

RAVEN GROWS NEW FEATHERS:
Realizing Contemporary Indigenous Visions of Justice
in Canada Through the Culturally Sensitive
Interpretations of Legal Rights

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ABSTRACT

Indigenous peoples in Canada demand self-determination over criminal justice for a number of reasons. Indigenous approaches to justice that resemble restorative justice are thought to be more effective in dealing with Indigenous criminality, to promote the healing of offenders and victims, and to promote relationship reparation in Indigenous communities. Indigenous punitive sanctions such as corporal punishment may also provide a briefer deterrent alternative that avoids the hardening conditions of prisons.

Indigenous peoples have little room to pursue these visions of justice. Canadian laws and policies accords only minor accommodations of Indigenous approaches to justice. This is sustained by a political culture that often demands harsher sentences to assure deterrence and public safety. Judicial treatment of the Aboriginal rights provision of the *Constitution Act, 1982*, provides limited scope for Indigenous peoples to litigate or negotiate for rights to substantive criminal jurisdiction.

One approach to overcoming this is to litigate for an Indigenous right of internal autonomy. It gives Indigenous peoples a better position to demand greater accommodation for their justice practices. Another approach is for Indigenous communities to explore avenues for their own economic development, so that they can their own justice systems, free of external influence, to meet their needs.

If Indigenous self-determination becomes a reality, there is another issue that is imperative to address. What happens when Indigenous individuals assert their legal rights under the *Canadian Charter of Rights and Freedoms* against their own justice systems? This engages a tension between Indigenous justice traditions that emphasize collective well-being and individual rights.

There is a method for resolving this tension. The Royal Commission on Aboriginal Peoples explored the concept of culturally sensitive interpretation of legal rights, re-interpreting legal rights under the *Charter* to better reflect Indigenous justice traditions while still leaving in place meaningful safeguards against the abuse of collective power. This dissertation puts culturally sensitive interpretation into action by exploring specific proposals with reference to specific rights in the *Charter*.

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For Mary, Leo, and Naomi

CHAPTER 1: INTRODUCTION

Raven cares for the Indigenous peoples of Canada. He wants to see them happy and free. He feels for their misery as they cope with their hardships in the present day, a time that sees an enduring and overwhelming society previously foreign frustrate their desires. He feels sorrow as they turn on each other and harm each other after being cut off from the teachings he shared with their ancestors, and after being oppressed in their own land called Canada. He feels sorrow as many of them are confined like animals inside small buildings called 'jails' and 'prisons'. Raven feels hope though. He sees Indigenous peoples pursuing concrete solutions to their problems. They want to be able to lead fulfilling lives, even allowing for the continued presence of that society called Canada. Many of them want to regain control over their own affairs, using the same teachings that Raven shared with their ancestors long ago. Many of them want to use those teachings to resolve the destructive conflicts and disputes that afflict their communities on an ongoing basis. Many of them want to use the teachings to heal those who have been harmed and oppressed. Raven is happy. He spreads his wings outward as he readies himself for an exciting new journey.

But Raven hesitates. He senses things that trouble him. Raven ponders what will happen when Indigenous peoples reclaim from the Canadian state the power to resolve their own disputes with their own teachings. He becomes aware of a law considered sacred by many Canadians, a written law called the *Charter*. He wonders what will happen if this *Charter* applies to conflicts in Indigenous communities. Raven begins to see possibilities that concern him. Some of the Indigenous peoples received from him a spiritual teaching to speak the truth to the Elders when there was a dispute. Raven's far

seeing eye begins to read the words of this *Charter*. He notices that people who are accused of wrongdoing have a right not to incriminate themselves. What if an Indigenous man accused of wrongdoing tells his Elders he doesn't have to speak to them because of this *Charter*? Does this mean nothing will be done about what the man did? Does this mean that the conflict and tensions in the community remain unresolved? What if he admitted he did the wrongdoing to a couple of men in uniforms who were employed by the community to keep the peace? Raven then looks at another part of this *Charter* and notices a clause that says something about excluding evidence. Does this mean that nothing will be done because the men in uniforms forgot to tell him about something called a 'right to a lawyer'? Raven is genuinely worried about the possibilities.

His concerns do not stop there. The old ways of proving oneself as a worthy leader have been eroded. People become leaders in Indigenous communities nowadays by mimicking the ways of Canadian leaders. This troubles Raven. He sees that community members often compete with each other for power and money. He sees that those in power can abuse their advantages to the detriment of the people they are supposed to be serving. What does this mean for resolving conflicts in the community? Does this mean that innocent people will be persecuted by being punished for things they never did? Does this mean that the powerful can use those men in uniforms to intimidate community members? Will this leave vulnerable people, such as women and children, unsafe in their own communities? Raven is distressed. Maybe this written law, this *Charter*, is helpful after all if it can prevent these abuses from happening.

But Raven then realizes that this leads back to those other problems. He is confused. He closes his eyes and thinks hard. Raven realizes that Indigenous people live

in a world that is far different than the one when he first gave his teachings. The needs and circumstances of Indigenous peoples have changed. Does this mean that the old laws and teachings should adapt? Is it possible that there are some things about the written law of the Canadians that are good and useful to Indigenous peoples? Can the old ways blend with some of those written laws to meet the challenges of a new time? He contemplates the possibilities. The journey ahead will be a challenging one. Raven wonders whether he should grow new feathers.

The narratives of Raven embarking on a new journey, meditating on potential troubles, and growing new feathers, are intended to symbolize the two primary goals of this dissertation. Both goals are concerned with realizing contemporary Indigenous visions of justice within what is now Canada. One goal is an in-depth exploration of possibilities for Indigenous peoples obtaining substantive jurisdiction over criminal justice, which is presently held by the Canadian state. This is the subject of the next seven chapters. The remaining chapters confront in detail an important issue that will need to be addressed if Indigenous peoples do attain jurisdiction over criminal justice. How can Indigenous communities address the inevitable tension that would arise should Indigenous individuals assert their constitutional rights under the *Charter of Rights and Freedoms*¹ against their own justice systems? The rest of this introduction provides a chapter by chapter overview of the dissertation.

Chapter 2 provides the initial background by exploring how some Indigenous societies dealt with crime in the past – some of the spiritual teachings that Raven (the Trickster) shared in the past. The basis for this is an examination of the justice practices

¹ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), c. 11.

of several Indigenous societies, as described through the lens of disciplines such as anthropology, ethnography, and history. There are several concerns with the use of such descriptions, such as historical authenticity, loss of memory, and perceived biases on the part of non-Indigenous scholars when studying Indigenous cultures. The discussion in this chapter strives to avoid such controversies by grounding reliance on scholarly descriptions on whether they are consistent with what present day Indigenous peoples themselves believed how their ancestors practiced justice. This overview reveals that Indigenous justice practices often emphasized community harmony, reparation, and reconciliation between aggrieved parties. Some Indigenous societies however also used harsh and forceful sanctions such as corporal punishment and execution.

Chapter 3 explores how Indigenous communities may want to adapt past justice practices for contemporary use. A key impetus behind this is the fact that Indigenous peoples are imprisoned far out of proportion to their representation in the Canadian population. This reflects several problems. Many Indigenous persons are left unable to lead healthy lives while in prison, and are damaged even further by the experience of incarceration. Social forces such as poverty wreak havoc on Indigenous communities, leading many Indigenous persons to lives of crime and prolonged involvement in the justice system. Many people in Indigenous communities become victims of crime. Contemporary adaptations of past Indigenous approaches to justice are often presented as potential solutions to these problems, that they can deal more constructively with the underlying causes behind Indigenous crime, that they provide a form of healing, and that they would further community harmony. These themes are fleshed out by comparing Indigenous justice practices to restorative justice, a model of justice for which there is an

abundance of literature produced by legal scholars, criminologists, sociologists, and others. The chapter also considers a relatively unexplored possibility, the contemporary use of corporal sanctions as punitive alternatives to incarceration.

Chapter 4 provides an overview of Indigenous demands for self-determination, the objective that Raven wants Indigenous peoples to achieve for themselves, from a number of perspectives and with a particular reference to criminal justice. Self-determination for identifiable peoples, free of interference from other peoples, is often thought of as something that has value in itself. Cultural legitimacy is also seen as important to self-determination. The concept is that different peoples should be able to govern themselves in accordance with their own cultures, customs, and laws. Canadian and Indigenous approaches to justice each reflect different cultures, and worldviews. The application of Canadian standards of justice to conflicts in Indigenous communities can amount to a culturally illegitimate imposition. Self-determination is also seen as having a remedial aspect. If a people have previously been oppressed, self-determination is seen as empowering them to pursue solutions to the social problems left behind by Canadian colonialism. Self-determination over criminal justice can enable Indigenous communities to employ contemporary adaptations of their past justice practices as solutions to the problems caused by colonialism. These are the possibilities that fill Raven with excitement and hope, and if realized would mark the start of a new journey.

The trouble is in getting to that point. The problem remains that Indigenous peoples have minimal legal space and jurisdiction within which to realize their own visions of justice. This is the subject of Chapter 5, which provides a detailed overview of Canadian laws and policies, judicial and legislative, relevant to Indigenous legal

jurisdiction over criminal justice. Canadian laws and policies tend to afford only minor accommodations of Indigenous approaches to justice in the form of sentencing circles and diversionary programs for minor offences, and correctional programs for incarcerated offenders. Canadian criminal legislation such as the *Criminal Code*² applies as a matter of course to Indigenous peoples, with the effect of suppressing Indigenous legal orders. While Indigenous constitutional rights are recognized in s. 35(1) of Canada's *Constitution Act, 1982* (which reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed")³, the rights available under this section are interpreted very narrowly by the courts. The result is that Indigenous peoples have very little recourse to challenge this state of affairs.

Chapter 6 explores some of the reasons behind this. Canadian politicians are motivated by two distinct political forces that dissuade them from further accommodations of Indigenous approaches to justice. One is a political culture that often regards longer and more severe sentences as necessary to deter crime and protect the public. Canadian leaders therefore strive to avoid the appearance of being soft on crime. The other political force is the risk of losing political support as a consequence of appearing to give too much away to an Indigenous minority at the expense of a non-Indigenous majority. These two forces may combine together to produce an especially acute political reluctance to further accommodate Indigenous approaches to justice. Canadian leaders avoid showing a leniency in the sentencing of Indigenous offenders that non-Indigenous offenders do not enjoy. The Canadian judiciary has in turn demonstrated a trend towards being deferential towards Canadian governments in its interpretation of

² *Criminal Code*, R.S.C. 1985, c. 46.

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), c. 11.

Indigenous rights. The judiciary has also consistently stated a preference that contentious Indigenous issues be resolved by political negotiation rather than litigation.

Chapter 7 will explore how Indigenous peoples can expand the legal space within which to realize their own visions of criminal justice. A strategy that will be explored is litigating for an Indigenous right to internal autonomy, the right of a community to resolve conflicts between its own members in accordance with its own customary laws. This is based on a dissenting judgment that suggested that the common law doctrine of Indigenous rights, which recognized the rights of Indigenous peoples to govern their own affairs by their customs and usages, can be elevated to become a source of constitutional rights under s. 35 (1). It also has basis in certain *obiter dicta* in Indigenous rights jurisprudence that suggest a willingness to revisit the issue of self-government under s. 35(1). Another encouraging development is the rising chorus of calls to have one Supreme Court seat reserved for an Indigenous judge. This may amount to little more than a position that is possibly favourable to Indigenous aspirations during litigation, but it may provide a relatively better setting in which to pursue broader rights under s. 35(1).

The desired result of this strategy is that Indigenous communities come to either the freedom to structure their own justice systems independent of Canadian legal and political restraints, or a strengthened position from which to negotiate greater accommodations from Canadian leaders. The latter indeed highlights a flaw with the Supreme Court's stated preference for Indigenous rights issues to be resolved by negotiation rather than litigation. Such a preference puts the horse before the carriage in the sense that without a strong basis in constitutional rights, the negotiating position of Indigenous peoples is weak. Indigenous peoples need a solid foundation for judicial

recognition of their rights under s. 35(1) to be able to negotiate effectively with Canadian governments and obtain meaningful concessions.

Even if Indigenous societies attain self-determination over criminal justice, this engages another important issue, and thus the reason why Raven hesitated to take flight right away. What might happen should Indigenous individuals invoke the *Canadian Charter of Rights and Freedoms* against their own justice systems? Should Indigenous societies allow their collective goals to be compromised for the sake of individual rights protections? What happens if Indigenous individuals are not allowed to invoke the *Charter*? Does this allow Indigenous collectivities to establish tyrannies over their own members? There is a certain tension here between Indigenous visions of justice that emphasize crime control and the collective good, and *Charter* rights that safeguard individual liberty. This can be seen not only as tension between collectivist and individualist visions, but between culturally-grounded visions of governance as well.

What is proposed is that this tension can be addressed through culturally sensitive interpretations of the legal rights of the *Charter*. What this means is that *Charter* rights are interpreted creatively to produce new doctrines that both accommodate Indigenous perspectives on justice and still provide meaningful checks against abuses of collective power. This tension, and the use of culturally sensitive interpretations to address it, is the subject of Chapter 8. Discussions in Chapter 8 will also demonstrate that Canadian constitutional law provides workable mechanisms to realize culturally sensitive interpretations of legal rights, since it requires that when different constitutional rights come into conflict they should be balanced in non-hierarchical fashion without clear priority being given to one over the other.

The remaining chapters explore how culturally sensitive interpretation of legal rights can be put into action. These are the parts where Raven closes his eyes and thinks hard. The particular rights that are subjected to culturally sensitive interpretation are the right to an independent tribunal, the right to natural justice, the right to be presumed innocent, the right to an adversarial trial, the right against unreasonable search and seizure, the right to silence, the right to counsel, the right against cruel and unusual punishment, and the exclusion of evidence as a remedy for *Charter* violations. Each *Charter* right is assessed in terms of potential difficulties that they can create for Indigenous visions of justice, but also in terms of why it may be needed in order to prevent abuses of power in Indigenous communities. A concrete proposal that reflects a culturally sensitive interpretation is then presented that strives to reconcile the competing concerns. What is meant by reconciliation is that the proposal tries to leave as much as possible for Indigenous visions of justice to operate in the communities, while still leaving in place meaningful checks against abuses of power. The proposals represent a blending of Indigenous traditions and Canadian legal principles. Raven grows new feathers and spreads his wings for a new journey.

Chapter 9 deals with rights of procedural fairness during what we may think of as the sentencing phase of criminal proceedings. The right to an independent judiciary means that judges have their independence protected by security of tenure, security of remuneration, and security of administration. If judicial independence requires certain qualifications such as a law degree, it can entail incompatibility with Indigenous notions of authority that often emphasize seniority and recognition for character and wisdom in the community. Mandatory retirement is also problematic since age did not represent a

limit on the eligibility of an Indigenous Elder to participate in conflict resolution. The coercive powers associated with common law judges may also be incompatible with Indigenous modes of authority that often emphasized teaching and persuasion. The proposal here is that Indigenous communities can have their conflicts overseen by community court judges who are protected by the three features of judicial independence. They do not necessarily have to have onerous requirements such as a law degree. Indigenous communities themselves can set the qualifications for community court judges. Furthermore, so long as the parties to a conflict act fairly towards each other, their resolutions can become binding on a community court judge.

The right to natural justice can present difficulties because it requires that judicial authorities remove themselves from hearing cases where they are personally tied to one of the parties. This in practice can result in community court judges from always having to disqualify themselves given the closely-knit nature of smaller Indigenous communities. There is nonetheless a real need for procedural fairness in Indigenous communities, where power dynamics can operate to the severe disadvantage of either the accused or the victim. The proposal is that community court judges need not disqualify themselves so long as they actually are being fair in their decision-making. If one of the parties has concerns about fairness, other safeguards can be made available such as recourse to Indigenous courts of appeal and requiring community court judges to provide recorded reasons in cases where natural justice is potentially a source of concern (e.g. the judge is tied to one of the parties).

Chapter 10 is concerned with *Charter* rights that are applicable to when an accused asserts innocence, and necessitates a trial to determine the facts. The right to be

presumed innocent until proven guilty beyond a reasonable doubt can present problems for Indigenous practices that encourage offenders to accept responsibility for their actions. It can also entail a social cost in the form of Indigenous offenders exploiting the high standard of proof to get off for crimes for which they may be factually guilty. This social cost may be especially acute for Indigenous communities that are plagued by problems such as intergenerational sexual abuse, substance abuse, and organized crime. At the same time, the presumption of innocence has the legitimate objective of avoiding the risk of convicting the possibly innocent. The proposal is that proof beyond a reasonable doubt be replaced by the use of consensus, either by members of the community or by a panel of community court judges, as to whether an accused is guilty. This is meant to comport roughly with the traditional concept that the community at large is satisfied that a community member committed an offence.

The right to adversarial procedures during a trial can be perceived as furthering tensions between community members where Indigenous visions of justice strive to further harmony. The right to cross-examine can also involve cultural faux pas since it often involves a confrontational approach to questioning a witness. The proposal is that the scope of when truly adversarial trials be used should be narrowed down to when there is a live issue as to whether the accused did anything to begin with (e.g. cases based on circumstantial evidence), and no longer applicable to where it is apparent the accused committed a harmful act but the reasons why remain unclear (e.g. self-defence, acting while intoxicated). Cross-examination during truly adversarial trials can be restructured in a narrative format that resembles traditional story telling to avoid cultural *faux pas*.

Chapter 11 deals with *Charter* rights that apply while matters are still at an investigative stage. The right against unreasonable search and seizure is designed to prevent the establishment of a police state by excluding what people may reasonably expect to be their own private affairs (e.g. their homes, their persons, their belongings) from police scrutiny, subject to judicial authority authorizing a search based on reasonable and probable grounds. This may significantly curtail the ability of modern Indigenous police forces to protect the public against threats to the collective good, such as substance abuse and gang activity. The proposal is that *Charter* jurisprudence on what citizens can reasonably expect to be kept private from the state provides an ideal mechanism to address Indigenous concerns, since Indigenous perspectives can enter the analysis. For example, Indigenous notions of collective property holding mean that a local Elder can permit a warrantless search of a suspect's home. Legitimate threats to collective well-being, such as gang activity, can justify warrantless searches where officers nonetheless have a reasonable basis to suspect the occurrence of the activity.

The right to silence may involve direct conflict with Indigenous truth speaking traditions that required crime suspects to express their side of the story to community leaders. The resolution is that Indigenous accuseds can assert their right to silence against police authorities during the investigative stage. When matters come to the trial phase, the accusers must present a bona fide case to meet against the accused. If a community court judge decides that there is a case to meet, the truth speaking tradition becomes operative and the accused must explain his or her side of the story.

The right to counsel may be problematic in more than one way. Some Indigenous societies did have a concept of a representative spokesperson for an accused, but others

did not. The right to counsel may therefore represent a form of external imposition. There are also circumstances in which a defence lawyer's duty of advocacy can present difficulties for Indigenous processes with a restorative emphasis, since the client's best interests and the interests of the community are not necessarily harmonious to begin with. One approach to resolving this is to incorporate the Australian concept of a prisoner's friend, someone who can safeguard an accused's rights during the investigative stage but is not necessarily a member of the bar. Another approach is to modify the role of the accused's advocate. If an Indigenous accused willingly participates in a process with a restorative emphasis, the role of his or her spokesperson ceases to be that of a true advocate. The spokesperson becomes more of a resource person for the accused. The spokesperson nonetheless can resume true advocacy if he or she notices an abuse of natural justice against the accused, and can then assist the accused with an appeal.

Chapter 12 concerns *Charter* rights involved with final resolution of a case. If any Indigenous communities want to adapt execution or corporal punishment for contemporary use, both are expressly prohibited by Supreme Court's treatment of the right against cruel and unusual punishment. One resolution is for the prohibition against execution to remain in force. This is an admittedly arbitrary call, but one that is motivated by a recognition that no remedy would be personally available to an innocent person if he or she were wrongfully executed. Another resolution is that an offender may consent to corporal punishment after he or she is apprised of the potential risks. (e.g. permanent scarring) This allows Indigenous communities to implement meaningful alternatives to incarceration, subject to *Charter* standards of waiver.

The exclusion of evidence is problematic for a number of reasons. The concept of excluding relevant evidence as a check against state power is alien to any traditional Indigenous vision of justice. It may be culturally illegitimate in the eyes of an Indigenous community. Canadian jurisprudence is heavily tipped in favour of excluding evidence if it is deemed conscripted from the accused, without consideration of other potentially relevant factors such as Indigenous cultural perspectives. It can also entail social costs to Indigenous communities since excluding relevant evidence can mean factually guilty Indigenous accuseds getting off without any sanction. The proposal is that exclusion of evidence be reserved for the most serious cases where the *Charter* violation was such that the evidence itself becomes unreliable, a coerced confession for example. For other cases, the proposal is that s. 24(1), the general remedial provision of the *Charter*, be available as an alternative source of remedy. Possible remedies can include fines, warnings to the police, suspensions of officers who violate the *Charter*, and damages awarded to the accused, while relevant evidence may still be included in the proceedings.

The proposals should not be thought of as binding on Indigenous communities and the one and only way of doing things. They are intended to provide springboards for future discussions and legal reform. Each community may see different feathers from Raven, receive different teachings from Raven, and travel different pathways as Raven journeys alongside them to meet their own particular circumstances and needs. But before we can understand how Raven will grow new feathers, or think long and hard about these issues, or embark upon the new journey, we must first understand what Raven taught in the past – how Indigenous peoples practiced justice in the past.

CHAPTER 2: INDIGENOUS JUSTICE IN THE PAST

2.1 Preliminary Observations

This chapter provides a brief overview of how some Indigenous societies dealt with crime in the past. But first, two preliminary observations are in order. One observation is that a complete catalogue of past justice practices among all Indigenous societies in all their diversity is far beyond the scope of this work. This dissertation will settle for describing a selective sampling of Indigenous approaches to justice that have been previously examined and studied.

Another observation relates to the difficulties involved with reliance upon those studies. Our knowledge of Indigenous justice practices depends upon information collected through disciplines such as anthropology, history, and sociology. Those disciplines may encounter methodological difficulties in the search for Indigenous lore such as to suggest caution to us. Bruce Miller, an anthropologist, states that there are significant problems in ascertaining what traditional law and practice might have been.⁴ For example, he explains that there are difficulties involved with relying on memory culture in an effort to reconstruct the past. In his study, many of the Coast Salish Elders that he spoke with ‘grew up in circumstances that limited their access to justice practices.’ Many of them attended residential schools which removed them from opportunities to observe how their communities resolved conflicts. These schools, as well as government agents, worked to disrupt the practice and the transmission between generations of their culture.⁵ Michael Coyle also states:

⁴ Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln and London: University of Nebraska Press, 2001) at 5.

⁵ *Ibid.* at 55-56.

... two warnings should be given. First, this paper speaks only of what we know about the traditional justice ways of Ontario Indians on the basis of *written* records. Usually, therefore, the historical source is non-Indian. Often the writer is someone, such as a trading post manager or a missionary, who may not have been particularly interested either in investigating the intricacies of the social organization of the Indians or in discovering that their social organization was a complex or effective one. Occasionally, on the other hand, a historical writer is biased in the opposite direction, inventing or glorifying aspects of traditional Indian society for ulterior purposes. Critical judgment of such historical testimony is especially important given the scarcity of the records available.⁶

It has been suggested that there is something inherently questionable in having Indigenous knowledge represented by non-Indigenous scholars, however well-intentioned those scholars may be, and that something is inevitably distorted or lost in the process. Roger Keesing, in performing ethnographical work among the Kwaio of Australia, admits as much in this manner:

Just as the ethnographer can never be an invisible presence, so that author aspiring to let the locals speak for themselves can never do so. As I have argued, it is always we who choose, orchestrate, paste together the pieces for our own rhetorical purposes. And inevitably, as I doubtless have done, we place ourselves in a carefully constructed chiaroscuro of self-justification or self-glorification, however we may proclaim our faiblesse.⁷

Mary Ellen Turpel-Lafond also states that academic efforts to describe Indigenous knowledge reveal more about the cataloguer than the subject.⁸ Linda Tuwihai Smith goes even further and suggests that ethnographical studies of Indigenous cultures and lore have been a tool of colonialism. The West exercises a monopoly on the representation of collected information about Indigenous cultures. Academic methodologies and studies reflect Western agendas and interests. They essentialize Indigenous peoples, and contrast them with Western societies. The scholarship justifies the superiority of the West relative to Indigenous peoples, whether in the imperial past (i.e. Indigenous peoples as savages) or in the present (i.e. unable to come up with their own solutions, hopelessly corrupt).

⁶ Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall L.J. 605 at 613.

⁷ Roger Keesing, *Custom and Confrontation: The Kwaio Struggle for Cultural Autonomy* (Chicago: University of Chicago Press, 1992) at 13.

⁸ Mary Ellen Turpel-Lafond, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," (1989-1990) Can. H.R.Y.B. 2 at 30.

Smith's solution is the creation of 'Indigenous research cultures' that require ethnographical descriptions of Indigenous cultures be carried out by Indigenous scholars.⁹

The methodological difficulties that are inevitable for such studies suggest that parts of the picture may be missing or inaccurate. We may never fully understand how a particular Indigenous group dealt with crime in the past. These problems may suggest that caution should be used in relying on the use of such materials. Even so, this dissertation will still need a foundation in existing literature that describes past Indigenous justice practices. The question becomes how to make use of such literature in good conscience while still being mindful of the problems that have been described.

Certain ethnographical materials, which will be listed shortly, will be used to describe a representative sampling of past justice practices amongst a diverse selection of Indigenous peoples. The starting point is the contents of the materials, including their descriptions of past Indigenous justice practices, will be accepted as is. This may sound intellectually dishonest or even lazy, but it is also necessary for at least two reasons. The first reason is that there has to be some basis on which to describe Indigenous justice practices in the past. In a sense, the studies that will be used are available, and by and large commend themselves for use practically by default. Secondly, whatever lingering concerns we may feel about their potential inaccuracies, there is no getting around the obvious problem that ascertaining a more accurate portrayal of the Indigenous past is frequently impossible. This is definitely the case where the studies rely on centuries old descriptions of past justice practices.

⁹ Linda Tuwihai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999).

This is not to say that accepting the studies at face value is done with blinders on. This work will insist that before using a study, that study must pass muster under at least one of four criteria of utility. These criteria of utility do not satisfactorily address concerns over accuracy or methodology from the perspective of the anthropologist or the historian. The point is to hopefully minimize any controversies stemming from potential inaccuracies or methodological difficulties by grounding reliance on a study on whether it is consistent with what Indigenous people (or at least many of them) honestly believe about how their ancestors practiced justice. This work is after all about what Indigenous peoples want out of justice, making this a sensible approach.

The first criteria asks whether there is consistency between what a study says about the justice practices of an Indigenous group's ancestors, and the beliefs and practices of contemporary members of that group. An example of this will be described. Michael Coyle's article, "Traditional Indian Justice in Ontario: A Role for the Present?", may seem suspect in that it relies on historical archives and descriptions that date back centuries. Those archives and descriptions were also produced by observers whose honesty or objectivity may invite suspicion. Coyle admits as much. Consider however that Cree communities frequently make use of sentencing circles with the idea of grassroots community involvement in resolving a criminal conflict. It can therefore be reasonable to accept as useful Coyle's description of Cree peoples in the past using village councils that involved the entire community to resolve serious conflicts.¹⁰ The natural supposition is that present day Cree make use of sentencing circles in the belief that they are a modern adaptation of a past practice, the village councils. Studies that

¹⁰ *Supra* note 6 at 618-624.

pass this criterion include but are not limited to the historical descriptions used in Coyle's article, and Joan Ryan's study of the Dene, titled *Doing Things the Right Way*.¹¹

The second criterion is whether the work was written by an Indigenous scholar. This is by no means a guarantee of accuracy, but it does insist that a written work be produced more or less within an Indigenous research culture, to answer Tuwihai Smith's objection, whereby the study is carried out by an Indigenous scholar and with respect for Indigenous perspectives. Studies that pass this criterion include but are not limited to Douglas George Kanentiio's *Iroquois Culture and Commentary*¹², and Moana Jackson's *The Maori and the Criminal Justice System, He Whaipanga Hou – A New Perspective*.¹³

The third criterion asks whether the study involves recording first person accounts of justice practices from Indigenous persons. This of course does not address certain methodological difficulties such as fallibility of memory. It does however involve a representation of what the Indigenous peoples themselves honestly believed about past justice practices. An example of this will be described. Karl Llewellyn and Edward Adamson's study, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, may seem unreliable because it is an older study. The presence of the word 'primitive' in the title also suggests that the authors hold a rather condescending view towards Cheyenne culture. The book does nonetheless record descriptions of past Cheyenne practices provided by Cheyenne participants.¹⁴ An appropriate way to use the study may be to not make use of any arguments or conclusions drawn by Llewellyn or

¹¹ Joan Ryan, *Doing Things the Right Way* (Calgary: University of Calgary Press, Arctic Institute of North America, 1995).

¹² Douglas George-Kanentiio, *Iroquois Culture and Commentary* (Santa Fe, New Mexico: Clear Light Publishers, 2000).

¹³ Moana Jackson, *The Maori and the Criminal Justice System, He Whaipanga Hou – A New Perspective* Part 2 (Auckland: New Zealand Department of Justice, 1988).

