one can speak with much certainty or confidence about what really went wrong in the relations between the Indians and the colonists. . . . In my view the Indians' lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have not yet escaped.

Being of a culture where everyone looked after himself or perished, the Indians knew how to survive (in most years) but they were not as industrious in the new economic climate as was thought to be necessary by the newcomers in the Colony. In addition, the Indians were a gravely weakened people by reason of foreign diseases which took a fearful toll, and by the ravages of alcohol. They became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not compete.¹²

This cultural explanatory model has provided the basis for a number of initiatives which are generically referred to as the "indigenization" of the criminal justice system. As described by Carole LaPrairie, "the intent of indigenization becomes one of 'closing the culture gap' through an 'add-on' of Aboriginal peoples approach to the dominant system." Thus, on the assumption that one of the important cultural problems that native people face is understanding the language and formal processes of Canadian law, the introduction of native court workers is

designed to provide a cultural bridge within the existing criminal process. Using the same cultural model, we have seen in different parts of Canada the appointment of native police officers, native probation officers and native justices of the peace. The Report of the Canadian Bar Association, for example, explains the rationale for the appointment of native justices of the peace:

It has been argued that there are a number of benefits that can be expected to flow from this approach. These include a sensitivity to native culture and traditions of social control; a better understanding of the circumstances of native offenders and the problems of needs of native communities; the greater likelihood of decisions of a native justice being accepted by a native accused and a native community; the enhanced opportunity of a native justice being able to secure the co-operation of native communities and resolving their own problems rather than expecting a non-native court from outside to do it; and in remote communities the ability to deal with cases in a timely way rather than await the arrival of the circuit territorial or provincial court.¹³

A second body of opinion has criticized an exclusively cultural explanation of over-representation in the criminal justice system on the basis that it obscures structural problems grounded in economic and social disparities. Thus Carole LaPrairie writes:

What the early Task Forces and studies failed to recognize or did not want to address, was that the disproportionate representation of Native people as offenders in the system, was not tied exclusively to culture conflict but was grounded primarily in socio-economic marginality and deprivation. . . . Access to justice by way of indigenization has both strengths and weaknesses. It provides employment to a number of Aboriginal people and it may help to demystify the criminal justice process so that Aboriginal people feel less alienated and fearful. What indigenization fails to do, however, is to address in any fundamental way the criminal justice problems which result from the socio-economic marginality. The real danger of an exclusively indigenized approach is that the problems may appear to be "solved", little more will be attempted, partly because indigenization is a very visible activity.¹⁴

Cast as a structural problem of social and economic marginality, the argument is that Aboriginal people are disproportionately impoverished and members of a social underclass, and their over-representation in the criminal justice system is a particular example of the well known correlation between social and economic deprivation and criminality.¹⁵

There can be no doubt that poverty is an important factor in prison. A number of studies have demonstrated that one of the most common reasons for imprisonment for a native person is the non-payment of a fine. Thus, a 1974 Law Reform Commission Study concluded that a

large number of native offenders are sent to jail for non-payment of fines. For example, in 1970-71 57.4% of all natives admitted to Saskatchewan jails, constituting one third of all admissions, were admitted for non-payment of fines. The comparable figure for non-native offenders was 34.7%.¹⁶

While not denying the harsh reality of these figures, there is a third body of opinion, to which most native peoples themselves subscribe, which maintains that poverty is not a sufficient explanation for high native crime and incarceration rates. This model seeks to integrate the cultural and socio-economic explanation for over-representation into a larger historical and political analysis. This third model argues that the over-representation of native peoples in our prisons is a result of a particular and distinctive historical and political process which has made native peoples poor beyond poverty. That process is colonization, whereby we of European descent have come to North American and have sought to make over native people in our image, and take over their lands and resources for our economic imperatives. As explained in the Report of the Canadian Bar Association,

What links these views of native criminality as caused by poverty or alcohol is the historical process which native people have experienced in Canada, along with indigenous people in other parts of the world, the process of colonization. In the Canadian context that process, with the advanced first of the agricultural and then the industrial frontier, has left native people in most parts of the country dispossessed of all but the remnants of what was once there homelands; that process, superintended by missionaries and Indian agents armed with the power of the law, took such extreme forms as criminalizing central Indian institutions such as the Potlach and Sundance, and systemically undermined the foundations of many native communities. The native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our "just" society.

This process of dispossession and marginalization has carried with it enormous costs of which crime and alcoholism are but two items on a long list. . . .

The relationship between these indices of disorganization and deprivation and Canada's historical relationship with native people has been the subject of intense scrutiny in the last decade. In the mid-1970s the MacKenzie Valley Pipeline Inquiry focussed national attention on the implications for the native people of the North on a rapid escalation of large scale industrial development. Mr. Justice Berger (as he then was), in assessing the causes for the alarming rise in the incidence of alcoholism, crime, violence and welfare dependence in the North, had this to say:

I am persuaded that the incidence of these disorders is closely bound up with the rapid expansion of the industrial system and with its persistent intrusion into every part of the native people's lives. The process affects the

complex links between native people and their past, their culturally preferred economic life, and their individual, familial and political self-respect. We should not be surprised to learn that the economic forces that have broken these vital links, and that are unresponsive to the distress of those who have been hurt, should lead to serious disorders. Crimes of violence can, to some extent, be seen as expressions of frustration, confusion and indignation, but we can go beyond that interpretation to the obvious connection between crimes of violence and the change the South has, in recent years, brought to the native people of the North. With that obvious connection, we can affirm one simple proposition: the more the industrial frontier displaces the homeland in the North, the worse the incidence of crime and violence will be.¹⁷

Important implications flow from this analysis.

The idea that new programs, more planning and an increase in social service personnel will solve these problems misconstrues their real nature and cause. The high rates of social and personal breakdown in the North are, in good measure, the responses of individual families who have suffered the loss of meaning in their lives and control over their destiny.¹⁸

The principal recommendations which came from the MacKenzie Valley Pipeline Inquiry were that the native people of the North must have their right to control that destiny—their right to self-determination—recognized and that there must be a settlement of native claims in which that right is entrenched as a lodestar. Only then could native people chart a future responding to their values and priorities rather than living under the shadow of ours.¹⁹

The importance of locating the contemporary problems facing native people in the broad context of colonialism is also emphasized by the *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee*. In its overview the Committee asserts:

The arrival of Europeans produced a profound effect on [the First Nations] societies and their way of life. One need only travel to the four First Nation's communities involved in this report to realize that the First Nations people have become the dispossessed—the fourth world. . . . What Euro-Canadians accept as common-place for themselves and their children are absent from these communities; clean drinking water, proper housing, adequate sewage disposal, effective dental and medical care, relevant education and a viable base for economic activity. Absent too is the hope that, under present circumstances, the First Nations people can share in the economic life of Canada. Above all, they are a people without an adequate land base. As one commentator has noted;

History demonstrates that there is a strong correlation between the loss of traditional lands and the marginalization of native people. Displaced from the land which provides both physical and spiritual sustenance, native communities are hopelessly vulnerable to the disintegrative pressure from

the dominant culture. Without land, native existence is deprived of its coherence and distinctiveness.

Stripped of their land, some First Nations people are forced to existing communities that are not viable and often the only reaction to situations of despair, poverty and powerlessness manifests itself in alcoholism, substance abuse, family violence and suicide to name but a few. Such responses may even be a "sane" reaction to these oppressive living conditions. It is a national shame and a calamity on our own doorstep.

While this report addresses the justice system it is but a flash point where the two cultures come in poignant conflict. The Euro-Canadian justice system espouses alien values and imposes irrelevant structures on First Nations communities. The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness. It is evident that the frustration of the First Nations communities is internalized; the victims, faced with what they experience as a repressive and racist society, victimize themselves. In most cases, both victim and offender are First Nations people. They kill and injure each other and may kill and injure themselves, having a suicide rate several times a non-native average in Canada . . .

The clash of the two cultures has been exacerbated by the attempts of the Euro-Canadian justice system to adjust the problems faced by the First Nations people. It lacks legitimacy in their eyes. It is seen as a very repressive system and as an adjunct to ensuring the continuing dominance of Euro-Canadian society. . . . Any attempt to reform the justice system must address this central fact; the continuing subjugation of First Nations people.²⁰

Building upon this analysis the Osnaburgh/Windigo Report in addition to making specific recommendations dealing with the criminal justice system, insisted that these had to be placed in the context of a much broader agenda designed to re-establish First Nations communities as healthy, strong and vibrant. The Report saw this as requiring government recognition that First Nations communities must have economically viable land bases, powers of self-government which would include the power to develop Aboriginal justice systems.²¹

The Blood Tribe in its submission to the Cawsey Task Force also analysed the problems from the perspective of colonization.

The over-criminalization of aboriginal people in Canada defies conventional criminological assumptions. For instance, although there is a well known correlation between poverty and crime, as well as urbanization and crime, these arguments do not adequately explain why aboriginal people are over-represented in Canadian prisons. Furthermore, aboriginal crime is simply not an extension of their alcohol problem, as some authors seem to suggest. It is the Blood Tribe's position that the key to ascertaining the antecedent causes of aboriginal incarceration lies in their history of oppression, colonization, exploitation of the lands and resources and the detrimental policy basis

of the past Indian Acts. Coupled with the fact that the criminal justice system is primarily a white middle-class male institute with no concept or understanding of Indianness.²²

The significance of placing the contemporary experience of Aboriginal communities in a framework which integrates the distinctive historical, political, cultural and economic influences which have characterized the establishment of colonial governments in their territories has also been reinforced in reports from other countries whose Aboriginal peoples have shared and continued to suffer the legacies of colonialism. One recent report which arises out of the experience in New Zealand is particularly valuable insofar as it was written from the perspective of New Zealand's Aboriginal peoples, the Maori.

This report as explained by its Maori author, Moana Jackson, endeavors to facilitate a valid explanation of Maori offending from a Maori point of view using a Maori research perspective to consider structural, social and cultural factors within New Zealand society that may lead to criminal offending by young Maori men. After reciting the litany of statistics demonstrating the over-representation of Maori young men in the criminal justice system Moana Jackson gives this graphic description which puts human faces on the terrible figures:

The young men faced with these problems are seen as travelers in a migration where the seas which buffet them are not those of Tangaroa, but the changing currents of life over which they often have little control. It is a migration quite different from that which brought our tipuna to Aotearoa. It is a journey of different proportions to that undertaken by our young men who fought with such bravery in World War II, a voyage some kaumatua call "Te hekengao te toto," the migration of blood. It is rather "te hekenga ka rehuri mōumou tangata," the migration of wasted lives.²³

Jackson rejects the thesis expressed by the New Zealand Justice Department that "the problem of Maori offending can be attributed to the lower socio-economic status of the Maori." She argues:

To view Maori offending, or indeed any Maori issue, in purely socio-economic terms is unnecessarily restrictive and limits any meaningful understanding of the problem. It is true that the bulk of the Maori population is confined within the lower socio-economic fringes of society, but the reasons for, and consequences of, that confinement are different from those of the Pakeha [non-Maori New Zealanders] poor. While many of the burdens of poverty are shared by all people in the lower socio-economic stratum, the difficulty of the Maori poor emanate from specific historic and cultural forces that overlay the purely economic.²⁴

The report tracks the nature of that historical and cultural process:

With the onset of colonization . . . this balance [in Maori society] was to be disrupted. The early Pakeha settlers ridiculed the efficacy of the spiritual powers, the missionaries condemned the philosophy which underpin them, and the colonial governments suppressed the sanctions and institutions which gave force to them.

The suppression of course involved more than the replacement of mere institutions. It involved the removal of one of the major cohesive forces in Maori society and so had a direct effect on the security, values and self-esteem of the people themselves. Increasing alienation of land compounded this sense of loss because it removed the tangible link between those living in the present and those in the past from whom the precedents for behaviour came.

The story of the combined attacks on the two basic threads of Maori existence is well known in the Maori community and is a source of grievance still expressed at hui [meetings] throughout the country. It is a story kept alive not because of the stubborn desire to instil guilt in the Pakeha community, or even to exact revenge; but simply because of the injustice inherent in the narrative, and the often tragic consequences played out in its present-day epilogue.

The extent of criminal offending is a specific part of that epilogue, and its understanding flows from a realization of how traditional Maori society was affected by colonization.

It has happened all over the world where an indigenous people have had their language and their faith and their laws attacked. Their whole culture is in danger of disintegrating and with that comes crime and social upheaval.²⁵

Relating this analysis to the involvement of young Maori in crime, the author concludes:

The present relationship between young Maori, their families and community has been divorced by inequality from the realities and strengths of its traditional form. In the past, the relationship was like a fabric design woven from the threads of a vibrant culture. . . . Those threads have been torn by the history of Maori/Pakeha interaction and frayed by the contemporary realities of life in a consumer society. They have been re-woven into a new, confusing, and often destructive pattern of existence.²⁶

Young Maori, battered in their self-esteem by the affects of cultural deprivation and denigration, are denied access to the Maori ideals of right and wrong, and are thereby weakened in their allegiance to any traditional standards of behavior. The resentment of economic inequality reduces their willingness to abide by the accepted codes of the wider society so that a developing pattern of behavior emerges which challenges both of those codes.

This pattern may take many, often inter-related forms, each of which may eventually lead to behavior that is defined as criminal. Thus the lack of a

positive cultural identity may lead to identification with peer groups and an initiation into the solidarity and sub-culture of a gang. The lack of a legitimately respected economic position may lead to an identification with life-styles which provide access to illegitimate means of gaining status. The lack of emotional security may lead to an identification with behaviors which provide security in drug or alcohol-enduced escapism. Whatever the scenario, and there are many, the patterns are manifest in the too frequent cost of violence to oneself, to others, or to property. . . .

Economic unfairness and cultural loss thus feed off each other in an almost symbiotic relationship shaped by the cycle of social confinement . . . Thus if low socio-economic status is the catalyst for much unacceptable behavior by Maori youth, it is cultural loss which makes the behavior manifest itself to such a worrying extent. Since economic and cultural deprivation both exist as the outcome of a shared history, it is clear that any disproportionate behavioral consequences of Maori existence issue from that history as well. In this sense, the level of criminal behavior by young Maori men can be viewed as the cost of the history and policies which have shaped their place in contemporary society.²⁷

For the Maori the responses and initiatives that will effectively address both the causes and consequences reflected in Maori involvement in the criminal justice system are directed to the reaffirmation of their inherent right as aboriginal peoples to self-government. In the particular historical context of New Zealand the Maori point to the terms of the *Treaty of Waitangi* negotiated between the British Crown and the Maori Chiefs in 1840 as the constitutional repository of those rights. As they understand the Maori text of the *Treaty* the Crown committed itself to Maori/Pakeha cooperation within a framework in which the Maori retained their traditional authority. Jackson, quoting from Maori elders, expresses this critical point and contrasts it with governmental initiatives which, from the Maori perspective, miss the point.

Many earlier studies . . . have noted the general need to reduce Maori offending by promoting racial harmony or improving the socio-economic status of the Maori community . . . while it is sometimes recognized that part of that process of improvement is related to increased cultural pride as well as economic advancement, the underlying philosophy is to help the Maori "catch-up" with the Pakeha and thereby reduce offending. . . . Initiatives to encourage Maori self-help programs or to improve the self-image of young Maori, therefore tend to be framed within the simple belief that time and money will reduce the rate of Maori offending. . . .

A Maori perspective is quite different. . . . It is culturally inappropriate to see the Maori as simply another economic minority or under-class in their own country. Rather, they need to be accepted as tangata whenua and partners to the Treaty of Waitangi, so that the correlates of their present cultural and economic status including offending, can be addressed within a

specific cultural and constitutional framework which acknowledges the reality of a genuine partnership.

If you are going to sort out how to help us or stop those of our young ones who are in trouble, you are going to have to look at alternatives that share power and retain our mana. Authority to deal with our wrong-doers without these two things is useless.²⁸

The same perspective is shared by Aboriginal peoples in Canada. Scott Clark, in his report prepared for the *Marshall Inquiry* entitled *The Mi'kmaq and Criminal Justice in Nova Scotia*, captures this in the following passage:

The process of justice has become an essential component in native plans to exercise self-determination. This is for three main reasons. First, native people and their leaders feel they are not well served by the existing justice system, including policing, the courts, and the sentencing process. Second, they see the system as removed from their communities (physically and conceptually), and largely irrelevant to the values, needs and processes of social inter-action operating in their communities. Third, they recognize that without activating appropriate justice processes free from outside interference, attempts at self-determination are meaningless.²⁹

The claim to self-determination, including control over the justice process in Aboriginal communities, is asserted on the basis of existing Aboriginal and treaty rights entrenched in the Constitution. Other papers prepared for by the Law Reform Commission as part of the Ministers Reference address the legal foundation for these assertions. Paralleling and supporting the legal foundations are the lessons of colonial history in both this and other countries. The restoration to Aboriginal peoples of control over the essential elements of their lives is the critical pathway to their future as strong healthy and vibrant communities as surely as the taking away of control has been the central force in creating the terrible legacies of the past reflected in the young men and women who continue to suffer the pains of imprisonment and "the migration of wasted lives."

III. THE NATURE OF ABORIGINAL SYSTEMS OF LAW AND JUSTICE

As we will see, the Alternative Dispute Resolution movement has been advanced as a new initiative. An inquiry into the appropriateness of A.D.R. to the administration of criminal justice in native communities could be seen therefore as one in which the benefits of *our* initiative and solutions may be helpful in the resolution of *their* problems. Embedded in this perspective, however, is not only the assumption of the superi-

ority of our legal processes but, in very large measure, it also reflects the extent to which we have been dismissive of the pre-existing institutions and laws of Aboriginal peoples. This point is well expressed by Moana Jackson in her report *The Maori and the Criminal Justice System in New Zealand*:

It is one of the tragedies of western history that the culture-specific nature of its own systems of law has blinded it to the existence of law in other societies. This monocultural myopia, coupled with the economic demands of an imperial ethic, has led to a dismissal of other cultural systems as not being "legal" and a subsequent imposition of the Western way. Maori society is one of many colonial victims of this short-sighted monolegalism. Indeed, the eventual suppression of Maori religious and legal values was

Underlain by undoubted (English) convictions of the superiority of English institutions, and . . . by a limited appreciation of local values.

Part of this "limited appreciation" has led Pakeha anthropologists and jurists to foster the myth that Maori society had no system of law. Rather, it had merely a complex set of customs and lore which regulated the behaviour of its people.³⁰

That this "limited appreciation" is still a powerful part of our legal culture has been most recently reflected in the judgment of Chief Justice McEachern, the Chief Justice of British Columbia in the Gitksan-Wet'suwet'en case. In response to the assertions by the hereditary Chiefs of these two British Columbia, First Nations that they "governed themselves according to their laws, maintained their institutions and exercised their authority over the territory through those institutions," the Chief Justice stated:

I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to Chiefs, clans and marriages and things like that, but I am not persuaded their ancestors practiced universal or even uniform customs relating to land outside the villages. . . .

The plaintiffs have indeed maintained institutions but I am not persuaded all their present institutions were recognized by their ancestors. . . . I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.³¹

It is submitted that this dismissal of Aboriginal law and institutions reflects assumptions and attitudes about Aboriginal societies which in the words of former Chief Justice Dickson in *R. v. Simon*,³² reflect "the biases and prejudices of another era in our history."

Standing in stark contrast to such outmoded biases and assumptions is an important and developing body of material demonstrating what for Aboriginal peoples is self-evident—that their societies had their own

ideas of justice and dispute resolution. In one of the classics of modern jurisprudence and anthropology, *The Cheyenne Way* (1941), Karl Llewellyn and B. Adamson Hoebel, using the common-law case method analysis, demonstrated the sophistication of Cheyenne law and legal process. Writing some twenty years later, Hoebel in his work *The Cheyennes Indians of the Great Plains* summarized some of the achievements and important features of the Cheyenne system:

As an operating system, Cheyenne law is remarkable for the degree of juristic skill that is manifest in it. By juristic skill we mean the creation and utilization of legal forms and processes that efficiently and effectively solve the problems posed to the law and in such a way that the basic values and purposes of the society are realized and not frustrated by rigid legalism. Juristic skill implies the ability to define relations between persons, to allocate authority, and to clear up conflicts of interest (trouble cases) in ways that effectively reduce internal social tensions and promote individual well-being and the maintenance of the group as a group. We have commented on this outstanding quality of the Cheyenne; it is not merely that we find neat juristic work. It is that the *generality* of the Cheyennes, not alone the "lawyers" or the "great lawyers" among them . . . worked out their nice cases with an intuitive juristic precision which among us marks a judge as good; that the *generality* among them produced indeed a large percentage of work on a level of which our rarer and greater jurists could be proud.

The greatest of Cheyenne governmental and legal achievements has been the absolute and total elimination of feud. Feud means internal war, civil strife between the kinship groups within the society; Feud means either the absence of law, or else the breakdown of legal machinery.³³

Hoebel goes on to illustrate how the Cheyenne have achieved this as a result of the reciprocal nature of their kinship society, a philosophy which while recognizing individualism balances it with a sense of obligation to the well-being of the whole tribe and a set of procedures and ceremonies which both practically and symbolically reflect the sense of relationship with each other and with the natural world. This integration of what in our society are regarded as discrete disciplines—law, religion, philosophy and art—reflects an important feature of the Cheyenne way, its holistic character. Hoebel illustrates the manner of the integration with what represents for the Cheyenne, as for our society, the greatest crime, that of homicide.

A murderer becomes personally polluted, and specks of blood contaminate the feathers of the [Four Sacred] Arrows. The very word for murder is *He'goxones*, "putrid." A Cheyenne who kills a fellow Cheyenne rots internally. His body gives off a fetid odor, a symbolic stigma of personal disintegration, which contrition may stay, but for which there is no cure. The smell is offensive to other Cheyennes, who will never again take food from a

bowl used by the killer. Nor will they smoke a pipe that has touched his lips. . . . This means that the person who has become so non-Cheyenne as to fly in the face of the greatest of Cheyenne injunctions is cut off from participation in the symbolic acts of mutuality—eating from a common bowl and smoking the ritual pipe. With this alienation goes the loss of many civil privileges and the co-operative assistance of one's fellows outside one's own family. The basic penalty for murder is therefore a lifetime of partial social ostracism.

On the legal level, the ostracism takes the form of immediate exile imposed by the Tribal Council sitting as a judicial body. The sentence of exile is enforced, if need be, by the military societies. The rationalization of the banishment is that the murderer's stink is noisome to the buffalo. As long as the unatoned murderer is with the tribe, "game shuns the territory; it makes the tribe lonesome." Therefore, the murderer must leave.