¹⁴ Karl Llewellyn & Edward Adamson, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

Adamson, but limit the use instead to the first hand accounts provided by the Cheyenne themselves. Other studies that pass this criterion include but are not limited to Joan Ryan's study, Jo-Anne Fiske and Betty Patrick's *Cis Dideen Kat: The Way of the Lake Babine Nation*¹⁵, Rennard Strickland's *Fire and the Spirits: Cherokee Law from Clan to Court*¹⁶, Bruce Miller's *The Problem of Justice: Tradition and Law in the Coast Salish World*¹⁷, Brad Asher's *Beyond the Reservation: Indians, Settlers, and the Law in Washington Territory, 1853-1889*¹⁸, and Leslie Jane McMillan's *Kogqwaja'ltimk: Mi'kmaq Legal Consciousness*.¹⁹

Another criterion of utility is whether the study was the product of a collaborative effort between the researchers and an Indigenous community. What this means is that decisions about research methodologies, who will be interviewed, funding, organization, hiring, and the final contents of the study, are made by consensus (or near consensus) among the researchers and community representatives. Joan Ryan relates that her study was the product of a collaborative empirical research system known as Participatory Action Research. She describes that system, while acknowledging its challenges, as follows:

PAR is a process whereby all members of the team share power, responsibility, and decision-making and co-operate fully to make sure the goals of the project are realized. It is not an easy process and the group's inter-action has to be negotiated so that there is true sharing of power in all matters. PAR works only by consensus.²⁰

Fiske and Patrick's study is another example.

¹⁵ Jo-Anne Fiske & Betty Patrick, *Cis Dideen Kat: The Way of the Lake Babine Nation* (Vancouver: U.B.C. Press, 2000).

¹⁶ Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975).

¹⁷ Miller, *supra* note 4.

¹⁸ Brad Asher, *Beyond the Reservation: Indians, Settlers, and the Law in Washington Territory, 1853-1889*.

¹⁹ Leslie Jane McMillan, *Kogqwaja'ltimk: Mi'kmaq Legal Consciousness* (Doctoral Dissertation) (Department of Anthropology, U.B.C. 2002).

²⁰ Ryan, *supra* note 11 at 7.

These criteria may appear to have different emphases that can be inconsistent with each other. In the end though, they share a common thread. They insist, in one way or another, on consistency between the descriptions of past Indigenous justice practices and what contemporary Indigenous peoples honestly believed regarding how their ancestors practiced justice. The goal is that the descriptions contained in the studies can be used as is with a minimum of controversy. With a methodology for using the studies in place, we now turn to a representative description of past Indigenous justice practices.

2.2 Past Indigenous Approaches to Justice

A common practice among many Indigenous societies was the holding of a council to resolve a conflict. A typical practice in these councils was the presentation of material gifts to the victim, or the victim's kin, as reparation for the offence. These gifts were often accompanied by apologies, or acknowledgements of responsibility. The acceptance of the gifts by an aggrieved party would signify the resolution of the conflict, and the restoration of community harmony. This practice is known to have occurred among the Cree²¹, the Ojibway,²² the Iroquois,²³ the Dene,²⁴ the Twanas, Clallams, the Puyallups, the Nisquallys,²⁵ the Mi'kmaq in New Brunswick,²⁶ and the Coast Salish in British Columbia.²⁷ In some Indigenous societies, the offender's clan bore collective responsibility for the offence, while the victim's clan was due the reparation. This concept was often an effective deterrent against deviant behaviour, because it meant that the offender brought shame upon the clan and was directly accountable to clan leaders.

²¹ Coyle, *supra* note 6 at 618-624.

²² *Ibid.*

²³ *Ibid.*

²⁴ Ryan, *supra* note 11 at 33.

²⁵ Asher, *supra* note 18 at 25-26.

²⁶ McMillan, *supra* note 19 at 74.

²⁷ Miller, *supra* note 4 at 63-64.

This was certainly true of the Iroquois, where reparation at council meetings was often given in the form of wampum beads, which were of special symbolic significance.²⁸

Indigenous societies in what is now British Columbia, such as the Gitskan, the Wet'suwet'en, the Coast Salish, and the Lake Babine, integrated dispute resolution into their ceremonial feasts. The feasts served many functions, including debt settlement, social celebrations, confirming the authority and responsibilities of leaders, and the renewal of relationships and alliances between kinship groups. The ceremonial feasts also provided the forum for resolving disputes, which were typically resolved by reparation to the clan of the injured party.²⁹ Fiske and Patrick's study of the Lake Babine ceremonial feasts, termed Balhats, provides additional details. The first step was for the aggrieved party to present gifts to the offending party along with a declaration of what the offender did wrong. The challenge was for the offending party to provide reparation to the aggrieved party in the form of material wealth with interest. The reparation would be accompanied by a public affirmation of proper and expected behaviour, and a final recounting of the infraction after which it was never to be mentioned again. These elements blended together to mark reconciliation and an end to the conflict. The ultimate goal was the strengthening of social relationships within the community.³⁰

Moana Jackson describes Maori approaches to conflict resolution as follows:

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 upon 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 matters, it covered both collective and more specifically individual matters. They were thus precedents embodied in the

²⁸ Coyle, *supra* note 6 at 620-621.

²⁹ For the Gitskan and Wet'suwet'en, see Justice Alan McEachern in *Delgamuukw v. R. in Right of British Columbia and Attorney General of Canada*, Transcript of Proceedings, vol. 2 at 83 (13 May 1987). For the Sto:lo, see Miller, *supra* note 4 at 150. The Coast Salish lived in both what is now British Columbia and Washington State. See Miller again at 150.

³⁰ Fiske & Patrick, *supra* note 15 at 97-101.

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, or physical well-being of an individual or *whanau* [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 offence itself. ...

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 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 proceeded on a clearly 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.³¹

Terms such as relationship reparation and reconciliation should be understood generously. If a process led to previously hostile parties becoming friendly and co-operative with each other, that was all well and good. The objectives behind Indigenous processes may often have been more modest, such as preventing hostilities from reaching a critical point that would lead to more violence, or preventing competition from endangering resources that the community needed to survive.³²

However, community meetings, reparation, and the promotion of harmony, were not the only elements of Indigenous justice practices. Many Indigenous societies also had significant punitive inclinations. Turpel-Lafond and Monture-Angus describe banishment as the most severe remedy under Indigenous justice systems, since it involved ‘the end of social and cultural life with one’s community.’³³ This was indeed a common thread among Indigenous societies, often a last resort for someone who just

³¹ Moana Jackson, *supra* note 13 at 36-44; See also Juan Tauri & Allison Morris, “Re-forming Justice: The Potential of Maori Processes” (1997) 30:2 Austl. Crim. & N.Z.J. 149.

³² See for example Miller, *supra* note 4 at 63-64.

³³ Mary Ellen Turpel-Lafond & Patricia Monture-Angus, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice”, Special Edition on Aboriginal Justice, (1992) U.B.C. Law Rev. 239 at 248.

would not respond to previous efforts at correction.³⁴ The uses of banishment varied. The Dene used banishment if satisfactory resolutions could not be reached when their most serious offences occurred, those dealing with the proper handling of game animals, and extra-marital sexual relations. This was practically a death sentence because a single individual was highly unlikely to survive on his own in the Arctic.³⁵ The Cheyenne did not usually intend that banishment be permanent. It was used in a manner surprisingly analogous to how modern justice systems use quantum of prison terms and parole hearing determinations. Terms of banishment could be lessened if there were mitigating circumstances such as provocation or intoxication. Banishment could also be lifted if the chiefs and military societies deemed that the killer demonstrated sufficient penitence, and an assurance that his return would not jeopardize community safety.³⁶

There were however plenty of other sanctions among Indigenous communities with a harshly punitive emphasis. A point that seems overlooked is that while many Indigenous societies did have justice practices aimed at reconciliation and restitution, those practices were at least in instances of homicide (intentional or not) integrally bound up with systems of private vengeance. Though precise practices varied, the kin of the victim generally had the right to seek the death of the killer if they were not given sufficient compensation. The victim's kin were expected to negotiate in good faith, and acceptance of adequate compensation was expected. Nonetheless, what we see is a fairly common emphasis on retributive killing, subject to the alternatives not working out.³⁷

³⁴ Coyle, *supra* note 6 at 616 for the Iroquois, and 624 for the Cree and Ojibway. For the Dene and Inuit, refer to Margaret Carswell, "Social Controls Among the Natives Peoples of the Northwest Territories in the Pre-Contact Period" (1984) 22 Alta. L. Rev. 303 at 307.

³⁵ Ryan, *supra* note 11 at 57-58.

³⁶ Llewellyn & Adamson, *supra* note 14 at 132-168.

³⁷ This was true of many of the societies previously mentioned, such as the Cree, Ojibway, and the Iroquois. Note that I used the word 'retributive' loosely. Such matters were often a matter of satisfaction

Under Canadian law, committing adultery would be resolved by a divorce judgment that made arrangements for child custody and access, financial support, and a division of matrimonial property. Among the Iroquois, a woman (and only the woman apparently) who committed adultery would be flogged publicly.³⁸ The Iroquois also punished the practice of witchcraft with execution.³⁹ The Cheyenne also used corporal punishment. On one occasion, members of the Fox Soldier society beat a man who inflicted an arrow wound on another man's arm which had the result of requiring amputation.⁴⁰ The Cheyenne also used public whipping for theft and bringing in a non-Cheyenne into the tribe without permission, and with the goal of general deterrence. The Cheyenne also punished sexual offences and violation of marital taboos with 'cropping', which meant the severance of an ear or the nose.⁴¹ Among tribes in what is now Washington state, a cuckolded man could slay the adulterer without fear of reprisal from the adulterer's kin. Among some groups, the wife could also be killed without reprisal from the wife's kin.⁴² Among the Sanpoil or Nespelem, a headman could determine that whipping be the punishment for crimes including, 'murder, stealing, perjury, improper sexual relations, and abortion.'⁴³

Public shaming of an offender was also a practice among some Indigenous groups. It can be emphasized that this was part in parcel with an emphasis on reintegration of the offender with the community. It was counterbalanced by other

for the victim's kin, and thus not quite the same as capital punishment administered by the state on behalf of the public entire. It sometimes involved different aims as well. For example, the Mohawk deemed either compensation or vengeance as necessary to allow the victim's spirit to rest. Coyle, *supra* note 6 at 619-620 & 622.

³⁸ *Ibid.* at 618-619.

³⁹ *Ibid.* at 618.

⁴⁰ Llewellyn & Adamson, *supra* note 14 at 123.

⁴¹ Llewellyn & Adamson, *supra* note 14 at 168-172.

⁴² Asher, *supra* note 18 at 26-27.

⁴³ *Ibid.* at 29.

considerations, such as affirming that the offender remained a valued member of the community, marking the end of the conflict, and a renewed state of harmony. This may certainly be true of Maori traditions for example. This was also characteristic of the balhats of the Lake Babine nation, where there was a final recounting of the offence, but also reparation to mark reconciliation. However, shaming practices in other societies may have had a distinctly punitive emphasis with deterrence or retribution as the objectives. Here's an example among the Dene:

A minor offence might be a small theft. For example, elders reported that when youths stole some bannock, they were ridiculed and shamed. The person from whom they stole would pin the bannock on their jackets and everyone in camp would know they had stolen it and would laugh at them. This was considered to be a "deterrent"; it was unlikely the youth would repeat his or her theft because they would not want to face ridicule again.⁴⁴

The Ojibway sometimes responded to repeated theft by compelling the thief to wear a special costume to signify his transgressions as a public humiliation.⁴⁵

It was common for Indigenous societies to use both reconciliatory and punitive approaches as complementary parts of an integrated system. Punitive sanctions provided encouragements to co-operate with community resolutions, or last resorts when offenders simply would not respond to previous efforts to persuade them to correct their behaviour.

Michael Cousins says of private vengeance among the Iroquois:

The rationale for executing offenders in situations of premeditated murder is not primarily one of revenge. The overriding purpose is to satisfy the spirit of the victim, who cannot find peace among the departed ones (spirit world) until the soul of the offender joins him or her. ...

Undoubtedly, executing a friend or clan/nation member is a most difficult duty to perform. The principal aim of capital punishment is to "put things right" with the victim and to reestablish the principles of peace and unity mandated by the Great Law. Achieving both ensures that the blood feuds of the past do not return or become a divisive factor within the League.⁴⁶

⁴⁴ Ryan, *supra* note 11 at 33.

⁴⁵ Coyle, *supra* note 6 at 624; For the Sto:lo, public shaming before the village also had a deterrent emphasis, see Miller, *supra* note 4 at 152.

⁴⁶ Michael Cousins, "Aboriginal Justice: A Haudenosaunee Approach" in Wanda D. McCaslin (ed.) *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 141 at 150-151.

The Indigenous community of Strelley, West Australia, is known to have used all of the following responses to crime: reconciliation meetings, community service, public admonition, public shaming, fines, banishment to a neighbouring community, and corporal sanctions.⁴⁷ With some past Indigenous justice practices described, the next chapter will explore possible contemporary uses of such practices with the view towards illuminating Indigenous aspirations for self-determination over criminal justice.

⁴⁷ Law Reform Commission of Australia, Report no. 31, *The Recognition of Aboriginal Customary Laws*, vol. 2 (Canberra: Australian Government Publishing Service, 1986) at 27-28.

CHAPTER 3: CONTEMPORARY INDIGENOUS VISIONS OF JUSTICE

The discussions in this chapter will animate much of the remainder of this work by exploring contrasts and similarities between what we know about past Indigenous justice practices, restorative justice, and Western approaches to justice with adversarial and punitive emphases.⁴⁸ There are reasons for this. Restorative justice is often presented as a more constructive approach to dealing with crime than adversarial and punitive approaches. This provides considerable impetus behind Indigenous demands for jurisdiction over justice as Indigenous communities often portray their own justice practices, many of which parallel restorative justice, as effective alternatives. This theme will resonate throughout this work. The possible contemporary significance of Indigenous justice practices with distinctly punitive emphases will also be explored. An explanation of Western approaches to justice and the rationale behind them now follows.

3.1 Western Approaches to Justice

Traditional Western models of justice are often characterized by at least two emphases, the use of punitive sanctions to address crime and the use of adversarial procedures to resolve disputes. The discussion begins with the first emphasis. Western justice systems make frequent use of punitive sanctions such as incarceration to address criminal behaviour. To be fair, incarceration is often reserved for more serious offences or for particularly recidivist offenders. Western justice systems also use other measures such as probation and fines, but even these sanctions are classified as punishments.⁴⁹

⁴⁸ The use of 'Western' is meant to include common-law based systems of justice and not necessarily continental systems of justice whose roots can be traced back to Roman law. (e.g. France)

⁴⁹ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, where the Supreme Court of Canada concluded that fines are punishments that can affect liberty and security of the person interests under s. 7 of the *Charter*, and therefore necessitate legal rights protections under the *Charter* just like incarceration.

There is more than one justification for punishing crime, and they are not necessarily consistent with each other. One justification is deterrence. Deterrence as an objective can be subdivided into two different types of deterrence. Specific deterrence focuses on the individual offender who has committed a crime. It is meant to communicate to the offender that the punishment is a direct consequence of crime, and therefore seeks to dissuade the offender against committing further crimes. General deterrence uses the punishment of an individual offender to send a message to society at large. The offender's punishment is used to dissuade other members of society against committing the same crime. Both general and specific deterrence strive to protect society by threatening punishment in order to dissuade against future crime.

Another justification is known as the Just Desserts Theory of punishment. An offender has caused harm by committing a crime, and so pain must be inflicted upon the offender in proportion to the moral gravity of his or her crime. It is a retributive justification. Theodore Blumoff's article, "Justifying Punishment", centers on the theoretical incompatibility between deterrent and retributive justifications. His position can be summarized as follows: Deterrence has a utilitarian emphasis. Punishment should be enough to deter the offender, or other members of society, from repeating the crime. Punishment should not exceed what is necessary to achieve the social net gain of decreasing crime. Retribution as an end to itself has the potential to inflict more punishment than is necessary, or less than what is required. Just Desserts theories emphasize the moral agency and rationality of the offender. Because an offender chose to engage in harmful behaviour, retribution must be inflicted upon the offender in proportion to the moral gravity of the crime. Therefore, utilitarian theories wrongly use

the offender as a means to a social end, and end up denying the autonomy and rationality of the offender as a moral agent. Blumoff argues that trying to articulate and sustain an intrinsically consistent theory of punishment is ultimately unattainable.⁵⁰ One can perhaps see this in ss. 718 and s. 718.1 of the *Criminal Code*, which read:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a) to denounce unlawful conduct;
- b) to deter the offender and others from committing offences;
- c) to separate offenders from society, where necessary;
- d) to assist in rehabilitating offenders;
- e) to provide reparations for harm done to the victim or the community; and
- f) to promote a sense of responsibility in offenders, and acknowledgement of the harms done to victims and the community;

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

One can see in s. 718(b) the utilitarian objective of deterrence. One can also see in s. 718(a) and s. 718.1 reflections of Just Desserts theories. It seems that the Canadian sentencing regime uses both justifications without stating a clear preference. Keep in mind also that rehabilitation is a sentencing objective in this provision as well, which is indeed a primary goal of restorative justice. However, it will be seen that a point that many restorative justice proponents make is that rehabilitation is frequently in competition with other sentencing goals like deterrence and retribution. Their point of

⁵⁰ Theodore Blumoff, "Justifying Punishment" (2001) 14 C.J.L.J. For other studies that explore the tension between deterrent/utilitarian and retributive approaches to punishment, see Mirko Bagaric & John Morss, "International Sentencing Law: In Search of a Justification and a Coherent Framework" (2006) 6:2 Int'l Crim. L. Rev. 191; Kevin M. Carlsmith, "The Roles of Retribution and Utility in Determining Punishment" (2006) 42:4 Journal of Experimental Social Psychology 437; Richard A. Bierschbach & Alex Stein, "Deterrence, Retributivism, and the Law of Evidence" (2007) 93: 6 Va. L. Rev. 173; Kevin M. Carlsmith, "On Justifying Punishment: The Discrepancy Between Words and Actions" (2008) 21:2 Social Justice Research 119.

contention is the goals of deterrence and retribution are prioritized reflexively and routinely for far too many offences and for far too many offenders, where perhaps the legal system should be giving greater consideration to rehabilitative possibilities.

In s. 718(c) there is a third justification specific to incarceration, the incapacitation of the offender. The public is protected against further harm from the offender by forcibly confining the offender. It is motivated by the same concern as deterrence. Deterrence however is premised on the idea that the offender and other members of society can be dissuaded against future misconduct. The incapacitation rationale in s. 718(c) is conceptually different in that it deems that the offender will not respond to the message of deterrence, at least not for the time being, and therefore physical separation becomes necessary. This is not to say that both rationales cannot inform the same sentence handed out for an offender. Incapacitation may protect society through physical separation in the interim. The term of imprisonment, during its duration and upon its expiry, hopefully triggers specific deterrence by communicating to the offender that the punishment is occurring, and has occurred, for the misconduct. In summary, Western justice systems respond to crime with punitive sanctions that can be motivated by a number of objectives which are not necessarily consistent with each other.

The second emphasis of Western justice systems is their reliance on adversarial procedures, which rely on an impartial adjudicator to decide a dispute. Each party to a dispute competes with the other party through various means such as giving evidence in support of their cases, cross-examining adverse witnesses, and making legal and factual arguments to persuade the judge that its position is the correct one. In the context of criminal justice, the parties are the criminal accused and the state. The accused is usually

represented by a defence lawyer, while the state is usually represented by a public prosecutor. The judge then renders a decision based upon the evidence presented and the arguments that have been made after both parties have had a fair chance to present their cases. Adversarial procedures apply to either a trial to determine guilt or innocence, or to a sentencing hearing, subject to the parties reaching an agreement (e.g. plea bargain). An overview of restorative justice as it applies to criminal conflicts will now be provided, along with comparisons to Indigenous approaches to justice.

3.2 Restorative Justice and Comparisons to Indigenous Justice

An important background to similarities between Indigenous justice and restorative justice is the fact that reliance on incarceration has resulted in drastic over-incarceration of Indigenous peoples in Canada. Michael Jackson states:

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the public and by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the statistics are so stark and so appalling that the magnitude of the problem can neither be misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. 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 over-representation 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. ...

Bad as this situation is within the federal system, it is even worse in a number of Western provincial correctional systems. In B.C. and Alberta, native people, representing 3-5% of the provinces' population, constitute 16% to 17% of the admissions to prison. In Manitoba and Saskatchewan native people, representing 6-7% of the population, constitute 46% and 60% of prison populations.⁵¹

Carol LaPrairie provides more recent statistics:

There is virtually no over-representation of Aboriginal people in provincial correctional institutions in Prince Edward Island and Quebec, but over-representation in Nova Scotia and New Brunswick is 1/5 to two times higher than would be expected given the size of their respective

⁵¹ Michael Jackson, “Locking up Natives in Canada” (1988-1989) 23 U.B.C. L. Rev. 215 at 215-216.

provincial Aboriginal populations. In B.C., this disproportionality is 5 times, in Alberta 9 times, in Saskatchewan 10 times, in Ontario 9 times, and, in Manitoba, it is seven times higher than expected.

...

An examination of change over time reveals that Aboriginal over-representation within the Federal prison population has grown from 11% in 1991/92 to 17% in 1998/99, and the increase has occurred primarily in the Prairie provinces.⁵²

Latest estimates are that the incarceration rates for Indigenous people are 1,024 per 100,000 adults in comparison to 117 per 100,000 adults for non-Indigenous people.⁵³

The theme of using contemporary adaptations of past Indigenous justice practices with restorative emphases as more constructive alternatives to incarceration is an important impetus behind Indigenous demands for greater control over criminal justice

As of yet, there is not a universally accepted definition of restorative justice.⁵⁴

What nonetheless follows is a summary of essential features of restorative justice. Restorative justice envisions a horizontal process where persons with a stake in a conflict negotiate a resolution, unlike the adversarial system where a judge imposes the resolution (vertical decision making). ‘Persons with a stake in a conflict’ is not restricted to the parties to a legal matter should the dispute proceed in adversarial court. It can include a wider circle of persons who have been affected, even indirectly, by the conflict.⁵⁵

In the adversarial justice system the interests of the victim are collapsed into the state’s interests in prosecuting crime. The prosecutor speaks to the harm done to the

⁵² Carol LaPrairie, “Aboriginal over-representation in the criminal justice system: A tale of nine cities” (2002) 44:2 Can. J. Crim. 181 at 186-187.

⁵³ Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2005-2006* (Ottawa: Minister of Public Safety, 2006) at 11.

⁵⁴ Kent Roach has noted that there has been no shortage of efforts to define restorative justice. “Changing punishment at the turn of the century: Restorative Justice on the rise” (2000) 42 Can. J. Crim. 239 at 256.

⁵⁵ One of the earliest proponents of this theme of restorative justice was Nils Christie, see “Conflicts as a Property” (1977) 17:1 Brit. J. Crim. See also Margarita Zernova, *Restorative Justice: Ideals and Realities* (Hampshire, England: Ashgate Publishing, 2007) at 48-53; Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) at 95-106; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Vienna: United Nations, 2006) at 56-67; Albert W. Dzur & Susan M. Olson, “The Value of Community Participation in Restorative Justice” (2004) 35:1 Journal of Social Philosophy 91; Patricia Hughes & Mary Jane Mossman, “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses” (2002) 13 Windsor Rev. Legal Soc. Issues 1 at 74-76.

victim before an adversarial court. This has been criticized as deflecting needed attention away from the fact that in many crimes, it is the victim that has suffered tangible harm and has a legitimate interest in obtaining redress from the offender. Randy Barnett states:

The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. It calls for a complete refocusing of our image of crime. Where we once saw an offense against society, we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt, therefore, is not to society; it is to the victim.⁵⁶

The horizontal emphasis of restorative justice provides the victim with an opportunity to participate directly in the process. A restorative resolution will ideally have the victim's agreement, and will satisfactorily address the victim's interests such as personal safety and healing the victim from any traumas that resulted from the offence.⁵⁷

Restorative justice frequently envisions non-custodial alternatives to incarceration. The emphasis is less on deterrence, or retribution, or incapacitation. It is more on repairing relationships and furthering harmony between those affected by the conflict. Restorative resolutions often require the offender to perform community service, make restitution to the victim, and participate in counseling programs to address problems such as substance abuse or anger management.⁵⁸ A primary objective of restorative justice is the re-integration of the offender into the community as he corrects his behaviour, and strengthens his relationships with those around him and those he has affected with his behaviour. John Braithwaite and Stephen Mugford hold that there is more than one facet to re-integration. One facet emphasizes the role of community members who provide support and encouragement to the offender as he reforms.

⁵⁶ Randy Barnett, "Restitution: A New Paradigm of Criminal Justice" (1977) *Ethics* 87:279 at 286.

⁵⁷ Zernova, *supra* note 55 at 42-43; Marian Liebmann, *Restorative Justice: How it Works* (London: Jessica Kingsley Publishers, 2007) at 26.

⁵⁸ Zernova, *supra* note 55 at 65-70; Liebmann, *ibid.* at 27; United Nations Office on Crime and Drugs, *supra* note 55 at 11.

Another facet, and one that is not necessarily incompatible with the other facet, is that those who have been adversely affected confront the offender so that he understands the gravity of his actions and develops motivation to change.⁵⁹

Western punitive approaches are said to focus on an offender's actions, and the appropriate punishments for them. Restorative justice is more holistic in that it emphasizes exploring the underlying reasons for an offender's behaviour, whether it is alcoholism, or a troubled childhood, or problems within the offender's community itself. Discovering the causes of criminal behaviour, and searching for ways to deal with it, provide the basis for many of the discussions in a restorative process.⁶⁰

Howard Zehr provides a table that describes in detail the differences between restorative justice and traditional Western models of justice:

<i>Retributive Lens</i>	<i>Restorative Lens</i>
Blame-fixing central	Problem solving central
Focus on past	Focus on future
Needs secondary	Needs primary
Battle model; adversarial	Dialogue normative
Emphasizes differences	Searches for commonalities
Imposition of pain considered normative	Restoration and reparation considered normative
One social injury added to another	Emphasis on repair of social injuries
Harm by offender balanced by harm done to offender	Harm by offender balanced by making right
Focus on offender; victim ignored	Victims' needs central

⁵⁹ John Braithwaite & Stephen Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 34 Brit. J. Crim. See also Nathan Harris, "Reintegrative Shame, Shaming, and Criminal Justice" (2006) 62:2 Journal of Social Issues 327; and Liebmann, *supra* note 57 at 27.

⁶⁰ John Braithwaite, "Doing Justice Intelligently in Civil Society" (2006) 62:2 Social Issues Journal 393; Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice, Canada, 1997) at 4-6; United Nations Office on Crime and Drugs, *supra* note 55 at 11.

State and offender are key elements	Victim and offender are key elements
Victims lack information	Information provided to victims
Restitution rare	Restitution normal
Victims' "truth" secondary	Victims given chance to "tell their truth"
Action from state to offender, offender passive	Offender given role in solution
State monopoly on response to wrongdoing	Victim, offender and community roles recognized
Offender has no responsibility in resolution	Offender has responsibility in resolution
Outcomes encourage offender irresponsibility	Responsible behaviour encouraged
Rituals of personal denunciation and exclusion Offender denounced	Rituals of lament and reordering Harmful act denounced
Offender's ties to community weakened	Offender's integration into community increased
Offender seen in fragments, offense being definitional	Offender seen holistically
Sense of balance through retribution	Sense of balance through restitution
Balance righted by lowering offender	Balance righted by raising both victim and offender
Justice tested by its intent and process	Justice tested by its 'fruits'
Justice as right rules	Justice as right relationships
Victim-offender relationships ignored	Victim-offender relationships central
Process alienates	Process ignores
Response based on offender's past behaviour	Response based on consequences of offender's behaviour
Repentance and forgiveness discouraged	Repentance and forgiveness encouraged
Competitive, individualistic values encouraged	Mutuality and cooperation encouraged
Ignores social, economic and moral context of behaviour	Total context relevant
Assumes win-lose outcomes	Makes possible win-win outcomes. ⁶¹

⁶¹ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990) at 211-214.

This chart clearly favours restorative justice in its presentation, and is overly simplistic. Section 718 includes rehabilitation and victim reparations as sentencing objectives. A probation sentence that requires alcohol counseling is an example of a forward looking sentence that attempts to prevent recidivism by addressing underlying contexts beyond the offender’s action itself. Nonetheless, the chart details the *theoretical* contrasts between restorative justice and traditional Western approaches to justice.

There are parallels between Indigenous conflict resolution and restorative justice. Both emphasize reparation to the aggrieved party, and improving relationships in the community. Indigenous conflict resolution often emphasized exploring the underlying causes of misbehaviour as well. Daniel Kwochka states: “Aboriginal traditions suggest that the acts are no more than signals of disharmonies in relationships, and it is the disharmonies that should be focused upon.”⁶² Len Sawatsky constructs his own chart depicting differences between Indigenous and Western justice systems as follows:

	European/Retributive	Aboriginal
1.	Crime defined as a violation of the state	No word for crime but recognition of injury, harm, conflicts and disputes.
2.	Focus on establishing blame, guilt, on The past (did he/she do it?)	Focus on identifying the conflict, on establishing accountability, on the current situation (what can we do?)
3.	Adversarial relationships and process	Consensus of elders/chiefs to advise on steps to take towards establishing harmony.
4.	Imposition of pain to punish and deter/prevent	Holding parties in conflict accountable to each other in context of family, community and Mother Earth
5.	Justice defined by intent and by process, right rules	Justice defined by social harmony and needs being met, judged according to community solidarity and survival
6.	Interpersonal, conflictual nature of crime Obscured, repressed: conflict seen as	Interpersonal conflict acknowledged in the context of responsibility to family, community and Mother

⁶² Daniel Kwochka, “Aboriginal Injustice: Making Room for a Restorative Paradigm” (1996) 60 Saskatchewan L. Rev. 153 at 159.

	Individual vs. state	Earth
7.	One social injury replaced by another	Focus on repair of social injury and restoration of social equilibrium and healing
8.	Community on sideline, represented abstractly by state	Community as facilitator, role of the elder respected
9.	Encouragement of competitive Individualistic values	Encouragement of spirituality, self-esteem and collective identity
10.	Action directed from state to offender: - victim ignored - offender passive	Recognition of victim's needs and offender accountability but in the context of wisdom and insight exercised by elders
11.	Offender accountability defined as taking punishment	Offender accountability defined as willingness to take steps to restore peace and harmony with self, victim, families, community, and the Great Spirit
12.	Offence defined in purely legal terms, devoid of moral, social, economic or political dimensions	Offence understood in whole context – morally, socially, economically, politically and in relation to the land
13.	'Debt' owed to state and society in abstract	Offender is held accountable to the victim, victim's family and community
14.	No encouragement or opportunity to express remorse or forgiveness	Encouragement for apology, forgiveness and healing with a view to making peace
15.	Dependence upon proxy professionals	Direct involvement of participants to the dispute under guidance of elders. ⁶³

Note the resemblance to Zehr's chart. These contrasts fuel both Indigenous demands for self-determination over justice and criticisms that restorative justice proponents make against Western approaches. The discussion will now examine in detail those criticisms, along with considerations where appropriate of their relevance to Indigenous peoples.