Banishment is not in itself enough, however. His act has disrupted the fabric of tribal life. Symbolically, this is expressed in the soiling of the Arrows, the allegorical identity of the tribe itself. As long as the Arrows remain polluted, bad luck is believed to dog the tribe. . . . The earth is disjointed and the tribe out of harmony with it. The Arrow Renewal is the means of righting the situation. The oneness of the tribe is reasserted in the required presence at the ceremony of every family—save those of murderers. The renewed earth, effected by the rites in the Lone Tipi, is fresh and unsullied, once again free of the stain of killing.

Such a concept of the effect of homicide within the tribe completely precludes the possibility of a feud. A feud would merely compound the stain, making disaster for the tribe complete. Nor is there any possibility of a death penalty for the crime. Exclusion and ostracism are eminently effective. In the same vein, no steps are taken to compensate the bereaved kin group for the death of its member. The offence is against the well-being of all the people. . . .

Yet it is contrary to Cheyennes principles to so ostracize a man forever. The Cheyennes cherish the individual personality. They value individualism, asking only that the individual never place himself above the tribal interest. They therefore always work toward reform and individual rehabilitation. For them, the law is corrective; it is never employed as a vindictively punitive measure. Punishment, in their view, need go no further than is necessary to make the individual see the right. Once they are convinced the knave is reformed, they move smoothly to reincorporate him into the community.³⁴

While the work of Hoebel and Llewellyn is held in high regard as pioneering the study of the law ways of Aboriginal peoples without the distorting lenses of ethnocentrism, the inescapable fact is that they were not Cheyenne. It is therefore an important and rewarding process to compare their description of Cheyenne law with that of the Maori as described by Moana Jackson, a Maori woman.

Although the Maori system shared with the Pakeha a clear code of right and wrong behaviour, its philosophical emphasis was different. The system of behavioral constraints implied in the law was interwoven with the deep spiritual and religious underpinning of Maori society so that Maori people did not so much live under the law, as with it. . . .

The traditional Maori ideals of law have their basis in a religious and mystical weave which was codified into oral traditions and sacred beliefs. They made up a system based on a spiritual order which was nevertheless developed in a rational and practical way to deal with questions of mana [authority], security, and social stability. Like all legal systems, it covered both collective and more specifically individual matters. They were thus precedents embodied in the laws of Tangaroa. There were also specific but interrelated laws dealing with dispute settlement, and the assessment and enforcement of community sanctions for offences against good order.

The particular reasons why certain people might act in breach of social controls, the "causes" of "offending," were understood within the same philosophical framework which shaped the laws themselves. Anti-social behaviour resulted from an imbalance in the spiritual, emotional, physical or social well-being of an individual or *whanau* [extended family or clan]; the laws to correct that behaviour grew from a process of balance which acknowledged the links between all forces and all conduct. In this sense, the "causes" of imbalance, the motives for offending, had to be addressed if any dispute was to be resolved—in the process of restoration, they assumed more importance than the offense itself.

This belief led to an emphasis on group rather than individual concerns: the rights of the individual were indivisible from the welfare of his *whanau* [clan], his *hapu* [sub-tribe], and his *iwi* [tribe]. Each had reciprocal obligations tied to the precedents handed down by shared ancestors. Although oral, the precedents established clear patterns of social regulation. . . .

The explanations for these rights and obligations, their philosophy, grew out of, and was shaped by, ancestral thought and precedent. The reasons for a course of action, and the sanctions which may follow from it, were part of the holistic interrelationship defined by that precedent and remembered in ancestral genealogy or *whakapapa*. The *whakapapa* in turn tied the precedents to the land through tribal histories, and so wove together the inseparable threads of Maori existence.

These threads found physical expression in a number of clearly defined institutions. Thus the institution of *muru* was known to be a

legalized and established system of plundering as penalty for offenses, which in a rough way resembled [the Pakeha] law by which a man is obliged to pay damages.

Tribal histories are replete with examples where a *whanau* has had to accept the consequences for a members wrongdoing. They range from the relatively recent payments of *taonga* made by an adulterous family to the *whanau* of the aggrieved spouse, to the large *muru* parties which sought recompense from all villages. In each case, *utu* or the price of compensation was mediated

through ritualized *korero* and was acknowledged by both parties as a just and appropriate means of settling the dispute.

The complex institution of *tapu* had two major facets. First, it was the major cohesive force in Maori life because every person was regarded as being *tapu* or sacred. Each life was a sacred gift which linked a person to the ancestors and hence the wider tribal network. This link fostered the personal security and self-esteem of an individual because it established the belief that any harm to him was also disrespect to that network which would ultimately be remedied.

Of all Maori sanctions, *tapu* is the most culture-specific. It evolved from the Maori consciousness and their beliefs that things and people had an inherent value or *mana*. If the notion of no person being "above the law" is a basic tenet of Pakeha law, the concept of a life-style protected and nurtured by an ideal of special worth is a basic tenet of Maori law.

The sanctions imposed through these institutions were accepted and understood because they were drawn ultimately from the threads which tied the people to their *tipuna* and their land. . . . Which particular sanction was correct or which course of action was appropriate at any given time were decisions made by the people—chiefs, *tohunga*, or the community assembled in *runanga* or *hapu* gatherings. . . .

The system imposed responsibility for wrongdoing on the family of the offender, not just the individual, and so strengthened the sense of reciprocal group obligation. The consequences of an individual or group action could therefore redound on the *whanau*, the *hapu*, or even the *iwi*, since the ancestral precedents which established the sanction also established the kinship ties of responsibility and duty. Thus the use of *muru* enabled justice to not only be done, but to manifestly be seen to be done by all members of both the offender's and victim's *whanau*. The ever-present influence of *tapu* created a group consciousness about behavior which was *tika* or correct because everyone was linked to its source . . . these concepts were not "foul superstitions," as the missionaries claimed, but a consistent body of theory and sanction upon which the society depended. They incorporated and reflected the Maori ideals of group control and responsibility within a weave of kinship obligation. Rules of conduct were not divided into civil and criminal laws since a "criminal" act of violence or a "civil" act of negligence influenced the same basic order: the balance between the individual, the group, and the ancestors.

Sanctions imposed for any infringement aimed to restore this balance. Thus the *whanau* of the offender was made aware of its shared responsibilities, that of the victim was given reparation to restore it to its proper place, and the ancestors were appeased by the acceptance of the precedents which they had laid down. . . .

The precedents were refined over time and their application clearly proceeded on a different basis to that of western jurisprudence. However, they provided a sense of legal control which was effective because it had a unifying basis that recognized the need for social order and the value of balancing community affairs.³⁵

It will be apparent from comparing this description of the legal forms for maintaining social order of the Cheyenne and the Maori—Aboriginal peoples from opposite ends of the earth—that they are distinctive systems with important differences. The Cheyenne centralized legal control in their Tribal Council compared to the more decentralized system of the Maori; in the Maori system compensation or *mu*ru was a primary sanction compared to its more limited role among the Cheyenne.

The distinctiveness of these two systems is not simply a reflection of the fact that the Cheyenne and the Maori are separated by continents. The distinctiveness of their societies and their law ways is no less reflected in the Aboriginal peoples of Canada. The social, political, and legal structures of the Mi'kmaq are different from those of the Six Nations of the Iroquois Confederacy as these in turn are different from those of the Dene, the Blackfoot, the Coast Salish, the Inuit and the Métis. As we come to recognize the existence of Aboriginal systems of law and justice and their contemporary forms it is imperative that we recognize this distinctiveness and not impose upon it a spurious unity. Patricia Monture and Mary Ellen Turpel have expressed this well in their companion paper *Aboriginal Peoples in Canadian Criminal Law—Re-thinking Justice*:

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 no single answer that will speak to the diversity of experience, geography, and culture of Aboriginal people in our communities.³⁶

While recognizing this dimension of distinctiveness between aboriginal systems, it is also possible to see some very significant common elements. Returning for a moment to the descriptions of the Cheyenne and the Maori systems we can see that both of these place a primary emphasis on restoration and reintegration of an offender into the fabric of communal life, in contrast with the primary emphasis on punishment and isolation which has characterized Euro-Canadian concepts of criminal justice. We see also in their systems a higher priority given to collective rights in contrast to the greater respect shown for individual rights in the common and civil law. In comparing institutions of decision making we can also see in both the Cheyenne and Maori systems a far greater democratization of those processes with the fulcrum of decision making resting in the group in contrast to Euro-Canadian systems in which law is heavily professionalized and decision making authority is allocated to individual specialists be they police, lawyers, judges or correctional officers.

Jackson in her discussion of the central elements of the Maori justice process has succinctly highlighted how these features diverge from common law based systems.

While the Maori community shared the universal abhorrence for acts which did violence to people, property, or good order, their methods of expressing this abhorrence were quite different to those enshrined in Pakeha law. The individual-based English systems stressed that an individual was solely to blame for his crimes . . . which were considered acts against society, not another individual—the Crown was the aggrieved agent which sought redress.

This of course, conflicted with the Maori system which was shaped by ideals of kinship obligation. Because Maori possessed individual rights but collective responsibilities, offenders were never regarded as solely to be blamed for their crime. Rather their *whanau* were deemed equally liable for their actions which were held to have aggrieved not just another individual but another *whanau*. Redress was therefore sought not by some distant symbol of “the Crown,” but by the *whanau* involved—both the victim’s and the offender’s. There was thus a very real and close relationship between the offender, the victim and the “judge and jury” . . . The imposition of the Pakeha system removed this intimate sense of responsibility and replaced it with its own courts and police force. . . .

These varied ideals of group/individual responsibility and methods of redress illustrate obvious systemic differences between the Maori and the Pakeha concepts of “crime control.” They also place in context the apparently paradoxical attitude Maori people have towards the Pakeha law. On the one hand, it is seen as a necessary ideal to maintain order, on the other its formulation and enforcement is seen as a alien, exclusive, and often discriminatory process detrimental to their interests. This paradox shapes Maori perceptions about how the law functions and how it affects the Maori community and the Maori offender.³⁷

Turning from the Cheyenne and the Maori to a consideration of the systems of law and dispute resolution of Aboriginal peoples in Canada, we are now seeing First Nations and Aboriginal communities articulating the nature and elements of those processes in their submissions to the growing numbers of public inquiries and commissions which have been appointed to consider various aspects of the criminal justice system and its impact on Aboriginal peoples. From reviewing some of these submissions we can discern both the distinctiveness and the common elements of Aboriginal justice systems in Canada.

The Osnaburgh/Windigo Tribal Council Justice Review Committee in its report provides us with this overview based upon submissions made to it by four communities of the Ojibwa Nation in Northern Ontario.

Aboriginal societies had their own ideas of justice and dispute resolution. Aboriginal law was concerned with maintaining social harmony since interdependency was necessary in order to meet the exigencies of a hunting and gathering existence. Disputes would be solved by a person known to both of the disputants, in contrast to the impersonalized machinery adopted by the Euro-Canadian Justice System. When a dispute arose, it tended to involve other members within the same community and a well-understood system existed to resolve itself. What the common law is to the Euro-Canadian justice system so customary law, based upon an oral rather than a written tradition, was to Aboriginal justice systems.

Crimes were seen as a hurt against a community of people, not against an abstract state. Community meetings of "calling-to-account" therefore played an important part in investigation, evaluation, sentencing and even, through the shame they could inspire, punishment. The judicial system itself was viewed in a fundamentally different light than is the European system by non-natives. Its primary goal was to protect the community and further its goals. To this end it placed much more emphasis on modifying future behaviour than on penalizing wrong-doers for past misdeeds. Counselling, therefore, was far more important than punishment. Punishment, in fact, was often only a last resort used to safeguard a community against extremely disruptive activity, when rehabilitative efforts had failed.³⁸

The Blood Tribe in Alberta explained its traditional concept of justice to the Cawsey Task Force.

Traditional approaches to justice were based upon the principle that every person should be given his due. This involved a reference to the tribal moral standard of a tribe. Acceptable behaviour was ascertained in light of the competing interests of the tribe. However, individual and group interests, if the occasion arose, would be sacrificed in favour of the greater tribal interest in such totality. As a result, social sanctions developed to protect individual interests as well as tribal interests, along with the appropriate machinery to enforce social sanctions. For the Blood Tribe this instrument was the *Ikunuhkahtsi* which was called upon to settle disputes, carry out punishments, maintain order and tribal equilibrium, and to guard against/or expel external aggression. The *Ikunuhkahtsi* were normally composed of tribal chiefs or headmen, religious leaders, elders and/or respected warriors.³⁹

The Cawsey Task Force also heard submissions from the Federation of Métis Settlements regarding Métis dispute resolution.

Sentencing should be based more on the traditional ways of distributing justice. Traditional approaches to justice delivery, such as shame tactics, could be used for the youth and adult first offender. The traditional way of doing this was to bring the offender before the whole community to be confronted by elders and the leaders of the village. The offender was then

lectured and reprimanded in front of the whole community. When this type of system was used there were very few repeat offenders. This system could work today if the Métis communities became totally involved, with minimal or no interference from the provincial and federal governments.⁴⁰

We will be considering in greater detail in part four of this report the justice systems of other Canadian aboriginal peoples. What emerges from this overview of Aboriginal justice systems is that the processes of dispute resolution are integrally linked to both social organization and cultural values and belief. As in our system a just result is as much dependant upon the process as the substantive rules. The relationship between the process of justice and the justice of a result for Aboriginal peoples and the manner in which our present system has been culturally blind to Aboriginal systems is well articulated by Jackson. Though written with reference to the Maori it has equal applicability to Aboriginal peoples in Canada.

The efficacy of law ultimately depends upon society's perception of its ability to provide justice. People respect legal institutions which they consider fair and which they have helped shape. They accept sanctions at law which they believe to be just and which relate to their personal and cultural beliefs. The perception of fairness is shaped by the systems established to enforce and apply the law, and a sense of justice flows as the end result of the processes which those systems impose on an alleged offender.

Maori people firmly believe that the processes of the present criminal justice system are often unfair, and that the end results are consequently unjust. That belief is shaped by the reality of their experience within a system whose attitudes and processes were developed in a non-Maori cultural setting. The powers which are exercised to determine arrest and charge, the laws which actually define the crimes, and the procedures which individuate the offence and isolate the offender, are products of the English tradition frequently inconsistent with that of the Maori. They both reflect its exclusive heritage and ensure its maintenance through a process that is claimed to be inherently just; beliefs that have often led the Pakeha law to dismiss the need for any other process or to regard a different system as manifestly inferior or unjust. In so doing, the law has however confused the processes of justice with the justice of a result. . . .

In a practical sense, Maori people have no difficulty with the concept that, for example, like offences should face like sanction (received "equal" justice) for life offences. However they would claim that the process by which a like result could be achieved can be based in different but equally valid cultural frameworks. Thus while it would be generally accepted that the purposes of a general justice system are to protect society, to transmit its abhorrence of certain behaviour, to seek a restoration of a balance between offenders and victims, and to dispense justice, the processes by which they are achieved can show considerable variation. . . .

A definition of criminal justice framed within a Maori perspective therefore looks to the attitudes and processes which produce the final consequences for an alleged offender. Those processes presently operating within the Pakeha legal system are based in mono-cultural attitudes that often result in a systemic bias and unfairness which effectively denies justice to the Maori. To remedy that situation, there is therefore a need to redefine the processes, and to base them in culturally appropriate attitudes that would ensure fairness.

The obvious key to that fairness lies in a process which is based not in English or Pakeha legal tradition but in Maori; it is a fairness founded in culturally specific systems aimed at achieving a culturally universal ideal of justice. Its philosophy and base would not, of course, be the Maori of two hundred years ago, but those traditions and legal concepts which can best be adapted to suit the changed circumstances of today's Maori community. Its fairness is not dependent on an impossible idea of an exclusive traditional purity, but on the Maori framework in which it would be developed, and the cultural authority under which it would be implemented.

The cultural weave for establishing a parallel Maori process of criminal justice is therefore drawn from the need to develop different procedures that more appropriately reflect Maori rather than Pakeha perspectives, and that more effectively ensure the development of systemic fairness toward alleged Maori wrong-doers. It is based on the cultural imperative that criminal justice should not only impose sanction but should also seek restoration of balance between offenders and victims, their families and the wider community. In this context, the sanction expresses community's disapproval while the restoration expresses a need for mutual responsibility. From these twin objectives arise an acknowledgment of individual worth and a respect for each person's inherent *tapu*.⁴¹

As Jackson states, determining the shape of criminal justice processes from an Aboriginal peoples perspective is not an attempt to reconstruct a system relevant to times long past. It is a search for solutions to contemporary problems albeit solutions which are firmly anchored in processes which reflect the deep currents of cultural continuity which have survived in the midst of enormous changes. How should our criminal justice system respond? More specifically how relevant is what we call the Alternative Dispute Resolution movement to their insistent demand that alternatives based on their models of justice must be accorded the same legitimacy and recognition as ours?

IV. THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

The Alternative Dispute Resolution (A.D.R.) movement which for over a decade has been the subject of enormous professional and aca-

demic interest in the United States has more recently become a subject of interest and study here in Canada. This is reflected in the consultation paper prepared for the Law Reform Commission by Professor Andrew Pirie in 1987 entitled *Dispute Resolution in Canada: Present State, Future Direction*. Shortly after publication of this consultation paper the Canadian Bar Association established the National Task Force on A.D.R. and its report, *Alternative Dispute Resolution: A Canadian Perspective*, was released in 1989.

So far in both Canada and the United States the primary focus of A.D.R. has been in areas other than criminal law, in particular labour, family and commercial law with some important developments in the human rights field. There are significant reasons why in the criminal law field the A.D.R. movement has been less influential, reasons which are succinctly summarized in the C.B.A. Task Force report:

In criminal matters, court adjudication has been the traditional method of conflict resolution. The emphasis has been on due process, principles of fundamental justice and full public hearings, all important elements when punishment of the offender is a key feature in the criminal justice system. While many of the common problems associated with court adjudication existing criminal cases (court congestion, lengthy delays, rising costs), the emphasis on individual rights appears to have precluded experimentation with alternate measures of dispute resolution.⁴²

The C.B.A. Task Force report reviewed four procedural adjuncts to this heavy reliance on court adjudication in terms of their potential for alternative dispute resolution. They are (1) pre-trial discovery in criminal cases; (2) pre-trial conference in criminal proceedings; (3) plea-bargaining; and (4) diversion.

The Law Reform Commission of Canada has been the principal exponent of a pre-trial criminal discovery process in its 1974 and 1984 reports (Law Reform Commission of Canada, *Criminal Procedure: Discovery* (1974); Law Reform Commission of Canada, *Disclosure by the Prosecution* (1984)). The benefits of such disclosure and the injustices that can result from non-disclosure have most recently been highlighted by the *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*. The *Report* found that the Crown's failure to disclose information to Marshall's counsel contributed to his conviction and continued imprisonment. The *Report*, paralleling recommendations made by the Law Reform Commission itself, urged the federal government to implement *Criminal Code* amendments designed to ensure a formal pre-trial discovery process.

However, even though the abuses of non-disclosure have been given their highest profile in the case involving a Mi'kmaq accused, implemen-

tation of pre-trial discovery procedures through amendment to the criminal code is not likely to have any particular or special impact on the criminal process so far as native people are concerned. It is similarly suggested that reforms in relation to pre-trial conferences and plea-bargaining are not issues which have special relevance for reshaping dispute resolution in criminal matters involving native people.

It is in the fourth area, diversion, that is of particular interest and importance for addressing some of the issues and concerns which the administration of criminal justice raises for native peoples.

The development of the concept of diversion in Canada owes much to the work of the Law Reform Commission. In its 1974 working paper the Commission identified a spectrum of initiatives encompassed by the concept of diversion. These were:

- (1) Community absorption: Individuals or particular interest groups dealing with trouble in their area, privately, outside the police and courts.
- (2) Screening: Police referring an incident back to family or community or simply dropping the case rather than laying criminal charges.
- (3) Pre-trial diversion: Instead of proceeding with the charges in the criminal court, referring a case out at the pre-trial level to be dealt with by settlement or mediation procedures.
- (4) Alternatives to imprisonment: Increasing the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, partial detention in the community based residence, or parole release programs.⁴³

The Law Reform Commission expressed the underlying value of diversion as one "of restraint in the use of the criminal law. This is only natural for restraint in the use of criminal laws as demanded in the name of justice."⁴⁴

As part of its work on diversion the Law Reform Commission commissioned a series of studies on the use of various diversion strategies collectively known as the East York Community Law Reform Project. Focusing on the Toronto area of East York the study provided significant information regarding the formal and informal ways in which problems are resolved within a community. Thus, in the first of the studies the following insight is offered

Although the criminal justice system, with its police, courts and corrections apparatus, is the most formal and perhaps the most visible element of the total social defense system, there are nevertheless a host of other, more informal mechanisms directed to the purposes of conflict resolution and problem management. While it must be acknowledged that there has been a substantial diminution of the role of the home and the community, informal

networks of affiliation continue to play the major role in interpersonal problem-solving and conflict resolution. Despite the pressures of the increased urbanization and geographic occupational mobility, most people are part of a close-knit network of relatives, neighbors and co-workers, and these primary groups remain an important source of sociability and support. . . . With specific reference to the criminal justice system, the consequence of intensifying the reliance upon informal social support systems would hopefully be a curtailment in the demands on the social service capacity of the police, and, to the extent that the police control intake into the other sectors of the criminal process, on the courts and corrections apparatus as well.⁴⁵

Other studies dealt with conflict management by the Metropolitan Toronto Police, diversionary dispositions (police cautions and agency referrals) for juvenile offenders, and the extent to which criminal occurrences involved situations in which there were prior and ongoing relationships between the victim and offender.

Accompanying these empirically oriented studies was a companion study which analyzed the limitation on court adjudication as the primary conflict resolution process in the criminal law. That analysis is summarized in the following passages:

As the criminal justice system is presently structured there is only one procedure for settling disputes: adjudication. Any conflict capable of criminal definition which is not solved by a negotiational compromise by the parties must wind up in the courts. Our studies show that in a significantly large number of disputes the relationship between the parties is one for which adjudication does not provide the answer.

A criminal event arising out of the pre-existing relationship is just the last link in a varied chain of events. The parties relate to each other on many levels: they might be husband and wife, or businessman and client, or merely neighbors, but they interact socially on a continuing basis. When the relationship creates a conflict that leads to a criminal action, this relationship is affected. What the parties want is a solution that will harmonize their difficulties, not necessarily a judgment that will crystalize their discord.

Yet, having invoked the criminal justice system, they must abide by its rules. And the process imposes on them a definition of the problem and the solution which do not correspond to their needs and wishes. Our criminal process, based on the adversarial techniques, focuses on conflict and forces each party to either win or lose a battle based on society's standards. In the process the individual's characteristics, the nature of their relationship and the purely personal dimension of their dispute are lost. They have been subordinated to an external norm, the public interest.

The adjudication process can only work this way. It sets up an impartial arbiter of disputes, who must be given a set of guidelines. The guidelines cannot relate to the personal interest of disputants, therefore they must conform to an abstract notion of the common good. The result is our

criminal law: rules regulating damage to property or persons in which one party is the victim and the other the offender. When parties submit to the criminal process, this framework must be imposed on their dispute in order for adjudication to work. And the framework will be imposed because we have no other mechanism for solving criminal-type disputes.

A dispute and the relationships thus change form. The invoker becomes "the victim," even though he might have contributed substantially to the event precipitating the crisis: The other party becomes "the offender," and is immediately placed in a negative role where both the "victim" and the state join forces against him. The event itself may have been just one incident in the overall context of the relationships. Yet it is singled out and regarded as an isolated act. The machinery of criminal justice focuses on it, out of context, and provides solutions that might fit the isolated event but do not either take into account or accommodate the surrounding network of dependencies and interaction . . .

Our studies show that the adjudicative process simply cannot accommodate what are termed "polycentric" relationships—those which contain interacting elements on several different levels. The adjudicative process will force such problems into a mold which reduces them to a single dimension and will fit solutions to the newly-defined problems, without solving the actual conflict. But the definition and the solution have been imposed by applying external and rigid norms and by disregarding the individual characteristics of the problem and its participants. This not only fails the individuals, and frustrates police, but in the long run it harms society and the public interest by sustaining a climate of hostility and discord which might lead to further criminal or anti-social acts. Any chance for compromises or settlement is eliminated by the system.

Adjudication plays an important role in the preservation of society's goals and standards, but it is predicated on the assumption that there are irreconcilable differences between the disputing parties.

What is needed is a system of conflict-solving mechanisms geared to continuing bilateral relationships. The terms of reference of such a system should extend beyond what is legally irrelevant in a criminal trial and permit the search for solutions on a wider basis—one which includes renegotiating and terminating relationships and taking account of social ramifications as well as mutual responsibility.⁴⁶

There has been in Canada an incremental acceptance of the legitimacy of diversion in its broadest meaning particularly in terms of encouraging greater community participation in criminal justice issues and in constructing viable alternatives to adjudication and imprisonment particularly through mediation, reconciliation and restitution. Indeed it is fair to say that the work done by and for the Law Reform Commission of Canada has been seminal in this regard.

A series of working papers and studies published by the Commission in the mid 1970s on the principles of sentencing and dispositions,

community participation in sentencing, restitution, compensation and pre-trial diversion laid the groundwork for a movement away from a model of retributive justice to what has been referred to as restorative justice. The thrust of working paper no. 3, *The Principles Of Sentencing and Dispositions*, was to develop a theoretical and pragmatic rationale for "reconciliation of the offender, victims and society." In recommending greater use of diversion schemes, particularly those which incorporated provisions for restitution and compensation, the Commission expressed the following views:

Rights of possession and dignity of the person are protected by tort law as well as by criminal law. Family law protects and enhances fundamental values arising out of domestic disputes, including assault. In family law, juvenile law or labour law, for example, the values that are protected and supported by law are not necessarily fought out in an adversarial court setting, but in a settlement or conciliation procedure. This mode of proceeding appears to be effective in underlining and clarifying interests and community values. Moreover, unlike the adversarial setting, conciliation encourages full recognition of the interest of the victim and the need for restitution and compensation. At the same time, the issue of responsibility is not evaded but worked out with fairness, humanity and economy. . . .

The settlement or conciliation procedure in its educative effect would thus promote the protection of core community values. For the offender such an experience may have an additional positive value. To see the victim as a person whose rights have been violated, paves the way for expiation. This incidental effect of settlement procedures may be especially helpful to some offenders. Unfortunately, the adversary nature of the criminal trial, where positions are polarized and where the psychological effect is such that the offender might well begin to believe himself blameless in a winner-take-all situation is not conducive to an acceptance of responsibility or a recognition of the rights of others.

For the victim, the criminal trial may be equally unrewarding and destructive, whereas, the proposed settlement process restores him to the center. What was his role in the alleged offence? What does he demand by way of satisfaction? We should not overlook the fact that, historically, before the King took collection of fines for revenue purposes, compromise and settlement were commonly used. Now that Her Majesty is no longer dependant upon fines in order to balance the budget fresh consideration should be given to using diversionary or settlement processes as an alternative disposition.⁴⁷

In one of the research papers on the subject of community participation in sentencing, Professor Graham Parker in referring to the "new criminology" writes:

The criminal law and its processes should be no more than *one* of many standards of the protection and betterment of modern, complicated, post-industrial society. In its simplest form, there is a demand for a replacement,

or at least a modification, of the conflict model with greater emphasis on the cooperative method of resolving and controlling community problems.⁴⁸

In this same paper Professor Parker recites the following position advanced by the English group "Radical Alternatives to Prison" in its advocacy of a community approach to crime:

Community programs . . . emphasize self-help—i.e., those involved determine what is important; they blur the distinction between offenders and non-offenders; they are concerned not just with individuals' problems of living in a community but also with changing some of that communities problems. At first, it may be necessary to start such community projects with considerable outside help, but as they gather momentum, such help should gradually be reduced and self-determination by those whom it effects takes its place. This is important if the problems of dependency on external support, so prevalent in an institution, are to be avoided. . . .

The advantages of the community approach suggested here are that involvement of groups of people who share similar problems in the same area means both that more time over a period can be spent in providing help in dealing with difficulties, and that a wider approach to those difficulties is possible. Rather than "patch-up" each individual or family in isolation, ways of changing local social conditions and relationships can be found. When problems such as too many children, poor housing, lack of skills, etc., are being dealt with by those who share some of the same difficulties, with support from others with more knowledge and experience, a group can achieve what individuals can rarely do; significantly to change their environment, and in so doing, to gain status, self-respect, self-confidence, and hope.⁴⁹

In its working paper on restitution the Commission in recommending increased use of restitution as a natural and just response to crime did so by examining the nature of crime and the relationship between the offender, the victim and the community.

In seeking to understand crime and develop responses to it, it may be helpful to view it not as a pathology or an evil to be suppressed at all costs but as an inevitable aspect of social living. In Civil Law the inevitability of social conflict has long been recognized. Thus, many social conflicts classed as torts or breaches of contract are understood to be normal features of social life, frequently serving the social purpose of clarifying different value positions. In criminal law, too, the wrongful conduct can be seen as an aspect of conflicting values as, for example in some drug offences an abortion. Through conflicts over value positions society has the opportunity of reaffirming its view of what conduct is so injurious that it ought to be dealt with by penal sanctions. Should the emphasis in sentencing policy, then, be on the suppression of crime through severe sanctions or should it be on making clear what values are at stake in a conflict and affirming in a tolerant and firm

way those values that have the support of the community? Should sentencing policy emphasize a rejection of the offender as a parasite on the body politic, or should we, on finding the offender responsible for having committed an offence take into account what the social sciences and common experience teach us about human behavior and impose a sanction that encourages reconciliation and redress;

Doubtless there are offences in respect of which reconciliation is useless and where the most rational sanction may be prolonged imprisonment. For the great majority of offences, however, restitution would appear to be appropriate. Restitution involves acceptance of the offender as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim, and society. In particular, restitution invites the offender to see his conduct in terms of the damage it has done on the victims rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence and that he will in many cases be willing to discharge that responsibility by making amends

On quite practical grounds restitution offers greater satisfactions and benefits to all concerned. Under restitution the victim, first of all, is no longer used largely as a means of protecting society's collective values. Rather his claim to satisfaction as well as society's is recognized in restitution and compensation. An important part of this recognition is the victims psychological need that notice has been taken of the wrong done.

Recognition of the victim's need underlies at the same time the larger social interest inherent in the individual victims loss. Thus, social values are reaffirmed through restitution to the victim but society gains from restitution in other ways as well. To the extent that restitution works toward self-correction, and prevents or at least discourages the offenders committal to a life of crime, the community enjoys a measure of protection, security and savings. . . .

The offender, too, benefits in a practical way from a sentencing policy that emphasizes restitution. He is treated as a responsible human being; his dignity, personality and capacity to engage in constructive social activity are recognized and encouraged. Rather than being further isolated from social and economic intercourse he is invited to a reconciliation with the community. While he is not permitted to escape responsibility for his crime his positive ties with the family, friends and the community are encouraged, as are opportunities for him to do useful work.⁵⁰

Under the Law Reform Commission's sentencing proposals restitution would become "a central consideration" in sentencing and dispositions; central in the sense that restitution would merit "foremost, but not exclusive, consideration."⁵¹

In its working paper on diversion the Commission further developed the link between diversion strategies and the need for greater involvement of the community with the victim and the offender in restoring the social balance:

The continuing interest in diversion is fed by many sources. There is a growing disappointment with an over-reliance on the criminal law as a means of dealing with a multitude of social problems. At the same time we realize the rehabilitation does not provide a full answer to the problem of crime. Increasingly, it has recognized that crime has social roots and sentencing policies must take into account not only the offender but the community and the victim as well. . . .

The general peace of the community may be strengthened more through a reconciliation of the offender and victim than through their polarization in an adversary trial. To put the matter another way, there is a need to examine diversion at this time if only to discover again that there is much value in providing mechanisms whereby offenders and victims are given the opportunity to find their own solutions rather than having the state needlessly impose a judgment in every case. . . .

Diversion encourages the community to participate in supporting the criminal justice system to the degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion program rests upon a community base.⁵²

The reader is invited at this point to reflect upon this collection of passages from the Law Reform Commission's work in the 1970s and compare its focus on non-adversary processes which emphasize restoration of social harmony, the links between offender, victim and the community and the need to enhance integration rather than isolation of the offender, with our previous analysis of the core features of Aboriginal justice systems. One does not need to be a professor of comparative law to see the parallels.

Since the work done by the Law Reform Commission in the 70s there have been a number of legislative initiatives which have reflected and implemented important aspects of the Commission's general approach to criminal conflict resolution. In particular recent amendments to the *Criminal Code* give greater recognition to the importance of restitution and seek to make the criminal trial and sentencing process more responsive to the needs of the victims. The importance of community based corrections and pre-trial diversion has also been given legislative recognition in the alternative measures provisions of the *Young Offenders Act*. In addition there has been increasing use made of community based sanctions, such as community service orders as a condition of probation. There has also been a significant new development since the work of the Law Reform Commission in the shape of victim-offender reconciliation programs both outside the formal criminal justice system and as part of diversion schemes.

Some of the thinking of the Law Reform Commission was also reflected in the Department of Justice's statement of policy published in

1982, *The Criminal Law in Canadian Society*, which sought to set out in broad terms the policy of the federal government with respect to the fundamental purpose and principles of the criminal law. Two of those principles reflect reconciliation, compensation and the importance of community participation. Principle (g) and principle (l) provide the following:

- (g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:
 - (i) Opportunities for the reconciliation of the victim, community, and offender;
 - (ii) Redress or recompense for the harm done to the victim of the offence;
 - (iii) Opportunities aimed at the personal reformation of the offender and his [or her] reintegration into the community
- (l) wherever possible and when appropriate, opportunity should be provided for lay participation in the criminal justice process and the determination of community interests.⁵³

It is fair to say, however, that while aspects of restorative justice were reflected in the 1982 policy paper the central focus of the policy was still on the adjudicative process and its need to balance both justice and security interests rather than on the development of alternative dispute resolution initiatives geared to reconciliation.

In 1985 the National Associations Active in Criminal Justice (N.A.A.C.J.) organized a national seminar entitled "Criminal Justice and Victim-Offender-Community Reconciliation." Building upon the work of the Law Reform Commission, reconciliation and restorative justice was presented as a new paradigm for dealing with crime. The 1985 seminar was designed to review the principle of reconciliation in a comprehensive manner, situating it within the criminal law and exploring its implications for correctional practice in the community, including correctional institutions. The background paper for the conference outlined the contours of the new paradigm:

Reconciliation can be tentatively defined as reduction of conflict between the offender, the victim, the community and the state, so as to mitigate against further alienation of one party from the other.

It is based on the conceptualization of crime as conflict—a conflict of interests (to be reconciled), a rupture of mutually satisfactory relations (to be mediated), a breakdown in the cohesiveness of the community (to be restored). The focus is on the relationship and interaction of the parties as members of a whole community, and the task that the community has of restoring the balance between the parties in conflicts. It assumes that the community need not be permanently damaged by a breakdown that mani-

fects itself. An opportunity can be provided to strengthen community cohesiveness as a whole by reaching out to both victims, offenders and their communities and learning new ways to process the needs of all; and an attempt should be made to do so during the administration of the sanction.

The "Reconciliation Model" is also based on the fact that the offending citizen has more ties with the social system than a conflict relationship arising from the violation of criminal law. Most, if not all citizens, function within a range and variety of relationships which exist between the state and its citizens, the majority of which are based upon the satisfaction of mutual interests rather than conflict. By emphasizing the similarities of offenders and non-offenders because of the predominance of these positive social contacts, the criminal justice process might be expected to facilitate a reconciliation of the interests of the offender with those of the general society. While this may require that the offender be punished, it would also recognize that the offenders sacrifice for the general good should be kept to a minimum and that his interest be pursued in every way which is consistent with the social need for punishment.

The objective of reconciliation, therefore, requires *conflict resolution* beyond which is achieved merely through the trial proceedings, because of the variety of inter-connections with the social system referred to above. It requires the eventual *reintegration* of the offender into that social system, a concept which is not synonymous with *rehabilitation* but does assume that certain skills are either learned or not lost; the achievement of such reintegration is a function of both the offender and the receiving community and often necessitates facilitating measures because of the damage done not only by the offence but also by the humiliation of the conviction and the de-skilling experience of incarceration. Reconciliation also requires *restoration* not only of the *victim*, but also of the offender as a functional member of the community, and of the *community's* on sense of peace, security and cohesiveness.

In such a model, the "client" of corrections is no longer the offender alone, but, in its most global sense, the community as a whole—because the phenomenon of concern is the broken relationship between the offender, the victim and the community at large.⁵⁴

The report of the seminar, having traced the origins of the concept of reconciliation as an objective of criminal justice in Canada to the work of the Law Reform Commission and noting the limited extent to which the concept was endorsed in the 1982 federal policy statement, pointed out that while a number of initiatives have been undertaken in the implementation of this concept in a piecemeal fashion, they were still marginal and vulnerable to a criminal justice system whose basic adversarial orientation tended to be carried over beyond the conviction stage, in the form of attitudes that are not conducive to conflict-resolution and community-reintegration.

Since the 1985 N.A.A.C.J. seminar two major reports have been released dealing with sentencing policy. The 1987 report of the Canadian Sentencing Commission represents the first such Commission with an exclusive focus on the sentencing process. While the commission did not focus on the question of over-representation of native people in the criminal justice system, its central thesis regarding the use of imprisonment has direct implications for this problem. The Commission's Report, *Sentencing Reform, A Canadian Approach*, stated:

There is no dispute about the justification for giving priority to an examination of incarceration, because its practice now raises problems which are in urgent need of a solution. The fundamental question which must be addressed in this report is whether incarceration is the future of sentencing. In view of the impressive body of official reports, research literature, official positions voiced by organizations involved in the field of criminal justice and public opinion surveys, the Commission must answer that it is not.⁵⁵

The Commission recommended a legislative statement of the overall purpose of sentencing together with a set of principles to be applied by the courts. Under the Commission's scheme the paramount principal governing the determination of sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender—the principle of just deserts. Consistent within this overall primacy of just deserts the court could give consideration to any one or more of a number of purposes: (i) denouncing blameworthy behavior; (ii) deterring the offender and other persons from committing offences; (iii) separating offenders from society; (iv) providing for redress for the harm done to individual victims or to the community; and (v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation.

Principles (iv) and (v) clearly reflect concepts of restorative justice although they fit uneasily with the Commission's primary emphasis on just deserts. However the Commission did recommend, consistent with its affirmation of the principle of restraint in the use of imprisonment, that guidelines be developed and increased funding be made available to encourage the greater use of community sanctions and restitution, acknowledging that the Commission was encouraged to "view sentencing as a means of restoring relationships in the community which had been broken by the commission of a crime."⁵⁶

The second major report addressing the issue of sentencing is the Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, released under the title *Taking Responsibility* (1988). This Committee of parliamentarians agreed with the need for a legislated

statement of purpose and principles for sentencing but their proposed formulation differs in emphasis from that of the Sentencing Commission insofar as it demonstrates a significant shift away from retributive towards restorative justice. According to the Committee,

The purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by holding offenders accountable for their criminal conduct through the imposition of just sanctions which;

- (a) Require, or encourage where it is not possible to require, offenders to acknowledge the harm they have done to victims and the community, and to take the responsibility for the consequences of their behavior;
- (b) Take account of the steps offenders have taken, or proposed to take, to make reparations to the victim and/or the community for the harm done or to otherwise demonstrate the acceptance of responsibility;
- (c) Facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs;
- (d) If necessary, provide offenders with opportunities which are likely to facilitate their habilitation or rehabilitation as productive and law-abiding members of society; and
- (e) If necessary, denounce the behavior and/or incapacitate the offender.⁵⁷

Under its recommended principles of sentencing the Committee recommended that

- (d) A term of imprisonment should not be imposed without canvassing the appropriateness of alternatives to incarceration through victim-offender reconciliation programs or alternative sentence planning.⁵⁸

Reflecting the importance the Standing Committee report attaches to the concept of restorative justice a significant part of the report is devoted to a review of sentencing alternatives and intermediate sanctions. Of particular relevance are the sections dealing with community service orders, alternative sentence planning and victim-offender reconciliation programs.

In reviewing the recent Canadian experience with community service orders and in recommending that legislation be enacted to permit the imposition of a community service order as a sole sanction or in combination with others, the Committee referred to the fact that this form of sentence represented

not only a change in method of punishment but also a change of goals . . . [community service fosters] an awareness of the needs of others, an awareness "that the members of society are interdependent" . . . in short . . . [the object is] to change the offenders basic moral attitudes towards his [or her] society.

This goal represents a desire not merely to repair damage done but to express the principle of justice's social relations.

The community service order is a means of providing restitution to society for the harm caused by the offender. . . .⁵⁹

In reviewing the concept of Alternative Sentence Planning (known in the United States as Client Specific Planning), the Committee traced the implementation of this concept by a Winnipeg community agency. The concept is one designed to reduce imprisonment by providing a detailed alternative acceptable to the court and the offender. Alternative sentence plans are based on six principles:

- (1) sentencing should promote *responsibility* by the offender (for his or her actions by encouraging him or her to be accountable for the harm resulting from the offence) and by the community (for the management of the criminal behaviour);
- (2) sentencing should be *restorative*—it should correct the imbalance, hurt or damage caused by the offence;
- (3) the sentence should be *reparative*, attending to repair the physical, emotional or financial harm caused by the offence;
- (4) the sentence should, wherever possible, attempt to bring *reconciliation* between the victim and the offender;
- (5) sentencing should be *rehabilitative* by providing the offender with opportunities to deal with the issues that have contributed to the offence; and
- (6) there should be a democratization of the criminal justice system to return justice to the community and place it in the immediate context of both the victim and the offender.⁶⁰

As we have seen, these are all principles which are the foundation of many Aboriginal justice systems.

The Winnipeg Alternative Sentence Planning Program accepts cases on the basis of three criteria; (i) the offender can reasonably expect to receive a prison sentence of three months or more (so the Plan serves as a true alternative to prison not an “ad-on”); (ii) the offender has pleaded or intends to plead guilty thereby accepting responsibility for the offence; (iii) the defendant has demonstrated a willingness to participate in the alternative sentence plans. The staff prepares a detailed social and criminal history of the offender and advocates on his (or her) behalf for such social and treatment services, if any, that may be required and obtained on a voluntary basis. A specific course of action is then prepared and proposed to the sentencing judge. The Standing Committee recommended that the federal government in conjunction with provincial and territorial governments provide funding to community organizations for similar alternative sentence planning projects in a number of jurisdictions in Canada on a pilot project basis.⁶¹

The third program falling within the broad spectrum of restorative justice reviewed by the Standing Committee was the victim-offender reconciliation programs. As described by the Committee, the victim-offender reconciliation has been used effectively in many North American communities since the birth of the concept in Kitchener/Waterloo area in 1974. Programs now operate in Ontario, Manitoba, Saskatchewan and British Columbia. As described by the Committee:

Victim-offender reconciliation seeks to affect reconciliation and understanding between victims and offenders; facilitate the reaching of agreements between victims and offenders regarding restitution; assist offenders in directing payment of their "debt to society" to their victims; involves community people in work problems that normally lead into the criminal justice process; and identifies the type of crime that can be successfully dealt with in the community.⁶²

The Committee identified the range of benefits of these programs to victims, offenders and the community. Dealing first with the victims, they are said to benefit through reconciliation by; participating throughout the process as subjects rather than objects of the criminal justice system; receiving information about the crime itself, the offender, and the criminal justice system and its processes; and receiving tangible benefits in the form of restitution and reparation. Also offenders benefit by; gaining an awareness of the harm suffered by victims; participating in a process in which they can accept responsibility through making it right in the form of restitution; and receiving a sentence which is an alternative to incarceration.

Equally important the Committee found that reconciliation provides a number of important benefits to the community. It provides an effective means of intervention in cases that resist or defy solution in the traditional criminal justice process; it provides a form of community education increasing understanding about the criminal justice system; because victims and offenders are often neighbours or members of the same community, effective mediation and reconciliation provides practical mechanisms which enable peaceful ongoing relationships in the community thereby reducing the sources of conflict later; and the process enhances a sense of empowerment in that community members are provided with an opportunity to learn effective conflict resolution strategies and skills which can be applied to the resolution of other conflicts which arise in the community.⁶³

Based on its review of victim-offender reconciliation programs the Standing Committee came to the following conclusions and recommendation:

The Committee found the evidence it heard across the country about the principles of restorative justice compelling and is particularly attracted to the

notion that the offender should be obligated to "do something" for their victims and for society. The Committee believes that it is essential that offenders be held accountable for their behaviour. The Committee was also impressed by the evidence of some of the victims who appeared before it of their capacity to come to terms with some of the most serious offences which could be perpetrated against them . . . through reconciliative meetings with offenders or other avenues opened up through victim services which operate on the principles of restorative justice . . .