3.3 Criticisms against Western Punitive Approaches

3.3.1 Deterrence Unrealized

Restorative justice proponents frequently claim that faith in the threat of imprisonment to deter crime is misguided. Criminologists Norval Morris and David

⁶³ Len Sawatsky, "Self-Determination and the Criminal Justice System" in Diane Engelstad and John Bird (eds.) *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Anansi, 1992) at 92-93.

Rothman state: “Research into the use of imprisonment over time and in different countries has failed to demonstrate any positive correlation between increasing the rate of imprisonment and reducing the rate of crime.”⁶⁴ David Cayley argues that there is no correlative relationship between increased prison terms and the effect of deterrence on crime rates as follows:

In fact, contrary to what common sense might assume, levels of crime and levels of imprisonment show no regular or predictable relationship. Crime has certainly gone up in the countries of the disbanded Soviet Empire; but, in both Canada and the United States, it has gone down for a number of years without any abatement in the growth of prison population – as a recent headline put it, “Crime Keeps on Falling but Prisons Keep on Filling.”⁶⁵

David Cornwell adds:

That evidence which is available, and there is not much of it that stands the test of empirical robustness, tends to indicate (through re-conviction and crime rate studies) that it can hardly be described as a reality. Unless and until empirical studies of a rigorous nature can be brought to bear upon the effects of deterrent measures, their success must remain questionable. Intuition and folk-wisdom inform us that some people are deterred by the actuality or the prospect of criminal punishment, but how many, and to what extent makes the expansive claims for its effects largely illusory. To rely upon the supposed effects of deterrence in the formulation of penal policies must be seen as condoning a deception, and this is a serious matter for concern because it calls into question the entire morality of the use of state power in punishing offenders.⁶⁶

Justice E.D. Bayda argues that deterrence is ineffective in certain contexts as follows:

The offender has no material goods to lose, no job to lose and no hope of ever having one, no self-worth to lose, no dignity to lose, no honour to lose. My goodness, he has nothing to lose. How am I supposed to persuade him that he has something to lose by committing another criminal offence? Will sending him to jail by some magical process persuade him that he has something to lose when in fact he has nothing to lose? Will sending him to jail give him material goods, a job, self-worth, dignity, and honour so that in the end he has something to lose?

Furthermore we presume that this offender, like most offenders, acted freely when he chose to do what he did. But is that a fair presumption? Or is it fairer to assume that he did, more or less, what he was socialized to do? Does one deter that sort of offender by throwing him into jail? Does he respond to jail in much the same way as someone raised and living in the mainstream of society? A businessman for example?⁶⁷

⁶⁴ Norval Morris & David Rothman, *The Oxford History of the Prison* (New York: Oxford University Press, 1995) at xii.

⁶⁵ David Cayley, *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives* (Toronto: House of Anansi Press Limited, 1998) at 5. Cayley was referring to Fox Butterfield, “Crime Keeps on Falling, but Prisons Keep on Filling,” *New York Times* (28 September 1997: Section 4).

⁶⁶ David Cornwell, *Criminal Punishment and Restorative Justice: Past, Present and Future* (Winchester, United Kingdom: Waterside Press, 2006) at 61.

⁶⁷ Justice E.D. Bayda, “The Theory and Practice of Sentencing: Are They on the Same Wavelength?” (1996) 60 Sask. L. Rev. 317 at 321.

Jo-Anne Fisk and Betty Patrick argue that few people who act out in a moment of enflamed passion will be deterred by the prospect of jail.⁶⁸ Critics also suggest that jail not only fails to deter, but actually makes matters worse.

3.3.2 Makes the Offender Worse

Cayley argues that prison life involves harsh conditions that harden inmates. Placing a convict among other convicts creates conditions whereby a convict has to harden himself, and be willing to commit violent acts without hesitation, in order to survive and convince the other convicts to leave him alone. Prisons have counter-cultures where the conventional rules of society are turned upside down. Defiance, lack of respect for authority, and violent behaviour become the norms. Once a person has done enough time, the painful effects of being separated from society wear off. Convicts frequently become acculturated and habituated into prison life such that they are unable to adapt to life outside of prison and prefer to remain behind bars.⁶⁹

Rupert Ross describes one of his personal conversations this way:

In that regard, I remember an Aboriginal woman at a justice conference complaining about the use of jail. She felt that jail was a place where offenders only learned to be more defiant of others, more self-centred, short-sighted and untrusting. Further, because they had so many daily decisions taken away from them, she felt that their capacity for responsible decision making was actually diminished, not strengthened.⁷⁰

Judge Heino Lilles stated:

Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. *It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing.* The power or authority structures within the jail operate against "openness." An elder noted: "jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out really bitter. In jail, all they learn is 'hurt and bitter'".⁷¹

⁶⁸ Fiske & Patrick, *supra* note 15 at 193.

⁶⁹ Cayley, *supra* note 65 at 101-122.

⁷⁰ Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books Canada Ltd., 1996) at 74.

⁷¹ *R. v. Gingell* (1996), 50 C.R. (4th) 326 (Y. Terr. Ct.) at 342-343.

Jail does have the benefit assuring of public safety by separating the offender from society for the duration of the prison term. Mark Carter states rather glibly: “The benefits of incapacitation, such as they are, are the only guarantees.”⁷² The problem is that those terms are usually temporary. There remains the potential danger that the offender has been worsened by the experience of imprisonment after release.⁷³ Fiske and Patrick argue that incarceration can ‘aggravate rather than alleviate’ social tensions in small Indigenous communities. Their consultations with members of the Lake Babine Nation in British Columbia led them to believe that imprisoning violent or sexual offenders can leave community offenders feeling unsafe after the offenders are released.⁷⁴

Justice Bayda also states that prisons are some of the best recruiting grounds for street gangs.⁷⁵ This is a phenomenon that is particularly worrisome among Indigenous peoples. Indigenous gangs now exist with significantly large memberships, and with every expectation of expanding their numbers. Bob Bazin of the Canadian Institute of Strategic Studies estimates that there are twelve Indigenous gangs in Saskatchewan with membership exceeding 500.⁷⁶ Edmonton alone also has twelve gangs with membership exceeding 400 as of 2003.⁷⁷ Indigenous gangs have their genesis in the Canadian prison system. Their origins go back to when Indigenous inmates formed associations to protect each other from rival inmates, such as biker or white supremacist inmates. The Criminal Intelligence Service of Canada reports:

⁷² Mark Carter, “Of Fairness and Faulkner” (2002) 65 Sask. L. Rev., Colloquy on ‘Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders, 63 at 65.

⁷³ See for example Bayda, *supra* note 67 at 322-323.

⁷⁴ Fiske & Patrick, *supra* note 15 at 41.

⁷⁵ Bayda, *supra* note 67 at 322.

⁷⁶ “Police Tackle Growth of New Gangs Across the Province” *Lloydminster Meridian Booster* (March 23, 2005) A10.

⁷⁷ “Native Gangs on the Rise: 10 Percent of Edmonton Aboriginal Community Struggling” *Daily Herald-Tribune* (April 11, 2003) 8.

In Alberta, Aboriginal-based gangs that once existed primarily in prisons for protection purposes have now recognized the financial benefit of trafficking hard drugs (e.g. cocaine) on reserves. Many of the gangs have ready access to weapons, including firearms, that has resulted in a number of incidents of violence.⁷⁸

Indigenous gangs continue to have a large presence in the federal penitentiary system. As of 2005 there were an estimated 437 inmates in the federal system with Indigenous gang affiliation, with only biker gangs having more.⁷⁹ One has to question how productive it is to send an Indigenous offender to the federal system with the likelihood of being recruited into the gangland culture that exists within.

3.3.3. Mere Political Gesture

Blumoff suggests that the infliction of punishment within the criminal justice system somehow soothes a human longing for safety. He states it this way:

We also punish in the hope and belief that, at the very least, the efforts we expend trying to prevent those who hurt us in the past from hurting us again are not in vain. Because we perceive the imminent surrounding randomness of violence, though, we can *never* know that these wrongdoers won't hurt our children – *any* of our children – again. *Never* and *any* are highlighted because, as to *never*, we genuinely hope that our judgment is wrong, although we know that crime will persist.⁸⁰

Cayley argues that over-reliance on incarceration reflects policies that appeal to this longing. For example, Douglas Hurd, a minister in Margaret Thatcher's government, commenced a policy starting in 1987 that emphasized restraint in the use of prison, and the use of community based alternatives. This led to a dramatic decrease in the British prison population while those of Canada and the United States were increasing just as dramatically. This policy was carried out administratively, well away from the public eye. Things changed after the notorious kidnapping and murder of two year old Jamie Bulger by two pre-adolescent boys. Hurd's legislative reforms were repealed in favour of

⁷⁸ 2003 Annual Report on Organized Crime in Canada (Ottawa: Criminal Intelligence Service Canada, 2003) at 5.

⁷⁹ Kathleen Harris, "Federal Jails Hit by Gang Mentality" *The Ottawa Sun* (February 25, 2005) 6.

⁸⁰ Blumoff, *supra* note 50 at 162.

a 'tough on crime' policy. The British prison population naturally skyrocketed afterwards. Penal policy went from being a quiet administrative exercise to a highly political commodity.⁸¹ Cayley also views American 'get tough on crime' and 'war on drugs' policies in a similar light.⁸² He asserts that such policies represent efforts to score political points with the public by showing that 'something has been done', but without a rational consideration of whether such a policy effectively reduces crime.⁸³ Justice Bayda also condemns such policies as 'politicians pandering to public fears and stereotypes in order to get re-elected.'⁸⁴ The reason why 'something has been done' is misguided is because it does not get to the bottom of why crime occurs in the first place, which leads to the next criticism.

3.3.4. The Root Causes of Crime

A common criticism against reliance on imprisonment is that it fails to address the underlying causes of criminal behaviour. For example, the British Columbia Court of Appeal considered an appeal from a jail term for a twenty year old Wet'suwet'en man who had a prolonged history of property offences. His latest offence would normally have required an increased jail term on the rationale that previous and shorter jail terms were insufficient to deter him from repeating the same kind of crime. The Court had this to say about such an approach:

In some cases it is unfortunate 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.⁸⁵

⁸¹ Cayley, *supra* note 65 at 32-35.

⁸² *Ibid.* at 23-26.

⁸³ *Ibid.* at 3 and 98; See also David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001).

⁸⁴ Bayda, *supra* note 67 at 326.

⁸⁵ *R. v. Mitchel* (February 21, 1990) (B.C.C.A.) (unreported) at 7.

The Court concluded that what the offender needed was guidance, supervision, and training to become self-sufficient and responsible.⁸⁶ The above excerpt hints at why restorative justice is held out as a better alternative than incarceration. Jail fails to address the roots causes behind why an offender commits crime. Restorative justice discussions aim to flush out those underlying causes, and then explore solutions to them.⁸⁷ One of Rupert Ross' criticisms against punitive approaches is that they reduce an individual who commits a crime to an abstracted label, 'the offender'. This in turn leads to labeling the actions as 'right' or 'wrong'. They are judgmental and stigmatizing labels. They can blind justice system participants to the broader context behind the behaviour, its underlying causes, and alternative methods to deal with the behaviour.⁸⁸ Ross stresses the need to look beyond the events themselves and explore the broader context, the influences upon an individual's life that are behind why the action was committed.⁸⁹

James Waldram explains the role of social conditions in crimes committed by Indigenous persons who wind up in federal penitentiaries. His starting point is the psychological concept of Post-Traumatic Stress Disorder. Certain events such as witnessing death, being kidnapped, being raped, or domestic abuse, can produce acute and prolonged trauma in the persons who experience those events.⁹⁰ This trauma can produce a range of symptoms, which Waldram describes as follows:

Symptoms can include irrational fears, insomnia, nightmares, digestive complaints, depression, anxiety or nervousness, irritability, and outbursts of anger. Also experienced are feelings of guilt, shame, fear, and hopelessness. Self-destructive and impulsive behaviour has also been noticed. As a result, victims of post-traumatic stress disorder often find it difficult to establish meaningful relationships or maintain jobs because of their occasionally erratic behaviour.⁹¹

⁸⁶ *Ibid.*

⁸⁷ Stuart, *supra* note 60 at 8 & 13.

⁸⁸ Ross, *supra* note 70 at 101-102.

⁸⁹ *Ibid.* at 135-136.

⁹⁰ James Waldram, *The Way of the Pipe* (Peterborough, Ontario: Broadview Press, 1997) at 44.

⁹¹ *Ibid.*

These symptoms can make their victims more given to criminal behaviour. He provides an example by paraphrasing the conclusions of psychologist Judith Lewis Herman in the context of child abuse as follows:

In her work, Herman describes the “pervasive terror” of physical or sexual abuse experienced by children, including the deprivation of the necessities of life, such as food. Abused children are survivors. But to survive they must go to extraordinary lengths, such as physically hiding and running away, internalizing the abuse and blaming themselves for being bad, or even cooperating in the abuse to avoid even more severe punishment. Anger, resentment, and hate are engendered. Trust is sacrificed. Fantasies of murderous revenge intrude on young minds, and they may act out their feelings on other children, adults, or even family pets. The development of positive self-identities is compromised. While arguing that most victims do not become perpetrators of violence, Herman also notes that “men with histories of childhood abuse are more likely to take out their aggressions on others.”⁹²

Waldram continues by explaining that social conditions produce a variety of traumatic stresses upon the lives of individual Indigenous persons. Waldram interviewed many Indigenous federal inmates. Their interviews revealed various traumatic influences upon their lives that can be traced back to the social conditions they found themselves in. Some of the participants described having endured racial persecution that often threatened their physical integrity, and their feeling of safety. Inmates often experienced a loss of connection to their cultures, which can often be traced back to colonial influences such as the residential schools or government policies that criminalized Indigenous cultural practices, leading to low self esteem as Indigenous persons. Other inmates experienced physical and emotional abuse in residential schools or in foster homes. Other inmates experienced such abuse by their own parents or relatives, who in turn were themselves scarred in similar ways. Extreme poverty was also a common factor, to the point that some inmates were deprived of the necessities of life and forced to somehow survive day to day. Many of the inmates, not surprisingly, turned to

⁹² *Ibid.* at 45; Waldram is drawing upon Judith Lewis Herman, *Trauma and Recovery* (New York: Basic Books, 1992) at 113.

substance abuse to escape the harsh realities of their lives, which of course only lowered their self-esteem even further.⁹³

Waldram connects these traumas with Indigenous crime and rehabilitation as follows:

Emotionally, the scars are evident. Some men have talked of hate and bitterness. Others expressed profound sadness. They spoke of an inability as adults to love their own families and to trust people. And they demonstrated profound difficulty establishing positive identities for themselves.

Trauma, it is argued here, also operates at community, societal, and cultural levels. Narratives presented in this chapter characterize some Aboriginal communities as pathological in a way that is clearly damaging to residents. ... Current psychopathology, and other problems experienced by Aboriginal inmates, must therefore be seen as the product of events and circumstances operating at four levels: the individual, the community, the society, and the culture. Rehabilitative programs which ignore this fact, for instance by focusing only on the individual, will not likely be successful.⁹⁴

Waldram presents as a solution Indigenous Elders adopting the role of both therapeutic healers and spiritual guides for Indigenous inmates. Because an Elder is also Indigenous, is possessed of considerable cultural and spiritual authority, and has often had similar life experiences to those of the inmate, the Elder can reach through to the inmate so that he or she is receptive to the Elder's teachings. Once an initial rapport is established, the Elder employs various methods of healing. The Elder can place the inmate's pain within the broader contexts of colonialism, racism, social conditions, and the events that have impacted upon the inmate's life. This extends understanding and sympathy to the inmate, and lets the inmate know that he or she remains valued as a person. The Elder can also instruct the inmate on his or her place in the world, his or her relationships to other people, to the Creator, to ancestral spirits, and to the natural world, with the idea of gently discouraging future actions that harm others. The Elder can also instruct the inmate on cultural and spiritual values, thereby gently persuading the inmate to reform and become

⁹³ *Ibid.* at 47-68.

⁹⁴ *Ibid.* at 68.

healthier. This also has the goal of building up an inmate's self-esteem in him or herself as an Indigenous person. The Elder maintains a bond of compassion and empathy with the inmate, to assure the inmate that the elder has the inmate's best interests in mind.⁹⁵

The concept of Elders using cultural practices and spiritual counseling as pathways to healing is also a central theme of Indigenous justice practices that resemble restorative justice. Ross explains that Elders play a vital role in the healing of offenders during restorative processes. They are there to 'guide, encourage and nourish.'⁹⁶ Philip Lane describes the healing path of restorative justice as a long term journey with distinct stages. The first stage is for the offender to start the healing journey. The offender often needs to hit rock bottom, and be forced to face the fact that his or her life must change. This requires somehow starting the journey, whether it involves accepting responsibility for an offence just committed, or starting a treatment program for the first time. The second stage is partial recovery. The offender has made some progress. Reparation to the victim may have been made. Substance abuse counseling may have started. The underlying causes of the offender's past behaviour, the traumas of the past, are still there and a source of continuing pain for the offender. At this stage it is important for the offender to immerse him or herself in a 'culture of recovery' that involves persistent treatment. That treatment can include treatment programs, but can also include receiving spiritual instruction or participation in cultural activities. The third stage is the long trail. The novelty of the initial phases of the healing journey may have worn making this a critical phase. The offender may have gotten past initial destructive behaviours, such as drug abuse. The lingering pain is still present, and the offender can be tempted towards

⁹⁵ *Ibid.* at 71-75.

⁹⁶ Ross, *supra* note 70 at 226.

less destructive but still inhibiting behaviours such as overeating. The challenge for the offender is to replace his or her old identity with a new identity and life pattern, and this leads to the next stage. The final stage is transformation and renewal. The offender completes the healing journey by no longer focusing on his or her own individual pain, and instead focuses emotional and spiritual energy outwards to helping others. It involves becoming selfless, to no longer need self-healing but to live for helping others.⁹⁷ The healing aspects of restorative based processes embrace not only the healing of the offender, but the victim and anyone else negatively impacted by the crime as well. If the victim, for example, was sexually assaulted by the offender, the restorative process would ideally include the victim's healing from the trauma as an objective. The next criticism takes issue with how retributive justice addresses harms suffered by the victim.

3.3.5. Does Not Serve the Victim

Western justice systems often collapse the harm done to the victim into the state's interest in prosecuting crime. The victim does not tend to have direct involvement in the proceedings, while the prosecutor speaks to the public interest before the court. Restorative justice proponents suggest that this does not necessarily address the victim's interests. Cayley expresses it this way:

Assuming the power of prosecution was in criminal cases one of the ways in which modern states built up their power. Victims, until very recently, were pushed to the side. They had no part in the proceedings. The restoration of their health, dignity, or property was unlikely to figure in the sentence. Instead, the state, through its criminal courts, presented itself as the surrogate victim.⁹⁸

Restorative justice idealizes providing a crime victim with the opportunity to speak to his or her fears, concerns, and interests in the course of the process. The victim

⁹⁷ Philip Lane, "Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities" in Wanda D. McCaslin (ed.) *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 369 at 392-396.

⁹⁸ *Supra* note 65 at 217.

does so in an atmosphere with a feeling of safety, and in complete honesty. By explicitly incorporating the victim's dialogue into the process, the victim's interests and concerns will be addressed by the resolution.⁹⁹ As will be explained in more detail below, an advantage that restorative justice claims is a better approach to inspiring contrition and responsibility in the offender. This is seen as integrally bound up with the victim's participation in the restorative process. Cayley expresses it this way:

If contrition is possible for the offender, it is the victim's suffering above all that is likely to trigger it. If healing and reconciliation are possible for the victim, then it is the humanization that occurs when an offender acknowledges and tries to atone for what he has done that is most likely to bring it about. In this respect each holds the key to the other's liberation from the continuing thrall of whatever violence has occurred.¹⁰⁰

By including victim participation, and reaching a resolution that accounts for the victim's interests, restorative justice claims to better serve the victim better than state administered punishment. The victim also benefits if the process effectively addresses the offender's behaviour. A key potential benefit is the victim's safety, even after the victim has suffered serious violence. The next criticism holds that punitive approaches are inferior when it comes to motivating the offender to reform him or herself.

3.3.6 Does Not Promote Responsibility

The Canadian justice system, due to the prospect of imprisonment or other punishments, provides procedural safeguards to the accused. One such safeguard is that evidence tendered by the Crown must prove the accused's guilt beyond a reasonable doubt. These safeguards are themselves cause for criticism for restorative justice proponents. Restorative systems do not ultimately aim to inflict punishment upon the accused for its own sake, but rather to heal the offender and correct behaviour. This leads

⁹⁹ United Nations Office on Drugs and Crime, *supra* 55 at 59-61; Ross, *supra* note 70 at 148-149; Stuart, *supra* note 60 at 45-47.

¹⁰⁰ *Supra* note 65 at 219-220; See also Liebmann, *supra* note 57 at 26.

to the reintegration of the offender, which in turn is part of the broader agenda of restoring relationships and harmony in the community.¹⁰¹ A problem, assuming that the accused did commit the crime, manifests when the procedural safeguards are exploited to garner an acquittal, or otherwise nullify the charges. The accused does not have to accept any responsibility, and the opportunity to strengthen community relationships is lost.¹⁰²

The sanctions themselves are also deemed to be not very conducive towards encouraging responsibility in offenders. The sentence is pronounced by a judge, which is often accompanied by a lecture. But chances are the offender will never see that judge again. Both the sanction itself and the manner in which it is handed out tend not to bring the message home to the accused.¹⁰³

Restorative justice, it is said, has a greater potential to inspire contrition and responsibility in the accused. The victim, and perhaps other members of the community as well, have the opportunity to describe how the offender's actions have affected them. The offender is forced to face up to the consequences of the behaviour. This in turn can lead to contrition, remorse, and an acceptance of responsibility. It can instill a genuine desire on the part of the offender to change his or her ways, and make right by those who have been affected. This in turn provides a stronger assurance that the accused will complete any rehabilitative measures that are agreed upon, such as counseling and community service.¹⁰⁴ Restorative justice does not necessarily present a softer option than jail. The meeting with the victim (and perhaps others affected by the crime) and the

¹⁰¹ Ross, *supra* note 70 at 20; Roche, *supra* note 55 at 28-30.

¹⁰² Ross, *supra* note 70 at 202; Rudolph Alexander, "Restorative Justice: Misunderstood and Misapplied" (2006) 5:1 Journal of Policy Practice 67.

¹⁰³ Cayley, *supra* note 65 at 219.

¹⁰⁴ Cayley, *supra* note 65 at 219-220 and 290; Zernova, *supra* note 55 at 62-63; Liebmann, *supra* note 57 at 26.

rehabilitative measures that are employed can make a restorative justice resolution just as or even more onerous than a prison term.¹⁰⁵ If the standard justice system does not enhance the victim's concerns, or further an offender's acceptance of responsibility, then community relationships remain fractured. This forms the basis of the next criticism.

3.3.7 Does Not Promote Relationship Reparation

Adversarial processes are also a target for criticism by restorative justice proponents because of their competitive emphasis. Robert Porter argues that the use of adversarial procedures can worsen relationships in an American Indian tribal community where previously those relationships had been nurtured by restorative processes. Porter emphasizes that many American Indian tribes used peacemaking as a means to resolve disputes. Peacemaking discussions would produce a satisfactory resolution for all concerned, and strengthen community relationships. Porter sees a danger in tribal court systems using adversarial procedures. Adversarial processes encourage tribal members to aggressively pursue their own interests against other members. It promotes a selfish individualism that can marginalize the traditional emphasis on relationship reparation.¹⁰⁶

Restorative justice processes are presented as more conducive to facilitating relationship reparation. They create a setting where the participants can freely speak to how to resolve the conflict, and repair the relationships between themselves that have been damaged.¹⁰⁷ The seating arrangement of a sentencing circle for example is more

¹⁰⁵ Ross, *supra* note 70 at 263 and 265-266.

¹⁰⁶ Robert Porter, "Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies" (1996-1997) 28 Colum. H.R.L. Rev. 235 at 278-280. Porter was dealing with the context of civil litigation, but it is still easy to see how the criticism might apply in the criminal context, especially when it involves crimes between different members of the same community.

¹⁰⁷ Ross, *supra* note 70 at 158; Zernova, *supra* note 55 at 44-46. John Braithwaite, "Restorative Justice and a Better Future" (1997) 76:1 Dal. L.J. 9; Christo Thesnaar argues that restorative justice can be used to

than a physical placement. It invokes a symbolism that reinforces the essential equality of all present. Even though a Canadian judge who sits in a sentencing circle can veto the circle's proposal and impose his or her own sentence, the judge nonetheless sits in the same circular arrangement. It represents at least a symbolic departure from the usual top-down decision making of the adversarial process, and emphasizes that the community has a real role to fulfill in the process.¹⁰⁸ The next criticism holds that restorative justice can produce superior results relative to punitive approaches when it comes to recidivism.

3.3.8 Restorative Justice is More Effective

A frequently made claim is that by successfully changing the offender's behaviour, and addressing its underlying causes, restorative justice can be more effective in addressing criminal recidivism. Restorative justice proponents can garner some pretty impressive statistical evidence in support of such claims. Evaluation studies of restorative justice programs for juvenile crime frequently report substantial statistical improvements against recidivism. One study found that youth who participated in selected victim-offender mediation programs in California and Tennessee re-offended at a rate 32% less than those who did not participate.¹⁰⁹ Another study of Community Justice Committees in Arizona found that youth who completed the program were 0.81 times less likely to re-offend.¹¹⁰ Youth who successfully completed a conferencing program in Indianapolis were 23% less likely to re-offend.¹¹¹ A study of a program in

resolve conflicts in South African communities so as to strengthen harmony in post-apartheid South Africa. See "Restorative Justice as a Key for Healing Communities" (2008) 15:1/2 Religion and Theology 53.

¹⁰⁸ Stuart, *supra* note 60 at 59-61.

¹⁰⁹ William Nugent *et al.*, "Participation in victim-offender mediation and reoffense: Successful replication?" (2001) 11:1 Research on Social Work Practice 5.

¹¹⁰ Nancy Rodriguez, "Restorative Justice, Communities, and Delinquency: Whom do we reintegrate?" (2005) 4:1 Criminology Public Policy 103.

¹¹¹ Edmund F. McGarrell, "Re-Offending Among First-Time Juvenile Offenders: The Indianapolis Experiment" (2007) 24:2 Justice Quarterly 221.

Australia found a 38% reduction in driving while intoxicated and violent offences by juveniles.¹¹² Success has not occurred only in relation to juvenile crime. A recent meta-analysis of 35 restorative justice programs, juvenile and adult, in Australia, Canada, and the United States, concluded that these programs had in the aggregate substantially reduced recidivism relative to non-restorative approaches.¹¹³

Restorative justice has also been successfully applied for serious crimes that would normally warrant incarceration. In Ottawa, the Collaborative Justice Program applies restorative approaches to offences regardless of seriousness, such as robbery, intoxicated driving causing bodily harm or death, and sexual offences. Of those who completed the program in the years 2002 to 2005, 15.4% re-offended within a year after completion, and 32.3 % within three years of completion. A comparison group of offenders re-offended at rates of 28% within the first year and 54% within three years.¹¹⁴ Kathleen Daly's study of a program in South Australia dealing with youth sexual offences found that those who completed the program re-offended at a lower rate (48%) than those who were dealt with through the standard court process (66%).¹¹⁵

Restorative approaches have occasionally produced remarkable successes in Indigenous contexts as well. Rupert Ross describes the success of the Hollow Water Healing Circle Program, which dealt with pervasive sexual abuse in a Manitoba Indigenous community, as follows: "Out of the forty-eight offenders in Hollow Water

¹¹² Lawrence Sherman, Heather Strang, & Daniel Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)*. [unpublished]

¹¹³ Jeff Latimer, Craig Dowden, & Danielle Muise, *The Effectiveness of Restorative Justice Programs: A Meta-Analysis* (Ottawa: Department of Justice, Research and Statistics Division, 2001).

¹¹⁴ Tanya Rugge, James Bonta, & Suzanne Wallace-Capretta, *Evaluation of the Collaborative Justice Project: a Restorative Justice Program for Serious Crime 2002-2005* (Ottawa: Public Safety and Emergency Preparedness Canada, 2005).

¹¹⁵ Kathleen Daly, "Restorative Justice and Sexual Assault: an Archival Study of Court and Conference Cases" (2006) 46 *Brit. J. Crim.* 334.

over the last nine years, only five have gone to jail, primarily because they failed to participate adequately in the healing program. Of the forty-three who did, only two have repeated their crimes, an enviable record by anyone's standards."¹¹⁶ A follow up evaluation found that the number of recidivists remained at 2 even after another 64, for a total of 107, had gone through the program.¹¹⁷

This relates to another criticism, that the high costs of incarceration are just not worth it. As of 2006, it costs the federal government \$110,223 annually to keep one male inmate, and \$150,867 annually for one female inmate, confined in a maximum security institution. The annual cost per inmate amounts to \$70,000 for medium and minimum security institutions.¹¹⁸ In the 2001/2002 fiscal year, 71% of expenditures by the Correctional Service of Canada were on custodial services, while 13% were on community supervision services.¹¹⁹ Inmates serving time in federal institutions or provincial jails accounted for only 15% of the offenders covered by the budget.¹²⁰ The Prison Justice Day Committee indicates that during the 2004/2005 fiscal year, the Correctional Service used 71% of its budget to keep 31,500 offenders in custody while 14% was spent supervising 120,500 offenders in the community.¹²¹

Consider this in light of the success of the Family Group Conferencing Program in New Zealand, which drew upon traditional Maori principles of mediation. Judge F.M.W. McElrea reported that admissions to youth custody facilities dropped from 2712

¹¹⁶ Ross, *supra* note 70 at 36.