The Committee believes that the sentencing purpose it has proposed puts the onus on offenders to do something for victims and society. It maximizes the opportunity to humanize the sentencing and, ultimately, the correctional processes. It respects the interest and needs of victims and increases community involvement in criminal justice. In the Committee's view, achievement of the sentencing purpose proposed by the Committee is likely to be enhanced where victims, offenders and the courts have access to services which employ the techniques of victim-offender reconciliation.

The Committee recommends that the federal government, preferably in conjunction with provincial/territorial governments, support the expansion and the evaluation throughout Canada of victim-offender reconciliation programs at all stages of the criminal justice process which:

- (a) provides substantial support for victims through effective victim services; and
- (b) encourage a high degree of community participation.⁶⁴

The Standing Committee specifically addressed the over-representation of native offenders in the prison population, and attributed this to the fact that too many of them are being unnecessarily sentenced to terms of imprisonment. In the Committee's view the appropriate response was a more widespread use of the alternatives to imprisonment it had identified in its report and recommended "that governments develop a greater number of programs offering alternatives to imprisonment to Native offenders—these programs should be run where possible for Native people by Native people."⁶⁵

In 1990 the Government of Canada issued a Green Paper entitled *Directions for Reform, Sentencing, Corrections and Conditional Release* which sought to provide an agenda for legislative reform in these areas. In relation to sentencing, the proposals, like those of the Sentencing Commission and the Standing Committee, include a legislative statement of the purpose and principles of sentencing. They also include a legislative code of evidence and procedure for the sentencing hearing, recommend reforms in the area of the imposition and collection of fines and address the critical issue of intermediate sanctions.

The Green Paper's legislative statement of purpose and principles of sentencing provides that the

Court [shall/may] consider the following objectives in assessing the appropriate sentence to be imposed upon the offender;

- (a) denouncing blameworthy behaviour;
- (b) deterring the offender and others from committing offences;
- (c) separating offenders from society, where necessary;
- (d) providing for redress for the harm done to individual victims and the community;
- (e) promoting a sense of responsibility on the part of the offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.⁶⁶

A comparison of this statement of objectives with the statement of purposes of the Standing Committee clearly demonstrates the differences between the two documents in terms of their respective positions on a spectrum of retributive and restorative justice. The Green Paper more closely parallels the existing mix of sentencing objectives as articulated by provincial appellate courts rather than reorienting the criminal justice system from its retributive axis. The Green Paper does however recommend that greater use should be made of what it refers to as intermediate sanctions, referring to restitution, community service orders, fine option programs and victim-offender reconciliation programs. The Green Paper states:

we believe that the use of these sanctions will provide a means of reparation to society for the harm done by the offender, and it may also assist in the reintegration of the offender into society. We believe that a wide range of community programs must be available for use by the courts.⁶⁷

However, because the delivery and administration of these community sanctions are within the jurisdiction of the provinces and in light of the cost implications of increasing use of intermediate sanctions, the Green Paper concludes:

We cannot move definitively, as the federal government, in the area of intermediate sanctions . . . we cannot impose requirements on the provinces that would have as their result major program expenditure, without close consultations. We cannot, at the same time, enter any undertaking that will have as its effect major federal expenditures in support of such programs and still maintain our stance of fiscal responsibility.⁶⁸

The federal government in its Green Paper identified the particular importance of intermediate sanctions for Aboriginal peoples having regard to the high rates of imprisonment:

Greater use of intermediate sanctions offers greater opportunity to engage the Aboriginal communities in the solution of common problems. It pro-

vides an opportunity to enlist the strong traditional and spiritual values practiced in many aboriginal communities in helping their own offenders make a positive contribution to their culture and communities.⁶⁹

A major criticism which has been directed at the Green Paper is that in seeking to merge together proposals from the Canadian Sentencing Commission and the Standing Committee Report, the resulting package lacks any clear philosophical or operational approach leaving judges to pick and choose between competing objectives and principles. Thus the Canadian Criminal Justice Association, in its response to the Green Paper, has commented:

Significant reform require bold steps. Is our overriding impression that this package represents really little progressive change. . . . A clear failing of the direction of the suggested reforms is there lack of coherence. In the attempt to pull together the Daubney and Archambault reports and reconcile this hybrid with what is thought to be public opinion, we are left with a "peaceful society" wrapper around competing "just deserts" and "crime control" ingredients. . . .

A suggestion in this regard would be to focus our attention on a justice process that would be primarily concerned with restoring harmony and seeking solutions. This focus would be very different from the current one which seems overly concerned with fixing blame and measuring punishment. Another feature of this new paradigm would be the employment of social development strategies aimed at preventing crime and the amelioration of criminogenic conditions in the first instance, and assisting in the rebuilding of trust after a breach in the second.⁷⁰

It would be a fair summary of the preceding material to say that over the past twenty years in Canada a growing understanding has developed regarding the limitations on the traditional criminal justice process and its reliance on imprisonment to further retributive and deterrent objectives. Furthermore, a consensus is emerging on the need to develop community based sanctions and non-adversary processes which balance the interests of the victim, the offender, and the community. There is also a significant and growing body of opinion that restorative justice principles should play a far more important role in criminal justice policy and practice.

It should also have become apparent that these initiatives to reshape the criminal justice process share many principles and elements which characterize traditional Aboriginal justice systems. It should be a salutary reminder of the indifference we have paid to Aboriginal legal, political and cultural institutions to realize that, using the words of the Minister of Justice's Reference to the Commission, "the development of new approaches to and new concepts of the law" in relation to alternative

dispute resolution leads to the discovery and recognition of the indigenous approaches and conceptions of Canada's First Nations which predate the *Penitentiary Act* and the building of Kingston Penitentiary by many centuries.

The significance of this discovery and recognition in the context of the Minister's Reference is that a consideration of the proposals of Aboriginal communities to achieve a greater accommodation between their systems of justice and the larger Canadian system and in some cases to make over and take over the administration of justice should be seen not only as reforms necessary to achieve real justice for native people but also as opportunities from which our criminal justice system can learn from the experience and accumulated wisdom of Canada's First Nations.

The achievement of such mutual respect in which lawyers trained in the common and civil law can acknowledge the legitimacy and maturity of Aboriginal systems of dispute resolution is a challenge which all too often Canadian lawyers and judges have failed to meet. A case in point is *R. v. Naqitarvik*⁷¹ which involves the intersection of the Canadian criminal justice system with the dispute resolution system of the Inuit of the Northwest Territories. The *Naqitarvik* case is important as a case study in the context of the Minister's Reference to the Law Reform Commission insofar as it points to both the possibilities for and impediments to mutual respect and accommodation.

In *Naqitarvik* the accused, who was twenty-one years of age, pleaded guilty to a charge of sexual assault. At the sentencing hearing before Judge Bourassa of the Territorial Court, evidence was given regarding the role played by the *Inumarit*—a Council of Elders—and its traditional treatment of offenders within the community. The nature of the sentencing hearing is well described in the judgment of Mr. Justice Belzil of the Northwest Territories Court of Appeal.

Judge Bourassa held a special sentencing hearing at Arctic Bay which attracted great community interest. About half the citizens of a community of some 400 people were in attendance throughout the twelve hours of evidence and submissions. In passing sentence at the end of this long hearing, Judge Bourassa delivered extensive oral reasons addressed as much to the community as to the accused. He pointed out the gravity of the offence and the long term of imprisonment which it would have attracted elsewhere in Canada. He discussed all the factors properly to be taken into account in imposing sentence. In arriving at the sentence which he imposed, he gave weight to the concerns of the community expressed to him by its elders known as the *Inumarit* and he took into account the unquestioned effectiveness of its traditional treatment of offenders.

It will be seen . . . that the primary concern of the community had been and still is to maintain its harmony and cohesiveness, a concern undoubtedly traditionally considered crucial to the very survival of a small group in a harsh and isolated environment and now considered crucial to the survival of its cultural identity in the face of intrusion by a civilization foreign to it. Imprisonment, even banishment, were historically unknown as forms of punishment. Imprisonment is viewed not only as destructive of the accused himself but as containing the seed of disharmony and division and hence destructive of the community itself. The traditional method of handling an offender is forced confrontation by the elders even to the point of denying him food or other amenities until a willingness to change for the better is manifested, and this is followed by relentless counselling until the offender is considered rehabilitated. The treatment is shown by the evidence to have achieved what must be the ultimate purpose in all punishment for crime, that is to say, protection of the community and rehabilitation of the offender. It has had the added benefit of effecting reconciliation between victim and offender, a concept only now being advanced in our society by some criminologists.⁷²

The views of the Inumarit expressed to Judge Bourassa were that the community wished to have the accused remain within the community to undergo his punishment, that they were confident that he had already started on the road to rehabilitation and that sending him away to prison would be destructive not only for his future but also be the cause for resentment in the community, including resentment against the victim. They did not see imprisonment to be in the best interests of the community, the victim or the accused.

Judge Bourassa, in imposing a sentence of ninety days imprisonment to be served intermittently at the local detachment of the R.C.M.P. at Arctic Bay plus two years probation and one-hundred hours of community work, gave as his reasons the following:

It is obvious to me from what has been said in evidence today that the community is willing to act, the Inumarit is willing to act and 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 an offender, reconciling the offender, the victim and the community so that there is unity in the community and a program of education. Can any of us really say that jails do that? For the person that responds, the Inumarit, the social services committee and the whole community together can obviously heal; they can unite; they can reconcile, and they can reform.

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 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 the 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 crimefree continues to function and work with respect to this man then everybody is served and the people in this community will be protected.⁷³

Judge Bourassa's sentence was appealed. The Alberta Court of Appeal, sitting in its capacity as the Northwest Territories Court of Appeal, substituted a sentence of eighteen months imprisonment. Mr. Justice Belzil, in his dissent, after setting out the passages cited above, affirmed Judge Bourassa's sentence on the following grounds:

The Trial Judge properly took into account the special circumstances disclosed in evidence of a small isolated group striving to preserve its cultural heritage by maintaining its cultural unity, not for the purpose of blocking the imposition of criminal law but by gradually introducing it by bridging the gap between traditional law and the new law. The crime-free record of the community obviously satisfied the Trial Judge that this community was much more successful in this than had generally been the unfortunate case in too many communities in the far North.

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.⁷⁴

The majority of the Court of Appeal in holding that Judge Bourassa's sentence was "wholly inadequate" confirmed its own "starting point" approach to sentencing. In the case of major sexual assaults it had ruled in *R. v. Sandercock*⁷⁵ that three years was the proper starting point for this offence. The Court held that in light of the mitigating factors in the case before Judge Bourassa—aparticularly the public apology the accused had made to his victim, the genuine remorse he had shown and the positive response to counselling which he had demonstrated—the appropriate sentence was eighteen months imprisonment.

The majority of the Court of Appeal, in the course of its judgment, made a number of comments on the cultural context in which the crime had been committed and on the role of the *Inumariit*.

There is no doubt but that for the last quarter century much of Northern Canada, particularly its more remote region, has been a land in transition. The traditional institutions and the old cultures of its people are being replaced or modified, in collision with influences from the south. But while the community of Arctic Bay is remote in distance from other parts of Canada, being situated on the northern coast of Baffin Island, it has many of the facilities of other towns and cities in other parts of Canada. Its people have been exposed for some time to the same laws and customs as other Canadians.

The witnesses in this case do not describe a culture markedly different than that in the rest of Canada. Rather, the incident itself arose as the victim and her sister played music on a modern player for which there was an electric cord. The complaint of sexual assault was conveyed to the police by telephone and the victim was taken to a modern nursing station for examination and treatment. Both victim and accused have at least grade school education. A large and modern mine is in the vicinity and several of the witnesses, including the accused, had worked there at some time.

My brother Belzil has described in his reasons the traditional Inumarit Committee. It is a traditional governing body of the Inuit, consisting of the experienced elders of the community. Amongst its functions is the counselling of offenders. If required, that counselling was traditionally relentless and continuous until effective. The offender reformed or he was excluded from community life. In a harsh and hostile environment where the offender could no longer be part of community cooperation in hunting and other food gathering, that exclusion could have fatal consequences.

The present Inumarit Committee in Arctic Bay is not a direct successor to the traditional governing body described by the witnesses. Ms. Koonoo Ipkirki, the Chairperson of the Committee, has lived in Arctic Bay since childhood. She did not say when the traditional committee last existed, but the present body was started in 1975. In that year six members were elected by the community. Since that time "anyone who wants to become a member becomes one." The ages of the members range "from 50 and up," and "a member should have more experience than other people."

Witnesses who spoke of relentless counselling by a Committee of Inumarit standing in a circle around the offender were describing a tradition rather than the present situation in Arctic Bay. Ms. Ipkirki said that the present membership of the Committee is six and that an individual member was assigned to counsel the respondent. That counselling was done much as it would be done in any other Canadian community. Indeed, one member of the Committee, who gave evidence, brings to his assignments a sophisticated background in counselling. . . .

The modern reincarnation in Arctic Bay of the traditional Inumarit Committee resembles the usual community counselling service rather than 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 on the

offender, that it is a remnant of ancient culture. Its counselling service, admirable as it undoubtedly is, cannot, in my opinion, replace the sentence of imprisonment which is required in virtually all cases of major sexual assault.⁷⁶

The approach taken by the majority of the Court of Appeal in *Naqitarvik* quite clearly circumscribes the ability of the native community to reach an accommodation between its own and the Canadian justice system. Those impediments flow from two sources, the one being the court's judgment about the paramount purposes of sentencing, and the second the courts conception of the nature of change and continuity in native societies.

Addressing the second issue the Court seized upon the surface realities of the presence of electricity, telephones and the infrastructure of schools, nursing stations and police forces as evidence of the essential similarities between contemporary native communities and other small non-native communities. However, the surface similarities obscure far more than they reveal about Arctic Bay and hundreds of other native communities across the country. The links within these communities between the past and the present, the continuity of deeply held values of sharing and cooperation, the respect for elders and the importance of maintaining community coherence through consensus decision making, are not signposted or visible to outside eyes in the same way as the evidence of outside intrusion, in the form of telephones, nursing stations and mines. We have to work much harder to see and understand the inner structure of native communities.

The Court of Appeal judgment falls into the trap of seeing native communities as evolving from an earlier to a modern state of civilization, with the ineluctable conclusion that their old "traditional" ways will inevitably wither as they assume the values, institutions and trappings of our civilization. This is part of the colonialist and superiorist stereotype with which many Canadians have typically viewed aboriginal peoples.

There is also another part of this stereotypical thinking about native peoples which requires that if they wish to assert rights to aboriginality, they must demonstrate that their "traditional" practices and laws have remained intact and unchanged. The assumption behind this thinking is that native societies are inherently static and nonadaptive; hence, they provide a corollary to the assumption that necessarily any change will be in favour of the incorporation and adoption of nonnative practices and laws.

The judgment of the Court of Appeal in *Naqitarvik* illustrates the combined effect of this thinking. The role of the *Inumarit* is seen as evolving from its "traditional" role as governing body of the Inuit to a

specialized counselling service similar to that operating in any other small Canadian community. At the same time, because the membership of the *Inumarit* includes individuals who have experience in "modern" counselling and there have been changes in its methods and sanctions, it is no longer part of "traditional" culture. It is easy to understand the implications of this sort of reasoning. Essentially it denies native people the right to be contemporary, the right to develop their indigenous systems of government and decision making to cope with the realities of contemporary life, without acknowledging their own demise as distinctively native societies.

In the case of Arctic Bay, we have an example of an Inuit community which over the past forty years has experienced major changes in their social and economic organization. From a life in which small hunting groups moved from camp to camp across the tundra, they now live within a central community while still spending a considerable part of the year on the land. Their economy has become a mixed one where wage employment and transfer payments now provide supplements to, or replacements for, hunting, fishing and trapping. In the same way, the old political processes have had new layers added to them in the form of community councils elected under territorial legislation. New religions have been introduced and incorporated into Inuit spiritual values, and there has been introduced a new language and an educational system modelled on the nonInuit society's values.

The cumulative effect of these changes was reviewed by Mr. Justice Berger in the Report of the Mackenzie Valley Pipeline Inquiry. He noted that it seemed to many in government that the old way of life was disappearing and that it was appropriate that government policies be geared to helping native people make as rapid an adjustment as possible to a new economy, a new political system, a new way of seeing themselves in the world. However, the evidence placed before the Mackenzie Valley Pipeline Inquiry, not only by the Inuit but by the other native peoples of the North, made it clear that they were not prepared, as others were, to consign their way of life to the past. What they aspired to was the development of their distinctive societies in ways which were consistent with their values, their social structures and economic systems. What they sought was the acknowledgement by the larger society of their rights to control the scale and pace of development in the North so that it did not overwhelm them. It was during the 1970s that Inuit communities and other native communities across the country (with the benefit of a generation of young people who had been to the white man's schools and universities and had observed how Canadian political institutions functioned and the extent to which they diverged from those of

aboriginal communities) started to develop initiatives which sought to make the old values and processes work in a modern context in order to provide the balance of continuity and change.

It is within this wider context that the formal introduction of the *Inumarit* committee in Arctic Bay must be placed. The assumptions which underlie the role and responsibilities of the *Inumarit* are entirely different from those of a "counselling service." The elders in a native community are not seen as they typically are in the larger society, as those whose productive life has ended, but are seen as the guardians of the society's history and the repository of its collective wisdom. There is respect accorded the elders which has no counterpart in a mere counselling service. The concern for the healing of collective wounds and of ensuring community cohesion is a mandate which private or state counselling services do not have. To equate the two is to fail to comprehend, as the Court of Appeal did, the respect afforded elders in Inuit society and the constructive ways in which that respect is channelled back by the elders in producing and maintaining social order. The implications of such lack of comprehension are equally selfevident in the judgment of the Court. A substantial sentence of imprisonment, judged by the community after due deliberation to be unnecessary, is imposed with the clear message to the community that our non-native elders, or at least some of them, know better than theirs as to what will contribute to a just and orderly society.

It is important to ask why the majority of the Court of Appeal in *Naqitarvik* could not respect the wishes of the community, as expressed through the *Inumarit*, to have the accused dealt with by the community and not be subjected to a punishment by imprisonment far removed from the community. The answer is directly related to what the Court conceived to be the primary purposes of sentencing. The court's reference to the *Sandercock* case demonstrates the court believed that a substantial sentence of imprisonment was necessary in order to further general deterrence and to reflect appropriately the denunciation of society for sexual assault. These purposes were held to be paramount in comparison to the purposes which the *Inumarit* sought to achieve which were the reconciliation between the victim and the offender and the reintegration of the offender into the community.

Given this explanation for the Court of Appeal's decision in *Naqitarvik* it is worthwhile reflecting upon whether the sentencing reforms which have been advanced by the Sentencing Commission, the report of the Standing Committee and the Federal government's Green Paper would significantly affect the outcome of this case. It is suggested that it is only the proposals of the Standing Committee which would likely lead

to a different outcome for the reason that of the three proposals only the Committee's gives any primary emphasis to the values of restorative justice. To the extent that the framework for sentencing retains its primary emphasis on denunciation and deterrence, the likelihood of our system continuing to impose our values on native communities will remain a formidable barrier to the achievement of a justice system which native peoples can respect and which has respect for them.

It is possible to assert therefore that the potential for accommodating native conceptions of justice and native dispute resolution procedures within the larger criminal justice framework is integrally related to the extent to which Canadian criminal law incorporates and gives substantial weight to the principles of restorative justice.

The recognition that there are important parallels between alternative dispute resolution based on principles of restorative justice and the justice systems of aboriginal peoples must, however, also encompass an understanding of some significant differences. The principal difference is that restorative justice gives greater emphasis to individual accountability and responsibility, whereas aboriginal justice systems to a greater degree reflect collective responsibility. Thus in most victim-offender reconciliation programs the focus is on this offender and this victim; by contrast aboriginal justice systems locate both offender and victim in a matrix of social and family relationships and responsibilities. A further difference again reflected in victim-offender programs is that the process for restoration of harmony and conflict resolution is often dyadic, the emphasis being on one-on-one negotiation or counselling. In aboriginal justice systems restoration takes place within a circle of relationships. Restorative justice initiatives while seeking to emphasize the link between offender, victim and the community also lack the dimension shared by many aboriginal systems in which the process of restoration and healing draws upon deep currents of spirituality which are brought to bear on the resolution of conflict not by university trained professionals but by elders and community leaders.

It is because of these differences and the way in which they are integrally related to aboriginal social systems that shifting our traditional emphasis from retribution to restorative principles, while necessary to permit greater accommodation between our system and aboriginal systems (and render decisions such as *Naqitarvik* less likely), cannot be seen as a sufficient legal pathway to justice for aboriginal peoples. That pathway must be found in their initiatives and it is to those which this report will now turn.

V. ALTERNATIVE DISPUTE RESOLUTION IN ABORIGINAL COMMUNITIES

It is apparent from reviewing the studies and reports of royal commissions, commissions of inquiry and task forces that initiatives for reform in the area of Aboriginal justice cover a broad spectrum. That this should be the case is indeed a reflection of the diversity of Aboriginal peoples. As the Indian Association of Alberta reminded the Cawsey Task Force:

Our First Nations are diverse in circumstance, culture and resources. Due to factors such as language, customs, traditions and contact with criminal justice institutions including laws, police, and the judiciary, First Nations are affected differently and respond differently to the criminal justice system.

Individual First Nations have taken different initiatives relating to the criminal justice system. They took those initiatives because they deemed that their specific initiatives were needed and because they were ready to take the responsibility of implementing the initiatives.⁷⁷

Those initiatives include pre-trial diversion, Aboriginal elders sitting as a panel of advisors to the sentencing judge, a system of lay Aboriginal judges and justices of the peace courts acting either under provincial or territorial legislation and/or under s.107 of the *Indian Act*, an indigenized provincial court with Aboriginal staff and judges, a new federal court appointed under s.101 of the Constitution, and separate aboriginal justice systems operating outside of the regular court system with various points of interface and interchange with that system.

The Report of the Royal Commission on the Donald Marshall Jr. Prosecution saw merit in the establishment of a native criminal court using native justices of the peace under s.107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offences committed on a reserve; the Cawsey Task Force Report made recommendations encompassing diversion, sentencing panels, native justices of the peace and a provincial criminal court in areas where there was a strong regional Tribal Council or a concentration of Métis.⁷⁸

It is not proposed in this paper to review the full spectrum of reform proposals but rather to focus on those initiatives which are based on indigenous models of justice and dispute resolution. The reason why many Aboriginal communities have focused on these kinds of initiatives is not difficult to understand. Indeed the Ministry of Indian Affairs in 1983 expressed the point very well:

Justice is a basic need in the life of every person. It has confronted, challenged and concerned every society which ever joined together for mutual benefit . . . the law belongs not to governments, not to bureaucrats, not to lawyers, but to the people . . . the many alternative means of resolving

disputes suggested now—mediation, arbitration, restitution, reconciliation, to name a few—are the very methods which are part of customary law . . . native peoples have been deprived of their own traditional laws, concepts of justice and legal procedure. We realize that the native peoples of Canada expect a system of justice that reflects their own cultural heritage.⁷⁹

The report of the Marshall Inquiry in endorsing this statement added:

Native Canadians have a right to a justice system 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.⁸⁰

Aboriginal peoples in Canada are not alone in seeking such a justice system built from their own foundations rather than replicating ours. The Australian Law Reform Commission several years ago undertook a major study which resulted, after almost a decade of hearings and research, in a two volume report, *The Recognition of Aboriginal Customary Laws*. This represents the most comprehensive study in any country of the problems associated with Aboriginal peoples and an imposed criminal justice system. Its terms of reference and many of its conclusions are discussed at some length in the report of the Canadian Bar Association, *Locking Up Natives in Canada*.

The Australian Law Reform Commission reviewed one scheme put forward by an Aboriginal community which sought to build on traditional ways of settling disputes and of restoring order while institutionalizing the procedures so that they could be fitted within the general legal system. While the Yirrkala scheme is specific to a particular Australian community, it represents an important case study and tells of the kind of issues which any similar scheme raise in a Canadian context. As described in *Locking Up Natives in Canada*:

The Yirrkala scheme envisages the use of Councils, some of which are already in existence. One, an administrative body (the Dhambul Association) elected by all adult members of the community, is responsible for the day-to-day administration of the community. Another, the Law Council (the Garma Council), comprises two senior men from each constituent clan chosen by the clans in their own way, and relying as far as possible on the established authority structure. The Garma Council which have responsibility for such matters as

- (a) the preservation of friendly relations between the constituent clans which make up the community;
- (b) the maintenance of Aboriginal traditional law and custom;
- (c) the settlement of disputes between persons, families and clans;
- (d) the maintenance of social order and discipline;
- (e) the relationship with judicial law enforcement and similar agencies of the federal government and the Northern Territory.⁸¹

Although the Garma Council would be responsible for local justice, it would not itself sit as a court, but would specify the persons who should constitute a "community court" in each case. Disputes may be resolved by agreement, but where this could not be achieved, a court would be appointed, the membership being determined by the nature of the issue and the persons involved. There would be no office holders (such as justices of the peace or magistrates) so that no new authority structures would be imposed.

The likely composition of a court where it was needed would be: a senior member of the clan or family of the complainant; a senior member of the clan or family of the defendant; and a senior person or persons from another clan or family chosen for their wisdom or standing in the community. The composition of the court would vary if an Aboriginal person from outside the community was involved in the dispute or if a nonAboriginal person was involved. The court would hear matters in public, and upon reaching a decision would report to a community meeting for final approval. Court records would be maintained setting out the cases heard, the decisions reached and the penalties imposed.

While the Garma Council and the community court would operate as an independent entity, there would be a considerable degree of interaction with the general legal system.

If a magistrate or judge has before him a case involving a member or members of the Yirrkala community, the magistrate or judge should authorize the Council to set up a community court to conduct a preliminary study of the case and see where a consensus settlement of the case is practicable by the community's own procedures. The outcome of this preliminary study would be reported to the magistrate or judge. The Council accepts that the magistrate or judge would not necessarily be bound by that outcome but expects that weight would be given to it.⁸²

The Garma Council considers that it should have some say in all offences or disputes involving community members. This would not necessarily mean that the Council would itself deal with all such matters. It may prefer to call in the police or refer matters to a magistrate, in which case the general law and procedure would apply. This could occur, for example, where a serious offence was involved (for example, homicide), or an interclan conflict was in danger of getting out of control. However, even in these matters the Garma Council would expect there to be some continuing consultation with the outside law enforcement authorities.

In addition to having responsibility for constituting a community court, the scheme envisages that the Garma Council would be responsible for appointing persons with police functions within the communities boundaries, establishing rules to operate within the community to maintain social order, appointing persons to oversee and carry out any punishments imposed by the community court and advising magistrates in cases involving members of the community.

The range of sanctions that could be imposed by a community court include compensation, fines, compulsory community work, temporary ban-

ishment from the community, overnight imprisonment in a lockup situated at the community or committal for a period to the care of a responsible member of the offender's clan. The principal differences between the Yirrkala scheme and the larger criminal justice system is that imprisonment, apart from overnight detention, would not anchor the system; rather, in conformity with indigenous dispute resolution processes, compensation, usually in the form of money payments, would be the primary remedy.

In reviewing the Yirrkala scheme the Australian Law Reform Commission referred to some of the issues which would require resolution before the scheme could be implemented. One such issue was whether individual members of the community should have the right to opt out and seek trial in the ordinary courts. Another relates to the right of an appeal to the ordinary courts. As the Commission points out, Article 14(5) of The International Covenant on Civil and Political Rights provides that a person convicted of a criminal offence should have the right to have the conviction and sentence reviewed by a higher tribunal according to law. Both opting out provisions and rights of appeal to outside authorities would tend to undermine the status of the community courts, especially if opting out was common or if appeals were regularly upheld. Nevertheless, the Australian Law Reform Commission felt that the Yirrkala scheme held sufficient promise that the scheme should be implemented with legislative backing and tested over a trial period.⁸³

In developing Canadian initiatives in aboriginal justice systems it can be anticipated that a comparative law perspective may be particularly instructive. Aboriginal peoples are already involved in a wide range of international exchanges and are increasingly aware of each others' judicial and political developments in relation to Aboriginal and treaty rights. The value of this comparative experience in relation to systems of justice and its incorporation into contemporary solutions for what in many cases are common problems is captured by Moana Jackson dealing with the development of a contemporary Maori justice system.

[A]s the Pakeha law has drawn on such diverse trains of thought as those of the Aristotelians and the Stoics, so a developing Maori jurisprudence would undoubtedly draw on the ideals of other indigenous peoples and other legal systems. But in developing those ideals into actual legal practices, a Maori system would pass them through the filter of its own needs and its own perspectives. It is only by viewing the law through those perspectives that the *Maori* community can replace the systemic biases of the present legal system and adequately satisfy the needs for justice and redress occasioned by the offending of its young.⁸⁴

A. THE CANADIAN EXPERIENCE IN ABORIGINAL JUSTICE SYSTEMS— TWO CASE STUDIES

Over the past several years aboriginal communities in Canada have begun the important task of both re-asserting and re-shaping their own

justice processes so that they are capable of responding to the array of problems from which their ancestors fortunately were spared. The Saddle Lake Tribal Council and the Blood Tribe in Alberta presented their proposals to the Cawsey Task Force. The Interlake Tribal Council presented its model for a Native Harmony and Restoration Centre to the Manitoba Aboriginal Justice Inquiry. In the Yukon, the Teslin Tlingit Tribal Council have developed a tribal justice system as a necessary and inherent part of Tlingit self-government built upon the traditional clan system. In the Northwest Territories both the Dene and the Inuit are also involved in pouring contemporary content into traditional institutions and processes for maintaining peaceful relationships in their communities. In this report we will be focusing on two initiatives of First Nations in British Columbia which in their own distinctive ways provide us with an opportunity to travel the Aboriginal pathways to justice.

Since 1985 the First Nations of South Vancouver Island Tribal Council have been engaged in research and analysis in identifying the general principles of Coast Salish Aboriginal law and its dispute resolution processes. This has resulted in a draft code which has been prepared after a very broad consultation with the community and the tribal government. The process of codification, not unlike the work of the Law Reform Commission of Canada, has itself played a valuable educative role in the community and in the reaffirmation of its core values. The Tribal Council has also established a Tribal Council Justice Committee composed principally of elders but also with representatives of the tribal government. The Committee has taken an active role in establishing relationships with provincial and federal ministries and agencies and has played a leading role in cross-cultural education particularly with the judiciary. Members of the Justice Committee have participated in a number of workshops organized by the Western Judicial Education Centre. The approach of a Tribal Council has been articulated by the Justice Committee in this way:

The Tribal Council approach to Justice centres upon a re-affirmation of the elders in their traditional role of teacher, law-giver, and counsellor.

Justice in Canada has become an adversary system. A system that fails to address the true needs of our community. The administration of justice tends to focus upon punishment and the correctional phase.

In accordance with our Salish traditions and customs, this approach is foreign to our beliefs. The goals and objectives of the legal system should center upon the aspects of rehabilitation; in particular reintroduction to self, to family, and to the community. Further importance is placed upon the maintenance of pride and dignity.

Our guidelines further emphasize the traditional concepts of piece of mind, peace with the lands, and peace with the family and community.

Program development relates strongly to the aspects of education, prevention, counselling, and treatment.⁸⁵

One of the first initiatives of the Tribal Council was the development of a detailed proposal for a diversion program as an alternative measure under the *Young Offenders Act*. Section 4 of the *Act* provides that alternative measures may be used to deal with a young person alleged to have committed an offence, instead of judicial proceedings, where the measures are part of a program of alternative measures authorized by the Attorney General of the province, subject to a number of conditions precedent. These are that the measures are appropriate, having regard to the needs of the young person and the interests of society; that the young person fully and freely consents to participate in the program, having been advised prior to giving their consent of their right to be represented by counsel; and that the young person accepts responsibility for the act or omission that forms the basis of the offence.

The purpose of the South Island Tribal Council initiative is set out by them in the following way:

The "Native Alternative Youth Program" under the authority of the *Young Offenders Act* and of First Nations of South Island Tribal Council will provide a unique opportunity to develop a creative and more responsive format of services and counselling to native young offenders. This program will cater to the special needs of our youth and requirements based upon the customs, traditions and the culture of the South Island region. . . .

The Native Alternative Youth Program will provide our native communities with the responsibilities for dealing with the behavioral problems of our youth. The problems that do not require formal, criminal sanctions. . . . The program will ensure the protection of community, the rights of the native youth, special needs and considerations as per the maturity level of the young person. The program will allow Indians to preside over Indians and to exercise a role in the rehabilitation programs of native young offenders. The Elders will once again provide counsel and guidance to correct the youth. It must be further emphasized, in keeping with our traditions, that our program is not one of punishment, it is designed as a program of education, counselling and a support system that will influence the individuals and families of South Island. The Native Alternative Youth Program, if accepted, will create a unique situation in the use of the *Young Offenders Act*, the diversion concept, and the application of Indian law. The implementation of this program will be a major step forward in regard to working relations between a provincial agency and the Tribal Council. This move into the justice arena takes place with considerable forethought, in particular because of the general native regard for the present legal system. Hopefully, the program will serve the needs of our youth and of our divergent communities [First Nations and the non-native].⁸⁶

The South Island project specifically sets out to design a process which uses a combination of "contemporary" and "traditional" concepts in the counselling of troubled native youth. The process is one which seeks to reflect the respective role and responsibilities of the Elders, the Tribal Council, the Band councils that make up the Tribal Council and, most importantly, the families which make up the native communities. The program establishes what is called a Tribal Court consisting of five members selected from prominent and respected elders of the South Island region. In addition to these five, three alternates will sit where one of the Court members is required to excuse himself or herself because of conflict of interest, particularly because of close family relations which might cause bias. Two members of the Tribal Court together with the diversion coordinator conduct an initial interview with the diversion candidate where that person has been referred by crown counsel. A candidate will be advised prior to the interview of his right to the presence of legal counsel and the candidate and his parents or guardians may have the services of a "spokesman and witness" pursuant to the rights of the family under the traditions and customs of Coast Salish Indian law. If the interview committee deems the candidate acceptable for diversion, it submits a report and recommendations to the Tribal Court which will then consider the case.

Any interested individual or agency recognized by the Tribal Court may make representations to the Court on behalf of the diversion candidate on concerns relating to the diversion candidate. The victim therefore is given the right to participate in the process. If the Tribal Court decides to accept the candidate for diversion, it sets the length and terms of the diversion contract which is limited to no more than six months. The Tribal Court must also select an Elder to act as sponsor for the young person. This Elder must be acceptable to the young person's parents or guardians. The sponsoring Elder will then work with the young person on a one-to-one basis and report on progress to the diversion coordinator.

Although the South Island proposal has initially been set up to deal with young offenders charged with summary offences, the expectation is that the same process could be expanded so that the jurisdiction of the Tribal Court could encompass young offenders charged with indictable offences and then be further extended to deal with adult offenders.

There are a number of observations which can be made about the South Island proposal. Perhaps most importantly, it demonstrates how native communities can devise justice mechanisms which integrate traditional processes into a contemporary social context in ways which are distinctively native, rather than versions of non-native programs

with the only variation being is that natives sit in the seats or offices ordinarily occupied by non-natives.

This is probably best illustrated by the role an Elder would be expected to play, in comparison to that usually played by a probation officer. A probation officer trained in a university school of social work will bring counselling and case work methodologies based on individual responsibility and individual change. An Elder, while understanding the importance and need for individual change, is able to locate this within a historical and cultural continuum. An Elder is able to identify the sources of individual strength for a young person which trace a spiritual path that has given native communities their collective strength; and a Elder is able to recount a history which identifies a young Indian person's responsibility for the future. In these and other ways Elders are able to show the young person how he or she has a valued place within the context of native society and to learn or rediscover how they can make a contribution to a future in which the native people of Canada can take their rightful place among the native peoples of the world. No non-native probation officer, however well-intentioned and however well-informed, can perform this role.

A further illustration of constructive adaptation in the South Island project is the way in which the project has been organized. The Tribal Court would operate on a regional basis with members being selected to reflect the different communities represented by the South Island Tribal Council. Also, the project would accept as diversion candidates both status and nonstatus native young offenders. The project, therefore, seeks to avoid the divisiveness which is often built into *Indian Act* based projects which are tied to band councils and status Indians; at the same time it draws on native collective energy and talents in ways reflective of how native people perceive themselves and their jurisdiction as First Nations.

The funding requested by the South Island Tribal Council from the provincial and federal government for this diversion project has not thus far been forthcoming although the provincial government has expressed great interest. Notwithstanding the lack of proper funding the Tribal Council has continued to work on the development of this proposal as part of its vision of a tribal justice system. Tracing this development is highly instructive in terms of understanding the pathways to mutual respect for Aboriginal and larger justice systems.

Reflective of the holistic approach of the Coast Salish system no bright line of distinction is drawn between what in our system is viewed as distinct areas of the law. Thus, in the Coast Salish way a breakdown in family or community harmony requires restoration without attaching

labels of criminal or family law to the dispute. The Tribal Council Justice Committee has been vigorous in its initiatives in both areas. The most publicized success to date has in fact been in relation to a custody dispute and the process of resolution together with the principles which were brought to bear upon, illustrating the Coast Salish law in operation, in this case in conjunction with the provincial court process.

The case concerned the custody of a child whose mother had died under tragic circumstances. One of her last requests was that her child, Jeremy, be brought up by her sister so that he could be taught the Indian traditions that would give him privileged status in her band. The boy's father, also a Salish Indian but from another band, claimed his child was entitled to similar rights through his family. Both the father and the aunt wanted custody and the case ended up in the Provincial Family Court. To have the privileges would require teachings from a very early age and the question posed to the court was whether the Court should recognize this as being in the boy's best interest and if so, whether the mother's family was more important than the father's. An application was made under the provincial *Family Relations Act* for custody of the boy by his aunt. The South Island Tribal Council obtained intervenant status in the provincial court hearings and proposed that the matter be referred to a "Council of Elders" to mediate the dispute. The case was adjourned for six weeks and terms of reference for the mediation were agreed to by the parties. They included the following elements:

The Council of Elders was to be acceptable to both families; and was to be chaired by the Chairman of the Tribal Council, Chief Tom Sampson;

The mediation was to take place in a neutral Big House, the traditional meeting place of the Coast Salish Nation.

The proceedings were to take place in the evening hours in order that the families on both sides could be properly represented. The families could call forward spokespersons to address the Council of Elders in the traditional way to address their concerns and act on their families' behalf.

Elders or elected members of council could act as witnesses to the proceedings from each of the two families' villages.

The families had the right to the presence of legal counsel as observers during the mediation. The mediators' alternatives and recommendations to the families were not to be binding except if the families were so decided in common agreement.

The families had the right to terminate the mediation at any time and continue the court proceedings. . . .

The Tribal Council was responsible for any financial cost incurred.⁸⁷

The Elders Council convened and met with the parties. The case history and the Salish Aboriginal law precedents were discussed, resulting in the parties agreeing to the Council's proposed resolution of the

dispute. Although traditionally such resolution was not formally transcribed in writing, in this case to enable the court to incorporate the terms of the resolution, a formal agreement was drawn up and signed by all parties and their legal representatives. The agreement contains the following provisions

Whereas differences did arise between Allan John Jones [the father] and Audrey Thomas [the mother's sister], in the matter of disposition, custody, and welfare of the child Jeremy. . . .

And Whereas the families did assemble in Council with the Elders of South Island;

And Whereas the families did express mutual concerns of love and the common desire to act in the best interest of the child;

. . . .

And Whereas it is desirous of both families that the child develop with the benefit of love and harmony of both families;

And Whereas the teachings, traditions, and cultural and heritage of both families are Jeremy's birthright and gift from the Creator;

Therefore Be It Resolved that in accordance with the precedent of Indian Family Law and the recommendations of the Council of Elders and the grandparents of both families that tradition be honored and respected, and that as per the customs of our Aboriginal communities that custody of the child to Allan John Jones is so recognized . . . and further be it resolved that Allan John Jones shall respect the role, advice, and the influence of the grandparents of both families in regard to raising the child and respect to our customs and traditions regarding Indian Family Law and the courtesies regarding the extended families;

And Further Be It Agreed that Audrey Thomas, sister to the late Lucy Thomas, does have special interest in the raising of Jeremy and that she be accorded due consideration in accordance with our teachings;

And Be It Further Agreed that the child shall be raised in respect of the customs and traditions of both families and the cultures of the great nations of the peoples of the Nuu-chah-nulth and the Coast Salish;

And Be It Further Agreed that Allan John Jones shall allow access and visitations to the relatives and members of both families in accordance with the courtesies and customs of the Aboriginal peoples in general and in particular shall ensure that the child does spend a respectful and sufficient time with the grandparents of both families and be further agreed that the same privileges accorded the grandparents shall be accorded to Audrey Thomas;

And Be It Further Agreed that both families shall maintain an open heart and open door in regard to access and influence to the child Jeremy in accordance with the courtesies and customs of our Aboriginal peoples;

And Further Be It Agreed that Allan John Jones does now have special obligation in accordance with the customs and traditions of Indian Family Law to his son Jeremy and to both families in this regard;

And Therefore Be It Further Resolved that Allan John Jones and Audrey Thomas in conjunction with the grandparents and the Council of Elders do petition his Honor Judge E. O. O'Donnel of the Provincial Court. . . . to render a decision accordingly with the respect to the wishes of both families which reflects the best interests of the child in accordance with the customs and traditions of Indian Family Law;

All parties do agree by their signature to this document to raise the child Jeremy with regard to our traditional customs with love, respect and education so that he may be properly prepared for life within our Aboriginal society and the non-Indian community that shall be a part of his world in the future.⁸⁸

The proceedings were resumed before the Provincial Family Court and a consent order giving custody to the father with access to the aunt and the grandparents of both families was entered. Attached to the order was the written agreement set out above, the access provisions of which were made part of the Court's order. In his written judgment Judge O'Donnel made the following comments:

Before dealing with the form of the actual Order, I personally would like to add a few words because of the historical significance of this process by which this agreement and this court judgment has been arrived at. . . . This method of resolving disputes has shown that traditional native methods and institutions can and do operate effectively in this day and age. The entire process has demonstrated that it is possible for the native institutions and in our courts to co-operate and work together for the benefit of all parties.⁸⁹

In this case the application of Salish law and the invocation of its dispute resolution process avoided the hostility and pain usually associated with custody battles. Both families will have the opportunity to contribute towards development of the child who is thus enabled to enjoy and benefit from the heritage and traditions of both families without having to choose between them. Nor is it likely that the same result could have been achieved by having each party call as witnesses elders from their respective families to give as it were expert evidence on Coast Salish law, leaving it with the Judge to take this into account in determining the best interests of the child. The successful outcome of this case is integrally related to the fact that all essential elements of the Aboriginal system of justice were invoked. The parties were able to accept the recommendations of the Council of Elders because they have legitimacy as law-givers; the forum—the Big House—in which their deliberations regarding the law and its application to this case took place, architecturally reflected the inter-connectedness of Coast Salish families and its carvings, totem poles and crests encapsulates their shared history; the procedures in the Big House, the making of speeches which are

listened to with respect and without interruption in the search for a consensus, draw upon time honoured traditions of Coast Salish decision making.

If the matter had been dealt with through the giving of expert evidence in court proceedings, the legitimacy of *our* judicial office, the symbolism of *our* court architecture and protocol and *our* procedural style of examination and cross-examination would have been brought to bear on the case and the ultimate decision would rest with one individual outside the community. Had the parties continued with adversary court proceedings the result would have been an imposed resolution which would likely have further divided the families and not only further fragmented the community but ultimately worked to the detriment of the child.

As Judge O'Donnel points out in his judgment the manner in which the case was dealt with instead provides an opportunity for native institutions and our courts to work in harmony. This was achieved in large measure because the South Island Tribal Council has been involved in working with the judiciary in developing a cross-cultural awareness and judges like Judge O'Donnel have demonstrated their receptivity to this collaborative effort. However, the following questions loom large in any discussion of doing justice in Aboriginal communities: why should it be necessary for Aboriginal communities like the First Nations of South Island to educate and persuade non-Aboriginal judges that they should respect the Aboriginal system in making their decisions? To the extent that Aboriginal peoples have their own ways of resolving disputes such as this in a manner more conducive to social harmony and individual development, why should we not recognize their authority to determine such matters in accordance with their own principles and procedures?