¹¹⁷ J. Couture *et al.*, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process* (Ottawa: Ministry of the Solicitor General, 2001).

¹¹⁸ Ira Bansen, "Doing the Crime and Doing the Time" *C.B.C. Reality Check Team* (January 5, 2006).

¹¹⁹ Denys Carriere, *Adult Correctional Services in Canada, 2001/02* (Ottawa: Statistics Canada, 2003) at 13.

¹²⁰ *Ibid.* at 3.

¹²¹ Prison Justice Day Committee, *Behind Bars in Canada: the Costs of Incarceration* (Vancouver: Prison Justice Day Committee, 2008).

in 1988 to 923 in 1992/93. Half of those facilities had been closed as a result. Youth prosecutions dropped by 27 percent from 1987 to 1992.¹²² Mandeep K. Dhami and Penny Joy note that in a diversionary program in Chilliwack, British Columbia, an average of 12.45 hours was spent for each participant in comparison to an average of 34.5 hours for an offender in the standard justice system.¹²³ They then add:

The insufficient funding of RJ initiatives in Canada is particularly difficult to accept in light of the large amount of money that the federal and provincial governments save through diversion cases from the traditional system into RJ programs. Volunteer-run, community-based programs are both efficient and cost-effective.¹²⁴

The argument is that restorative approaches represent the better demand on resources.

The preceding sections attempted to describe what are seen as essential features of restorative justice, and the criticisms made by restorative justice proponents against Western punitive approaches. It is these contrasts that fuel a rhetoric that essentializes past Indigenous justice practices as holistic healing and relationship reparation, while essentializing Western justice systems as adversarial and punitive. It must be noted however that some Indigenous justice practices represent a considerable distance from what is associated with restorative justice. The potential relevance of these practices to contemporary visions of Indigenous justice will now be considered.

3.4 Indigenous Punitive Approaches

To summarize, some past Indigenous justice practices had strong parallels to restorative justice. It is fair to say that community reconciliation was often the primary emphasis of Indigenous justice systems. This will be germane to many of our subsequent discussions, since the use of restorative type processes is an important impetus behind the

¹²² Judge F.M.W. McElrea, "Restorative Justice: The New Zealand Youth Court – A Model for Development in Other Courts?" (1994) 4 *Journal of Judicial Administration* 36 at 53.

¹²³ Mandeep K. Dhami & Penny Joy, "Challenges to Establishing Volunteer-Run, Community-Based Restorative Justice Programs" (2007) 10:1 *Contemporary Justice Review* 9 at 19.

¹²⁴ *Ibid.* at 19.

Indigenous pursuit of control over justice. The practices that were restorative in nature were not however the sum and total of past Indigenous justice. Some Indigenous justice practices were harsh and punitive. Certainly some of these practices were part of systems that emphasized reconciliation, either as encouragements or last resorts. Some practices however were often of such a forceful or retributive nature as to be at considerable dissonance from restorative justice. The potential contemporary relevance of these practices will also be relevant to some of our subsequent discussions, the discussion in Chapter 12 on the *Charter's* right against cruel and unusual punishment in particular.

To begin with, contemporary Indigenous responses to crime, even if jurisdiction over justice is obtained, are unlikely to rely upon restorative measures to the complete exclusion of punitive measures. It is erroneous to think of punishment and restorative justice in purely oppositional terms. Christopher Bennett stresses that while a criminal justice system can accommodate restorative ideals such as apology and victim restitution, it should not compromise other important functions as retribution and public denunciation of crime.¹²⁵ Kathleen Daly argues that restorative justice is really about alternative approaches to punishment. A restorative resolution can impose onerous burdens and restrictions on an offender. It is punishment, but with a greater emphasis on rehabilitation and reintegration. Restorative justice resolutions are often backed up by the prospect of punitive sanctions (e.g. jail terms) in the regular justice system, in order to encourage compliance with their conditions. They can also provide a backup when an offender fails to comply with the terms of a restorative resolution.¹²⁶ Daly stresses that

¹²⁵ Christopher Bennett, *The Apology Ritual* (Cambridge: Cambridge University Press, 2008).

¹²⁶ Kathleen Daly, "Revisiting the Relationship between Retributive and Restorative Justice" in Heather Strang & John Braithwaite (eds.) *Restorative Justice: Philosophy to Practice* (Dartmouth: Ashgate, 2000) 33 at 38-40; Dena M. Gronet & John M. Darley suggest that the availability of retributive sanctions in the

restorative and standard punitive approaches should be seen as complementary instead of oppositional. Each can fill in the gaps of the other to provide a comprehensive system of responding to crime.¹²⁷

Even the most enthusiastic proponents of restorative justice do not propose a complete reliance on restorative justice. They often concede that some offences are so serious as to be inappropriate for applying restorative justice. It is also often conceded that restorative justice would be inappropriate for some offenders who are simply so dangerous or who simply will not respond to corrective efforts. Their point is that in Western justice systems, imprisonment is relied upon reflexively and uncritically for far too many offences.¹²⁸

It is also clear that restorative justice relies in no small measure upon the voluntary participation. A victim's refusal to participate can be a significant stumbling block to a restorative process. Kent Roach states:

If they become vocal supporters, crime victims can play an important role in the movement towards restorative justice. On the other hand, their vocal opposition and their refusal to participate could be devastating given the central role that victims have been given in most public discussions of restorative justice and the importance of the victim in achieving restorative justice.¹²⁹

Daniel Kwochka concedes that the victim's refusal to participate '... tend(s) to militate against proper and full reconciliation', but holds that it is not necessarily fatal.¹³⁰ For the Hollow Water program, the victim was encouraged but not required to attend the sentencing circles that were held outside the court system. If the victim did not attend,

event of offender may be a necessary prerequisite to any meaningful political support for restorative justice programs. See "Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures" (2006) 19: 4 Social Justice Research 395.

¹²⁷ *Ibid.* at 35 and 40. See also Roche, *supra* note 55 at 174-177.

¹²⁸ Kwochka, *supra* note 62 at 171-173; Ross, *supra* note 70 at 229-232; Cayley, *supra* note 65 at 328-239; Bayda, *supra* 67 at 330-331.

¹²⁹ Roach, "Changing punishment at the turn of the century", *supra* note 55 at 271.

¹³⁰ Kwochka, *supra* note 62 at 184.

the circle could proceed with pursuing a resolution that emphasized the offender's rehabilitation and reintegration.¹³¹

Even more critical is the offender's participation. It has been held that a fundamental prerequisite to applying restorative justice is the offender's willingness to accept responsibility for, or otherwise admit to the commission of the offence. Daly describes it in this way:

Commentators suggest that for a restorative/reparative process to work effectively, there needs to be a genuine admission of responsibility, remorse, or guilt for a wrong. Unless that symbolic reparation occurs, the rest will not follow easily, and as Retzinger and Scheff suggest, there will be many impediments to settlement. To date, restorative justice processes have been used mainly in cases where an offender admits or has "not denied" the offence to a police officer (and at times, to a magistrate).¹³²

Ross also states that when an offender genuinely wishes to contest the charges then it is entirely appropriate that the offender's case go ahead within the adversarial system.¹³³

It is not a matter of one approach to justice occupying the entire field. Both punitive and restorative approaches can, and necessarily would have to, exist side by side in a dual-system approach. The real question is how much space in the same field should each occupy relative to the other. If Indigenous communities do adapt traditions with restorative emphases they will necessarily have to use punitive measures as well. Indigenous communities may find themselves unwilling to dispense with prison altogether for certain offenders or certain offences. Judge Heino Lilles has pointed out that Elders' sentence advisory panels have occasionally recommended terms of incarceration that exceeded what the Crown recommended.¹³⁴

¹³¹ Ross Gordon Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) 24 Manitoba L.J. 77 at 94-95.

¹³² Daly, "Revisiting the Relationship between Retributive and Restorative Justice", *supra* note 126 at 48.

¹³³ *Supra* note 70 at 229.

¹³⁴ Judge Heino Lilles, "Tribal Justice: A New Beginning" (Paper delivered to a conference entitled Achieving Justice: Today and Tomorrow, Whitehorse, Yukon, 3-7 September 1991) at 11-12 [unpublished].

Another possibility is the revival of traditional sanctions such as public shaming and/or corporal punishment as deterrent sanctions, and as ‘short and sharp’ punishments that have cultural significance for Indigenous offenders but avoid the long-term effects that have been associated with imprisonment. Corporal punishment may offend some peoples’ notions of treating criminals humanely because of the physical pain involved and the possibility of lasting injuries or scars. The Correctional Service of Canada for example states that Canadian use of corporal punishment as a criminal sanction ended in 1972, and that it is degrading to human dignity.¹³⁵ The idea of corporal punishment may not be as outrageous as some people might think. Michael Fay, an American citizen, was sentenced to public caning in Singapore in 1994 after he was caught spray painting and egging several cars, and in possession of stolen public property. President Bill Clinton and 34 American senators sent a petition for leniency to the Singaporean Embassy. The American public was to no small degree of a different opinion. Many Americans flooded American radio stations, newspapers, and the Singaporean Embassy with both letters and phone calls expressing support for the caning. A public opinion poll also indicated that 38 percent of Americans were in favour of the use of corporal punishment.¹³⁶ John Huntsman, a former ambassador to Singapore, questioned whether the use of such a sanction was appropriate for an American system that values political dissent, freedom of expression, and rights of appeal during the criminal process. He also went on to suggest the role of cultural differences in Singapore’s use of caning: “Culturally, it’s a far different equation. It is a very traditional, Confucianist society in which the family is still the most important unit . . . a society that believes in the well-being of the whole, not

¹³⁵ Correctional Service of Canada, <Online: <http://www.csc-scc.gc.ca/text/pblct/rht-drt/05-eng.shtml>>.

¹³⁶ Tim Poor, “Singapore Caning brings Outpouring of Agreement Here” *Washington Post* (April 10, 1994) 1A.

necessarily the individual.”¹³⁷ On that note, it is conceivable that corporal sanctions, if having a basis in past practices, could gain currency in a contemporary Indigenous community. A community may want to revive such sanctions with the goal of deterrence and/or public denunciation as an alternative to jail. An Indigenous community may want to use corporal sanctions as part of restorative resolutions, or supplementary to terms of incarceration. All of this then arrives at the question of whether Indigenous communities should have the legal autonomy (i.e. jurisdiction) to realize these visions of justice. Therefore the next stage is to explore Indigenous demands for self-determination.

¹³⁷ *Ibid.*

CHAPTER 4: INDIGENOUS DEMANDS FOR JURISDICTION OVER JUSTICE

A frequent aspiration among Indigenous peoples is to obtain greater legal and political autonomy against a dominant Canadian legal-political system. Various reasons for Indigenous self-determination will now be explored, with particular emphasis on criminal justice where appropriate.

4.1 For Its Own Sake

The idea here is that all peoples having autonomy to govern their own affairs without external imposition from other peoples is itself something of worth and value. The United Nations' *International Covenant on Economic, Social and Cultural Rights* states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹³⁸ S. James Anaya states in the context of ending colonialism:

In its constitutive aspect, self-determination comprises a standard that enjoins the occasional or episodic procedures leading to the creation of or change in institutions of government within any given sphere of community. When institutions are born or merged with others, when their constitutions are altered, or when they endeavor to extend the scope of their authority, these phenomena are the domain of constitutive self-determination. Constitutive determination does not itself dictate the outcome of such procedures; but where they occur it imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned. This aspect of self-determination corresponds with the provision common to the international human rights covenants and other instruments that state that peoples "freely determinate their political status" by virtue of the right of self-determination. ...

Colonization was rendered illegitimate in part by reference to the processes leading to colonial rule, processes that today represent impermissible territorial expansion of governmental authority. The world community now holds in contempt the imposition of government structures upon people, regardless of their social or political makeup.¹³⁹

One can argue that applying the concept in Canada means that Indigenous peoples should have the autonomy to govern themselves free of external imposition from the Canadian

¹³⁸ *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, G.A. Res. 2200(XXI), Art. 1(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

¹³⁹ S. James Anaya, *Indigenous Peoples in International Law* (2nd. ed.) (Oxford: Oxford University Press, 2004) at 105-106.

state. The concept of self-determination is often idealized as having value in itself, but it is also closely tied to other concerns specific to Indigenous peoples.

4.2 Cultural Difference

There remain to this day significant cultural differences between Indigenous peoples and non-Indigenous peoples, and this includes approaches to governance. Sakej Henderson, for example, contrasts Algonquian customary law as more persuasive and less coercive in comparison with Western law as follows:

From an Algonquian language perspective, the answers to our belief in law and justice are found in our worldview, language and values. First, the teachings of the elders have taught us of the value of human dignity and integrity. They believe only personal attributes can create extended friendships and alliances. Second, the innermost structure of Algonquian thought is hostility toward the idea that the cult of violence manifest in Eurocentric thought can create a just society. We prefer shared ideas and persuasion to brute force.¹⁴⁰

He continues:

Sui generis Aboriginal orders reveal legal traditions based on shared kinship and ecological integrity. They demonstrate how Aboriginal peoples deliberately and communally resolved recurring problems. ...

Sui generis Aboriginal orders exist as comprehensive orders with deeply interrelated responsibilities, rights and obligations that are specific and precise. They are consensual, interactive, dynamic and cumulative. They operate by their own force; they are not delegated orders derived from the British or French sovereign.¹⁴¹

This concept of cultural difference helps fuel frequent legal and political demands that Indigenous peoples should be free to govern themselves by their own laws and customs. For example, the *Declaration of the Rights of Indigenous Peoples* reads in part:

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, ...

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,¹⁴²

¹⁴⁰ Sakej Youngblood Hendersen "Indigenous Legal Consciousness" (2002) 1 Indigenous L.J. 1 at 27.

¹⁴¹ *Ibid.* at 34.

¹⁴² *Declaration of the Rights of Indigenous Peoples*, United Nations General Assembly, 7 September 2007, A/61/L. 67.

Patricia Monture-Angus explains: “What seems to be common to all Aboriginal Peoples, despite our vast differences, is a desire to continue to exercise our authority in political, social and legal ways, at least amongst our own people, following our own understandings or our (political authority).”¹⁴³ Her goal is to promote independence for Indigenous peoples, which involves far more than legal or political reform within the existing Canadian system. Independence is a state of being that is pursued by Indigenous peoples, both by their leaders and at the grassroots level.¹⁴⁴ Culturally appropriate governance remains important, as Monture-Angus explains: “Reclaiming our self-governing relationships sometimes means remembering, and in other places means putting back into practice, traditional systems of governance (or responsibility).”¹⁴⁵

Demands for culturally appropriate systems of governance include criminal justice as well. Mary Ellen Turpel-Lafond and Patricia Monture-Angus state:

Especially insofar as criminal justice institutions reach *within* our communities, the criminal justice system can only work if premised on the notion that Aboriginal peoples are different and separate. Therefore, Aboriginal people must be allowed to design and control the criminal justice system inside their communities in accordance with the particular Aboriginal history, language and social and cultural practices of that community. The justice system in Aboriginal communities will, of necessity, be different than elsewhere (namely in non-Aboriginal society) in Canada. It will not be a lesser system and it will not be Canadian law - it will be our system and our law.¹⁴⁶

Canadian criminal procedure is often seen as culturally inappropriate from Indigenous perspectives. Adversarial processes, such as confrontational cross-examination of witnesses, can be incompatible with Indigenous processes designed to achieve consensus and restore community harmony. Richard Gosse argues that Canadian adversarial procedures are a culturally illegitimate imposition as follows:

¹⁴³ *Ibid.* at 30.

¹⁴⁴ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999) at 21-22.

¹⁴⁵ *Ibid.* at 22.

¹⁴⁶ Mary Ellen Turpel-Lafond & Patricia Monture-Angus, *supra* note 33 at 257.

From the Aboriginal perspective, the Canadian “administration of justice system” is foreign... The philosophies, values and approaches of the Aboriginal Peoples differ fundamentally from those of Canadian society generally in coping with “antisocial” behavior and conflict resolution.

The Aboriginal Peoples do not believe in a confrontational guilt determination process, but in a holistic approach where emphasis is placed upon repairing the damage caused by antisocial behavior. To them, it is not only the justice system that is alien, it is also the law that the system is applying¹⁴⁷

The Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee also describes the problem of cultural legitimacy in this way:

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 clash of 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.¹⁴⁸

Leonard Mandamin argues that Canada’s adversarial justice system may be inappropriate for Indigenous persons with traditional beliefs. He proposed that the existing justice system could continue to apply to Indigenous peoples along with the Criminal Code offences, but also that the existing system should be infused with Indigenous consensus-based processes.¹⁴⁹

Turpel-Lafond and Monture-Angus characterize the Canadian justice system as using deterrence, retribution, and correctional reform to legitimate punishment by incarceration, while punishment as a concept is ‘not culturally relevant to Aboriginal social experience.’¹⁵⁰ They argue that the problem of Indigenous over-representation requires substantial changes that recognize and support Indigenous cultural practices.¹⁵¹

¹⁴⁷ Richard Gosse, “Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government” in Richard Gosse, James Youngblood Henderson, and Roger Carter (ed.), *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 1 at 14.

¹⁴⁸ Alan Grant *et al.*, *Report of the Osnaburgh-Windigo Tribal Council Justice Review Committee* (Toronto: Government of Ontario, 1990) at 6.

¹⁴⁹ Leonard Mandamin *et al.*, “The Criminal Code and Aboriginal People” (1992) U.B.C.L. Rev., Special Edition on Aboriginal Justice, 5 at 15-18.

¹⁵⁰ Turpel-Lafond & Monture-Angus, *supra* note 33 at 248.

¹⁵¹ *Ibid.* at 250.

This requires nothing less than Indigenous peoples having control over the institutions of justice within their own communities that reflect Indigenous cultures.¹⁵²

It cannot be assumed however that every member of an Indigenous community is traditional in terms of justice ideology. Indigenous people today interact with a different world than the one that existed before contact with Europeans. Carol LaPrairie writes:

For all communities, however, the mass communication in the form of telephones, radio, television and video, and other vestiges of mainstream society are facts of contemporary life. Radio bingo often replaces the gathering in the school gymnasium, and television has, for many, replaced the kinds of social interaction that only the middle-aged and older people can remember. Video outlets, frequently operating out of private homes, are commonplace, and videos are widely viewed and portray images of the outside world. The result is that many of the values of that world have inundated communities, but without the relevant context. One consequence is that mass communication has changed the way people interact socially, and education and wage-labour have altered the economic relationships within and between families, and between men and women. Several commentators have noted that the traditional practice of sharing widely among all community members is now often restricted to the nuclear family.¹⁵³

Two of her previous studies indicate that Indigenous communities are often divided over issues such as the acceptance of traditional or contemporary values, individualism versus collectivism, and traditional spirituality versus other religions such as Christianity and new age spirituality.¹⁵⁴ An Indigenous community, or at least the majority of its members, would not necessarily want a justice system that reflects traditional values. The system would not be in keeping with their more 'contemporary values' and therefore would be illegitimate.

For example, Leslie Jane McMillan has documented that Mi'kmaq traditionalists in the community of Membertou have used a combination of traditional ceremonies and healing discourses in a number of ways. One was to help young kids found acting on a

¹⁵² *Ibid.* at 249.

¹⁵³ Carol LaPrairie, "Community Justice or Just Communities?: Aboriginal Communities in Search of Justice" (1995) Can. J. Crim. 521 at 527.

¹⁵⁴ *Ibid.* at 528. The studies she was referring to are Carol LaPrairie, *Justice for the Cree: Communities, Crime and Order* (Nemaska, Quebec: Cree Regional Authority, 1991); and Carol LaPrairie, *Exploring the Boundaries of Justice: a report prepared for the Department of Justice* (Yukon Territory: First Nations of the Yukon Territory and Justice Canada, 1992).

suicide pact. This evolved into more widespread efforts of promoting self-esteem in Mi'kmaq youth, as well as assisting them during crises and conflicts.¹⁵⁵ However, a significant portion of the Membertou community is Catholic, some of whom dismissed the traditionalists' efforts as 'hocus pocus'. They did not generally discourage children from attending the ceremonies, but they did frown upon adult participation.¹⁵⁶

Fiske and Patrick describe 'cultural confusion' among the Lake Babine as follows:

Cultural confusion entails a loss of traditions and an impossible conflict between two groups of contrasting norms. For the Babine, cultural confusion is experienced as a dissonance between, on the one hand, the ideals, wisdom, and aspirations of the elders and, on the other hand, the incompatibility of Babine values with those of the non-Aboriginal community. ...

Most obvious in Babine communities are the tensions between youth and elders. As the former enter schools outside of their communities, they confront cultural conflicts within their own age groups as well. They also realize that the values of their parents and grandparents either are not reinforced by outside authority figures or are in conflict with the values upheld by non-Aboriginal communities.¹⁵⁷

One of Bruce Miller's criticisms against the South Vancouver Island Justice Education Project was that it was a top-down affair that failed to ascertain contemporary justice ideologies among the broad membership of the Coast Salish community, some of whom did not consider themselves traditional.¹⁵⁸

Another example involves the Mohawk community of Akwesasne. Mohawk traditionalists attempted to implement a comprehensive justice system based on Mohawk culture by drafting *The Code of Offences and Procedures for Justice for the Mohawk Territory at Akwesasne*.¹⁵⁹ The Code emphasizes mediation whereby appointed Justice Chiefs resolve conflicts by consensus. Even though the Code contains a gradation of

¹⁵⁵ McMillan, *supra* note 19 at 295-296.

¹⁵⁶ *Ibid.* at 297.

¹⁵⁷ Fiske & Patrick, *supra* note 15 at 186-187.

¹⁵⁸ Miller, *supra* note 4 at 195.

¹⁵⁹ *Code of Offences and Procedures for Justice for the Mohawk Nation at Akwesasne*, draft #10. The draft was provided by Martha LaFrance of the Akwesasne Justice Department.

offences ranging from Serious to Grievous to Minor, imprisonment as a sanction is conspicuously absent from the Code. Sanctions include banishment, fines up to \$5,000, reparations of up to twice the amount gained from the offence, probation, and community service.¹⁶⁰ While the Code asserts exclusive jurisdiction over the offences listed, it also makes provision for turning over offenders to provincial or federal authorities for certain serious offences.¹⁶¹ The *Code* was submitted to the Mohawk Nation council of Chiefs in 1989, but apparently never adopted. The reason why is not entirely clear. George-Kanentiio suggests that Mohawk smugglers who trade contraband across the Canadian and American border felt threatened by the prospect of a unified justice system and police force in all Mohawk communities, and therefore worked against adoption of the Code. However, George-Kanentiio is unclear as to who they worked with and what methods they used to block the Code.¹⁶² Another reason could be that Mohawk communities are often divided into factions. Some consider themselves modernists or progressives. Part of their agenda is the continued existence of elected councils, and for some the discontinuance of the Longhouse Councils. Then there are the traditionalists, who believe in the revival of traditional forms of governance.¹⁶³ E. Jane Dickson-Gilmore argues that this dichotomy is overly simple, since even within each side there are further variations of ideology and objectives.¹⁶⁴ Nonetheless, she still acknowledges that a rough progressive and traditional division exists within Mohawk communities.¹⁶⁵ The council

¹⁶⁰ Jonathan Rudin & Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Mississauga, Ontario: Ontario Native Council on Justice, 1993) at 49-50.

¹⁶¹ *Ibid.* at 55.

¹⁶² Douglas George-Kanentiio, "Iroquois Justice" 1:1 Akwesasne Notes (Spring 1995) 106.

¹⁶³ For a detailed history, see Gerald R. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Don Mills, Ontario: Oxford University Press Canada, 1995).

¹⁶⁴ E. Jane Dickson-Gilmore "'This is My History, I Know Who I Am': History, Factionalist Competition, and the Assumption of Imposition in the Kahnawake Mohawk Nation" (1999) 46:3 *Ethnohistory* 429.

¹⁶⁵ *Ibid.* at 434-435.

may have refused to adopt it to prevent traditional forms of governance from gaining ground, although there is no way of knowing this for sure.

What is still true is that if a significant portion of an Indigenous community supports the revival of traditional justice practices the Canadian justice system can have problems maintaining legitimacy. It can fuel a demand for greater community control over justice. Indigenous communities may want justice restructured to reflect their cultures. It is not only a matter of legitimacy though. It is also a matter of social remedy

4.3 Remedial Self-Determination

A fact of Canadian history is that its Indigenous peoples were subjected to harmful processes of colonization, which included military conquest,¹⁶⁶ the acquisition of Indigenous land bases through treaties¹⁶⁷, and policies of assimilation that attempted to force Indigenous peoples to abandon their own cultures in favour of Euro-Canadian lifestyles by criminalizing cultural activities like the potlatch¹⁶⁸ and forcing Indigenous children to attend the residential schools.¹⁶⁹ Phillip Lane Jr. describes the enduring legacy of colonization as follows:

- diseases (such as influenza, small pox, measles, polio, diphtheria, tuberculosis, and later, diabetes, heart disease, and cancer);
- the destruction of traditional economies through the expropriation of traditional lands and resources;
- the undermining of traditional identity, spirituality, language, and culture through missionization, residential schools, and government day schools;
- the destruction of Indigenous forms of governance, community organization, and community cohesion through the imposition of European governmental forms, such as the Indian agent and

¹⁶⁶ Although Canada did not fight wars against its Indigenous peoples as often as the United States, they did use military subjugation on occasion. A particularly notorious example was the defeat of the Rebellion of 1885 involving Metis and Cree groups. See Olive Patricia Dickason, *A Concise History of Canada's First Nations* (Donna Mills, Ontario: Oxford University Press, 2006) at 234-247; and James R. Miller, *Skyscrapers Hide the Heavens: a history of Indian-white relations in Canada* (Toronto: University of Toronto Press, 2000) at 202-211.

¹⁶⁷ For a historical overview of the numbered treaties in the western provinces, see J.R. Miller, *ibid.* at 216-224; Dickason, *ibid.* at 173-187.

¹⁶⁸ J.R. Miller, *ibid.* at 260-263; Dickason, *ibid.* at 184, 224.

¹⁶⁹ J.R. Miller, *ibid.* at 135-136, 340-341; Dickason, *ibid.* at 227-229

- the elected chief and council system, which systematically sidelined and disempowered traditional forms of leadership and governance and fractured traditional systems for maintaining community solidarity and cohesion;
- and the breakdown of healthy patterns of individual, family, and community life, manifested in alcohol and drug abuse, family violence, physical and sexual abuse, dysfunctional intimate relationships, neglected children, chronic depression, anger, and rage, and greatly increased personal levels of interpersonal violence and suicide.¹⁷⁰

Anaya argues that there are two kinds of aspects of self-determination, the constitutive aspects and the remedial aspects. Constitutive aspects involve the creation or alteration of institutions of governance to meet peoples' needs.¹⁷¹ Anaya describes the remedial aspects in the context of international law and human rights standards:

The prescriptions promoted through the international system to undo colonization, while not themselves equal to the principle of self-determination, were contextually specific *remedial* prescriptions arising from colonialism's deviation from the generally applicable norm. As we have seen, colonialism violated both the constitutive and ongoing aspects of self-determination. Although the violation of constitutive self-determination in the context of colonial territories was mostly a historical one, it was linked to a contemporary condition including the denial of ongoing self-determination.¹⁷²

Indigenous self-determination has a remedial aspect in that it demands the creation of new institutions or altering existing institutions of governance. Self-determination is also remedial in that it means Indigenous peoples have the autonomy and power to address legacies stemming from colonialism such as poverty, high criminality, and poor health.

Indigenous over-incarceration is often attributed to the social legacy of colonialism, and Indigenous approaches to justice are therefore often presented as a remedy. The Royal Commission on Aboriginal Peoples proposes Indigenous control over separate criminal justice systems as a solution. Consider this excerpt:

It is Aboriginal law, with Aboriginal law and through Aboriginal law that Aboriginal people aspire to regain control over their lives and communities. The establishment of systems of Aboriginal justice is a necessary part of throwing off the suffocating mantle of a legal system imposed through colonialism.¹⁷³

¹⁷⁰ Philip Lane, *supra* note 97 at 370.

¹⁷¹ *Supra* note 139 at 105-106.

¹⁷² *Ibid.* at 107.

¹⁷³ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: a report on Aboriginal people and criminal justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 58.

The Commission builds a dichotomy of restorative/Indigenous justice vs. Western retributive justice by using these excerpts from Justice Murray Sinclair:

Aboriginal cultures approach problems of deviance and non-conformity in a non-judgmental manner, with strong preferences for non-interference, reconciliation and restitution. The principle of non-interference is consistent with the importance Aboriginal peoples place on the autonomy and freedom of the individual, and the avoidance of relationship-destroying confrontations.

...

Rehabilitation is not a primary aim of the Euro-Canadian justice system when dealing with an offender, with the possible exception of very young offenders. It is only one of several factors taken into account by sentencing judges, and it is often undermined by lack of public support. Institutionalized support is rarely and only minimally offered to victims. Restitution is ordered generally as a form of financial compensation and usually only if the offender has the financial resources to do so. Thus, retribution is often the primary thrust of action taken against deviance.

...