The second case drawn from the contemporary application of Coast Salish law is a criminal case in which a young woman was charged with shoplifting from a local store. She had one previous similar conviction. After her first appearance when she was interviewed by a native courtworker she indicated that she wished to plead guilty to get the matter over with and her expectation was that she would be fined and perhaps put on probation. The native courtworker, who works very closely with the Tribal Justice Council, was aware of this woman's background in the community and that she was involved in the "Long-House" ceremonies where she held an honored position as the custodian of a ceremonial rattle. The Courtworker suggested that the woman ask for an adjournment so that he could talk with her family. The woman was initially reluctant to do this because her family was unaware of her previous

conviction and she did not wish to have to deal with their reaction to her bringing shame on the family. The Courtworker, however, persuaded her to allow him to talk with her family.

The family deliberated over the matter and then organized a ceremonial dinner in which the young woman's family members, including her grandparents and other elders were invited. At this dinner her grandfather announced that while she would still attend the Long House ceremonies, for a one year period she would not be able to discharge her honored position as a holder of the rattle. They made it clear to her that her dishonest actions did not reflect only upon her but upon all her family. However she was not cast out of the circle of her relations and therefore must continue to face them in the Long House.

When the case came back before the Court the trial judge was appraised of what had happened and the nature of the family's decision and its seriousness. He acceded to the submission of the courtworker that an absolute discharge was appropriate.

What should be apparent from this case is that for this young woman, going to court, pleading guilty and being fined or put on probation was initially seen as a less onerous alternative than being shamed by her own community. Thus this case, like the preceding custody case, raises important questions regarding the legitimacy, respect and effectiveness of court procedures which are seen by Aboriginal peoples as being foreign to their own community values.

These issues of legitimacy and respect have been raised in a very thoughtful way by Rupert Ross based upon his experience of many years as a Crown attorney dealing with cases in Aboriginal communities in Northern Ontario. Ross addresses the question of what lies behind the increasing demands by Aboriginal people for greater control of the administration of justice:

The cries for local control over community justice are growing. It is tempting to conclude that they spring only from political claims of sovereignty, incidental only to the larger issue of political autonomy. While that may indeed form part of the background, it appears that much more is at stake in their eyes: the contribution which local control over justice would make, directly and indirectly, to the very goal of peaceful co-existence to which our system aspires. In this connection, a proposal submitted by the Sandy Lake Band in Northwestern Ontario to the Ministry of the Attorney General provides as clear an articulation of the issue as I have yet encountered. In that proposal, they requested a number of experiments, including the formation of a salaried Elders Panel to "co-judge" during sentencing, the establishment of a community lock-up for less serious offences, and exploration of a youth diversion court. It was their explanation of the reasons behind such requests which began to explain what they perceive as a central failing of our system. Their own words cannot be improved upon:

The element of community respect must be instilled in the court in order for any meaningful changes in attitude (of the offender) to occur. The court does attempt to cause respect in a formal sense, however, the factors of deep-seated respect are absent. Respect for Elders occurs over a lifetime of familiarity and trust in their wisdom. It is therefore expedient that the court be perceived as part of a *community process* and that the offender is not only before the court but *before the community*.

In earlier days the community practiced public courts wherein a person was confronted in the presence of the whole community with his misbehavior. This caused great shame because the community as a whole was respected by all. This shame and remorse laid the groundwork for the teaching that would occur . . . An important ethic . . . is the use of shame to teach and rehabilitate. *Since a person can only be shamed by someone who is respected and looked up to, this cannot be effected by a travelling court* [emphasis in original].⁹⁰

Ross suggests that there are several issues involved here:

The first is the more obvious: because "we" are outsiders, we are incapable of making the accused feel truly ashamed. . . . Removal to an outside jail, in their view, permits an offender to *escape* being held accountable to the community. It is not, as we tend to see it, the ultimate punishment, because it enables offenders to avoid the very people whose presence is most likely to give rise to shame and remorse.⁹¹

This point is clearly illustrated by the case we have just looked at regarding the young woman's preference for court-imposed sanctions. The second point made by Ross is also directly related to the South Island experience, having to do with legitimate forums of dispute resolution.

The very presence of our courts has taken away a critical forum in which wisdom can be demonstrated and respect earned. There can be no doubt that it was respect for elders which was the social glue holding people together in relatively peaceful obedience to commonly accepted rules. People accepted their guidance because they had observed their wisdom. The arrival of the court took away the critical arena of dispute-resolution from the Elders. With a grossly diminished opportunity to demonstrate wisdom, there was a corresponding diminishment of heart-felt respect. The same dynamic took place as we introduced our education, our health care, a bureaucratic Band Council structure, our policing, etc. The Elders arena shrank, and the glue that held each small society intact began to dry and crack.

Viewed from this perspective, the cry for "local control" is more than a grab for power. It comes from more than an assertion that we do a poor job. Instead, it aims at a restoration of forums within which wisdom can be developed and demonstrated, and respect can once again be earned. Absent that rebuilding of respect within the community, they see only a continuing slide into social anarchy.

....

As long as we appropriate such forums as dispute-resolution to ourselves we will only aggravate the problem of diminishing respect of the community leaders and community wisdoms, thereby putting the possibility of effecting remorse even further out of reach.⁹²

Rupert Ross's comments provide a bridge between the initiatives of the First Nations of South Island Tribal Council and those of two other Indian nations in British Columbia, the Gitksan and Wet'suwet'en. They too have made proposals which include diversion but which are part of a much larger vision for the development of a tribal justice system reflecting their own distinctive social organization and the dispute resolution process which flows from it.

In a proposal submitted to the B.C. Ministry of the Attorney General entitled *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People*, these two Indian nations in North-western British Columbia who have been linked together in peaceful alliance for many centuries set out the purpose of their initiative in this way:

The justice system brought to Canada by the Europeans has been very disruptive of both the individual and community life of its Aboriginal people. We propose 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 justice system in a way that does not undermine the integrity of either.⁹³

In setting out the nature of the Gitksan and Wet'suwet'en system of dispute resolution the proposal starts from the proposition that the holistic nature of the Gitksan and Wet'suwet'en world view and the social structure of its kinship society requires an integrated conception of dispute resolution which sees it as part of the fabric of social and political life rather than as a distinctly formal legal process. To understand therefore the system it is necessary to understand the nature of the society. We have previously explained the importance of this in describing the dispute resolution systems of the Cheyennes and the Maori. If we are to understand the nature of Aboriginal justice societies in Canada and respond to Aboriginal initiatives it is essential that we undertake the intellectual challenge of understanding their systems within the context of the nature of their societies. The Gitksan and Wet'suwet'en provide this description of that society:

For a Gitksan or Wet'suwet'en there is no such thing as a purely legal transaction or a purely legal institution. All events in both day-to-day and formal life have social, political, spiritual, economic as well as legal aspects. . . .

The primary political unit of the system is the House named from the Long House where many of its members lived at one time. All House members share a common ancestry that in most cases they can trace. They thus share a common oral history encapsulated in songs and in crests that are displayed on blankets and poles. Peoples' responsibilities to each other and to the natural world are funnelled through the Head Chief of the House. It is the House through its Chief that is the land owning entity in both Gitksan and Wet'suwet'en societies. There is no higher political authority in the system than a House Chief. . . . While the Head Chief is responsible for the actions of the House and its members, he does not act alone. Within the House there are a number of other Chiefs, the Wings of the Head Chief, who must be consulted along with the Elders of the House and, on larger matters, the Chiefs of other Houses.

The person is born into his or her mother's House and succession to Chief's names comes through the mother's side. Those Houses that are closely related and that have shared historical moments remain important to each other as it is the Chiefs of those Houses that most frequently consult each other. The broadest grouping of related Houses is the Clan. There are four Clans in the Gitksan system and five in the Wet'suwet'en. Clan members know they are historically related but may no longer be able to record the precise blood relationship that binds them. Clan identity is important in marriage law in that no-one can marry within his or her own clan. Marriage out of the clan and succession through the mother tends to dissipate enduring male power blocks and diffuse both exceptional and non-exceptional individuals throughout society.

Although the societies are matrilineal, the father's side is important, particularly at the beginning and end of a person's life. A father is expected to raise his children even though they are not members of his House or Clan. As they go through life the children reciprocate and when they die, it is their father's House that arranges their burials.

People in a region acknowledge that each Clan in their society has a counterpart in each neighboring society, although the Clan names and some of the crests may vary. Many Houses also have early histories in common with Houses which today exist among other peoples. Travellers can make contact with distant relatives in villages outside their own society by recognizing the crest shown on poles, blankets and house fronts. In this way an individual's kinship network extends over the whole region, although the fabric is much more tightly woven within his or her own people.

The most important economic transactions that travel through the network are the sharing of wealth within the House and the reciprocated payments for services between Houses. The reciprocity is reflected in the feasts, the most important of which are concerned with the succession of the name and responsibilities of a Head Chief. These occasions give the authority of the community to the Chief and to the system as a whole. While the daily interaction binds the society together, the formal exchanges at the Feast reinforce its kinship structure. It is at the Feast that a Chief may exert

political authority over Houses other than his or her own by validating or witnessing the succession of a new Head Chief, by confirming the host House's description of its territorial boundaries and river fishing sites and by reaffirming the society's laws. But no Gitksan chief or group of chiefs have authority over all the Gitksan, although each has knowledge of the laws, history and protocol of a number of neighboring Houses and of more distant Houses with whom there are frequent marriage ties. Similarly, no group of Wet'suwet'en chiefs claim overarching authority over the Wet'suwet'en people. Each chief's authority extends over a part of the society, partly overlapping that of the next chief and so on until the whole society is covered by a woven mat of authority. The weave pattern of this mat reflects that of the kinship net.⁹⁴

The Feast (often referred to in the anthropological literature as the potlatch) is the fulcrum of the Gitksan and Wet'suwet'en system. While it operates as a formal affirmation of the resolution of disputes its purposes are much broader and reflect and encapsulate the multiplicity of functions of Gitksan and Wet'suwet'en institutions.

When today, as in the past, the hereditary chiefs of the Gitksan 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 for 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 to 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 neighboring peoples.⁹⁵

The Gitksan and Wet'suwet'en system of control of anti-social behaviour, like many other Aboriginal systems, places a heavy emphasis on social censure within the kinship network and pays much attention to compensation rather than punishment. One way of giving context to the differences between their systems and ours is by looking at a recent case which the Gitksan and Wet'suwet'en see as an example of how our justice fails them and then review how it would be dealt with under their system.

The case involved a fourteen year old girl who had been sexually abused by her step-father. The case was reported by the girl's mother to

the R.C.M.P. and charges were laid. The accused was committed for trial at his preliminary hearing. During the considerable time that elapsed between the preliminary and trial the Crown Counsel met with the young girl and was able to establish a trusting relationship with her. On the day of the trial the victim and her family found to their surprise an ad hoc Crown Counsel had been appointed at the last moment who had no previous contact with the case. In the absence of any prior relationship with her he demanded very personal information of the victim and became irritated by her reluctance to give clear answers. On the witness stand she was under so much pressure she "clammed up" and was unable to give reliable testimony. The result was that the accused was acquitted. The victim felt doubly victimized both by her step-father and by Crown Counsel and her family was incensed that an injustice has been done, that the problems for the young girl has been intensified and the offender has not been made accountable.

Let us consider this same case had it been dealt with under the Gitksan and Wet'suwet'en systems. The mothers first step would be to contact her own mother, the girl's grandmother who together with other members in the girl's House would have provided her with the emotional support and guidance she needed. Because the offender was her step-father, the responsibility to contact the offender's House would be left with the maternal grandfather. He would contact either the House chief or other key people in the House who would best be able to take charge of the situation.

It would be the responsibility of members of the offender's House to confront him because in a system in which there is collective responsibility, when a person does or says anything to shame himself this unfailingly shames those who belong to his House. The purpose of the confrontation is both to make manifest this collective responsibility and to determine how to deal with the offender and restore balance and harmony within and between the victim's House and the offender's House. In terms of dealing with the offender this would likely involve counselling by a respected member of the House and also involve the particular scrutiny of the offender's behaviour by all members of the House. As to the restoration of balance and harmony this would require some form of restitution or compensation to the victim and her House.

Making contemporary this traditional approach might also require the involvement of a properly trained counsellor who understands the causes and dynamics of sexual abuse, in particular where it has a background of childhood abuse in residential schools or foster homes.

The offender's House members would then meet with the victim's House members in order to come to a joint agreement between the

parties as to what would be appropriate restitution to make amends to the victim and her House. Elders, Chiefs and Advisors from other Houses, particularly those closely connected with the victim's and offender's Houses might also be involved in this agreement. In this way knowledge of the offence would be diffused throughout the community as would the agreement for restoring harmony.

Once the Houses have collectively agreed on a just settlement the offender's House would proceed to hold a Shame Feast in which the offender has an opportunity to display his remorsefulness and shame for his offence and will announce the compensation to be paid to the victim and her House for the pain and suffering she and they have endured.

If the victim is in a different Clan than the offender than her House may hold a separate Feast called a Cleansing Feast or if in the same Clan, the victim's House may decide to hold the Cleansing Feast at the same time to coincide with the offender's Shame Feast. The purpose of the Cleansing Feast is to accept the offender's restitution and is another step in restoring balance and harmony between the two Houses and within the community.

At these Feasts representatives from other Houses and Clans would be invited in order to witness and record both the act of violation of the community's laws and the just settlement of the matter. In the past, eagle down would be spread at the Feast to mark the restoration of peace. The formal resolution of the dispute at the Feast gives it both legitimacy in the eyes of the whole community and ensures its remembrance in the history of the Houses.

The Gitksan and Wet'suwet'en are seeking ways to establish a process of justice which bears the hallmarks of their own system rather than indigenizing a system organized along quite different principles and processes. The proposal asserts:

If, as we suggest, the content of indigenous justice, that is its principles, laws and precedents, is to be used in a meaningful way, it must function within the structure of indigenous justice. Attempts to fit the content of one system into the structure of another are bound to fail. . . .

The setting up of parallel systems for native communities—with native police, native courts and native jails—will not work unless the society already has equivalent institutions of its own. The decentralized Gitksan and Wet'suwet'en societies cannot accommodate the hierarchical court system and specialized enforcement powers of the police. This is shown by the failure of an earlier parallel justice system endured by the Wet'suwet'en and other B.C. native villages at the turn of the century. It was introduced by the Oblate missionaries and called "the Durier" system after its inventor, Bishop Paul Durier. In his book *Will to Power*, Historian David Mulhall describes how it worked;

the Oblate's appointed Catholic chiefs, captains and watchmen. The captain was the chief's Deputy and he usually administered the frequent whipping meted out as a form of public penance. The watchmen were spies and policemen who detected and apprehended suspected sinners. But as well as repressing "pagan" practices and the vices learned from the whites, Durier wanted these Indian aides to help the Oblates to uproot native spirituality and to sow in its place the seeds of Catholicism.

The church's vision of an interior Christian empire was overtaken by the secular powers of the federal and provincial governments. But the policy did not change. It was still to uproot all aspects of indigenous society, including its justice system, and to sow the seeds of western ways. Thus the church chief and his watchmen were eventually replaced by the elected Band Council under the *Indian Act*—a misplaced institution that continues to create problems in native communities.

Learning from this history, our proposal seeks to explore how the two legal cultures might co-exist with dignity rather than try to thrust large parts of one system onto the other.⁹⁶

Pausing here for a moment it is necessary to reiterate a point made earlier, that the search for reform in relation to native justice systems is not singular and that the Gitksan and Wet'suwet'en in this proposal, while rejecting the idea of native police forces and native courts, are speaking from their own experience and in the context of their own social structures.

The Gitksan and Wet'suwet'en in their proposal acknowledged that the circumstances in which they find themselves today and the problems they face are dramatically different from those of a century ago. While they insist that any reforms must be consistent with long term objectives of self-government they recognize that transitional reform may contribute to that objective.

The Chiefs have said that they intend to govern themselves according to Gitksan or Wet'suwet'en principles and law. It is recognized that in many areas there cannot be a simple switch from the imposed state system to indigenous self-government. The acute social crisis in which the 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 anti-social behavior is to be accomplished. This thinking has begun and some ideas about Gitksan and Wet'suwet'en self-government can be outlined here.

If the indigenous system of the upper Skeena is to have any validity at all, it is imperative that the ultimate responsibility for the members of a House . . . be placed on the hereditary chief of that House. Not the chief as an individual and not as a member of some western-style board of directors or advisors but as the focus of authority embedded in the kinship net of elders, relatives and other chiefs. . . .

In light of this, it is equally imperative that social service professionals not be organized in such a way that they would tend to take on the task of social control. The usual bureaucracy of judges, police and social workers, even if nominally under the control of the tribal group, would be a seductive ineffective alternative to real community responsibility. But professionals will be needed. The process of social repair will require the skills of health, social workers and others.⁹⁷

Instead of establishing bureaucratic, administrative hierarchies the Gitksan and Wet'suwet'en propose that as an instrument of self-government, contracts be negotiated between the hereditary chiefs and professionals working within the Gitksan and Wet'suwet'en systems defining their respective relationships and responsibilities. As such the contract

would be one of the key documents of modern Gitksan and Wet'suwet'en self-government. By acknowledging existing relationships among House chiefs and House members and by defining relationships between the people and professionals at the individual level, it would create a decentralized support structure that would enhance the House system, not erode it. Such a structure would be a significant departure from, current models for the administration of justice, social services, education and resource management for Canadian Indian communities whether run by central governments or under the various self-government agreements.⁹⁸

The Gitksan and Wet'suwet'en proposal identifies four areas which are of special concern to the communities (and indeed to many other Aboriginal communities): assault, spousal abuse, sexual assault and child sexual abuse. Focussing on those areas the proposal suggests that though transitional reforms such as diversion and Aboriginal sentencing advisors to the courts, responsibilities could be shared without undermining the integrity of either the Aboriginal or provincial systems.

In relation to diversion the proposal advocates the more extensive use of alternative measures under s.4 of the *Young Offenders Act* and that pre-trial diversion should also be utilized for adult offenders from Gitksan and Wet'suwet'en villages. The distinctive feature of diversion in the Gitksan and Wet'suwet'en communities would be that there would be a formal role not just for the offender and victim but also for the offender's and victim's houses. In this way collective responsibility in the Gitksan and Wet'suwet'en system can play an important part of the process. In relation to sentencing advisors, the proposal envisages that the importance of the House system can be acknowledged by having one sentencing advisor drawn from the offender's House and another coming from victim's.

While sharing certain features with the diversion proposal of the First Nations of Vancouver Island, the Gitksan proposal is more decentral-

ized with authority located within the House groups rather than in a council of elders drawn from a number of different villages across the region. In both cases, however the process is of the native peoples' own choosing and draws its strength and its legitimacy from being theirs not ours.

Unlocking Aboriginal Justice contained an application for funding in which Gitksan and Wet'suwet'en people would be trained to research, design and implement justice procedures based on their own laws and disputes settlement practices. As the Gitksan and Wet'suwet'en have themselves pointed out since they submitted their proposal "the problems that western justice systems have with Aboriginal people have been vividly recounted in a number of enquiries across Canada, anyone of which would cost more than the *Unlocking Aboriginal Justice* project." Thus far only a small part of the proposal has been funded by the Province of B.C.

Ironically the principal response to the Gitksan and Wet'suwet'en proposal has come obliquely from a decision of the British Columbia Court of Appeal. In February 1990 that Court heard an appeal against the sentence imposed on a twenty year old Wet'suwet'en man for stealing two pick-up trucks. The man had acknowledged the thefts and had a history of property offences from the time he was sixteen. It was also revealed that he had been sexually abused between the ages of nine and eighteen. The Court recognized "that this might be a case where a cycle of crime has developed in a seriously disadvantaged young person" and that the Court should investigate "what resources would be available in the Smithers-Morristown area which might permit us to do something more constructive than just continuing the cycle . . ."⁹⁹

The Court put little faith in prison being able to break that cycle:

In some cases it is unrealistic to think that some of these unfortunate persons can be rehabilitated once the cycle starts by successive and increased periods of imprisonment, especially when, upon release, they are returned to the same environment, lifestyle, frustrations and temptations which contributed to their misfortune in the first place. . . .¹⁰⁰

What is urgently required in this case is to the break the cycle of crime in which this young man has become entrapped, and every reasonable effort must be exerted in that connection. At some stage in his life he must be educated or trained to become self-sufficient, and he must be made to understand that at some early date, if he continues his present path, even a tolerant and caring society or community will give up on him so that longer and longer terms of imprisonment may become the only possible future for him. . . .¹⁰¹

What is required, in this and many similar cases, is intensive guidance, encouragement, training and supervision on preferably a daily or frequent basis by a person or persons in whom the accused has confidence. . . .¹⁰²

While acknowledging the enormous costs of maintaining a prisoner in custody for a year (the figure of \$50 000 is cited) the Court admits that this intensity of interaction, while desirable, is not possible through bureaucratic systems;

It would probably be beneficial, on a cost-benefit ratio, to have persons such as this accused assigned to a probation officer on a one-to-one basis, although that is clearly impossible, and may involve more supervision than is desirable.¹⁰³

The emphasis on training recurs throughout the judgment, here in relation to the offender, elsewhere in relation to those who might advise him:

It is essential, in my view, that he have the support of a trained advisor who can bring both the humanity and the authority of society to bear on the problem. But it is even more important that he also have the support of his indigenous community.¹⁰⁴

As the Gitksan and Wet'suwet'en have pointed out,

this then, is the essence of *Unlocking Aboriginal Justice*: to train advisors who can facilitate the application of humanity and authority from within indigenous society to help its members confront and deal with their personal crises in the context of their community.¹⁰⁵

The Court of Appeal saw the Gitksan and Wet'suwet'en Tribal Council as fulfilling an important role in carrying out the sentence of the Court:

We were told that the accused may be a non-status Indian. But he is a Wet'suwet'en person, and his grandmother is an honored Head Chief of the Wet'suwet'en people. We can only hope that his legal status will not prevent the Council from assisting him. If, for any reason, the Tribal Council is unable to help, the probation officer will have to do the best he can on his own.

I would view with favor any arrangement approved by the Provincial Court which would on proper terms pass the supervision of this particular accused over to the Tribal Council.¹⁰⁶

The accused was given a suspended sentence and placed on probation for one year, the terms of which were that he live with his grandmother at Moricetown and comply with his probation officer's requests.

The Gitksan-wet'suwet'en Education Society who have taken a coordinating role in advancing the *Unlocking Aboriginal Justice* initiative, have pointed out some of the implications of the Court of Appeal judgment.