Retribution as an end in itself and as an aim of society is a meaningless notion in an Aboriginal value system that emphasizes reconciliation of the offender with the community and restitution for the victim.¹⁷⁴

The Commission then states:

Based on the evidence we have considered, it is our view that the contemporary expression of Aboriginal concepts and processes of justice are likely to be more effective than the existing non-Aboriginal justice system, both in responding to the wounds that colonialism has inflicted, which are evident in a cycle of disruptive and destructive behaviour, and in meeting the challenges of maintaining peace and security in a changing world.¹⁷⁵

If Indigenous approaches to justice can realize their promise of healing those affected by Indigenous criminality, and addressing criminal recidivism more effectively than Western reliance on incarceration, then Indigenous self-determination over criminal justice can certainly have a remedial aspect. Indigenous self-determination can, it is hoped, empower Indigenous communities to address the various social problems associated with crime in Indigenous communities, and Indigenous over-incarceration. This however may not be the only possibility. Even if Indigenous communities obtain

¹⁷⁴ Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Richard Gosse, James Youngblood Henderson & Roger Carter (ed.) *Continuing Poundmaker and Riel's Quest, Presentations made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 175 at 178-184. Quoted in *Bridging the Cultural Divide*, *supra* note 154 at 60-63; See also Barbara Grey & Pat Lauderdale, "The Great Circle of Justice: North American Indigenous Justice and Contemporary Restoration Programs" (2007) 10: 2 *Contemporary Justice Review* 215.

¹⁷⁵ *Bridging the Cultural Divide*, *supra* note 173 at 66.

self-determination over criminal justice and use restorative justice practices, there may still be certain types of offences and certain offenders who just will not respond to restorative measures such that incarceration may remain a necessary part of Indigenous justice systems. It is also conceivable that contemporary Indigenous communities may want to revive traditional sanctions such as public shaming and/or corporal punishment as alternatives to imprisonment. This may be remedial in the sense in that it allows Indigenous communities to use deterrent approaches to crimes that threaten their collective well-being, while still avoiding the hardening effects associated with prolonged incarceration. Such sanctions could also be used as part of restorative resolutions or as supplements to terms of incarceration. There are however objections to the very notion of Indigenous self-determination which will now have to be considered.

4.4 An Objection - Not Good Enough to Justify Full Independence

The idea is that problems like the colonial legacy and cultural differences are not quite enough to justify Indigenous self-determination, at least not to such a degree that Indigenous communities comprise separate political units that autonomously exercise substantive jurisdiction over subject matters that have traditionally been under federal and provincial jurisdiction. There is more than one basis for such an assertion. One basis is that the non-Indigenous peoples of Canada are here to stay, along with the attendant legal and political structures. It is a reality that Indigenous peoples have to live with, even if Indigenous peoples still contest the legitimacy of imposing Western legal orders. For Indigenous peoples to try and carve substantially autonomous enclaves for themselves within those structures is therefore unrealistic. Thomas Flanagan writes with

references to colonial history and to international law as it relates to European conceptions of state sovereignty:

State practice, interpretive works, and decisions of international tribunals unanimously agree that long-continued possession and effective control, combined with declarations of sovereignty, eventually confer title by prescription. The length of time required varies according to circumstances – for example, whether any protests or challenges are lodged – but there can be no doubt that prescription has conferred title to the European discoverers and their successor states over the hundreds of years that they have controlled the New World. Maybe it was wrong for Cortez and Pizarro to overthrow the Aztec and the Inca regimes. Maybe it was wrong for John Cabot, Jacques Cartier, and all the other explorers to claim sovereignty for Britain and France. Nonetheless, Canada, the United States, and all other states of the Americas exist and their sovereignty is recognized throughout the world. In a free country like Canada, aboriginal leaders can talk all they want about their inherent sovereignty, but the expression is only a rhetorical turn of phrase. It may produce domestic political results by playing on guilt or compassion, but it has no effect in international law or, as shown below, in domestic law.¹⁷⁶

Alan Cairns states:

To end empire in Canada is not, unfortunately, as easy as in the former overseas colonies where power could be transferred to local elites claiming to speak for the vast majority of the colonized peoples. The dilemma of Aboriginal peoples is that although the Canadian state may lack legitimacy, they, unlike Quebec, cannot opt out of it. Although they have been subjected to colonial treatment, its natural resolution by independence is unavailable. ...

In Canada, the majority is non-Aboriginal, and it cannot and will not go home, or give up power, as was the case when the independence flag was raised in colonies where white settlers were only a small minority. ... In Canada, decolonization applies to Aboriginal peoples who are now a small, divided minority (albeit growing), of under 3 percent of the overall Canadian population, differentiates the Canadian – and the New Zealand, Australian and American – and the situations of many Latin American countries – from the decolonization process in most of Africa and Asia. In no case does the relationship between the formerly imperialist and the formerly colonized completely end with independence, but the international coexistence with the formerly dominant that accompanies the winning of statehood is relatively straightforward compared to the complex domestic coexistence that has to be worked out within a single political community, as in Canada.¹⁷⁷

A related basis is that it is not only unrealistic, but it can be highly disruptive of society at large. Indigenous self-determination can imply Indigenous control over subject matters that were previously under the control of the Canadian legal-political system, and often to the benefit of non-Indigenous Canadians. This can for example mean that Indigenous societies gain control over economic resources that were previously exploited to the

¹⁷⁶ Thomas Flanagan, *First Nations, Second Thoughts* (Montreal: McGill-Queen's University Press, 2000) at 61.

¹⁷⁷ Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 27.

benefit of non-Indigenous Canadians with the implication of possible detriment for non-Indigenous peoples.¹⁷⁸ Flanagan asserts that the whole concept of Indigenous self-determination is contrary to the ‘national interest of Canada.’¹⁷⁹

Another basis is that while Indigenous social problems are regrettable, self-determination is not necessary to address that. Solutions can be pursued within the existing system in Canada. This can mean Indigenous communities having increased powers and participation in addressing their social problems, but not to the extent that they comprise separate legal and political units. Cairns recognizes that an important reasoning behind Indigenous demands for self-determination is ‘that self-government is the necessary vehicle to address the multitudinous socio-economic problems facing Aboriginal communities.’¹⁸⁰ Cairns suggests that this is not only unnecessary but can even be counterproductive by precluding co-operative solutions in this fashion:

Rights employed in the service of difference, with little concern for solidarity or fraternity, may generate “otherness” on both sides of the divide inherited from the past, and provide little of the sustenance and fellow-feeling that the carrying out of the task of healing and rapprochement requires.¹⁸¹

In the more specific context of criminal justice it can be argued that Indigenous peoples, having cultural differences or having had particular difficulties in the Canadian criminal justice system, are hardly unique in those regards and therefore do not merit self-determination over criminal justice. In 2005 there was a heated dispute in Ontario over whether Muslim communities should continue to resolve family disputes in their own separate tribunals using Sharia law, which they had since 1991. The conflict was addressed by the provincial government passing a law prohibiting the use of such

¹⁷⁸ This theme will come up in more detail during Chapter 5 as it relates to Aboriginal rights jurisprudence.

¹⁷⁹ Flanagan, *supra* note 176 at 66.

¹⁸⁰ Cairns, *supra* note 177 at 134.

¹⁸¹ *Ibid.* at 160.

tribunals, and ensuring that federal and provincial legislation related to family matters applied to everyone in Ontario. This measure was justified partly on the basis that many perceived Sharia law to privilege men over women in the resolution of disputes. The Attorney General of Ontario, Michael Bryant, also emphasized that only Canadian law was going to apply in family disputes.¹⁸² Other ethnic groups besides Indigenous peoples, such as Blacks and Chinese, have also had adverse experiences with the Canadian criminal justice system.¹⁸³ It can be contended that Indigenous peoples do not particularly stand out in need of self-determination over justice as a remedial measure. Addressing Indigenous social problems and healing Indigenous persons touched by crime does not require full self-determination over criminal justice. These issues can be addressed by Indigenous peoples working within the existing justice system. These are pretty persuasive criticisms. It is now time to attempt to deliver a riposte.

That Indigenous peoples can work co-operatively within the existing system may sound appealing, but in truth it still leaves non-Indigenous peoples in a dominant position relative to Indigenous peoples. Sandy Grande argues that inclusionary and multicultural models of liberal democracy are hegemonic models that suppress the efforts of marginalized groups to procure a better position for pursuing solutions. She writes:

Though advocated as a “democratic” model premised on the incorporation of all peoples and values, “multiculturalism” operated in a homogenizing way, centered on unifying all peoples in the nation-state. Within this model, “diversity” could be expressed only within the preexisting, hegemonic frames of the nation-state, reading democracy as “inclusion.” As Mitchell explains, “Historically, liberal practitioners have ‘generously’ attempted to include members of the nation who have been disenfranchised legally and culturally ... Yet this inclusion springs from the premise that Western liberalism is not only a superior philosophical foundation but also that its institutional application in realms such as education is good for everyone.”

¹⁸² Kerry Gillespie & Rob Ferguson, “New law to ban religious tribunals” *The Toronto Star* (November 16, 2005) A9.

¹⁸³ Some case authorities have recognized that social problems faced by such minorities are similar to the ones faced by Indigenous peoples and have therefore been willing to use them as mitigating factors during sentencing. See *R. v. Borde* (2003), 172 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114 (Ont. S. Ct. J.).

Such logic fails to account for those who represent the “constitutive outside.” That is, peoples who can “never participate fully or unproblematically as democratic citizens of the nation because they are always already located outside of it”. Moreover, in the “generous” rhetoric of inclusion it is patently unacceptable for groups to “step outside the discourse and argue for separateness” as a *more advantageous* location for their own cultural survival and the good of the nation.¹⁸⁴

The problem with Indigenous peoples working within a hegemonic power structure arises when Canadian leaders and Indigenous peoples do not share the same goals. Indigenous peoples may have objectives of a remedial nature (e.g. economic development, different approaches to criminal justice) designed to address social problems. Canadian leaders may have different policy objectives and priorities, ones that differ from or are even oppositional to Indigenous objectives. There is the constant prospect that Indigenous objectives will receive less or no priority since the demands of non-Indigenous peoples will often, even always, be in competition for support from Canadian leaders.

A recent example of Indigenous peoples working within the dominant political system to address their social problems is the Kelowna Accord that was negotiated for 18 months between the federal government led by former Prime Minister Paul Martin and Indigenous leaders. It was finalized on November of 2005. It promised \$5.1 billion over 10 years to address Indigenous social problems in areas such as health, education, and poverty.¹⁸⁵ Martin’s minority Liberal government was subsequently defeated, and replaced by a minority Tory government led by Stephen Harper. Under the original Accord, \$600 million would have been spent during the 2006 fiscal year on the Accord’s objectives. Harper’s government, upon assuming power, replaced the Accord with a

¹⁸⁴ Sandy Grande, *Red Pedagogy: Native American Social and Political Thought* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 2004) at 47. Grande’s use of quotes reflects her reliance on Katharyne Mitchell, “Education for Democratic Citizenship: Transnationalism, Multiculturalism, and the Limits of Liberalism” (2001) 71 *Harvard Educational Review* 51 at 69-70.

¹⁸⁵ John Ibbitson, “In praise of a flawed Native accord” *The Globe & Mail* (November 26, 2005) A4.

budgetary allocation of \$150 million during 2006 and \$300 million during 2007 to address similar objectives.¹⁸⁶ Indigenous peoples and their leaders have many times since decried this development as bad faith and neglect on the part of the federal government.¹⁸⁷ The Canadian state can not only set objectives that do not satisfy Indigenous demands, but also has the power to pursue those objectives in disregard of Indigenous demands. This represents an imposition of the state's will on Indigenous peoples.

Self-determination is necessary in order to free Indigenous peoples of the considerable restraints that come with being under the Canadian hegemony, and increase their capacity to meet the needs of their communities. This does not and cannot mean full and absolute independence. It must be noted that even modern states that enjoy the status of sovereignty under international law cannot truly consider themselves independent in the most absolute sense. The right of a sovereign to decide domestic affairs free of interference from other sovereigns is a theme of international law. A sovereign, in setting domestic policy and even more so in pursuit of international policy, cannot as a matter of practical politics wholly disregard the good will of other sovereigns. To do so carries with it the latent risks of strained diplomatic relations, economic sanctions, or acts of warfare. The potential responses of other sovereigns always presents to one degree or another constraint upon the independence of the sovereign.¹⁸⁸ Absolute independence is therefore unattainable for any political entity. In that respect previous

¹⁸⁶ Sue Bailey, "Tories gut Liberal brokered \$5.1 billion in Native funding" *The Toronto Star* (May 3, 2006) A6.

¹⁸⁷ See for example Colin Perkel, "Fontaine calls on Ottawa to fulfill its responsibility to Aboriginals" *The Globe and Mail* (October 13, 2007) A7; Alison Auld and Keith Doucette, "Aboriginal leaders call for more protests, days of action" *The Globe and Mail* (July 11, 2007) A8; "Ottawa's neglect invites Indian anger" *Toronto Star* (May 20, 2007) A16.

¹⁸⁸ For an analysis of this see Michael Milde, "Contemporary State Sovereignty Under The Microscope" (2002) 52:2 U.T.L.J. 275.

uses of terms such as ‘full self-determination’ have been a bit misleading. What is presented as an ideal is as much independence as is possible for Indigenous peoples. The maximum possible degree of independence is necessary so that Indigenous peoples can set their own objectives to meet their communities’ needs.

A number of reasons for Indigenous self-determination, criminal justice included, were described such as self-determination for its own sake, cultural difference, the pursuit of more constructive methods of addressing crime, and Indigenous justice as remedial justice. Each viewed in isolation may appear vulnerable to criticism. I submit that all of them together combine to produce a powerful impetus behind Indigenous demands for self-determination over criminal justice.

Others may still say this line of reasoning is not good enough and that self-determination remains unnecessary. There is a point where if something matters enough to a people, they should push for it as best they can despite the opposition. Demands for self-determination have frequently resulted in the fracture or re-alignment of existing legal and political orders over the objections of those supporting the status quo. The breakup of the former communist republic of Yugoslavia into several states such as Serbia, Montenegro, Croatia, and Bosnia is one example.¹⁸⁹ I am not calling for a militaristic pursuit of independence. The point is that for various reasons, the pursuit of self-determination over criminal justice is important to Indigenous peoples. Opposition from those who want to leave the existing order intact is to be expected. Decades of working within the existing system has done little to address the problems faced by Indigenous peoples. Self-determination does not hold out the guarantee of success or

¹⁸⁹ John Borrell, “Yugoslavia: the Old Demons Rise” *Time Magazine* (August 6, 1990) 30.

doing better, even if there were past successes. It is nonetheless time for something new, preferably with Indigenous peoples having more control over possible solutions.

The problem is of course that the current situation in Canada falls well short of Indigenous control over criminal justice. At the heart of the problem is that substantive jurisdiction over criminal justice remains firmly in the hand of the Canadian state. Indigenous peoples tend to receive only minor accommodations for their own approaches to justice from the state, and face considerable legal and political obstacles to obtaining any real autonomy over justice. The subsequent discussions will examine these obstacles and then explore possible methods of overcoming them, beginning with an overview of the limited degree of executive and legal accommodation in Chapter 5.

CHAPTER 5: THE PRESENT SITUATION IN CANADA

The purpose of this chapter is to examine the extent to which Indigenous approaches to justice have been accommodated in Canada. Legislative and executive allowances are mostly limited to adaptations of sentencing processes, diversionary programs for limited ranges of offences, and correctional programming for convicted offenders. Constitutional Aboriginal rights are also interpreted narrowly, providing Indigenous peoples with very little legal leverage to demand more from Canadian leaders. This leads into Chapter 6, which will explore the motives of Canadian judges and politicians for sustaining a status quo that minimizes the legal space for Indigenous visions of justice. But first, we begin with an overview of legislation relevant to Indigenous approaches to justice.

5.1 Canadian Legislation and Indigenous Justice

The Governor in Council, consisting of the Governor General and members of the federal cabinet, can appoint justices of the peace under s. 107 the *Indian Act*.¹⁹⁰ Under s. 107(a), these justices have jurisdiction over summary offence violations of the *Indian Act*, including trespass on Indian reserves (s. 30), removal of certain cultural objects situated on reserves (s. 91), and removing natural resources from the reserves (s. 93). Section 102 creates a general offence for violating a provision of the *Indian Act* or any other federal legislation. Under s. 107(b), a justice of the peace has jurisdiction to enforce band council by-laws by fines and/or imprisonment, although the by-laws themselves are subject to disallowance by the Minister of Indian Affairs under s. 82(2) of the *Indian Act*. Section 107(b) also confers a justice of the peace with jurisdiction over *Criminal Code* offences ‘relating to cruelty to animals, common assault, breaking and

¹⁹⁰ *Indian Act*, S.C., 1985, I-5.

entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.’ Section 107 also allows incorporation of provincial legislation (i.e. provincial offences) into *Indian Act* court jurisdiction, subject to substantive limitations in ss. 81, 83 and 85.1 of the *Indian Act*. A justice of the peace may also issue a peace bond, an order to keep the peace and be of good behavior as well as other conditions deemed necessary to secure the good conduct of a defendant, under s. 810 of the *Criminal Code*.

In a sense, these *Indian Act* provisions can be seen as a statutory grant of substantive jurisdiction. However, there are obvious limitations. Jurisdiction is confined to by-law infractions, summary offences, and peace bond orders. Even within these limits, the parameters of that jurisdiction are often dependent on allowance by the Minister of Indian Affairs. This can hardly be thought of as conferring rights of substantive criminal jurisdiction to a degree anywhere near consistent with Indigenous aspirations for self-determination.

Another legislative accommodation of Indigenous perspectives on justice is s. 718.2(e) of the *Criminal Code*, which reads in part:

A court that imposes a sentence shall also take into consideration the following principles: ...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The first Supreme Court case to consider this provision was *R. v. Gladue*.¹⁹¹ The Court stated that this provision was enacted in response to alarming evidence that Indigenous peoples were incarcerated disproportionately to non-Indigenous people in Canada.¹⁹²

¹⁹¹ *R. v. Gladue*, [1999] 1 S.C.R. 688.

¹⁹² *Ibid.* at para. 58-65. At para. 58, Justice Cory notes the following statistics: ‘By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all

Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to reduce incarceration of Indigenous offenders, and seek reasonable alternatives for Indigenous offenders.¹⁹³ Justice Cory adds:

It is often the case that neither Indigenous offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the Indigenous perspective.¹⁹⁴

A judge must take into account the background and systemic factors that bring Indigenous people into contact with the justice system when determining sentence. Justice Cory describes these factors as follows:

The background factors which figure prominently in the causation of crime are by now well known. Years of dislocation and economic development have translated, for many Indigenous peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.¹⁹⁵

A judge must also consider the role of these factors in bringing a particular Indigenous accused before the court.¹⁹⁶ A judge is obligated to obtain that information with the assistance of counsel, or through probation officers with pre-sentence reports, or through other means. A judge must also obtain information on community resources and treatment options that may provide alternatives to incarceration.¹⁹⁷

Certain offences, and offences committed under certain circumstances, could render an Indigenous accused ineligible for a community based sentence under s. 718.2(e). *R. v. Wells*, which revisited s. 718.2(e), holds that a community based sentence

federal inmates ... The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia ...'

¹⁹³ *Ibid.* at para. 64.

¹⁹⁴ *Ibid.* at para. 74.

¹⁹⁵ *Ibid.* at para. 67.

¹⁹⁶ *Ibid.* at para. 69.

¹⁹⁷ *Ibid.* at para. 83-84.

will not be appropriate if an offence requires two or more years of imprisonment. The presence of mitigating factors can reduce an otherwise appropriate term of imprisonment to less than 2 years, and thereby make an Indigenous offender eligible for community based sentences. On the other hand, if a judge decides that an Indigenous offender is a danger to the public, that offender will not be eligible for community based sentences.¹⁹⁸ This may in practice dissuade judges from allowing sentencing circles in certain cases. Section 718.2(e) at best makes concessions within the standard sentencing process. It would be a stretch to say the least to view this provision as a legislative grant of substantive jurisdiction to Indigenous communities. The chapter now provides an overview of other accommodations of Indigenous justice initiatives in Canada.

5.1 Indigenous Justice Initiatives in Canada

A frequent contemporary adaptation of Indigenous justice is the sentencing circle. A sentencing circle involves the offender, victim(s), family members of those involved, as well as any members of the community with an interest, assembling together in a circular seating arrangement. Sentencing circles often include justice personnel such as lawyers, probation officers, the judge, and counseling professionals. The proceeding often commences with a smudging ceremony or similar rite. A spiritual symbol, often a feather, is then passed around to one participant at a time. The person who currently holds the symbol has the opportunity to speak to matters being considered by the circle. The symbol is then passed on to the next person in the circle. This process continues until a consensus is reached on the appropriate resolution.¹⁹⁹ Examples of communities

¹⁹⁸ *R. v. Wells*, [2000] 1 S.C.R. 207 at para. 27-28, 44-50.

¹⁹⁹ Consensus means a general agreement. It is an agreement between most, but not all, of the people concerned.

that have engaged in this practice include the Kwanlin Dun in the Yukon²⁰⁰, Hollow Water in Manitoba²⁰¹, and the Innu at Sheshashit and Davis Inlets.²⁰²

There is no *Criminal Code* provision that authorizes or even mentions the holding of sentencing circles. Whether a judge will allow a sentencing circle as part of the sentencing process is a matter of discretion.²⁰³ The Saskatchewan Court of Appeal has collated criteria for when to use sentencing circles that had been articulated by Saskatchewan Provincial Court Judges. They are as follows:

- 1) The accused must agree to be referred to the sentencing circle.
- 2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- 3) That there are elders and respected non-political community leaders willing to participate.
- 4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
- 5) The court should try to determine beforehand, as best it can, if the victim is subject to battered wife syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle.
- 6) Disputed facts have been resolved in advance.
- 7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.²⁰⁴

²⁰⁰ Stuart, *supra* note 60.

²⁰¹ Public Works and Government Services Canada. "The Four Circles of Hollow Water Aboriginal Peoples Collection" (1997) 15 Aboriginal Peoples Collection, online: *Public Safety and Emergency Preparedness Canada* < http://ww2.ps-sp.gc.ca/publications/abor_corrections/199703_e.pdf >.

²⁰² Anne Harrison, Muriel Meric, and Alan Dickson, *Justice as Healing at Sheshatshit and David Inlet* (Ottawa: Peace Brigades International, 1995).

²⁰³ *R. v. Morin* (1995), 134 Sask. R. 120 (C.A.), an authority that deals with the appropriateness of sentencing circles, quotes with approval this passage from *R. v. Gardiner*, [1982] 2 S.C.R. 368: 'It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. ... The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.' (at 414) The informalities of the sentencing process and the need for full information makes the use of sentencing circles permissible (*Morin* at para. 16).

²⁰⁴ The Saskatchewan Provincial Court decision that sets out these criteria is *R. v. Jouseyounen*, [1995] 6 W.W.R. 438 at 439. The criteria were quoted in *Morin* at para. 8. Though they quote the criteria, the Court of Appeal in *Morin* was also hesitant to set down guidelines on the use of sentencing circles (at para. 16).

The Newfoundland Court of Appeal has endorsed these criteria as appropriate guidelines for judges,²⁰⁵ while other Courts of Appeal have been hesitant to do the same and instead emphasize that the use of circles is a matter of judicial discretion.²⁰⁶ A judge is not bound by the recommendations of the circle. The judge can impose a harsher sentence if he or she concludes that the recommendations do not provide a fit sentence.²⁰⁷ Indeed, a trial judge's adoption of the circle's recommendation can be appealed if it involves a sentence that is unfit for not giving sufficient emphasis to deterrence (e.g. incarceration).²⁰⁸

Diversionary programs allow offenders to resolve their cases outside of the court system. The usual first step is that a prosecutor approves an offender for participation in a program based on certain criteria such as the offence being a minor one, the offender not having previously been through the program, and whether the accused is willing to accept responsibility for the offence. Note that diversionary programs often allow an accused to accept responsibility for an offence without prejudicing his or her right to plead not guilty at a later time. The court then typically adjourns the case for a period of months or even in excess of a year. The offender is then required to perform certain tasks or meet conditions with a view towards correcting behaviour. In diversionary programs with an Indigenous emphasis, this can include attending counseling for certain types of behaviour, meetings with the victim(s) under appropriate conditions in order to resolve differences, performance of community service hours, participation in cultural activities, and meetings with Indigenous Elders for spiritual guidance. If an offender successfully

²⁰⁵ *R. v. J.J.* (2004), 192 C.C.C. (3d) 30 (Nfld. C.A.).

²⁰⁶ *R. v. B.L.* (2004), 2 Alta. L.R. (4th) 32 (C.A.); *R. v. Johns* (1995), 66 B.C.A.C. 97 (Y.T.C.A.); and *R. v. Munson* (2003) 232 Sask. R. 44 (C.A.).

²⁰⁷ *Morin*, *supra* note 203 at para. 9.

²⁰⁸ For two examples, see *R. v. Morris* (2004), B.C.A.C. 235; and *R. v. H.R.* (1997), 205 A.R. 226 (Prov. Ct.).

completes the required steps then the prosecutor will withdraw the charge on the next court date. If an offender does not complete the requirements, and the prosecutor is not willing to extend another chance, the case is returned to the court system.²⁰⁹ The usual procedures and dispositions become applicable again. Many Indigenous communities in Ontario for example have established diversionary programs. They are largely confined to minor offences, and cases are subject to approval by Crown Prosecutors.²¹⁰

Canada has also established a small number of courts designed specifically for Indigenous accuseds. The Cree Court in Saskatchewan is presided over by Provincial Court Judge Gerald Morin. The Court holds session in a circuit of 3 different Indigenous communities in and around Prince Albert. Indigenous offenders attending the court have the option of having the proceedings conducted in the Cree language. Judge Morin speaks with each offender, asking blunt questions and probing for the root causes of the behaviour. The goal is to discover whether a non-custodial sentence may be appropriate so as to deal with those root causes.²¹¹

There is also the Teslin Tlingit Council Peacemaker Court system in the Yukon. The Tlingit people have traditionally been divided into Clans. Each Clan has a separate peacemaker court. A Tlingit who is charged with a summary offence may be eligible for diversion. The requirements for diversion are worked out between the accused and the Elders of his or her Clan. A Justice Coordinator acts as a facilitator between the Clan

²⁰⁹ Note that this is often, but not always, the case. There are examples of programs where once a matter is diverted, the offender remains accountable only to members of the Indigenous community while the Crown has no further role. See for example Ted Palys & Winona Victor, "'Getting to a Better Place': Qwi:Qwelstom, the Sto:lo, and Self-Determination" in Law Commission of Canada (ed.) *Indigenous Legal Traditions* (Vancouver: U.B.C. Press, 2007) 12; and also a reference to the Vancouver Transformative Justice Society in *Inventory of Aboriginal Services, Issues and Initiatives in Vancouver* (Vancouver: City of Vancouver - Social Planning Department, 2008).

²¹⁰ *Inventory of Indigenous Community/Restorative Justice Programs: Known Programs as of February 2003* (Toronto, Ontario: Indigenous Healing and Wellness Strategy, 2003).

²¹¹ Amy Jo Elman "A People's Justice" *National* 11:1 (June/July 2002) 12 at 12-14.

Elders and the court. For any offences not dealt with by diversion, the Clan Elders are allowed to act in an advisory capacity. The Clan Elders hear submissions from Crown and Defence counsel, and are allowed to read a pre-sentence report that provides background information on the accused. The judge then explains what the available sentencing options may be. The case is then adjourned. The Clan Elders then work out a recommendation for sentencing, which the judge is not obligated to accept.²¹² Most recommendations are accepted, and this in turn has meant a 50% decrease in property crime, a 75% decrease in break and enters, a 50% decrease in assaults, and a 35% decrease in over all crime within the first few years of implementation.²¹³

Another court is the Aboriginal Persons Court in Toronto, Ontario. This court can hear bail applications, but as of yet does not hear trials. There are two main functions of this court. One is to explore restorative resolutions for Indigenous offenders through the sentencing process. One of three staff caseworkers from Indigenous Legal Services of Toronto will assist the court at the request of the judge, defence counsel, or the Crown Prosecutor. The caseworker will investigate the background and life circumstances of Indigenous offenders. The caseworker will then prepare a report detailing that information, and may also provide recommendations for a sentence.²¹⁴ The other function of the court is a diversionary process called the Community Council Program. Even serious offences or repeat offences that could merit jail time can be diverted. Once approved by a Crown prosecutor, the offender meets with members of the Community

²¹² *Research Framework for a Review of Community Justice in Yukon: Community Justice – Peacemaker Diversion Project* (Whitehorse, Yukon: Department of Justice, Government of Yukon, 2003).

²¹³ *Ibid.* at 21.

²¹⁴ *Gladue (Aboriginal Persons) Court*. online: *Aboriginal Legal Services of Toronto*. <<http://www.aboriginallegal.ca/gladue.php>>. Brent Knazan, *Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court*, (Paper presented to the Aboriginal Law Seminar convened by the National Judicial Institute, held in Calgary, Alberta, on January 23-25, 2003) [unpublished] at 8-11.

Council, a group of selected volunteers from Toronto's Indigenous community. The Council then works out a plan of rehabilitation and acceptance of responsibility with the offender. Successful completion leads to the charge being withdrawn.²¹⁵

The Peacemaking Court of the Tsuu T'ina nation near Calgary, Alberta, is presided over by Judge Leonard Mandamin, an Ojibway Indian. The distinguishing feature of this court is a highly expanded diversionary program, from which only sexual assault and homicide offences are excluded. The offender meets with selected Elders, who then work out a plan of rehabilitation and responsibility. If the offender successfully completes the requirements, the charge is withdrawn. If unsuccessful, the case is returned to court and resolved by the standard justice system. Even if the Crown Prosecutor does not assent to an offender's diversion, Judge Mandamin can override the Crown Prosecutor and allow for the offender's participation.²¹⁶

There is another type of accommodation for when the criminal process has already concluded by convicting and sentencing an Indigenous offender. It is while the offender is serving his or her prison term. A brief explanation of the Canadian penal system and its correctional programming is in order first. Federal penitentiaries are for those offenders who are sentenced to a term of imprisonment exceeding two years. Provincial jails are for offenders serving two years or less. In both types of institutions, correctional programs are often available that emphasize rehabilitation and gradual re-integration of offenders into the community after release. The types of services available to inmates in these programs include educational upgrading classes, anger management

²¹⁵ *Aboriginal Legal Services of Toronto's Community Council Program* online: *Aboriginal Legal Services of Toronto* <<http://aboriginallegal.ca/docs/outline.htm>>.