We acknowledge that cases such as this are among the most difficult to assist. While the Court has been progressive in recommending that the man's

rehabilitation take place within the Aboriginal system, it is done so only after the provincial welfare and justice systems have, after many attempts, clearly failed him. His recent experience has been dominated by courts and jails. It has left him without education, work experience and, most importantly, close and intimate relationships.

The young man's history of suffering sexual abuse will likely very much complicate and lengthen his healing. . . .

Local lawyers who have read the Court of Appeal judgment have indicated they will likely use it as a precedent to obtain similar orders from the lower courts for their clients in parallel circumstances. Besides the real possibility of the Education Society and other Gitksan or Wet'suwet'en organizations being overwhelmed with facilitation requests, there is the more serious concern that House members, chiefs and elders will be increasingly pressed to supervise probationers without adequate and appropriate preparation and support. While some can assume these responsibilities now, others cannot. Failures among the latter group would lead to the false conclusion that Aboriginal justice systems no longer work.¹⁰⁷

In the resubmission of its proposal the Education Society advances the argument that to be able to respond effectively to not just to this one young man but to other Gitksan and Wet'suwet'en offenders requires a commitment of energy, creativity and money. The Gitksan and Wet'suwet'en have more than enough of the energy and creativity to make contemporary these processes which until this last century have kept their communities peaceful. The money is another matter. Somewhat ironically the same Chief Justice who wrote the judgment of an unanimous court in the case which we just discussed has also recently ruled that the Aboriginal rights of the Gitksan and Wet'suwet'en to their lands and resources were extinguished before Confederation by colonial land legislation. Until such time as there is a negotiated settlement of land claims providing sufficient resources to once again make the Gitksan and Wet'suwet'en communities economically strong, it is essential that both federal and provincial governments respond positively to proposals like *Unlocking Aboriginal Justice*.

The limited response of governments to the Gitksan and Wet'suwet'en initiative is reflective of a more general problem, the sources of which are identified by the Gitksan and Wet'suwet'en in their resubmission:

The reaction of the justice establishment to our initial proposal has been disappointing on two accounts. First, there has been no real engagement with the ideas and programs laid out in the proposal. Second, there has been a hesitation on the part of politicians to seek innovative ways to support *Unlocking Aboriginal Justice*.

We anticipated, correctly as it turned out, that the proposal would not fit within existing guidelines for government funding programs. The provincial

government response has been coordinated by the Ministry of the Attorney General. . . . Three meetings have been held with Ministry Committees but there mandate has been more to ease delivery bottlenecks within the existing justice system than to facilitate structural solutions.

For their part, federal ministries referred the proposal to the Department of Indian Affairs which declared justice to be a self-government issue that could not be acted upon until the current self-government negotiations with the Gitksan and Wet'suwer'en Chiefs have been concluded.

Government institutions find it difficult to comprehend and interact with decentralized societies. Two different traditions with two different ways of righting wrongs are attempting to deal with the same problem. Both perspectives have their strengths but require detailed work to integrate and apply them.¹⁰⁸

A similar point was also made by the Cawsey Task Force Report in its review of an Aboriginal community-based crime prevention program in Alberta, the Talking Drum Youth Program. The Task Force commented,

The community as well as presenters stated that the holistic approach to helping and developing the youth of this Indian community was very effective. However, the very approach that made the program effective caused problems in funding. Because the activity could not be fitted into a social services, recreation, crime prevention, or cultural program, obtaining funding was difficult at best. . . . Government departments must look for reasons to say yes to Aboriginal projects and programs instead of finding reasons to say no.¹⁰⁹

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 for such a commission should be substantial bearing some relationship to the enormous financial costs of the over-representation of Aboriginal peoples in Canada's prisons.

The federal government in its Green Paper has responded favourably to the Canadian Sentencing Commission's recommendation that there be a Sentencing Commission with a broad range of functions concerning the development of sentencing guidelines, promotion of training and professional development of sentencing judges and the promotion of exchange of information regarding sentencing. An Aboriginal Justice Commission could, in addition to its funding role, also play a coordinating role in bringing together the developing body of research and experience in Aboriginal justice systems both in Canada and many other parts of the world. The Northern Justice Society, based at Simon Fraser University, has published a research bibliography and has put out a number of publications resulting from the series of conferences it has organized. Apart from this, Aboriginal communities seeking to benefit from the broad range of comparative experience are really left to trial and error in obtaining materials relevant to their situation. An Aboriginal Justice Commission which had both research coordination and funding capacity would be capable of making a significant contribution to getting aboriginal justice initiatives off the ground and beginning the process of getting Aboriginal people out of our prisons.

Both of the initiatives we have discussed can be implemented without the need for any new legislation. So far as young offenders are concerned legislation already exists under the alternative measures provisions of the *Young Offenders Act*. However, these provisions have not been much utilized in the case of Aboriginal young offenders. For example, the Cawsey Task Force found that in Alberta 93% of individuals accepted in the alternative measures program were non-Aboriginal.¹¹⁰ Also, as we have noted in British Columbia, even though the First Nations of South Vancouver Island Tribal Council specifically designed their diversion program to fit into the requirements of s.4 of the *Young Offenders Act* this has not yet led to a positive government response to fund the program. It would seem that political commitment rather than legislation is the key to getting these programs off the ground.

That is not to say that enabling legislation is unimportant. There is an advantage in having such framework legislation, provided that it is broad enough to encompass distinctively native initiatives. In particular it ensures that native communities can come up with proposals with a realistic expectation that they will be respected by non-native participants in the criminal justice process. This advanced, negotiated validation of an alternative process will minimize the situation we observed in the *Naqitarvik* case where community expectations are frustrated because of the courts' lack of understanding of the dynamics of native conflict resolution systems and the ensuing failure to reconcile native and non-native processes.

Since we have focussed on initiatives in British Columbia, it is instructive to review the provincial government's responses to Aboriginal proposals for their own justice processes because it throws light on some of the assumptions which still dominate government thinking in coming to grips with these initiatives.

In British Columbia the Criminal Justice Branch of the provincial Ministry of the Attorney General, having become increasingly aware of the problems posed by the dramatic over-representation of Native peoples in all aspects of the justice system, in 1988 appointed a committee to study the concept of diversion programs for native communities. The work of this committee coincided with a series of provincial-wide hearings of the Justice Reform Committee which included representations from native communities and organizations identifying what they saw as the significant problems with the present system of administration of justice. In its report, *Access to Justice* the Justice Reform Committee states

Native groups spoke about the cultural barriers that have alienated them from the Canadian justice system. For many Natives, Canadian justice can seem like a foreign system, imposing a value system which is at odds with their own culture. This conflict poses problems that non-Natives do not experience.¹¹¹

The nature of this conflict is explored in more detail in a report by Peter Ewert, the Executive Crown Counsel for Native Justice and Environmental Issues. Mr. Ewert notes the following ways in which the administration and imposition of the criminal justice system on native communities aggravates rather than resolves problems:

The punishment of crime can well be more disruptive than the crime itself;

The present system of administration of justice does nothing to heal or resolve the problems confronted by the community of the offender as a result of his offence;

Non-Native courts when dealing with sentencing, are not equipped to evaluate the individual and social situations of many Natives;

Natives who have an awareness of their own traditional values and approaches to dispute resolution find themselves confronted by a foreign alternative which they don't understand but which takes precedence;

The "foreign" system which confronts natives is aggressively adversarial—an approach which is alien to their traditions.

Many natives actually do not understand the language or its nuances in the legal/judicial context; and

Non-Native members of the justice system often do not appreciate cultural differences of approach or even, in the case of police, response to an approach, which results in the drawing of inaccurate conclusions as to attitude and intent.

The trend among concerned Natives is towards the re-establishment of their traditional values and methods of dispute resolution as viable alternatives to the regular justice system in certain instances. Diversion of offenders into the native community for a mediated resolution which satisfies all involved parties, and which recognizes the interest of the community in resolution, is seen as a suitable alternative to prosecution in many instances. *This approach should not be interpreted as encouraging the creation of a separate justice system but rather the enhancement of the justice system presently in place in Canada* (emphasis in original)¹¹²

The last sentence would appear to be a reflection of the views of the Justice Reform Committee regarding separate Aboriginal justice systems.

The concept of an Aboriginal justice system was presented to the Committee as one that is receiving a great deal of interest and attention. However, the Committee favors a mainstream justice system for all British Columbians which serves the needs of all of the people of this province. At the same time, it is recognized that Native people have traditional values and customary ways that the justice system can and should accommodate. Native people tend to resolve disputes for a mediation or conciliation: bringing the community together. There is much scope for this approach within the present justice system.¹¹³

The principal recommendation of the Justice Report Committee related to diversion programs. Recommendation 155 is to the effect that

Native communities should be encouraged to develop their own diversion programs and be supported in this endeavor by those with the responsibility of leadership in the justice system.

The Criminal Justice Branch of the Attorney General responding positively both to Recommendation 155 and to its own research and consultation with native communities has been working on developing guidelines for native diversion programs. These will deal with appropriate cases for diversion, suitable offences, diversion measures and the selection of pilot projects.

The passages underlined clearly reveal two things: first, that leadership in the criminal justice field is seen as remaining with non-Aboriginal officials; secondly, that there are limits to what the system will tolerate and those limits are overstepped when Aboriginal peoples propose their own justice system. While the proposals we have considered in British Columbia do seek an accommodation in the first instance through such schemes as diversion, this is a reflection of those communities wishing to build up their experience and not to place burdens on their communities which they cannot carry. In this respect their positions are well expressed by a submission made to the Cawsey Task Force by the Lesser Slave Lake Indian Regional Council.

The Lesser Slave Indian Regional Council is proud of its track record, the credibility it has built up over the years, and its vision of Indian control over their future as communities with a distinct identity, culture, language and aspirations. Among these aspirations, controlling their own Cree Tribal Justice System is a positive goal. However, the Regional Council is also aware of its current capabilities, and recognizes that a gradual transition to control is best achieved by making an impact within the existing system. To start slowly and gradually grow has been the pattern of the Regional Council. . . . Our recommendations are designed to offer a first step on the road to the ultimate goal of a Cree Tribal Justice System within the region of the Lesser Slave Indian Regional Council.¹¹⁴

Both the First Nations of South Island Tribal Council and the Gitksan and Wet'suwet'en proposals are seen as first steps; they seek mechanisms of accommodation which are consistent with mutual respect that may require ultimately the recognition of Aboriginal justice systems which operate as a separate system although with important interacting elements. It is important that recognition of legal pluralism in Canada should not be foreclosed by either federal or provincial governments in considering the pathways to reform.

The central importance of grappling with the issue of legal pluralism in the context of the criminal justice system has been well expressed by one scholar viewing the Australian, Canadian and American experience. This is how he has framed the crucial questions:

In assessing social activity in the resolution of disputes, whose standards are to be applied, those of the native community involved, or those of the majority community? When assessing what is right or wrong, condoned or condemned, humane or inhumane, legal or illegal or just or unjust, should one be ethnocentric and apply western notions; should one attempt to see things as natives see them and judge accordingly; should one have "a bet each way" according to circumstances; or is the only realistic approach to accept that you have no choice in the matter? These are intransigent problems, but they are vital, for once a stance is adopted, all else follows. . . . These questions are perhaps most acutely raised, in the three jurisdictions under study, in the context of indigenous minority populations and the "Anglo-based" criminal justice system. The response to date of the three jurisdictions has been very much concerned with limiting, or avoiding altogether, legal pluralism in the sense of accepting parallel, separate systems of law as between native and non-native populations. This analysis, it is suggested, also applies to what might be perceived as a major exception, the American Indian reservation justice systems, for these systems are considered to be no more than a pale mirrorimage of the justice system. Some reforms and inquiries . . . are underway, but there remains a deeply ingrained reluctance in all three countries to cut the Gordian knots and allow separate, parallel native justice systems to develop. This tension between social theory and legal administra-

tion continues to cause problems. It is suggested when dealing with indigenous peoples, policies of social pluralism should be complemented by legal separatism. It is also suggested that the brutal and bloody facts of history show that the alternative has rarely achieved native justice.¹¹⁵

The Osnaburgh/Windigo Tribal Council Justice Review Committee in its Report pointed out that legal pluralism is not a foreign concept in Canada, having been part of our constitutional arrangements with the acceptance of the Quebec Civil Code. The Report continues:

First Nations possess collective rights by virtue of their Aboriginal history and culture. A legal regime that is relevant to their culture and supports collective rights can co-exist in a liberal egalitarian society without infringing upon fundamental concepts of liberty and equality. If the Civil Code of Quebec can be tolerated in Canada, so can a native justice system.¹¹⁶

Patricia Monture and Mary Ellen Turpel have expressed the same point with reference to the principal of respect.

To deny difference at the outset by suggesting that a discussion of distinct justice institutions for Aboriginal communities is not open, is to jettison respect for difference. It is an embracement of hegemony, of cultural superiority, of blind defence 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 to a free and democratic, and evidently pluralistic state who cannot know what justice will be for Aboriginal peoples and communities. . . .

Justice requires a legally based commitment to cultural diversity and Aboriginal collective rights to determine our own destiny. Justice must be a resistance of imposed structures and a commitment to political arrangements negotiated in good faith. Justice must mean justice as understood by Aboriginal peoples and not only as conceptualized by non-Aboriginal Canadians. In other words, justice must encompass inclusion and not reinforce exclusion.¹¹⁷

B. ABORIGINAL COURTS

The principal context in which legal pluralism has been explored is that of Aboriginal courts. In the past several years the history and evolution of Aboriginal courts in the United States, Australia and Papua New Guinea have been the subject of considerable study by Canadian scholars, Commissions of Inquiry and Aboriginal peoples. What emerges from these reviews is that with some exceptions these courts do not reflect indigenous or traditional models of dispute resolution and

have, at least in their initial stage of development, reflected government policies designed to usurp rather than enhance Aboriginal values. *Locking Up Natives in Canada* described the origins of Aboriginal courts in Australia in this way:

Official responses to law and order in Aboriginal communities have generally been limited to the creation of special courts for Aborigines. These courts have not used existing Aboriginal authority structures, but have sought to adapt the model provided by the regular court system to allow for what was perceived as a special situation of Aborigines. They have not necessarily been intended as concessions to Aboriginal communities. According to the Australian Law Reform Commission, one reason for their creation may have been the difficulty in obtaining convictions before the ordinary courts, where jurors were often reluctant to convict. Aboriginal court systems have often been imposed on Aborigines with little consideration given to their views or to the effectiveness of their customary mechanisms.

Both Queensland and Western Australia still have systems of Aboriginal courts. While these operate in different ways, basically they involve the enforcement by Aboriginal personnel of a set of local by-laws. . . .

Some of the criticisms levelled at the Queensland Aboriginal court system are that the courts are inferior or second class institutions; the lack of Aboriginal influence or control over the courts; the court's inability, or failure, to take into account local customs and traditions; and overarching over all of these, the reality that the court system and the general reserve system of which it is a component are an imposition of alien structures and values. This last point has been expressed by one commentator in this way:

The Aboriginal court was ineffective primarily because it did not reflect the mores of the local community. The Queensland Government dictated the structure and content of the laws which dignified behavior that was acceptable to the reserve population under certain conditions . . . the purpose of this imposition was to teach Aborigines European values and decorum, and to deter behavior which whites found offensive.

The system of Aboriginal courts in Western Australia is of more recent vintage than that of Queensland. The *Aboriginal Communities Act* in 1979 enables community councils to make by-laws governing a large range of matters, including entry to community lands, restriction on alcohol, disorderly conduct and regulation of firearms. . . . Penalties of a fine not exceeding \$100 and imprisonment for a maximum of three months may be imposed for breaches of the by-law. The *Act* does not create a special Aboriginal court: rather it envisages that the regular Justice of the Peace court be staffed by Aboriginal Justices and Aboriginal court staff and that white magistrates would train the Aboriginal Justice of the Peace who, once they became proficient, would then be left to run the court themselves. This has apparently occurred only to a limited degree. In practice Aboriginal communities still have little real responsibility for local law and order problems.

A recent review of the Australian scheme was highly critical of the way the scheme was operating in practice, partly based on the lack of real indepen-

dence of the Aboriginal Justices but more fundamentally on the scheme's failure to incorporate local customary laws. Part of this criticism is worth citing because it points to some of the problems which the establishment of any similar scheme in Canada might encounter.

There are general feelings of discontent among community members participating in the scheme . . . the whole social organization of traditional Aboriginals rests on the kinship structure which is closely linked to expectations and obligations between kin. The Justice of the Peace scheme is creating havoc among tribal Aboriginals in terms of the expectations alone. Tribal laws are either being ignored or undermined by an alien value system. Further, Aboriginal Justices feel they are becoming powerless both within their own law, and within the framework of the . . . *Act*. . . There is a lot of resentment and an increasing sense of impotency because they feel they are still advisors to the court.

As the Law Reform Commission points out however, the Western Australian scheme was never intended to be a recognition of "tribal law" or of "tribal arbitration." Structurally it was from the beginning an extension into local communities of the regular court system, with certain adjustments and with the addition of local personnel.¹¹⁸

In the United States, with the exception of the traditional customary courts of the Pueblo Indians of the American South-West, tribal courts derived from two distinct eras in American Indian policy. As described in *Locking Up Natives in Canada*, the Courts of Indian Offences were first established in 1883.

Far from being an instrument of Indian self-determination, they were conceived as an adjunct to the process of cultural assimilation. The establishment of these courts was part of the concerted effort to outlaw traditional cultural institutions, eliminate plural marriages, weaken the influence of the medicine men, promote law and order, civilize the Indians and teach them respect for private property by breaking up tribal land holdings into individual allotments. The initial plan was to develop these Courts of Indian Offences for every tribal government. Eventually they were established, at the direction of the Commissioner of Indian Affairs, in roughly two-thirds of all Indian agencies. The courts were staffed by the local Indian Agent, who applied the law as defined by an abbreviated criminal and civil code drafted by the Commissioner. Customary law was ignored or outlawed as it represented a way of life that the court was designed to destroy.¹¹⁹

The other principal form of tribal court was the product of a change in the U.S. Federal Indian policy in the 1930s. Referred to as the "Indian New Deal," this was designed to restore a measure of autonomy to the tribes. The *Indian Reorganization Act* of 1934¹²⁰ authorized each tribe to adopt their own constitution, establish a tribal government and to make laws governing their internal matters. Many tribes responded by estab-

lishing their own tribal court systems to enforce tribal codes and by-laws. Although the *Indian Reorganization Act* was enacted in the context of established principles of inherent tribal sovereignty articulated in early judgments of the United States Supreme Court (of which *Worcester v. Georgia* 31 U.S.(6 Pet.) 515 (1832) is the centerpiece) the legislation envisaged that tribal governments and tribal court systems would be based upon western and not tribal conceptions of government and adjudication. The Bureau of Indian Affairs drafted model codes which contained both penal and civil sections. Most tribes, lacking resources to hire their own lawyers simply adopted these codes without regard to whether they reflected traditional conceptions of offences or traditional conflict resolution processes.

Tribal courts exercise both civil and criminal jurisdiction although the criminal jurisdiction is circumscribed by federal legislation which in cases of major crimes gives jurisdiction to federal courts¹²² and which requires tribal courts to observe enumerated certain civil liberties contained in the U.S. Constitution.¹²³

This latter act also restricts sentencing powers of a tribal court to not more than six months imprisonment or a fine of \$5000 (amended in 1986 to one year's imprisonment or a fine of \$5000).

There is also a complex body of jurisprudence which impinges on the jurisdiction of tribal courts.¹²⁴

The American Indian Lawyer Training Program in its report, *Justice in Indian Country* described the challenges facing American tribal courts:

Tribal courts today face a monumental task. They must comply with the mandates imposed by the federal government, yet maintain the uniqueness and cultural relevance that makes them "tribal courts" and not merely arms of the federal government operated by Indians in Indian country. Accomplishment of these goals depends, to a great extent, on the availability of adequate funding and relevant and pervasive training programs. In addition, tribes must address the need for separation of powers in those courts which are not traditional or customary, in order to assure procedural due process, fundamental fairness, stability and credibility.¹²⁵

Another comment from an Australian lawyer who had worked in one of the Indian courts describes some of the trade-offs which the courts have had to make as the basis of continuing to exercise tribal sovereignty:

The justification that I see for the tribal courts that operate along similar lines to a European court under a written law and order code is that they are a visible aspect of the tribes sovereignty. Generally neither the procedures nor the substantive law have anything to do with traditional Indian law. The present mood is largely towards tightening up the procedures through

training to ensure due process. "Due process" is used entirely in the Anglo sense. I believe that many of the judges and others who were involved in tribal government are aware that "due process" may not reflect the Indian way of doing things but, specially following the *Indian Civil Rights Act*, it is seen as another imposed valued (which may or may not be good) but must be observed the right to run one's own affairs is to be preserved.¹²⁶

That tribal courts are a manifest and continuing demonstration of inherent tribal government is critical to their success in the United States. This point was effectively made by a distinguished group of Indian tribal court judges who participated in a forum organized by the Manitoba Aboriginal Justice Enquiry in 1989. American tribes see their tribal courts as an essential part of the panoply of self-government. As such Indian tribes in the United States perceive the tribal court as *their* court, an institution which is responsible to them. As these American Indian jurists pointed out, "tribal members have developed a respect for the tribal justice system because whether the judges are elected or appointed the judges are ultimately responsible to the tribe." In this very significant way tribal courts, even if their procedures are founded on Anglo European models, are seen as institutions accountable to the tribe.¹²⁷

The sense of ownership and accountability is fundamental to generating respect and legitimacy for institutions of justice. This point has been made in the Canadian context by the *Causey Task Force Report*. One of the principal recommendations of the *Report* was the re-establishment of community control in the criminal justice system.

The Task Force recommends that the criminal justice system be brought back to the communities it serves. One of our findings is that the criminal justice system has become too centralized and legalistic and generally too removed from the community. As a result, communities are unable to identify with the system. . . . The involvement of the community in all aspects of that system is an integral requirement for the successful return of the criminal justice system to the community. Communities must be encouraged to participate in the criminal justice system and take responsibility for that system. Without involvement and responsibility, the community will never identify with the system and without such identification, the system becomes a meaningless oppressor of the community.¹²⁸

Tribal courts in the United States have fulfilled this essential purpose so that the courts operate as *part* of rather than *apart* from tribal communities. It is this fact which makes the concept of tribal courts a compelling one for Aboriginal groups in Canada.