²¹⁶ Norma Large, "Healing Justice: The Tsuu T'ina First Nation's Peacemaker Court throws out punitive justice and restores the ancient tradition of ... talking." *Alberta Views* (May/June 2001) 20; Marian E. Bryant, "Tsuu T'ina First Nations: Peacemaker Justice System" *Law Now* (February/March 2002) 14.

counseling, substance abuse treatment, and life skills training. The availability and types of these programs apparently varies considerably from institution to institution. The programs are also both less available and less accessed within provincial institutions due to the much shorter incarceration terms being served within them.²¹⁷

Section 80 of the *Corrections and Conditional Release Act* mandates that the Canadian Correctional Service (hereinafter the C.S.C.) shall “provide programs designed particularly to address the needs of aboriginal offenders.”²¹⁸ One approach to fulfilling this mandate has been to provide life skills programs, education programs, and rehabilitative programs, but tailored to include the inculcation of Indigenous cultural values. Another approach has been to facilitate inmate participation in cultural activities, such as training in traditional spiritual practices or sweat lodge ceremonies. These services are often delivered by Elders or other members of Indigenous communities with similar cultural authority. The availability of culturally sensitive programs varies greatly from institution to institution.²¹⁹ The rationale behind these approaches is that the C.S.C. identifies the loss of cultural identity as the underlying cause of Indigenous criminality.²²⁰ From an Indigenous perspective, an Indigenous cultural authority is much more likely to gain the trust of an Indigenous inmate than a C.S.C. staff member. Once that trust is established, the healing process and offender reformation can begin.²²¹

When the National Parole Board grants parole, the delivery of correctional programming continues. The early stages of parole are often spent in a residential

²¹⁷ Carole LaPrairie, *Examining Aboriginal Corrections in Canada* (Ottawa: Aboriginal Corrections, Ministry of the Solicitor General, 1996) at 80-83.

²¹⁸ *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

²¹⁹ Howard Sapers, *supra* note 53 at 84-85.

²²⁰ *Ibid.* at 83.

²²¹ Waldram, *supra* note 90 at 204-207.

correctional facility, a halfway house. A halfway house, while not a prison, requires the offender to reside there and not be absent save under specific exceptions (e.g. supervised absences or employment). It is meant as a transitory phase in an offender's parole, neither full incarceration nor full freedom in the community, with the goal of gradual re-integration into the community. Many of the services previously mentioned as available in federal penitentiaries are often available in halfway houses as well.²²² There are indeed a number of halfway houses designed specifically to provide culturally sensitive services for the re-integration of Indigenous offenders. These include the Forensic Behavioural Management Clinic for sex offenders in Winnipeg, the Stan Daniels Centre in Edmonton, Waseskun House in Montreal, and the AIMS House in Vancouver.²²³

Indigenous justice initiatives in Canada are subject to definite limitations. One type of limitation is that they are confined to where an Indigenous accused has plead guilty (e.g. sentencing circles and correctional programs), or otherwise accepted responsibility (e.g. diversionary). If an Indigenous accused contests the allegations then Canadian legislation requires adversarial procedures. The Akwesasne Justice Code hints that Indigenous communities may want even their fact determining processes to have restorative or inquisitorial aspects instead of an adversarial emphasis. This limits the capacity of Indigenous communities to design their justice systems in such a way as to reflect cultural difference.

Another type of limitation is offence bifurcation whereby Indigenous approaches to justice generally remain inapplicable to more serious offences. The precise parameters of this bifurcation vary greatly from court to court, and program to program. Indigenous

²²² John Howard Society of Alberta, *Halfway House: Executive Summary* (Edmonton: John Howard Society of Alberta, 2001).

²²³ LaPrairie, *Examining Aboriginal Corrections in Canada*, *supra* note 217 at 85-86.

peoples may want to expand their initiatives beyond what is allowed by present offence bifurcations. The obvious reason is the important concern of over-incarceration of Indigenous peoples. Calls for greater Indigenous control over justice are motivated in large degree by a desire for autonomy to develop community-based alternatives to incarceration. This lack of autonomy clearly manifests during the sentencing process. When Indigenous communities reach a consensus for sentence, their implementation is at the discretion of a judge who is not a member of the community. Judges have frequently not accepted circle recommendations.²²⁴ Offence bifurcation limits the capacity of Indigenous communities to implement their visions of justice that reflect cultural difference since accommodation is extended only for certain categories of offences.

Canadian legislators, executive officials, and judges, are willing to accommodate Indigenous approaches to justice, but usually only within certain limitations. The next portions of the chapter will reveal that Indigenous peoples have rights recognized under the Canadian constitution, yet this provides a weak foundation for challenging the status quo, since those rights are interpreted narrowly.

5.2 Inherent Indigenous Rights under the Constitution

5.2.1 Section 35(1) and Sparrow

The basis for constitutional Aboriginal rights in Canada is s. 35(1) of the *Constitution Act, 1982*, which reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” There are two categories of rights under this provision. One is treaty rights, which will be examined later. The other is inherent Indigenous rights. Patrick Macklem states:

²²⁴ Green, *supra* note 131 at 119-120; For two recent examples see *R. v. Morris*, *supra* note 197; *R. v. Capps*, [2005] S.J. no. 720 (C.A.).

In my view, the combined effect of ss. 35(1) and 25 of the *Constitution Act, 1982* is to authorize and very possibly require legislative reform of the criminal justice system to enable Aboriginal peoples to assume more responsibility for the administration of justice in Aboriginal communities across the country.²²⁵

However, this optimistic comment was made in 1992 and the development of inherent rights jurisprudence since then cast serious doubts upon such a conclusion. The first Supreme Court case to consider inherent Indigenous rights under s.35 was *R. v. Sparrow*.²²⁶ Ronald Sparrow was charged with fishing with a larger net than was permitted by regulations in force in British Columbia. Sparrow argued that his Musqueam Indian band had traditionally fished for food and ceremonial purposes in the area in question. As the practice was now elevated to a constitutional right, he argued that he should be allowed to do it without the restrictions imposed by the regulations.²²⁷

The Court in *Sparrow* expounded a number of principles concerning s. 35. Section 35 protects Indigenous rights which were in existence when the *Constitution Act, 1982* came into effect. Indigenous rights are not frozen in the form in which they were limited by law when the *Constitution Act, 1982* came into force, contrary to arguments made by the Attorney General of B.C. In other words, laws and regulations can now be found unconstitutional if they have imposed limitations on the exercise of Indigenous rights. This can include situations where a law or regulation has the effect of not allowing Indigenous peoples to exercise their rights in their “preferred manner.”²²⁸ In this case, the Court would recognize Mr. Sparrow’s right to fish with a larger net than permitted by the regulations. The Court also mandated that Indigenous rights were to be

²²⁵ Patrick Macklem, “Aboriginal Peoples, Criminal Justice Initiatives, and the Constitution” (1992), Special Edition on Aboriginal Justice, U.B.C.L. Rev. 280. See also Matthias R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1998).

²²⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

²²⁷ *Ibid.* at 1088-1091.

²²⁸ *Ibid.* at 1091-1093.

interpreted in a generous and flexible fashion, taking into account the perspective of Indigenous peoples.²²⁹ The Court also suggested a threshold for what is protected as an inherent right under s. 35(1), by stating, “The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted *an integral part of their distinctive culture*.”²³⁰ (emphasis added)

5.2.2 Van der Peet

The next landmark case on inherent rights would develop in more detail the theme that Indigenous rights are those practices that are ‘integral part of a distinctive culture’, but in restrictive fashion. *R. v. Van der Peet*,²³¹ along with two other companion cases, *R. v. Gladstone*,²³² and *R. v. N.T.C. Smokehouse*,²³³ saw claims to Indigenous rights to fish for commercial purposes. An initial determination involves how the right is to be characterized. Chief Justice Lamer wrote in *Van der Peet*: “[t]o characterize an applicant’s claim correctly, a court should consider such factors as the nature of the action done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action impugned, and the tradition, custom or right relied upon to establish the right.”²³⁴ The practice which is claimed as a right must be phrased in specific, as opposed to general terms, and cognizable to the Canadian common law system.²³⁵ A right to a separate justice system for example would be unacceptable. What may instead be acceptable is phrasing rights to individual practices within that separate justice system. Possible examples include the right of an Indigenous society to banish an offender

²²⁹ *Ibid.* at para. 1099, 1112-1113.

²³⁰ *Ibid.* at para. 1099.

²³¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

²³² *R. v. Gladstone*, [1996] 2 S.C.R. 723.

²³³ *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672.

²³⁴ *Van der Peet*, *supra* note 231 at para. 53.

²³⁵ *Ibid.* The requirement for specificity is at para. 52 and 69. The requirement of being cognizable to a non-Aboriginal legal system is at para. 46.

permanently from the community, or a right to inflict corporal punishment for repeated theft. It is also not enough to show that Indigenous peoples in general engaged in the practice. The practice must be specific to the Indigenous society claiming the right.²³⁶

Once the practice is properly characterized, the next test is that only practices, traditions, and customs which were integral to distinctive Indigenous societies before contact with Europeans are protected as inherent Indigenous rights under s.35(1).²³⁷ It is not enough for the practice to have been significant to an Indigenous society before contact. It had to have been “integral” to that society before contact, that “it was one of the things that truly made the culture what it was.”²³⁸ Practices which developed solely in response to contact with Europeans are excluded.²³⁹ The test is a restrictive one. As such, Chief Justice Lamer stated: “In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right... It must also be recognized, however, that the perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.”²⁴⁰ Conclusive evidence of the practices is not required in order to establish a successful claim. The evidence only needs to demonstrate which practices originated before contact.²⁴¹

The practice need not be distinct to only one particular Indigenous society alone. The inquiry is whether the practice is integral to a “distinctive” as opposed to “distinct” Indigenous society. Distinct means unique. Distinctive means “different in kind or quality; unlike.”²⁴² The test also requires that there be continuity between the practice

²³⁶ *Ibid.* at para. 69.

²³⁷ *Ibid.* at para. 60-61.

²³⁸ *Ibid.* at para. 55.

²³⁹ *Ibid.* at para. 73.

²⁴⁰ *Ibid.* at para. 49.

²⁴¹ *Ibid.* at para. 62.

²⁴² *Ibid.* at para. 71. Lamer C.J.C. quoted the Oxford Dictionary for the meaning of distinctive.

before contact and the practice as it manifests today. There need not be an unbroken chain of continuity. The practice may have ceased for a period of time, then resumed, without offending the requirement for continuity. The test will also permit some modification of the practice so that it can be exercised in a contemporary manner.²⁴³

What is abundantly clear is that the *Van der Peet* test imposes substantial restrictions on what can be protected as an Indigenous right under s.35(1). The *Van der Peet* doctrine would be applied, in a subsequent case, to deny claims to a broad right of self-government.

5.2.3 Pamajewon

In 1987, the Shawanaga First Nation enacted a lottery law authorizing high stakes bingo and other gambling activities. High stakes gambling activity continued on the reserve without a provincial licence. Roger Jones, the chief, and Howard Pamajewon, a councilor, were charged with keeping a common gaming house contrary to s.201(1) of the *Criminal Code*. Members of the Eagle Lake Nation who had joined the appeal argued that a licence was not needed as they and the Shawanaga nations had a broad right to manage use of reserve lands.²⁴⁴

The Supreme Court was not prepared to recognize a broad and inherent right to self-government, which they implied from the Eagle Nation members' argument. Such claims must still pass muster under the *Van der Peet* tests. Chief Justice Lamer stated:

To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the Indigenous group claiming the right.²⁴⁵

²⁴³ *Ibid.* at para. 64.

²⁴⁴ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 3-21. Allan Gardner, Jack Pitchenese, and Arnold Gardner were the members of the Eagle Lake nation.

²⁴⁵ *Ibid.* at para. 27.

Considering *Van der Peet* and *Pamajewon* together, it becomes obvious that the question cannot be framed as: “Does this Indigenous group have the right to a traditional justice system?” Each and every single practice that has a basis in that group’s tradition may have to be proven as meriting constitutional recognition on a case by case basis. For example, a right to subject an offender to corporal punishment would have to be litigated through an individual case. A right to banish an offender from the community would have to be litigated through an individual case. A right to hold a longhouse council to resolve a dispute would have to be litigated through an individual case. It is even conceivable that particular procedures within an Indigenous group’s longhouse traditions would have to be litigated one at a time. Of course, some of these practices may receive limited accommodation in the Canadian justice system in the form of creative sentences (i.e. temporary banishment, probation with counseling instead of jail) and sentencing initiatives such as advisory panels and sentencing circles. The point is that it is only by such a long and drawn out procedure that an Indigenous group could obtain constitutional recognition of rights to their justice practices such as to choose to use them instead of the Canadian justice system. The next authority may have marked a partial retreat from this.

5.2.4 Delgamuukw

*Delgamuukw v. British Columbia*²⁴⁶ articulates the tests for whether an Indigenous group holds title to a parcel of land. All three of the following questions must be answered in the affirmative: (i) Did the Indigenous group occupy the land prior to the assertion of Crown sovereignty? (ii) Is there continuity between present occupation and pre-sovereignty occupation? (iii) Was the Indigenous group in exclusive occupation of

²⁴⁶ *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010.

the land at sovereignty?²⁴⁷ If these criteria are met, the Indigenous group possesses a “bundle” of rights with respect to that land, described by Chief Justice Lamer in this way:

... that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Indigenous practices, customs and traditions which are integral to distinctive Indigenous cultures; and second, that those protected uses must not be irreconcilable with the nature of the group’s attachment to that land.²⁴⁸

Sale of the land to a private third party and strip mining which destroys the value of the land as a hunting ground when the Indigenous group traditionally hunted on that land were examples of irreconcilable uses provided by Chief Justice Lamer.²⁴⁹

The Supreme Court has since provided an additional gloss on the *Delgamuukw* tests. The test for exclusive occupation has become stricter by now emphasizing that exclusive occupation means actual physical occupation by the Indigenous claimants’ forebears. This occupation can be demonstrated in more than one way. Land on which physical dwelling units (e.g. tipis, longhouses) were regularly constructed qualifies for Indigenous land title. Land enclosed for cultivation or otherwise subject to regular year-round hunting, fishing, or other methods of resource exploitation also likely qualifies for Aboriginal land title.²⁵⁰ Seasonal fishing or hunting activities will not likely found land title, but can instead found inherent Aboriginal rights separate from title.²⁵¹

Delgamuukw does represent a retreat from *Van der Peet* at least where land use is concerned. *Delgamuukw* may afford a broader recognition of traditional criminal justice practices tied to an Indigenous land base without having to pass all of the *Van der Peet* tests. In discussing proof of Indigenous title, Chief Justice Lamer had this to say: “..., if,

²⁴⁷ *Ibid.* at para. 143.

²⁴⁸ *Ibid.* at para. 117.

²⁴⁹ *Ibid.* at para. 128.

²⁵⁰ *R. v. Bernard; R. v. Marshall*, [2005] 2 S.C.R. 220 at para. 55-56.

²⁵¹ *Ibid.* at para. 57.

at the time of sovereignty, an Aboriginal society had laws in relations to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for Indigenous title. Relevant laws might include but are not limited to, a land tenure system or laws governing tenure.”²⁵² Lamer’s commentary suggests that land laws are treated in evidentiary fashion, providing proof of land title. It is unclear if this contains the understanding that land title includes a substantive right to use traditional laws related to land use. Kent McNeil for example has consistently advanced the position that this means that traditional Indigenous laws will at least continue to apply internally. That is to say that they will continue to regulate land use within the community and disputes over land between members of the Indigenous community.²⁵³ He has also gone as far as to say: “We have seen that the Supreme Court of Canada has also held that aboriginal title is a communal right entailing decision-making authority that appears to be jurisdictional in nature.”²⁵⁴ Whether the Supreme Court would agree with this comment such that Indigenous land use laws take jurisdictional paramountcy over federal and provincial laws is unclear. Absent further clarification from the Court, this may be a possibility.

The Court also provided some commentary on the issue of self-government during *Delgamuukw*. Consider this *obiter dictum* from the case:

The degree of complexity involved can be gleaned from the Report of the Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us grapple with these difficult and central issues. Without assistance from the parties it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.²⁵⁵

²⁵² *Delgamuukw*, *supra* note 246 at para. 148.

²⁵³ Kent McNeil, “Aboriginal Title and Aboriginal Rights: What’s the Connection?” (1997) 36 Alta. L. Rev. 117; Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 McGill L.J. 473; Kent McNeil, “Aboriginal Land Title and the Supreme Court: What’s Happening?” (2006) 69 Sask. L. Rev. 282.

²⁵⁴ McNeil, “Self-Government and the Inalienability of Aboriginal Title”, *ibid.* at 507.

²⁵⁵ *Delgamuukw*, *supra* note 246 at para. 171.

This *obiter dictum* may bespeak a willingness to revisit aspects of self-government cast in more general terms if the right case with a proper evidential foundation were to come to the Court. Indeed, the Court went so far as to suggest the Royal Commission's report as a basis for legal argument in the future.²⁵⁶

However, this evaluation of the *obiter dictum* in *Delgamuukw* may be too optimistic at the present time. Chief Justice MacLachlin has since stated:

In the *Van der peet* trilogy, this Court identified the aboriginal rights protected under section 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies. ... Subsequent cases affirmed this approach ... and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.²⁵⁷

What this means is that the present state of the law is such that Indigenous claims to rights of self-determination will still be subject to the *Van der peet* tests. They will have to be framed as rights to specific governing practices, on a case by case basis, rather than as a general right to self-determination. The priority of Crown sovereignty over inherent Indigenous rights also manifests in a series of tests that allows Canadian governments to justifiably infringe those rights.

5.2.5 Justifiable Infringement

Section 35 is not part of the *Charter*, but is in another part of the *Constitution Act, 1982*. Section 35 rights are therefore not subject to justifiable limitation under s.1 of the

²⁵⁶ This is a possibility that has been considered by Brian Slattery. Slattery classifies Indigenous rights into two broad categories, general rights and specific rights. General rights are bundles of rights that all Indigenous societies can make claims to, with land title being an example. Specific rights are those based on the historic practices of a particular Indigenous society, the obvious example being inherent Indigenous rights as articulated under the *Van der peet* tests. Slattery argues that *Delgamuukw*'s commentary on land use laws and the reports of the Royal Commission means that the Court in the future should seriously consider treating Indigenous self-determination as the subject of general rights rather than specific rights. See Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar. Rev. 196 at 214-215; See also Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 29 S.C.L.R. (2nd) 595 at 599-603.

²⁵⁷ *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, [2001] 1 S.C.R. 911 at para. 63.

Charter. Nonetheless, the Court noted that the words “recognized and affirmed” mean that s. 35 rights are not absolute. They are still subject to justifiable limitation.²⁵⁸

The first stage of the limitation test is whether there is a *prima facie* infringement of an Indigenous right. Chief Justice Dickson stated:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?²⁵⁹

In *Gladstone*, the Court affirmed that an Indigenous litigant does not have to satisfy all three of these tests to demonstrate a *prima facie* infringement, as follows:

The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.²⁶⁰

The next stage is deciding whether there is valid legislative objective for infringing the Indigenous right. In *Sparrow*, the Court stated that “the public interest” is too broad and vague to qualify as a valid objective.²⁶¹ Conservation of natural resources and preventing the exercise of Indigenous rights in a way that would cause harm to the general population or to Indigenous peoples themselves were mentioned by the Court as examples of valid objectives.²⁶² The Court expanded on this, in *Gladstone*, to state that legislative objectives are valid if they are directed at either ‘the recognition of the prior occupation of North America by aboriginal peoples’ or ‘at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.’²⁶³ Providing for non-Indigenous access to a fishery to ensure ‘regional and economic fairness’ is an

²⁵⁸ *Sparrow*, *supra* note 226 at 1109.

²⁵⁹ *Ibid.* at 1112.

²⁶⁰ *Gladstone*, *supra* note 232 at para. 43.

²⁶¹ *Sparrow*, *supra* note 226 at 1112.

²⁶² *Ibid.* at 1113.

²⁶³ *Gladstone*, *supra* note 232 at para. 72.

example of a valid legislative objective directed towards reconciliation between prior occupation and Crown sovereignty.²⁶⁴ In *Delgamuukw*, the Court affirmed that general economic development is a valid legislative objective for purposes of the test of justifiable infringement.²⁶⁵

The next stage is whether the measures in pursuit of the objective are justified. This is influenced by *Guerin v. The Queen*.²⁶⁶ In that case, the Supreme Court found that the Crown owes fiduciary duties to Indigenous peoples in particular circumstances.²⁶⁷ Chief Justice Dickson incorporated the notion of fiduciary obligation first introduced in *Guerin* into the *Sparrow* justification test: "... the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."²⁶⁸ He also has more to say on the test of justification:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.²⁶⁹

This also represents a potential concern in that Canadian governments can limit the space for Indigenous approaches to justice so long as they satisfy the tests. How the tests for justifiable infringement would apply in such a context has not yet been addressed by the courts. One can see that it would involve a very complex analysis of competing concerns such as state interest in preserving public safety and deterring crime, and Indigenous

²⁶⁴ *Ibid.* at para. 75.

²⁶⁵ *Delgamuukw*, *supra* note 246 at para. 165.

²⁶⁶ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

²⁶⁷ In *Guerin*, the fiduciary obligation arose in the context of negotiating a lease of reserve land on behalf of the band (at 365, 375-376).

²⁶⁸ *Sparrow*, *supra* note 226 at 1114.

²⁶⁹ *Ibid.* at 1119.

interests in cultural legitimacy and justice as healing. What results an analysis under the *Sparrow* tests of justifiable infringement would yield is far from clear at this point.²⁷⁰

The present state of the law is such that claims to inherent rights to traditional justice practices, with a possible but unclear exception relating to land title, still have to pass the *Van der peet* tests. Indigenous claims to inherent rights to justice practices are also subject to justifiable infringement. Another possible source of constitutional Indigenous rights to control over justice is treaty rights.

5.3 Treaty Rights

If a treaty is reached between an Indigenous group and Canada, the rights enjoyed by the Indigenous group under the terms of that treaty modify or replace their inherent rights under s. 35(1). Bruce Wildsmith summarizes the historical scenario in Canada:

In the Atlantic provinces, particularly Nova Scotia and New Brunswick, a series of Pre-Confederation treaties were made with the Mi'kmaq (or Micmac) and Malecite by the colonial authorities. These treaties were made over a period of time from at least 1725 to 1784 and are chiefly characterized by reference to British sovereignty, the establishment of a relationship of peace and friendship between the British and aboriginal group and the absence of a general cession of Aboriginal land title or rights.

Other treaties were made in the pre-Confederation period, notably the Selkirk treaty in 1817 along the Red River, a series of fourteen treaties with the Hudson's Bay Company on Vancouver Island in the 1850s and the Robinson-Huron (1850), Robinson Superior (1850) and Manitoulin Island (1862) treaties in the Lake Huron and Lake Superior regions of Ontario. The Vancouver Island and Ontario treaties are all based on the cession of land in exchange for a series of promises. Numerous land purchase agreements were made in southern Ontario as well. After Confederation in 1867, the Canadian government between 1871 and 1921 negotiated the so-called "numbered" treaties (1 through 11) extending from northwestern Ontario through the Prairies to northeastern British Columbia and a portion of the Northwest Territories. The numbered treaties also purport to be land cession documents.²⁷¹

²⁷⁰ For a discussion of this, see Leonardy, *supra* note 224 at 184-185. Leonardy suggests that Canadian governments may not be able to satisfy the tests. Indigenous peoples can make out a *prima facie* violation since Canadian legislation may deny Indigenous peoples their preferred means of practicing justice. Canadian governments trying to assert the application of all criminal legislation over Indigenous peoples takes matters closer to a broad 'public interest' objective and therefore invites a finding of vagueness. He also suggests that Indigenous over-incarceration means that Canadian governments cannot satisfy the minimal impairment test. One must be cognizant however that these issues have not yet been tested, and courts must treat constitutional issues in relation to the specific fact patterns that come before them.

²⁷¹ Bruce H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model" (1992), Special Edition on Aboriginal Justice, U.B.C. L. Rev. 324 at 324-325.

The Supreme Court has articulated a number of principles of treaty interpretation that apparently favour the Indigenous signatories as follows:

1. “[A] treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred.”²⁷²
2. “[R]elations with Indian tribes fell somewhere between the kinds of relations conducted between sovereign states and the relations that such states had with their own citizens ... [A]n Indian treaty is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”²⁷³
3. The treaties “should be given a fair, large and liberal generous constructions in favour of the Indians.”²⁷⁴ This in turn requires that ambiguities and uncertainties be resolved in favour of the Indigenous signatories.²⁷⁵
4. Treaties “must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians.”²⁷⁶
5. Treaties should be “interpreted in a flexible way that is to sensitive the evolution of changes” in practices that are the subject of treaty rights. (e.g. evolving methods of hunting or fishing)²⁷⁷
6. It is implicit that treaty rights include those activities which are ‘reasonably incidental’ to those expressly mentioned in a treaty.²⁷⁸
7. “... the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfill its promises. No appearance of “sharp dealing” will be sanctioned.”²⁷⁹

Bruce Wildsmith argues that historically the British understood the treaties as respecting Indigenous peoples’ autonomy over their internal affairs.²⁸⁰ The Supreme Court stated: “The whole emphasis of Treaty 8 was on the preservation of the Indian’s traditional way of life.”²⁸¹ With reference to Treaty 6, the Court stated: “It [British Crown] also allowed them autonomy in their internal affairs, intervening in this area as

²⁷² *R. v. Sioui*, [1990] 3 C.N.L.R. 127 at 152.

²⁷³ *Ibid.*, at 135.

²⁷⁴ *R. v. Simon*, [1985] 2 S.C.R. 387 at 402.

²⁷⁵ *Sioui*, *supra* note 271 at 134. *R. v. Horseman*, [1990] 3 C.N.L.R. 95 at 102.

²⁷⁶ *Jones v. Meehan*, 175 U.S. 1 (1899); cited in *R. v. Nowegijick*, [1983] 1 S.C.R. 29; and in *R. v. Simon*, *supra* note 274 at 402.

²⁷⁷ *R. v. Simon*, *supra* note 274 at 402.

²⁷⁸ *Ibid.*, at 403.

²⁷⁹ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 45.

²⁸⁰ Wildsmith, *supra* note 271 at 330-331.

²⁸¹ *Horseman*, *supra* note 275 at 117.

little as possible.”²⁸² The Court also noted a letter written by the Lieutenant Governor of Manitoba and the Northwest Territories, Alexander Morris, to the Federal Government:

I then fully explained to them the proposals that I had to make, that we did not wish to interfere with their present mode of living, but would assign them reserves and assist them as was being done elsewhere, in commencing to farm, and that what was done would hold gold for those that were away.²⁸³

In Wildsmith’s view, this historical context and the principles of treaty interpretation mean that the treaties recognize Indigenous autonomy over internal dispute resolution.²⁸⁴

Another example of this is provided Sakej Henderson. The Wabanaki and the British reached an agreement known as the Wabanaki Compact of 1725. The pertinent clause is Article 6, which reads:

If any Controversy or difference at any time hereafter happen to arise between any of the English and Indians for any reall or supposed wrong or injury done on either side no private Revenge shall be taken for the same but proper application shall be made to His Majesty's Government upon the place for Remedy or induse there of in a due course of Justice. We submitting ourselves to be ruled and governed by His Majesty's Laws and desiring to have the benefit of the same.²⁸⁵

The last sentence could come across as submission to the colonial legal regime. However, it appears within a clause that makes specific mention only of disputes arising between the Indigenous peoples and the Crown, but makes no mention of a dispute between members of the same Indigenous nation. For Henderson, a proper application of the principles of treaty interpretation means that the British recognized that the Mi’kmaq retained authority over disputes between their own members. In his words:

Under the terms of the treaties, the Wabanaki agreed to maintain peace by suspending the Aboriginal law of the land in cases involving British subjects and by allowing controversies between British settlers and the Wabanaki to be settled by His Majesty's law and tribunals. In controversies between Indians, however, Aboriginal law was applied.²⁸⁶

²⁸² *Sioui*, *supra* note 272 at 147.

²⁸³ *R. v. Horse*, [1988] 1 S.C.R. 187 at 206.

²⁸⁴ Wildsmith, *supra* note 271 at 333-335.

²⁸⁵ Wabanaki Compact, 1725, art. 6 in letter, with enclosures, of Lt. Governor Dummer of New England to Duke of Newcastle, Secretary of States, Calendar of State Papers, Colonial Series (America and West Indies) vol. 35 (8 January 1726); UK Public Records Office, Colonial Office Papers, Series 5/898 at 173-74v.

²⁸⁶ Sakej Henderson, “Constitutional Powers and Treaty Rights” (2000) Sask. L. Rev. at 723.

Gordon Christie however cautions us that treaty interpretation is not always tipped in favour of the Indigenous signatories.²⁸⁷ In *Marshall (no. 1)*, Justice Binnie stated: “The Court’s obligation is to ‘choose from among the various possible interpretations of the *common* intention [and at the time the treaty was made] the one which best reconciles’ the Mi’kmaq interests and those of the British Crown.”²⁸⁸ This principle, while seemingly fair, can potentially work at cross-purposes with the other principles of interpretation that favour the Indigenous signatories. Justice Binnie concluded that the Mi’kmaq right to trade the products of hunting and fishing was limited to the attainment of a “moderate livelihood”, which includes “food, clothing and housing, supplemented by a few amenities”, but does not include the accumulation of wealth. This reflects a reconciliation of the interests of the Mi’kmaq and the Crown, and their common intention as of 1760.²⁸⁹ Christie criticizes this conclusion as follows:

But what can be made of the argument that, in asking for a truckhouse to exchange peltry, the Mi’kmaq were agreeing to a limit on the treaty right, such that they could be prevented by the Crown from attempting to hunt and fish to the extent that they might be able to trade for more than necessities? Was that in the contemplation of the Mi’kmaq (or the British)? Does this suggest that if a Mi’kmaq family had a good winter of hunting, came to a truckhouse to trade and found that they could obtain more than necessities with their substantial supplies of pelts, the British could find that they had exceeded the terms of the treaty, even when read broadly? What would the Mi’kmaq family have imagined if they had been informed that from that point on their hunting would be regulated, so that they could no longer lawfully bring to the truckhouse a substantial supply of pelts? Had their people’s representatives agreed to such an arrangement?²⁹⁰

Another example of how the reconciliation principle can work to the detriment of Indigenous signatories can be seen in *R. v. Badger*. The Supreme Court interpreted Treaty 8 as permitting the Indigenous signatories to hunt and trap for food only so long as it did not conflict with ‘visible, incompatible land use’.²⁹¹ It is interesting to note that

²⁸⁷ Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 Queen’s L.J. 143.

²⁸⁸ *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 14. Hereinafter *Marshall (no. 1)*.

²⁸⁹ *Ibid.* at para. 59.

²⁹⁰ Christie, “Justifying Principles of Treaty Interpretation”, *supra* note 287 at 186.

²⁹¹ *Badger*, *supra* note 279 at para. 54.

immediately after this principle was articulated, the Court acknowledges “[t]he promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty ...” by the commissioners who negotiated Treaty 8.²⁹² John Borrows criticizes this as allowing non-Indigenous economic development to always continue in disregard for promises that were made to the Indigenous signatories. It always allows non-Indigenous economic interests to trump constitutionally protected treaty rights.²⁹³

Henderson identifies other concerns. Treaty rights are subject to the same tests for justifiable infringement from *Sparrow*.²⁹⁴ He views this as inconsistent with the nature of treaties as solemn agreements, as the Court perpetuating a ‘colonial legal consciousness’, and the Court endorsing legislative and executive discrimination against Indigenous peoples.²⁹⁵ In *Marshall (no. 2)*, Justice Binnie states: “regulations that do no more than reasonably define the Mi’kmaq treaty right” do not infringe a treaty right.²⁹⁶ This meant that: “regulatory limits that take the Mi’kmaq catch below the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the Badger test.”²⁹⁷ Henderson criticizes this principle as allowing governments to unilaterally limit treaty rights without even having to meet a justification test.²⁹⁸

While there is a strong argument for the treaties recognizing Indigenous rights to criminal jurisdiction, there is reason for caution. A guarded appraisal can sense danger in

²⁹² *Ibid.* at para. 55.

²⁹³ John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) McGill L.J. 615 at 631-632.

²⁹⁴ *Badger*, note 279 at para. 74-82. Justice Cory reasoned that as both inherent and treaty rights are included in s. 32, a common approach to legislative infringement should be used for both types of rights.

²⁹⁵ Henderson, “Constitutional Powers and Treaty Rights”, *supra* note 286 at 746-747.

²⁹⁶ *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 37. Hereinafter *Marshall no. 2*.

²⁹⁷ *Ibid.* at para. 39.

²⁹⁸ Henderson, “Constitutional Powers and Treaty Rights”, *supra* note 286 at 743.

certain principles of treaty interpretation that are not generous in favour of Indigenous signatories. Borrows offers this commentary:

Despite the presence of principles of liberal treaty interpretation, however, many decisions can still be found that perfunctorily recite these canons without seeming to apply them in any genuine way. This is detrimental to the implementation of these agreements and helps to facilitate assimilation. Each time a court stumbles over a treaty's meaning because it lacks information or evidence, this creates a bias in favour of the Crown, to the detriment of Aboriginal people. This bias occurs since Aboriginal peoples most often bear the burden of proof in treaty cases, while the Crown does not have to substantiate the benefits that it receives from the agreements. The Crown's position is unaccountably the default position, yet this was not discussed or agreed to by the parties during the treaty negotiations. As a result, doubt is cast on Aboriginal peoples' treaty claims for differential treatment, while Crown rights are automatically assumed to be the standard by which every person's rights and conduct are judged. This homogenizing tilt constrains Aboriginal preferences and compels the assimilation of Aboriginal peoples.²⁹⁹

One can perhaps see this at work in both *Marshall (no. 1)* and *Marshall (no. 2)*. Consider the principle of reconciliation with the Crown's interests. Will the exercise of treaty interpretation bring the Crown's interests in preserving order in society and protecting the public into the analysis? Will this in turn legitimate narrowing the treaties' recognition of rights to Indigenous justice practices? It is impossible to tell at this point how the Supreme Court would interpret the various treaties when confronted by these questions. But the principle of reconciliation, and how that principle was used during *Marshall* and *Badger*, gives reason for concern. That Canadian governments can 'reasonably define' and justifiably infringe treaty rights also leaves cause for concern. Just how far would the court take these principles if Indigenous communities were to litigate claims to rights to their own justice systems? Would the Court then state that existing criminal legislation and current accommodations such as diversionary programs reasonably define or justifiably infringe treaty rights to past justice practices?

A few observations are in order regarding modern self-government agreements. The treaty between the Nisga'a, the federal government of Canada, and the provincial

²⁹⁹ Borrows, "Domesticating Doctrines", *supra* note 293 at 624.

government of British Columbia recognizes Nisga'a jurisdiction over public order, peace, and safety.³⁰⁰ The Nisga'a may prosecute violations of Nisga'a laws, although they are limited to dealing with it by sanctions recognized for summary offences under the *Criminal Code*.³⁰¹ Under s. 14 the *Sechelt Band Self-Government Act*³⁰², the Council of the Sechelt band may punish the violation of any law made by the Band government upon summary conviction. Similar provisions that emphasize enforcing local laws through summary conviction are also found in the *Tsawwassen First Nation Final Agreement Act*.³⁰³ These are examples of modern agreements with apparent limitations on traditional justice practices. With modern treaties, Canadian courts will likely impute a greater degree of education or understanding, and less linguistic difficulty, to the Indigenous signatories.³⁰⁴ As such, the absence of linguistic barriers or difficulties in understanding means that principles such as resolving textual ambiguities in favour of the Indigenous signatories will not be invoked in interpreting modern treaties. The text of a modern treaty, if it imposes any limitations upon criminal justice practices, will be determinative if those limitations are spelled out in clear language relatively free of ambiguity. Of course, s. 3 of the *Sechelt Act* expressly stipulates that the Act does not affect inherent or treaty rights. Even so, Leonardy suggests that this reflects an effort on the part of the federal government to contain an Indigenous government within parameters resembling those of a municipal body.³⁰⁵ Some observations on the relevance of s. 35(1) jurisprudence for Indigenous control over justice are now in order.

³⁰⁰ *The Nisga'a Final Agreement* (Ottawa: Canada – Library of Parliament, 1999), Chapter 11, 165-179.

³⁰¹ *Ibid.* at Chapter 12, s. 128.

³⁰² *An Act relating to self-government for the Sechelt Indian Band*, S.C. 1986, c. 27.

³⁰³ *Tsawwassen First Nation Final Agreement Act*, Bill 40, 3rd Session, 38th Parliament, 2007, ss. 133-136.

³⁰⁴ *R. v. Taylor & Williams* (1981), 34 O.R. (2d) 360 (C.A.).

³⁰⁵ Leonardy, *supra* note 225 at 113.

5.4 Section 35(1) and Indigenous Justice

Section 35(1) of the *Constitution Act, 1982* does recognize Indigenous rights as constitutional rights. This provision conceivably provides recognition of Indigenous substantive jurisdiction over criminal justice. However, Supreme Court interpretations of this provision do not leave a lot of cause for optimism. The Court's jurisprudence subjects the recognition of inherent Indigenous rights to a series of strict tests. If efforts to obtain effective control over criminal justice are stonewalled by Canadian authorities, an Indigenous community would have to take on the onerous burden of litigating multiple claims to all the individual justice practices that would form part of its justice system. This makes the pursuit of constitutional recognition of comprehensive Indigenous justice systems through litigation too costly and impractical for Indigenous communities.

Litigating for rights to justice practices may also frequently fail to satisfy the *Van der peet* tests, given their stringency.³⁰⁶ *Van der peet* has been heavily criticized on a number of fronts. For example, Russell Lawrence Barsh and Sakej Henderson criticize the pre-contact temporal threshold as denying Indigenous cultures the right to evolve and adapt to meet changing times and needs:

Cultures continue to change, reorder their priorities and revise their conceptions of themselves. ... Assuming, arguendo, that societies self-consciously identify certain elements of their life-ways as particularly positive or distinctive achievements, these cultural self-assessments are as fluid as culture itself. This is as true of Canada as of Aboriginal peoples. We gravely doubt that Thomas Chandler Haliburton would recognize many of the symbols or practices that are dear to Canadians

³⁰⁶ This statement is not necessarily meant to rule out the possibility of any Indigenous society ever satisfying the *Van der peet* tests. Depending on the specific circumstances and facts facing a particular Indigenous society, maybe a case can be made under the law as it currently stands. Michael Cousins, for example, argues that the Mohawk can make a strong case for constitutional recognition for their own justice system under s. 35(1) and its jurisprudence, although he hesitates to make a definitive conclusion. He bases this to a significant degree on the strength and availability of numerous materials describing past Mohawk justice practices including their own oral histories. He also bases his argument on historical interactions between the Mohawk and European societies, where the latter routinely recognized Mohawk autonomy, with the two row wampum belt symbolizing the equality of these interactions. See Michael Cousins, *The Inherent Right of the Haudenosaunee to Criminal Justice Jurisdiction in Canada: A Preliminary Inquiry* (Master's Thesis) (School of Criminology, Simon Fraser University 2004).

today, although his writings were definitive of the Canadian self-image 150 years ago. Change (and arguments over its direction) is not only essentially human, but essential for survival in a world of changing ecological and political forces. To presume that Aboriginal societies are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights, is sociological nonsense recalling the discredited social-Darwinist conception of "primitivity". To be sure, Chief Justice Lamer acknowledges the fact that all cultures change, and calls upon his colleagues to be flexible in determining what is genuinely Aboriginal. But his underlying paradigm nonetheless requires the demonstration of precolonial roots, as well as the centrality of the challenged practice to precolonial Aboriginal society. A precolonial practice is permitted to evolve, but an Aboriginal culture cannot adopt new elements and remain genuine. Even the concept of "culture" is inherently cultural and, in *Van der Peet*, "culture" has implicitly been taken to mean a fixed inventory of traits or characteristics.³⁰⁷

Bradford Morse adds:

This is true regardless of how insignificant the first contact between Aboriginal peoples and Europeans may have been to the cultural development of either party, or its relevance to the effective assertion of sovereignty subsequently by the Crown. This approach bears little resemblance to the way in which cultures in fact evolve, adapt and transform over time. It also excludes what may have later become, or what may become in the future, integral to the very survival of Aboriginal cultures.³⁰⁸

Barsh and Henderson also argue that the 'central and integral' test in *Van der peet* has the potential to deny constitutional protection to many important facets of Indigenous cultures. Their argument is as follows:

The application of "centrality" to Aboriginal rights on this grander scale exacerbates the problem of distinguishing between what is "central" to a culture, and what is merely "incidental". Making any such distinction presumes that cultural elements can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of the others. This presumption of independence is, in and of itself, utterly incompatible with Aboriginal philosophies, which tend to regard all human activity (and indeed all of existence) as inextricably inter-dependent. At the same time, we consider that it is empirically fallacious. The notion of centrality in human society is, we contend, as absurd as arguing that an ecosystem remains the same after the removal of a few "incidental" species. We wonder if the Supreme Court would dare render an opinion as to what is "central" to modern Canadian society (hockey? beer? the maple-leaf flag?). Centrality is a judicial fiction, an especially slippery slope, and undermines Aboriginal societies by exposing their purportedly "incidental" elements to judicial excision notwithstanding section 35 of the Constitution Act, 1982.³⁰⁹

Some claims to justice practices may fail to meet the pre-contact threshold, while others could be deemed merely incidental instead of central and integral. The jurisprudence on s. 35(1) tips the scales heavily in favour of the Canadian state.

³⁰⁷ Russell Lawrence Barsh & Sakej Henderson, "The Supreme Court's *Van der peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1001-1002.

³⁰⁸ Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011 at 1031-1032.

³⁰⁹ Barsh & Henderson, *supra* note 307 at 1000-1001.

Indigenous communities lack a meaningful basis to demand more. *Delgamuukw* hints at a possibly more generous recognition of Indigenous laws and justice practices in relation to land title. However, a strict reading of *Delgamuukw* suggests that Chief Justice Lamer's comment is limited to Indigenous laws regarding land use being used as proof of land title. Whether the Court is willing to agree with McNeil that land use laws are themselves Indigenous rights under s. 35(1), and a source of Indigenous jurisdiction, is unclear and remains an open question.

Unlike inherent rights jurisprudence, the Court's treaty jurisprudence contains interpretive principles that are stacked in favour of Indigenous signatories. That is not true of all of them though. One must be wary of the principle of reconciliation with Crown interests, and the application of that principle in *Marshall (no. 1)* and in *Badger*. A guarded appraisal of treaty jurisprudence suggests that the Supreme Court may not be willing to interpret treaties as recognizing Indigenous jurisdiction over criminal justice.

Another lingering concern is that constitutional Indigenous rights are subject to justifiable infringement. The tests for justifiable infringement conceivably allow Canadian governments to limit the space for Indigenous justice. Presently, it is far from clear though how Indigenous claims to justice practices would be treated under the tests. In the end, Indigenous rights under the Canadian constitution are interpreted very narrowly. Indigenous peoples are therefore left without a solid constitutional foundation with which to challenge Canadian policies that accord only limited accommodations.

Whether it is legislators, executives, or the judiciary, it is apparent that Canadian allowances for Indigenous approaches to justice are quite limited. The motivations and policies that maintain this state of affairs is the subject of the next chapter.

CHAPTER 6: SUSTAINING MINIMAL LEGAL SPACE

This chapter will explore the motives and policies behind minimizing the legal space for Indigenous visions of justice. Judicial interpretations of s. 35(1) rights are narrow. Possible motives include subordinating Indigenous rights to state sovereignty, judicial deference to Canadian political leadership, and a preference that the issues be resolved by political negotiations instead of litigation. Canadian politicians in turn are motivated to sustain the status quo by political pressures to avoid the appearance of being ‘soft on crime’, and to avoid giving too much away to an Indigenous minority at the expense of a non-Indigenous majority. These pressures dovetail together to produce an especially acute political disincentive against further accommodation, the pressure to avoid extending a perceived leniency in the sentencing of Indigenous offenders that non-Indigenous offenders do not enjoy. The discussion begins with exploring the rationales behind judicial interpretations of Indigenous rights that sustain the status quo.

6.1 Judicial Doctrine and the Status Quo

6.1.1 Subordination to State Sovereignty

It can be suggested that Supreme Court jurisprudence on s. 35(1) reflects an intention to extend deference to Canadian politicians, and leave Indigenous self-determination subordinated to Canadian state sovereignty. Inherent rights have been interpreted restrictively, rendering litigation for self-determination rights costly and impractical. Principles of treaty interpretation appear to be generous towards Indigenous signatories, but also contain strands that leave cause for concern. The reconciliation principle in particular leaves concerns for how generously courts would interpret the treaties in the contexts of self-determination and criminal jurisdiction.

It is interesting to note that ‘sovereignty’ is a word frequently used in Supreme Court decisions on Indigenous rights. In *Sparrow*, Chief Justice Dickson had this to say:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional land, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown;³¹⁰

Chief Justice Lamer stated in *Delgamuukw* that s. 35(1)’s purpose is to reconcile the prior presence of Indigenous peoples with the assertion of Crown sovereignty.³¹¹ In *Haida Nation v. British Columbia*, Chief Justice McLachlin states that the honour of the Crown requires that Indigenous rights be ‘determined, recognized, and respected’³¹², and that the Crown must negotiate a just settlement of unresolved Indigenous claims through a treaty-making process.³¹³ Nonetheless, *Haida* also maintains the principle that sovereignty remains vested with the Crown, albeit subject to duties to act honourably.³¹⁴

Indigenous academics argue that Supreme Court decisions on s. 35(1) rights are motivated by subordinating Indigenous self-determination to state sovereignty. John Borrows says of *Pamajewon*:

For example, in *Jones* it would not be an unfair reading of the case to observe that the appellants were asserting an aboriginal right to self-government. However, the Supreme Court considered that assertions of aboriginal rights to self-government were cast at a level of "excessive generality". If s. 35(1) rights encompass claims to self-government, these claims must be considered in the light of specific practices integral to the pre-contact aboriginal culture. The court's re-characterization of the right being claimed illustrates that it is not willing to consider self-government rights on any general basis. This approach defeats many aboriginal peoples' aspiration for a fuller articulation of the powers relative to the federal and provincial governments.³¹⁵

He also ascribes a deferential objective to Chief Justice Lamer as follows: “The door slams shut. The chief justice drives away. Self-government will serve more time in

³¹⁰ *Sparrow*, *supra* note 226 at 1003.

³¹¹ *Van der peet*, *supra* note 231 at para. 141.

³¹² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 25.

³¹³ *Ibid.* at para. 20.

³¹⁴ *Ibid.* at para. 17.

³¹⁵ John Borrows, “Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada” (1996) 50 C.R. (4th) 230 at 235.

isolation, locked within federalism's cells.”³¹⁶ Lamer uses the *Van der peet* tests to achieve his goal, preserving Canadian state sovereignty at the expense of Indigenous self-determination.³¹⁷

Monture-Angus argues that the Supreme Court of Canada will invariably be Eurocentric by always interpreting Indigenous rights in narrow fashion so as to favour non-Indigenous interests.³¹⁸ She also says of *Van der peet*:

To hold Aboriginal people to this time immemorial standard without understanding the history of interference entrenches historical and colonial patterns by their consequence into current Canadian legal results. Not only does the Court's analysis fail to fully consider colonial impacts, it develops a test that turns this colonial impact into a legal impasse that could have the result of denying constitutional protection to some Aboriginal nations.³¹⁹

As previously mentioned, Christie implies that the Court can abuse the reconciliation principle to subordinate even treaty-protected recognitions of self-determination to Canadian sovereignty. There is however an alternative explanation.

6.1.2 Preference for a Political Resolution

The idea is not so much that the Court is unsympathetic to Indigenous aspirations, but rather the Court questions its own fitness to resolve the issues. Political negotiations are suggested as a better route than litigation for resolving Indigenous claims. Catherine Bell suggests that the Court has been conscientious of the potential consequences of its decisions, and the resulting political backlash, and therefore pushes such issues “back into the political arena”, because “... consensual resolution is preferred to the imposition of perceived chaos.”³²⁰ Former Supreme Court Justice Michel Bastarache stated:

I think the Court is not the right forum for determining how the native rights will blend in with the rights of other citizens in the country, and with citizenship and all of those other issues, and I wish

³¹⁶ John Borrows, *Recovering Canada: the Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 68.

³¹⁷ *Ibid.* at 67-69.

³¹⁸ Monture-Angus, *supra* note 144 at 47-48.

³¹⁹ *Ibid.* at 101.

³²⁰ Catherine Bell, “New Directions in the Law of Indigenous Rights” (1998) 77 Can. Bar Rev. 36 at 65-66.

there was a way that most of these things could be determined through negotiation. I don't really believe that the Court is going to be able to be the final arbitrator in that area.³²¹

Justice LaForest, speaking in the context of Indigenous land title claims, asserted that “the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.”³²² This rationale may have some justification in that the honour of the Crown does require Canadian governments to pursue a just settlement of unresolved claims, and the test of justifiable infringement typically imposes on the Crown duties to consult with Indigenous peoples before pursuing actions that will adversely affect their rights.

This approach suffers from a certain flaw however. It is difficult to overlook the fact that accommodations of Indigenous justice practices, which are the products of negotiations between Indigenous communities and Canadian leaders, remain minor. The existence of Crown duties to consult, and to pursue the just settlement of outstanding claims, has apparently done little to assist Indigenous communities in obtaining extensive accommodations of their approaches to justice. Even as Bell suggests that the Court is trying to force the parties into negotiated resolutions of Indigenous rights issues, she points out the fundamental problem. She states: “[U]nfortunately, the history of Aboriginal peoples in this country has demonstrated the need for a judicial hammer to effectively realize rights at negotiation tables.”³²³ Jonathan Rudin adds:

The obvious difficulty with Aboriginal-government negotiations is that Indigenous people come to the table with little to negotiate with. If Aboriginal rights are only those rights that the government is prepared to recognize, then the negotiation process, despite all the trappings, becomes essentially a take it or leave it process. Unless Aboriginal people can rally a great deal of political will on their side, real negotiations with government are not likely to occur.³²⁴

³²¹ Quoted in Cristin Smitz, “SCC Wrong Forum for Native Land Claims: Bastarache” *The Lawyers Weekly* (January 19, 2001) 20:34.

³²² *Delgamuukw*, *supra* note 246 at para. 207.

³²³ Bell, *supra* note 320 at 66.

³²⁴ Jonathan Rudin, “One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada’s Decisions in *R. v. Sparrow*, *R. v. Van der peet*, and *Delgamuukw*.” (1998)

Meaningful negotiations are hampered by a certain reality despite whatever faith the Court may have in negotiated solutions, and despite the existence of legal duties to consult owed to Indigenous peoples. That reality is that the Supreme Court has framed Indigenous rights with significant restrictions that preserve state sovereignty. This allows Canadian political leaders to sustain the status quo. The discussion will now explore the political motivations behind perpetuating a minimal level of accommodation.

6.2 The Political Inertia against Indigenous Justice Reform

There are certain political pressures that motivate Canadian authorities to sustain the status quo. One is to avoid the appearance of being ‘soft on crime’. Another is to avoid the appearance of giving too much away to an Indigenous minority at the expense of a non-Indigenous majority. These combine to produce an especially acute political disincentive against further accommodation, to avoid extending a leniency in the sentencing of Indigenous offenders that offenders from a non-Indigenous majority do not enjoy. The discussion begins with exploring the political pressures to avoid being ‘soft on crime.’

6.2.1 Political Pressures in Responding to Crime

One reason for Canada granting only limited accommodations of Indigenous visions of justice is that extensive support for Indigenous community-based alternatives may be politically controversial. ‘Tough on crime’ policies are intended to win political support from the public.³²⁵ To be fair, Western democracies have often recognized the merits of restorative justice, and have often implemented restorative justice programs to

13 J.L. & Soc. Pol’y 67 at 85; For a similar and more recent argument, see Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw*, and *Haida Nation*” (2005) 24 Windsor Y.B. Access Just. 17.

³²⁵ Cayley, *supra* note 65 at 3 and 98; Bayda, *supra* note 67 at 326.

reflect such recognition.³²⁶ This only goes so far though. Western justice systems have a stake in the use of imprisonment for offences deemed more serious to avoid losing public support by appearing soft on crime.³²⁷

Recall Cayley's argument that widespread reliance on incarceration amounts to a political gesture to appease the public, but without a rational consideration of whether such policies are effective. David Garland adds with reference to the American scene:

Policy measures are constructed in ways that privilege public opinion over the views of criminal justice experts and professional elites. The professional groups who once dominated the policy-making community are increasingly disenfranchised. Policy is formulated by political action committees and political advisers – not by researchers and civil servants. Policy initiatives are announced in political settings – the party convention, the party conference, the televised interview. They are encapsulated in sound-bite statements: 'Prison works', 'Three-strikes and you're out', 'Truth in sentencing', 'No frills prisons', 'Tough on crime, tough on the causes of crime'. Often these initiatives are under-researched and lack the elaborate costings and statistical projections that are a standard feature in other areas of policy.³²⁸

Voting publics in Western democracies often demand hefty prison terms. According to David Pacciocco, public opinion surveys indicated that approximately 80% of the voting public in Australia, Canada, England, the Netherlands, and the United States feel that existing sentences are too lenient.³²⁹ A particularly lenient individual sentence can indeed provoke public controversy. As an example from Ontario, Anthony and Irene Goodchild's marriage had been falling apart partly due to Irene's infidelity. The situation

³²⁶ Examples include Law Reform Commission of Canada, *Studies on Diversion*, working paper no. 7 (Ottawa: Law Reform Commission, 1975) at 23-24; Canada. House of Commons - Standing Committee on Justice and Solicitor General, *Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections. Taking Responsibility*. (Ottawa: Solicitor General, 1988) at 75; For a description of Canadian responses to these reports, see Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992), Special Edition on Aboriginal Justice, U.B.C. L. Rev. 147; See also *The Recognition of Aboriginal Customary Laws, Report no. 31*, *supra* note 47, vol. 1 at 7.

³²⁷ For example, Evelyn Zellerer and Chris Cunneen notice this type of offence bifurcation with regards to juvenile diversion programs in Australia. See "Restorative Justice, Indigenous Justice, and Human Rights" in Gordon Bezemore and Mara Schiff (eds.) *Restorative Community Justice: Repairing Harm and Transforming Communities* (2001) 245 at 253.

³²⁸ Garland, *supra* note 83 at 142-143.

³²⁹ David Pacciocco, *Getting Away with Murder: the Canadian Criminal Justice System* (Toronto: Irwin Law, 1999). He is referring to the findings of Andrew Ashworth & M. Hough in "Sentencing and the Climate of Opinion" (1996) *Crim. L. Rev.* 761 at 780-781.

culminated in Anthony fatally discharging a shotgun blast that struck Irene in the neck. Anthony pleaded guilty to manslaughter, and received one year of jail, followed by parole and then probation.³³⁰ Paciocco describes the public outrage as follows:

The public was appalled. The Sudbury open-line talk shows were abuzz with callers, letters to the editor were sent off, and protests were staged. The sentence, for many, brought the administration of justice into disrepute.

It is easy to understand why this sentence was considered to be outrageous. Members of the public would conclude that it was simply too lenient to act as a deterrent to other potential offenders. They would wonder why the cost of killing a human being is less than a year in jail, followed by parole and then probation. What kind of message is that? The public would be disturbed that within a year there was a killer walking in its midst. How does this protect society? Of equal importance, the public would feel that the sentence simply fails to express its outrage at the crime. Symbolically, it devalued the life of Irene Goodchild.³³¹

Sometimes the public demand for stiffer sentences is fueled not just by seemingly lenient sentences in notorious individual crimes, but also by a perceived need to get tough on particular categories of crime. A frequent response to crimes that gain public notoriety for being prevalent and/or serious is to increase the imprisonment terms for those offences. Recent examples in Canada include street racing, auto theft, and possessing or trafficking in crystal meth.³³²

Bryan R. Hogeveen demonstrates how public demands for stiffer sentences led to tangible legal reforms in youth criminal legislation.³³³ Statistics Canada reported that violent crime by young offenders had increased by 16.1% between 1991 and 1996.³³⁴ Added to this were highly publicized and shocking violent offences. Jonathan Wamback was beaten into a 3 month coma by several youth on account of graffiti that he had

³³⁰ *Ibid.* at 19-21.

³³¹ *Ibid.* at 21.

³³² For street racing and auto theft, see “Cotler to table bills inspired by Cadman” *The Vancouver Sun* (September 28, 2005) A1. For crystal meth, see Jonathan Fowlie, “Liberals to ramp up war on meth” *The Vancouver Sun* (December 12, 2005) A1.

³³³ Bryan Hogeveen, “If we are tough on crime, if we punish crime, then people get the message: Constructing and punishing the young offender in Canada during the late 1990s” (2005) 7:1 *Punishment and Society* 73.

³³⁴ Canada Centre for Justice Statistics, *Youth court statistics 1995-1996* (Ottawa: Statistics Canada, 1997).

allegedly authored.³³⁵ Rodney Bell had his face caved in, and brought to near death, by the blunt edge of an axe shortly after he had chased after a number of youth who ran a stop sign and nearly struck his vehicle.³³⁶ Reena Virk was beaten and drowned to death at the initiative of Kelly Ellard and her friends, after Virk had allegedly slept with Ellard's boyfriend.³³⁷ For many, these developments reflected the federal government's failure to impose tough enough penalties through the *Young Offenders Act*.³³⁸

Hogeveen argues that these crimes, shocking as they are, are not typical of youth crime. The most common types of youth crimes in Canada are property offences and common assault.³³⁹ That fact did not stop the youth crime rates and the highly publicized crimes from fueling a political dialogue demanding an overhaul of young offender legislation. Member of Parliament Mark Crawford demanded: "Where does it end? Local parents and other citizens are calling for vigilante justice. They do not trust our current system of justice, that it lets criminals off with a slap on the wrist while the victims are left in limbo for the rest of their lives."³⁴⁰ Alliance Member of Parliament Jay Hill stated:

In my home province of British Columbia, the names of Reena Van Kirk, Dawn Shaw and Tryvge Magnusson represent just a few victims who died at the hands of violent youth. Their senseless deaths demand laws from the government that punish and deter those who commit violent acts and provide mandatory rehabilitation programs during incarceration.³⁴¹

³³⁵ Robert Granatstein, "Teens' charges reduced, family of beating victim livid" *Toronto Sun* (January 21, 2000) 1.

³³⁶ "B.C. man hit with axe by teens" *Toronto Sun* (May 10, 1994) 32.

³³⁷ "Virk's killer gets life in jail: judge finds no remorse in Ellard since '97 attack" *Toronto Star* (July 8, 2005) 20.

³³⁸ Jonathan Simon, "'Entitlement to Cruelty': Neo-liberalism and the punitive mentality in the United States" in Kevin Stenson & Robert Sullivan (eds.), *Crime, Risk and Justice: the Politics of Crime Control in Liberal Democracies* (Portland, Ohio: Willan Publishing, 2001) 125; *Young Offenders Act* (1984) C-110.

³³⁹ Hogeveen, *supra* note 333 at 80 & 83; Statistics Canada, *Youth in custody and community services in Canada, 1998/99* (Ottawa: Canadian Centre for Justice Statistics, 2000).

³⁴⁰ Canada, *House of Commons Debates: Official Report* (Ottawa: Queen's Printer, May 2, 1994).

³⁴¹ Canada, *House of Commons Debates: Official Report* (Ottawa: Queen's Printer, October 21, 1999).