In reviewing the experience of the U.S. tribal courts it is important to realize that the courts are still being developed and indeed it is fair to say

that within the last decade very significant changes have taken place in some of the courts, particularly in finding ways to introduce into Anglo structures traditional dispute resolution processes. The most important example of this is the introduction of the Peacemaker Court as part of the Navajo tribal justice system. The Navajo system is the most sophisticated and complex in the United States and visits to the Navajo courts by Canadian Aboriginal groups and Commissions of Inquiry have become almost akin to the search for the Holy Grail. In light of this context the reasons for the establishment of the Peacemaker Court are particularly relevant in discussing alternative dispute resolution in a Canadian context. The origins and rationale for the Navajo Peacemaker Court are set out in the preface to the Court's manual:

On April 23, 1982 the judges of the Navajo nation adopted rules and procedures of establishing the Navajo Peacemaker Court. The new court is based on the ancient practice of the Navajo to choose a "Naat'aanii," or 'headman,' who would "arbitrate disputes, resolve family difficulties, try to reform wrong-doers and represent his group and its relations with other communities, i.e., tribes and governments". When the Navajo Court of Indian Offences was founded under the supervision of the Bureau of Indian Affairs in 1903 the Navajo judges of that court continued the tradition of the "Naat'aanii" by appointing community leaders to work with individuals who had problems and quarrels. . . .

In modern times the emphasis has been to create and maintain Navajo courts based upon an Anglo-European legal model, and that path was followed because of Navajo fears of termination and state control of the Navajo legal system. As a result, tribal attorneys and the Navajo Tribal Council modelled the Navajo courts on a state and federal design, with an assumption there was no justice under Navajo custom. The fact was overlooked that Navajo custom had worked effectively to resolve disputes up to that time.

The current judges of the Navajo Tribal Courts desired to revive the old practice of appointing community leaders to resolve disputes because of the fact that there are many problems in the community which cannot be resolved in a formal court setting. Law suits are expensive, time consuming and confusing to the ordinary citizen and often the Anglo-European system of courtroom confrontation simply does not work. . . .

Under Navajo law, the Navajo Tribal Courts are required to use the customs and traditions of the Navajo people as law in civil cases. Not only is this the legislative command of the Navajo Tribal Council, but it is an assurance that the Navajo people can have their problems taken care of in their own way. . . . Aside from the fact the Navajo have the legal right to use traditional ways, there are very good policy reasons for doing so, particularly through a community court system. The Indian court systems were originally established with the idea that punishment would make people behave, but there are studies which show that there is reason to doubt that punish-

ment, as such, works. Therefore the law should look to individual reconciliation with the community in criminal law and individual conciliation in civil disputes . . .

The Peacemaker Court is designed to achieve these goals and to show that the testimony of Vine DeLoria, Jr. to the United States Congress is true:

Tribes are not vestiges of the past, but laboratories for the future.

Aside from the right to be a laboratory for change, the right to make laws which fit the situation of the Navajo people is very important. The name "Peacemaker" was taken from a Pennsylvania Statute passed in 1683 which provided for peacemakers to arbitrate disputes [in turn the legislators of the Pennsylvania Quaker Legislature took the name from the Peacemaker Courts of the Seneca Nation]. It is very appropriate that the Navajo courts have used the term "Peacemaker Court," because the Naat' Aani used as the traditional precedent for our court were the "peace leaders" of the Navajo. The Peacemaker court system is designed to take the place of formalized, expensive and unharmonious Anglo-European legal systems and to provide a way for the Navajo peacemakers to be new "peace leaders" to show the way to peaceful community dispute resolution.¹²⁹

Thus we can see how the best known of the U.S. tribal courts is now reaching back and restoring as an important part of its dispute resolution process a contemporary version of its traditional processes. Under the Navajo system peacemakers are selected by local communities although the parties to a particular dispute may select someone of their own choosing to act as peacemaker. The peacemaker function combines both mediation and, if the parties agree, the determination of a final decision regarding the dispute. Any decision rendered by the peacemaker may be entered as a formal order of the Navajo court system. The process can be initiated by the parties themselves or the District Court, the trial level of the Navajo system, can refer a matter to the Peacemaker Court. There is thus a high degree of flexibility and interaction between the two dispute resolution processes with the view that the strength of both be brought to bear in the interests of the administration of justice. Although the principal jurisdiction of the Peacemaker Court is civil it also deals with lesser criminal cases.

The Peacemaker concept is one which a number of Aboriginal communities in Canada have found attractive insofar as it reflects their own dispute resolution process. Thus the Sauteau Indian Band of northeast British Columbia has recently proposed a justice system for its community which builds around the Peacemaker model. In the Sauteau proposal there would be established a Tribal Justice Commission whose members would be elected by the community. The Commission would have authority to nominate respected people within the community to act as peacemakers and also as Justice Tribunal jurors. The system

envisages a two-level process with a single peacemaker at the first instance and a panel of Tribunal jurors at the second level for more complicated cases where resolution is not achieved before the peacemaker. The significant difference between this proposal and the Navajo system is that under the Navajo system if the peacemaker process does not work the case then enters an adversary tribal court process in accordance with the non-Aboriginal model. Under the Saulteau proposal the Tribunal would not be based on the adversary model but would reflect Saulteau decision-making. Also reflecting the Saulteau world view, a complaint filed with the Tribunal may involve both civil and criminal matters. The relevance of the distinction would be that in the case of a criminal matter consultation would take place with local Crown Counsel to avoid conflicting proceedings.

From the perspective of initiatives such as that of the Saulteau Band the development of a justice system which is woven into the fabric of their society and reflects its values is made easier by the very absence of an established adversary-based tribal court such as the Navajo.

The Saulteau are not the only aboriginal communities in Canada who have sought to build upon the Peacemaker model. In Manitoba, the Interlake Reserves Tribal Council has given this concept a contemporary focus and has seen this initiative as being more productive for its communities than a Navajo style tribal court. The Native Harmony and Restoration Centre was initially approved in 1986 at a Peoples Assembly involving the eight reserve communities than comprising the Interlake Reserves Tribal Council (I.T.R.C.). The process also involved consultation with the neighboring non-aboriginal communities. The Tribal Council began the planning process to establish the centre in the old Gypsumville Radar Base which they received from the provincial government. The site has since been renamed as Pineimuta Place. The philosophy of the Interlake initiative is described by the Tribal Council in this way:

The mandate of the Native Harmony and Restoration Centre is to provide a comprehensive rehabilitational environment for offenders and victims based on culturally consistent Aboriginal justice traditions. The key cultural concept around which the program components are structured is that of restorative justice; mediation of conflicts, injury, and harm between the parties directly involved and holding them accountable to each other in the context of community solidarity. Traditionally, the responsibility for the resolution of conflict and for the restoration and relationship was assigned to the "peacemaker": an Elder skilled in bringing disputants together to resolve differences and restore harmony in community life. The N.H.R.C. is a contemporary attempt to re-establish that peacemaker role within a cultural setting where it remains an appropriate, albeit under-utilized, response to issues of justice, well-being and community harmony. . . .

Operations of the N.H.R.C. are both community-based and centralized at an off-reserve residential setting. Elders and community-based mediation workers provide conflict resolutions services at the local community level. They also act as a link between the individual community and the Centre at Pineimuta Place. In the residential setting, elders provide healing and peacemaker services while other trained program staff provide counselling and mediation services. Because of the cultural value placed on keeping the family together, the program also accommodates families of offenders whenever possible. Facilities at Pineimuta Place include 20 family units for this purpose. . . .

An actual treatment program consists of three distinct phases. Time spent in healing and therapy allows the resident to develop skills and increase his/her self-esteem. This enables the residents to take part in the peacemaking process. The second phase of the treatment process is mediation and, hopefully, reconciliation with the victim. The final phase is that of restitution and/or other appropriate consequences as agreed to in the mediation agreement.¹³⁰

The Interlake Tribal Council see the services at the Harmony and Restoration Centre as being available to adults who have been convicted by criminal courts for property offences and less serious offences against the person; adults who are diverted from the court process for the purposes of applying alternative measures; young offenders who are candidates for open or closed custody but not subject to attempts by the Crown for transfer to adult court proceedings; referrals by band authorities and social service agencies of reserve residents engaged in conflict that could lead to criminal charges; and any aboriginal person likely to be incarcerated for convictions awaiting disposition.

The Interlake proposal has a carefully planned training program in which there is a primary commitment to train local community members to staff the centre. In every sense, therefore, the initiative is community based and is designed to both draw its strength from the collective resources of its members and in turn provide strength to those who most need it. As with the Gitksan and Wet'suwet'en, the essential elements of the Interlake proposal have been laid before both the provincial and federal governments but thus far the necessary funding commitments have yet to be made.

The work of the Interlake Tribal Council, like that of the Sauteau, the Coast Salish and the Gitksan and Wet'suwet'en, seeks to build upon the secure foundations of an indigenous system while exploring its relationship to our system which has for a long time reflected different assumptions about the process of achieving justice. These initiatives seek to find the points of intersection, points of conflict and also points where mutual accommodation is possible.

Accommodation for Aboriginal peoples thus far in the history of this country has been one dimensional with their accepting or being forced to accept our way of doing things. But as we have shown our way of doing justice is itself undergoing significant conceptual and structural changes in the resolution of conflicts which we characterize as criminal. For our system this represents a search for a new paradigm of justice. For Aboriginal peoples, as we have also seen it represents making contemporary an existing paradigm, indeed the original paradigm of justice in Canada. In this regard it is appropriate to reflect on the words of the great Iroquois statesman, Canassatego, in 1744 when in responding to the Governor of Maryland regarding that colony's claims to lands based on long-time possession, he stated:

When you mention the affair of the land yesterday, you went back to old times, and told us, you had been in possession of the province of Maryland about 100 years; but what is 100 years in comparison of the length of time since our claim began? Since we came out of this ground? For we must tell you, that long before 100 years our ancestors came out of this very ground, and their children have remained here ever since. You came out of the ground in a country that lies beyond the seas, there you may have a just claim, *but here you must allow us to be your elder brethren*, and the lands to belong to us long before you knew anything of them.¹³¹

In the search for pathways to justice to resolve the conflicts in Aboriginal communities which lead away from the gates of our prisons, it is appropriate that we see Aboriginal peoples as "our elder brethren." If we can do that there is much scope for mutual accommodation both in the short and long term.

It is, however, critical to acknowledge that the search for the pathways to justice necessarily involves the recognition and respect for Aboriginal and treaty rights and the principle of Aboriginal self-determination within Canadian Confederation. In the long term, doing justice for the First Nations of South Vancouver Island, the Gitksan and Wet'suwet'en, the Saulteau, and the Interlake Tribal Council may look very different from what we now view as the criminal justice system. But there is also the possibility that for non-Aboriginal people the system may go through fundamental changes. If it does, the process of accommodation will clearly be that much easier. But paralleling that reform agenda, in the spirit of the Two Row Wampum, the right of Aboriginal peoples to develop their own systems of justice must be recognized and seen not as a symbol of the failure, but rather an integral part of the completion of Confederation—a Confederation which includes all of Canada's founding nations.

NOTES

- ¹ Correctional Law Review Working Paper No. 7, *Correctional Issues Affecting Native Peoples*, at 3.
- ² Census Canada (1981); Solicitor General, Native and Non-native Admissions to Federal, Provincial and Territorial Correctional Institutions (1985).
- ³ Michael Jackson, *Locking Up Natives in Canada*, a Report of the Committee of the Canadian Bar Association (June 1988) reprinted in (1989) 23 U.B.C.L.Rev. 205.
- ⁴ *Justice on Trial*, ch. 8-17ff. The figures released by the Manitoba Justice Inquiry indicate that in Manitoba also the overrepresentation of aboriginal people has accelerated in recent years. The aboriginal population in all Manitoba provincial institutions in 1989 was 37%. For young people it was 61% and for women 67% (*The Justice System and Aboriginal People*, Report of the Aboriginal Justice Inquiry of Manitoba (1991) vol. 1 at 101.
- ⁵ Commissioners Report, Findings and Recommendations, vol. 1 at 162.
- ⁶ Royal Commission on the Donald Marshall Jr. Prosecution, *The Mi'kmaq and Criminal Justice in Nova Scotia*, vol. 3 (1988) at 52.
- ⁷ *Ibid.* at 2-46.
- ⁸ *Indian Policing Policy Review*: Task Force Report (1990) at 3.
- ⁹ *Justice on Trial* at ch.2-49.
- ¹⁰ Moana Jackson, *The Maori and the Criminal Justice System, He Whaipanga Hou—A New Perspective, Part 2* (New Zealand Department of Justice, 1988) at 120-21.
- ¹¹ *Report of the Special Committee on Indian Self-Government, Indian Self-Government in Canada* (the Penner Report) 1983 at 14-15.
- ¹² *Delgamunkw v. B.C.* [1991] 3 W.W.R. 97 at 268-69.
- ¹³ *Supra*, note 3 at 246-47.
- ¹⁴ LaPrairie, 1990.
- ¹⁵ See e.g. Muirhead, *An Analysis of Native Over-Representation in Correctional Institutions in B.C.* (1981), where the impact of migration from rural to urban areas is also discussed as an additional layer of causation for socio-economic conditions leading to crime. See also Havemann *et al.*, *Law and Order for Canada's Indigenous People: A review of Recent Research Literature Relating to the Operation of the Criminal Justice System and Canada's Indigenous People* (Prairie Justice Research, 1985) at 110.
- ¹⁶ Law Reform Commission of Canada, *The Native Offender and the Law* (1974) at 81 and 45.
- ¹⁷ *Northern Frontier, Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry*, vol. 1 at 152.
- ¹⁸ *Ibid.* at 194.
- ¹⁹ *Supra*, note 3 at 6-7.
- ²⁰ *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (1990) at 4-6.
- ²¹ *Ibid.* at 72.
- ²² *Supra*, note 4 at ch.8-1.
- ²³ *Supra*, note 10 at 25.
- ²⁴ *Ibid.* at 64.
- ²⁵ *Ibid.* at 44-45.
- ²⁶ *Ibid.* at 100.

- 27 *Ibid.* at 102-03.
- 28 *Ibid.* at 161-62.
- 29 *Supra*, note 6 at 53.
- 30 *Supra*, note 10 at 35.
- 31 *Delgumuukw*, *supra*, note 12 at 272-73.
- 32 (1986), 23 C.C.C. (3d) 238 at 245.
- 33 Hoebel at 50.
- 34 *Ibid.* at 50-51.
- 35 *Supra*, note 10 at 36-44.
- 36 [this issue].
- 37 *Supra*, note 10 at 110-11. For more general discussion of the differences between Aboriginal and non-Aboriginal models of justice, see *Justice on Trial* ch. 9; An Aboriginal Perspective on Justice. See also, *The Justice System and Aboriginal People* [this issue].
- 38 Submission by New Saugeen Nation, cited in *supra*, note 20.
- 39 *Supra*, note 4 at ch.4-3.
- 40 *Ibid.* at ch.4-31. For further examples of aboriginal justice systems in Canada see W. Newall, *Crime and Justice Among the Iroquois Nations* (Montreal: Caughnawagh Historical Society, 1965); M. Coyne, *Traditional Indian Justice in Ontario: A Role for the Present?* (1986) 24 Osgoode Hall L.J. 605.
- 41 *Supra*, note 10 at 262-64.
- 42 *Ibid.* at 15-16.
- 43 Law Reform Commission of Canada, *Studies on Diversion*, working paper no.7 (1975) at 4.
- 44 *Ibid.* at 3.
- 45 *Supra*, note 43 at 10-12.
- 46 *Ibid.* at 26-27.
- 47 Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions*, Working Paper no. 3 (1974), at 7, 9-10.
- 48 Parker, "The Law of Probation," in Law Reform Commission of Canada, *Community Participation and Sentencing* (1976) at 88.
- 49 *Ibid.* at 63.
- 50 Working paper no. 5 at 6-8.
- 51 *Ibid.* at 14.
- 52 *Supra*, note 43 at 23-24.
- 53 Canada, Department of Justice, *The Criminal Law in Canadian Society* (1982) at 62.
- 54 Report of the N.A.A.C.J., presented at September 1985 seminar "Criminal Justice And Victim-Offender-Community Reconciliation" at xiv-xv.
- 55 Law Reform Commission of Canada, *Sentencing Reform, A Canadian Approach, Report of the Canadian Sentencing Commission* (1987) at 114.
- 56 *Ibid.* at 114.
- 57 Canada, Standing Committee on Justice and Solicitor General, *Taking Responsibility* (1988) at 55.
- 58 *Ibid.* at 56.
- 59 *Ibid.* at 81.
- 60 *Ibid.* 87.

- ⁶¹ *Ibid.* at 90.
- ⁶² *Ibid.* at 90.
- ⁶³ *Ibid.* at 91-93.
- ⁶⁴ *Ibid.* at 97-98.
- ⁶⁵ *Ibid.* at 212.
- ⁶⁶ Canada, Department of Justice, *Sentencing: Directions For Reform* (1990) at 7-8.
- ⁶⁷ *Ibid.* at 20.
- ⁶⁸ *Ibid.*
- ⁶⁹ *Ibid.* at 19.
- ⁷⁰ Canadian Criminal Justice Association, "Comments on *Directions For Reform*" (7 December 1990) at 3.
- ⁷¹ (1986), 26 C.C.C. (3d) 193 (C.A.).
- ⁷² *Ibid.* at 199-200.
- ⁷³ *Ibid.* at 205.
- ⁷⁴ *Ibid.* at 206-07.
- ⁷⁵ (1985), 22 C.C.C. (3d) 79.
- ⁷⁶ *Supra*, note 71 at 195-96.
- ⁷⁷ *Supra*, note 4 at ch.2-61.
- ⁷⁸ *Supra*, note 6, vol. 1 at 167-70; *supra*, note 4 at ch.11.
- ⁷⁹ *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, *ibid.*
- ⁸⁰ *Ibid.* at 162.
- ⁸¹ *Supra*, note 6, vol.2 at 83-89.
- ⁸² *Ibid.* at 84.
- ⁸³ *Supra*, note 3 at 239-42.
- ⁸⁴ *Supra*, note 10 at 269.
- ⁸⁵ First Nations of South Island Tribal Council Justice Committee, "An Introduction to Aboriginal Law," presented to the Western Judicial Education Centre, 9 March 1990.
- ⁸⁶ Project Proposal of First Nations of South Island Tribal Council submitted to the Attorney General of B.C., 20 June 1986.
- ⁸⁷ Terms of reference as set out in "An Introduction to Aboriginal Law" prepared for a Cross-Cultural Awareness Workshop by the First Nations of South Island Tribal Council, 9 March 1990.
- ⁸⁸ *Ibid.*
- ⁸⁹ *Family Relations Act and Audrey Thomas and Allan John Jones* (13 July 1988) [unreported].
- ⁹⁰ Rupert Ross, "Cultural Blindness and the Justice System in Remote Native Communities," a paper presented to the Sharing Common Ground Conference on Aboriginal Policing Services, Edmonton, May 1990 at 11-12.
- ⁹¹ *Ibid.*
- ⁹² *Ibid.* at 13-14.
- ⁹³ Proposal submitted to the B.C. Ministry of the Attorney General entitled *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People* at 15-19.
- ⁹⁴ *Ibid.*

- ⁹⁵ *Delgamuukw v. R.*, Transcript of Proceedings, Vol. 2 at 83 (13 May 1987). Reproduced in Sisday Wa and Delgamuukw, *The Spirit in the Land*, (1989) at 31.
- ⁹⁶ *Supra*, note 93 at 25-26.
- ⁹⁷ *Ibid.* at 27-28.
- ⁹⁸ *Ibid.* at 30.
- ⁹⁹ *R. v. Mitchell* (21 February 1990) (B.C.C.A.) [unreported] at 5.
- ¹⁰⁰ *Ibid.* at 7.
- ¹⁰¹ *Ibid.* at 9.
- ¹⁰² *Ibid.* at 8.
- ¹⁰³ *Ibid.* at 9.
- ¹⁰⁴ *Ibid.*
- ¹⁰⁵ Resubmission to the B.C. Ministry of the Attorney General entitled *Unlocking Aboriginal Justice* (4 May 1990) at 7.
- ¹⁰⁶ *Ibid.* at 10.
- ¹⁰⁷ *Ibid.* at 9.
- ¹⁰⁸ *Ibid.* at 2-3.
- ¹⁰⁹ *Supra*, note 4 at ch.2-27.
- ¹¹⁰ *Ibid.* at ch.6-46.
- ¹¹¹ B.C. Ministry of Attorney General, Justice Reform Committee, *Access to Justice* (November 1988).
- ¹¹² P. Ewart, *Report on Proposal for Native Diversion* (30 June 1989) at 3.
- ¹¹³ *Supra*, note 111 at 202-03.
- ¹¹⁴ *Supra*, note 4 at ch.2-61.
- ¹¹⁵ B.B. Keon-Cohen, "Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis", (1986) Canadian Legal Aid Bulletin 186 at 189-90.
- ¹¹⁶ *Supra*, note 20 at 38-39.
- ¹¹⁷ [this issue] at [25-27 in original submission]
- ¹¹⁸ *Supra*, note 3 at 229-33.
- ¹¹⁹ *Ibid.* at 225.
- ¹²⁰ Pub.L.No. 73-383 c.576, 48 Stat 984.
- ¹²¹ *The Major Crimes Act* of 1885 (c.341, 23 Stat. 362).
- ¹²² *The Indian Civil Rights Act* of 1968 (82 Stat. 75, 25 U.S.C. 1301-03).
- ¹²³ See *Locking Up Natives in Canada*, *supra*, note 3 at 227-28. For a more detailed discussion see Hommingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience" [1988] 2 C.N.L.R. 1 and *The Report of the Aboriginal Justice Inquiry of Manitoba* (1991) vol. 1, ch. 7 at 268-98.
- ¹²⁴ *Supra*, note 3 at 229.
- ¹²⁵ *Ibid.*
- ¹²⁶ For further discussion of the advantages of tribal courts in the U.S., see *The Report of the Aboriginal Justice Inquiry of Manitoba*, *supra*, note 122 at 296-98.
- ¹²⁷ *Supra*, note 4 at ch.1-5.
- ¹²⁸ *Navajo Peacemaker Court Manual* (1982) at 2-6.
- ¹²⁹ Interlake Reserves Tribal Council's Native Harmony and Restoration Centre, Staff Training Proposal, rev'd 23 January 1991.
- ¹³⁰ *Treaty of Lancaster*, 1744, in *Early American Indian Documents, Treaties and Laws* 1607-1789, vol. II, at 84.