Hogeveen argues that the Liberal government responded to the pressure with the *Youth Justice Criminal Act* (hereinafter the *YJCA*).³⁴² It must be noted that the *YJCA* does have a distinct emphasis on restorative alternatives to custody. Section 39(1) reads:

(1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(a) the young person has committed a violent offence;

(b) the young person has failed to comply with non-custodial sentences;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the *Young Offenders Act*...; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravated circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Sanjeev Anand states that many provisions in the *YJCA* direct youth court judges ‘to seriously consider restorative processes and conditions when imposing youth sentences.’³⁴³ Section 19 for example reads: “A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.” Section 3(1)(c)(ii) includes reparation to victims and community as an objective of youth sentencing. Section 3(1)(c)(iii) also states that sanctions should: “be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration ...” However, the *YJCA* also contains punitive elements that go beyond what were seen in the *Young Offenders Act*. Hogeveen explains:

³⁴² Hogeveen, *supra* note 333 at 85. *Youth Justice Criminal Act*, S.C. 2002, c-1.

³⁴³ Sanjeev Anand, “Crafting Youth Sentences: the Roles of Rehabilitation, Proportionality, Restraint, Restorative Justice and Race under the *Youth Justice Criminal Act*” (2002-2003) 40 *Alta. L. Rev* 943 at 958.

Despite innovations and a willingness on the part of the Federal government to experiment with programming for minor offenders, the sentencing amendments contained the YJCA for dangerous and repeat young offenders rarely venture much beyond the carceral. That is, special sentencing options for violent offenders that include long periods of supervised control, the addition of a serious violent offender category that mirrors American three strikes legislation and the easing of transfer provisions, signals that the Canadian government is prepared to come down tougher on serious young offenders. Nevertheless, these new policies are hardly innovative as they continue to rely on incarceration as the main form of punishment. While the discourse of intrusive punishment has not been the lone voice directing Canada's juvenile justice policy, it has certainly been the loudest and most prominent.³⁴⁴

Hogeveen's reference to transfer provisions means provisions for transferring a juvenile accused to adult criminal court.³⁴⁵

Public demands on the Canadian state to respond to crime with incarceration, and lengthier terms of incarceration, present a powerful obstacle to the realization of Indigenous control over justice. Past Indigenous justice practices did not always have a restorative emphasis. Nonetheless, those practices that do resemble restorative justice retain an important contemporary significance in the effort to deal with the problem of Indigenous over-incarceration. A reasonable conclusion is that Canadian politicians are reluctant to extend greater accommodations of Indigenous approaches to justice for fear of losing public support after giving the appearance of being 'soft on crime'. This however is not the only political obstacle for Indigenous peoples.

6.2.2 Giving Too Much Away

Western governments may have a political incentive to at least be seen as recognizing diversity for the sake of Indigenous peoples. Carol LaPrairie states: "One explanation for the power of the State 'to find proposals compatible with the self-government rubric' is its recognition of the legal, moral, and cultural imperative of aboriginal people for self-government based as it is on historical injustices of

³⁴⁴ Hogeveen, *supra* note 333 at 76-77. Some of the provisions that Hogeveen refers to include s. 42(2)(n) – for lengthy supervised control of violent offenders; the serious violent offender designation is dealt with in the definitions provision – s. 2(1); the sentencing of serious violent offenders is dealt with in s. 42(2)(o).

³⁴⁵ See ss. 61 to 76 of the YJCA.

colonization and subjugation.”³⁴⁶ The federal government has a policy guide for the implementation of self-government.³⁴⁷ The introduction to the policy guide states: “Aboriginal peoples in Canada have long expressed their aspiration to be self-governing, to chart the future of their communities, and to make their own decisions about matters related to the preservation and development of their distinctive cultures.”³⁴⁸ And again:

Our goal is to implement a process that will allow practical progress to be made, to restore dignity to Aboriginal peoples and empower them to become self-reliant. Aboriginal governments need to be able to govern in a manner that is responsive to the needs and interests of their people.³⁴⁹

Former Prime Minister of Australia John Howard indicated a desire for greater understanding towards and social equality for Indigenous Australians in these words:

By passing this resolution, we display a generosity and an understanding and a capacity to compromise between two genuinely held but different views. In passing this resolution, I think we say to the indigenous people of our community that we want you in every way to be totally part of our community, we want to understand you, we want to care for you where appropriate, we want you to be in every way part of the Australian achievement and part of the Australian story.³⁵⁰

Be that as it may, there is also another political force that acts in direct opposition. Indigenous rights often clash with the interests of a non-Indigenous majority. The results of a public opinion poll by the Centre for Research for Information on Canada are particularly illuminating in this respect. According to their 2004 report:

In this year’s *Portraits of Canada* survey, ‘improving the quality of life of Aboriginal people’ was among the issues that the respondents were asked to rank as a priority (high, medium, low) for the federal government. Twenty-nine percent rate it as a high priority item – the same percentage who want more military spending. The only item receiving less support as a high priority is giving more money to the country’s big cities (18%). The highest-rated items are protecting the environment, spending more money on health care and increasing cooperation between the federal and provincial governments.³⁵¹

³⁴⁶ LaPrairie, “Community Justice or Just Communities?”, *supra* note 153 at 524.

³⁴⁷ Department of Indian Affairs and Northern Development, *The Government of Canada’s Approach to Implementation of the Inherent and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995).

³⁴⁸ *Ibid.* at 1.

³⁴⁹ *Ibid.* at 1.

³⁵⁰ “Federal Parliament expresses regret over Stolen Generations”, online: *ABC Online* <<http://www.abc.net.au/7.30/stories/s47033.htm>>.

³⁵¹ Centre for Research and Information on Canada, *Portraits of Canada 2004* (Montreal: Centre for Research and Information on Canada, 2005) at 11.

This by itself does not necessarily translate into political hostility towards Indigenous aspirations. The potential for political hostility arises in contexts where policies that accommodate Indigenous demands can operate to the perceived detriment of non-Indigenous peoples. This is particularly true of competing demands for wildlife resources. According to the same poll, 58% were of the view that hunting and fishing policies should not accord preferential access to Indigenous peoples. This of course does not amount to an overwhelming majority. What is remarkable though is that this figure rises in provinces where competing demands for wildlife resources between Indigenous and non-Indigenous peoples can be especially acute. The percentage of respondents who say that preferential access should not be given to Indigenous peoples rises to 74% in the Atlantic region, 73% in Saskatchewan, and 71% in British Columbia.³⁵²

If Canadian policies give Indigenous peoples preferred access to wildlife resources, it can spark opposition from a non-Indigenous majority, particularly in those provinces where larger majorities indicated that Indigenous peoples should not be given preferential access. In 1992 the federal Department of Oceans and Fisheries negotiated a small number of Indigenous-only commercial fisheries in British Columbia. In 1998, nearly 200 non-Indigenous persons were arrested for illegal fishing in protest of the policy. This led to a temporarily successful legal challenge against the policy in the Supreme Court of British Columbia on the basis that it violated the *Charter's* right to equality (s. 15).³⁵³ A Natural Resources Minister in Ontario received a public grilling over a similar policy as follows:

³⁵² *Ibid.* at 14.

³⁵³ *R. v. Kapp*, 2003 BCPC 0279; Overturned on appeal in *R. v. Kapp*, 2004 BCSC 958; The British Columbia Supreme Court's Decision was upheld in *R. v. Kapp*, 2006 BCCA 277; The Court of Appeal decision was upheld by the Supreme Court of Canada in *R. v. Kapp*, 2008 SCC 41.

Natural Resources Minister Bud Wildman felt the wrath of hunters and anglers yesterday as he defended the province's aboriginal rights policy against charges of racism. Wildman urged members of the Ontario Anglers and Hunters Association to be tolerant and respect native rights to hunt and fish for food. But his speech to the group's annual conference fell largely on deaf ears as he was heckled and faced a barrage of angry questions. "I don't think he satisfied anybody," association executive vice-president Rick Morgan said after the two-hour showdown. "I think the members' concerns are greater than they were before." Many of the delegates refused to accept that there should be one law for natives and another for everyone else. Some members complained that an interim Ontario policy allowing natives to hunt and fish out of season and without regard to provincial quotas is racist because it treats non-natives as second-class citizens. Indian chiefs and association members were to debate the issue today. ... Hecklers jumped on Wildman early in his speech. One cried that natives should have to follow "the same rules we have to follow" while another charged that "the rules are there are no rules."³⁵⁴

Public outrage often follows distinct treatment of Indigenous interests.

Non-Indigenous public opinion can also convince Canadian governments to oppose Indigenous rights during constitutional litigation. The position of the government of British Columbia during the hearing of *Sparrow* is described as follows:

The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the Constitution Act, 1982, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the Band and that the Band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups.³⁵⁵

Likewise in *Marshall (no. 1)* the federal Crown argued that the Mi'kmaq did not have a treaty right to fish for and trade eels.³⁵⁶ Other examples of Crown opposition during the appellate process include *Van der peet*, and *Badger*.

Opposition can also manifest in governments taking hard line and inflexible policy positions in negotiations. After *Marshall (no. 1)*, the lucrative lobster catch of the Atlantic Ocean has inspired considerable hostility between the Mi'kmaq of Burnt Church

³⁵⁴ Darcy Henton, "Minister defends natives-first policy on hunting, fishing" *Toronto Star* (February 22, 1992) A19.

³⁵⁵ *Sparrow*, *supra* note 226 at 1087.

³⁵⁶ *Marshall (no. 1)*, *supra* note 288 at para. 4.

and non-Indigenous fishermen. Non-Indigenous fishermen have frequently vandalized the lobster traps and homes of the Mi'kmaq, with retaliation and counter-retaliation frequently occurring.³⁵⁷ The federal government has negotiated agreements with most of the bands in New Brunswick. Negotiations broke down however with the Burnt Church community. The federal government would not budge from its demand for only 40 lobster traps, insisting that anything more would endanger the lobster as a species. Burnt Church representatives would not budge from their demand for 5,000 lobster traps, insisting that anything less was inadequate to address the poverty faced by 1,200 community members. Afterwards, Burnt Church members frequently set lobster traps in defiance of federal regulations, often leading to violent clashes with federal enforcement officials.³⁵⁸ Lobster conservation is certainly a legitimate policy concern. At the same time, the federal government has considerable discretion in how the available quota is allocated. A reasonable conclusion is that the federal government's hard line position was meant to ensure substantial access to the lobster resource for non-Indigenous fishermen, and thereby avoid losing significant voting support come the next election.

A similar phenomenon is easily observed in how Australian politicians have reacted to judicial decisions recognizing Indigenous land title under common law. *Mabo v. Queensland (no. 2)*,³⁵⁹ which recognized Indigenous land title at common law, sparked outcries among non-Indigenous Australians. When then Prime Minister Paul Keating suggested that legislation in the works may end up not exempting pastoral leases from Indigenous title claims, one response was described as follows:

³⁵⁷ "Fish Wars" (October 6, 1999) *Toronto Sun* 14.

³⁵⁸ Colin Nickerson, "Indian Defiance of Rules Inflames Canada's Lobster War" *Boston Globe* (August 23, 2000) A1; Stephanie Nolen, "Nova Scotia Lobster War Rages as Native Fisherman Defy Law" *The Independent* (August 26, 2000) 15.

³⁵⁹ *Mabo v. Queensland (no. 2)*, (1992), 175 C.L.R. 1.

The Cattleman's Union has warned of blood in the streets if the Federal Government allows pastoral leases to come under Mabo-style land claims. The union said thousands of graziers would be forced off the land, primary industry would grind to a halt and banks would be forced to make mass reposessions unless pastoral leases were exempt from the claims. Union president Kerry Martin said the possibility that such leases could be subject to native title would be violently opposed. "There's one thing saying that we should be sacrificing rural industries to appease the Aborigines but I believe it's another thing to extradite rural families from their properties," he said. "If this is going to happen, I believe there could be blood on the streets . . . the suggestion has already come to me from a number of people that we should be setting up a fighting fund to approach this issue in that fashion."³⁶⁰

Such public furor was apparently successful. The cabinet of the federal government forced Keating to recant his position and to validate pastoral leases thereby extinguishing native land title. The National Farmers' Federation had likewise promised war against the cabinet the evening prior to this development.³⁶¹

Subsequent developments were not much different. After *Mabo*, the High Court ruled that pastoral leases and native land title could co-exist together in *Wik Peoples v. Queensland*.³⁶² The *Wik* decision, coupled with the fact that then Prime Minister John Howard was not convinced that he could pass legislation extinguishing native land title on pastoral leases through the Senate,³⁶³ meant that containing the parameters of native land title had to take on a different tack. The end result was the *Native Title Amendment Act (Cth)*. Larissa Behrendt describes the essential features of the legislation as follows:

- reducing the say native title holders have on mineral exploration in their traditional country;
- enabling the States and Territories to replace the right to negotiate on pastoral leases;
- allowing a range of primary production activities to take place on pastoral leases without negotiation with traditional land holders;
- native title holders have less say in a whole range of government activities on their land; and
- making it more difficult for native title holders to present their case in a claims hearing.³⁶⁴

³⁶⁰ Kim Sweetman, "Cattleman Warn of Blood on the Streets" *Courier-Mail* (October 16, 1993).

³⁶¹ Kim Sweetman, "Cabinet Forces PM Backdown" *Courier-Mail* (October 19, 1993).

³⁶² *Wik Peoples v Queensland* (1996) 187 C.L.R. 1.

³⁶³ C. Johnstone, "Howard's Way on Native Title" *Courier-Mail* (December 28, 1996) 28.

³⁶⁴ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) at 2.

Primer Minister Howard made himself clear whose political support he was garnering:

[A]lthough I was born in Sydney and I lived all my life in the urban parts of Australia, I have always had an immense affection for the bush. I say that because in all of my political life no change would offend me more, than the suggestion that what I've done and what I've believe in has not taken proper account of the concerns of the Australian bush.³⁶⁵

And again:

[T]he plan the Federal Government has will deliver the security, and the guarantees to which the pastoralists of Australia are entitled ...

Because under the guarantees that will be contained in the legislation, the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders in Australia, that native title right will be completely abolished and removed for all time ...

That if there are any compensation payments ordered to be made in relation to the compulsory acquisition or compulsory resumption of any established native title rights anywhere in Australia, that compensation will not be borne by the pastoralists of Australia, it will be borne by the general body of the Australian taxpayers ...³⁶⁶

The political clout of non-Indigenous majorities speaks louder to Western state governments. What this translates into is state policies that at best accord piecemeal accommodation of Indigenous rights when they conflict with non-Indigenous interests, or at worst direct opposition towards Indigenous rights. State governments strive to avoid the appearance of giving too much away to the Indigenous minority. This reality dovetails in a particular way with the public pressures felt by politicians when it comes to responding to crime.

6.2.3 The Dovetail

Previous discussions have made clear the effects of policies of imprisonment on Indigenous peoples. This does not affect just Indigenous peoples however. David Garland indicates that America's war on drugs has resulted in the incarceration of a

³⁶⁵ "Address to Participants at the Longreach Community Meeting to Discuss the Wik 10 Point Plan, Longreach, Queensland." Transcript reproduced in Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *CERD and the Native Title Amendment Act 1998*, Parliament of the Commonwealth of Australia 276.

³⁶⁶ *Ibid.* at 276-277.

disproportionately large number of Black and Hispanic Americans.³⁶⁷ Tough on crime policies may be having negative social consequences for minorities in the United States beyond the fact of over-incarceration. Studies have shown that inmates incarcerated in the American prison system suffer higher rates of mental illness, tuberculosis, HIV infection, and violence.³⁶⁸ Lisa D. Moore and Amy Elkavich argue that this means that America's 'War on Drugs' is having a disproportionate effect on the health of African Americans, and has repercussions for the broader African American community when released inmates expose others to their illnesses.³⁶⁹ Margaret E. Frinzen argues that over-incarceration of African Americans has negative social consequences that linger far beyond the experience of imprisonment itself, such as inability to apply for funding for higher education, inability to obtain employment, decreased housing and access to food stamps, and electoral disenfranchisement. African American offenders are denied opportunities of reintegrating into society, or even obtaining the necessities of life. Racial inequality is thereby perpetuated.³⁷⁰

Even as tough on crime policies have an especially adverse effect on racial minorities, those same minorities lack the political power to challenge them. Garland describes the political inertia involved with contesting such policies as follows:

Motivated by the politically urgent need to 'do something' decisive about crime, in a context where the federal government mostly lacks jurisdiction ... the war on drugs was the American

³⁶⁷ Garland, *supra* note 83 at 132.

³⁶⁸ See J.B. Glaser & R.B. Grelfing, "Correctional health care: a public health opportunity" (1993) 118 *Annual Intern Medicine* 139; J. MacNeil & M.N. Lobato & M. Moore, "An unanswered health disparity: tuberculosis among correctional inmates, 1993 through 2003" (2005) 55 *American Journal of Public Health* 1800; J.V. Jacobi, "Prison health, public health: obligations and opportunities" (2005) 31 *American Journal of Law & Medicine* 447.

³⁶⁹ Lisa D. Moore and Amy Elkavich, "Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health" (2008) 98:5 *American Journal of Public Health* 782. See also Donya C. Arias, "High rate of incarcerated Black men devastating to family health" (2007) 37:2 *Nation's Health* 6; Michael Massoglia, "Incarceration, Health, and Racial Disparities in Health" (2008) 42:2 *Law & Soc'y Rev.* 275.

³⁷⁰ Margaret E. Finzen, "Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities" (2005) 12 *Geo. J. on Poverty L. & Pol'y* 324.

state's attempt to 'just say no'. Disregarding evidence that the levels of drug use were already in decline, that drug use is not responsive to criminal penalties, that criminalization brings its own pathologies (notably street violence and disrespect for authorities), and that declaring a war against drugs is, in effect, to declare a war against minorities, the US government proceeded to declare such a war and to persist in pursuing it, despite every indication of its failure. Why? Because the groups most adversely affected lack political power and are widely regarded as dangerous and undeserving; because the groups least affected could be assured that something is being done and lawlessness is not tolerated; and because few politicians are willing to oppose a policy when there is so little political advantage to be gained by doing so.³⁷¹

Deborah Small has gone as far as to call the War on Drugs a racist policy that unjustifiably imprisons Blacks and Hispanics disproportionately.³⁷²

This phenomena likely has a direct impact on the degree of accommodation afforded Indigenous approaches to justice. Russell Hogg argues that over-incarceration of Indigenous peoples in Australia reflects a continuing policy of racial segregation. The routine application of Australian criminal laws to its Indigenous peoples helps maintain a façade of legal impartiality in a contemporary liberal culture that discourages overtly racist policy objectives. Indigenous over-incarceration nonetheless continues to perpetuate the racial segregation, social marginalization, and civic disenfranchisement of Indigenous peoples.³⁷³ Section 718.2(e) has apparently sparked some public controversy in Canada. Philip Stenning and Julian Roberts admit that statistical evidence of public opinion on s. 718.2(e) was unavailable at the time of their writing. However, they point to a number of newspaper articles and editorials that have been very critical of the provision.³⁷⁴ They directly quote an article from the *Globe and Mail* as follows: 'The

³⁷¹ Garland, *supra* note 83 at 132.

³⁷² Deborah Small, "The War on Drugs is a War on Racial Justice" (2001) 68:3 Social Research 896.

³⁷³ Russell Hogg, "Penality and Modes of Regulating Indigenous Peoples in Australia" (2001) 3:3 Punishment & Society 355.

³⁷⁴ Phillip Stenning & Julian V. Roberts, "The Sentencing of Aboriginal Offenders in Canada: A Rejoinder" (2002) 65 Sask. L. Rev., *Colloquy on 'Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders'*, 75 at 92. Their 56th footnote reads: "*The [Ottawa] Citizen* was also very critical of paragraph 718.2(e), declaring that 'The primal injustice of treating people differently on the basis of race is surely obvious' under an editorial headline 'Systemic Racism' *The [Ottawa] Citizen* (1 May 1999) B5. In a subsequent editorial, *The [Ottawa] Citizen* demanded that 'Parliament should repeal differential sentencing', and that 'the Supreme Court should return to first principles': 'Badly formed

clause, as drafted, has no meaning. It is like saying, be kind to all animals and horses too. Pronouncing 718.2(e) the nonsense [that] it is will allow judges to be fair to aboriginals, and the justice system to be fair to all.”³⁷⁵ Rachel Dioso and Anthony Doob performed a study to gauge public Canadian public opinion on s. 718.2(e). They admitted that their sample of survey participants was not necessarily representative of Canada as a whole. Survey participants who viewed the justice system as too lenient were significantly more likely to view s. 718.2(e) negatively (mean=9.4 with a higher number on the scale indicating a supportive attitude) in comparison to those who viewed current sentences as about right (mean=11.3) and those who viewed sentences as too harsh (mean=12.7).³⁷⁶ One has to wonder how the Canadian public at large would view s. 718.2(e) given that surveys indicate that at least 80% consider the justice system to be too lenient.

There are two distinctly noticeable political forces that impede Indigenous efforts for control over justice. First, politicians feel obligated to use incarceration as the standard sanction for many crimes, and often to increase the length of terms of incarceration, to avoid the appearance of being soft on crime. Second, Canadian politicians often work to limit the scope of Indigenous rights to avoid the appearance of giving too much away to an Indigenous minority and thereby avoid losing the support of the non-Indigenous majority. These two forces dovetail in a particular way to create a powerful political inertia against broader accommodation of Indigenous approaches to

sentences" *The [Ottawa] Citizen* (5 April 2001) A14. *The National Post* stated its view that "Criminals should not be sentenced on the basis of statistics or skin colour": "Sorry's not enough", *The National Post* (June 28, 1999) A19."

³⁷⁵ *Ibid.* at 92. The article is cited as "Crime, Time and Race", *The Globe and Mail*, editorial, (16 January 1999) D6.

³⁷⁶ Rachel Dioso & Anthony Doob, "An Analysis of Public Support for Special Consideration of Aboriginal Offenders at Sentencing" (2001) 43:3 Can. J. Crim. 405. Dioso and Doob do not indicate the range of the scale, but they do indicate that the scale measured an alpha reliability coefficient of 0.77, where 0.70 is generally the desirable minimum threshold for reliability.

justice. Policies that rely extensively on imprisonment, as applied to everybody, end up having a very adverse impact on disadvantaged minorities by incarcerating them in disproportionate numbers. These minorities are unable to address this reality because they simply do not have the political clout to contest those policies. For the politicians, addressing harsh penal policies as applied to disadvantaged minorities carries a double whammy. It not only gives the appearance of being soft on crime, but it gives the especially unpalatable appearance of a leniency towards offenders from an Indigenous minority that offenders from the non-Indigenous majority do not enjoy.

Some of the commentary that has been discussed here has gone as far as labeling tough on crime policies as racist policies that sustain racial inequality and segregation. It is tempting to view the routine application of Canadian criminal laws to Indigenous peoples the same way. I will stop short of asserting such a conclusion, since there is at the present time insufficient evidence to ascribe racist objectives to Canadian policies. Nonetheless, what is at the very least apparent is a political disincentive to afford broad accommodations of Indigenous approaches to justice. It sustains a political inertia that is difficult for Indigenous peoples, as a clear minority, to contest. This political disincentive is probably informed by a fear of political fallout for not only appearing soft on crime, but also treating Indigenous offenders with a leniency that is not available to offenders from a non-Indigenous majority. Canadian authorities are able to impose their will in this fashion due to judicial deference that promotes state sovereignty at the expense of Indigenous self-determination. The next chapter will consider methods of overcoming these obstacles in order to increase the legal space (i.e. jurisdiction) for realizing Indigenous visions of justice.

CHAPTER 7: REALIZING INDIGENOUS JURISDICTION OVER JUSTICE

The goal of this chapter is to explore avenues by which Indigenous peoples may obtain greater control over criminal justice. This involves attaining constitutional recognition of Indigenous rights to internal autonomy so as to expand Indigenous legal jurisdiction over justice. The discussion begins with a comparison between negotiating for expanded jurisdiction with Canadian governments and litigating for constitutional rights to criminal jurisdiction.

7.1 The Need to Revisit Precedent in Canada

Previous discussions suggested that political negotiations for greater control over justice are hampered by restrictive interpretations of Indigenous rights that leave Indigenous peoples in a power imbalance relative to the Canadian state. A challenge for Indigenous peoples then is to convince the Supreme Court to revisit its restrictive precedents in some instances (e.g. *Van der peet*) or to correctly apply them in others (i.e. treaty interpretation) in the pursuit of greater control over justice.³⁷⁷ The problem is that this involves asking a Court to change its mind after a lengthy history of unsympathetic treatment of Indigenous rights. The fair question is, “How is this any better than approaching the politicians at the negotiation table?” Monture-Angus seems resigned to a belief that Indigenous rights litigation does not offer any meaningful hope for decolonization. It is a flawed enterprise, from the start, since it tries to further Indigenous aspirations in a normative space that reflects the beliefs and ideologies of the

³⁷⁷ This is not to say that a specific Indigenous society, given the right facts and circumstances, cannot be up to the challenge of asserting rights to criminal jurisdiction under the law as it is now. See for example Cousins' thesis. The point is that it can be readily anticipated that many Indigenous societies may be unable to satisfy the legal tests given their stringency, or simply not be in any position to engage in multiple series of litigations over specific justice practices. The goal therefore is to litigate for a more generous basis of constitutional recognition of Indigenous rights to criminal jurisdiction that most, if not all, Indigenous societies can try to benefit from.

colonizers. The Supreme Court will inevitably be Eurocentric in its treatment of Indigenous rights. Its judgments will lack understanding of Indigenous needs or aspirations.³⁷⁸ She adds: “the courts do not possess any trust in the belief that Aboriginal nationhood and Canadian sovereignty can co-exist.”³⁷⁹

Sakej Henderson takes a different stance, a stance that could be called one of cautious optimism. He does of course acknowledge that Canadian judicial treatment of Indigenous rights has offered little cause for optimism, like for example in this commentary:

In the United States, Canada, Australia and New Zealand, among others, the complicity of the existing legal systems with colonialism is all too often unappreciated and conveniently avoided. This is especially true in laws schools, in judicial interpretations and in legal practice. For a discipline known for its commitment to unmasking injustice and oppression, such neglect, avoidance and continuation of jurispactic traditions in supporting the colonialization of Indigenous peoples are remarkable.³⁸⁰

And then:

Indigenous lawyers and peoples should never forget that the judiciary created our imprisonment. By their interpretations of the constitutional order and of our treaty order, the courts created the colonial structure of federal Indian law. In the era of deep colonialism and racism, the courts used colonial ideology to fabricate new relationships between governments and Indigenous nations and tribes. These categories still imprison Aboriginal peoples behind the virtually unlimited will of unrepresentative legislative bodies. These legal doctrines create exemptions from typical constitutional protection.³⁸¹

Henderson nonetheless argues that Indigenous peoples and Indigenous lawyers must constantly strive to have the courts revisit their restrictive precedents until the courts are persuaded to depart from them and untangle the law from its colonialist ideological underpinnings. He refers to this process as decolonizing precedents.³⁸² Henderson holds no illusions about this process producing an overnight turnaround. A constant theme in the article just quoted is that the road to decolonization is a long and hard one.

³⁷⁸ Monture-Angus, *supra* note 144 at 47-48.

³⁷⁹ *Ibid.* at 110.

³⁸⁰ Henderson, “Indigenous Legal Consciousness”, *supra* note 140 at 36.

³⁸¹ *Ibid.* at 37.

³⁸² *Ibid.* at 39.

Nonetheless, he does hold a certain faith in the ability of litigation conducted by Indigenous peoples to lead onto a path to decolonization.

The development of Indigenous rights jurisprudence over the years seems to lend greater justification to Monture-Angus' resignation than to Henderson's cautious optimism. Let us however, for the time being, entertain the possibilities aligned with Henderson's optimism. Perhaps not all politicians are given to an overt disregard for Indigenous interests. There is probably a need to appear politically correct and sensitive with regard to Indigenous interests. Regardless, an awareness of how non-Indigenous Canadians, often wielding greater electoral influence, will view a given issue can present significant obstacles to politically accommodating Indigenous interests. What can be said for Supreme Court justices however is that they enter their office fully aware that protecting minority rights, including Indigenous rights that have a particular basis in both historical relationships and the Constitution, is part of the job description. Chief Justice Dickson stated with reference to the freedom of religion under s. 2(b) of the *Charter*:

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".³⁸³

The Court's track record may fall short of a meaningful protection of Indigenous rights, or even demonstrate a deliberate avoidance of the task through various techniques. Nonetheless, they are aware that one of their tasks is precisely to protect the rights of minorities, Indigenous rights included, against the political will of the majority. It is possible that with compelling and well-made arguments, the Court can be persuaded to revisit its restrictive precedents. The United States Supreme Court was persuaded to

³⁸³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 337.

abandon the “separate but equal” doctrine in *Plessy v. Ferguson*³⁸⁴, and interpret the Fourteenth Amendment as requiring public schools to provide equal access to both Black and White students in *Brown v. Board of Education*.³⁸⁵ While *Delgamuukw* has been a frequent subject of criticism, it did recognize a category of inherent Indigenous rights that is more generous relative to the restrictive tests of *Van der peet*. Striving to decolonize precedents may provide a relatively better place to start than political negotiations sans meaningful constitutional doctrines that provide an effective ‘sledgehammer’.

Another reason to prefer Henderson’s cautious optimism may be found in recent demands for a proposed modification to our legal system. Constitutional law professor Peter Hogg, Sakej Henderson, political science professor Peter Russell, and an Indigenous Justice of the Ontario Court of Appeal, Harry LaForme, have advocated appointing a qualified Indigenous individual to the Supreme Court. Hogg and Russell have gone as far as suggesting that it become standard practice for one seat to be reserved for an Indigenous candidate. The idea is that in adjudicating issues affecting Indigenous peoples, an Indigenous justice would bring Indigenous knowledge and perspectives into the deliberations.³⁸⁶ Even if this does become custom in Canada, it cannot be assumed that this becomes the quick and instant bridge to decolonizing the law. Reserving one seat for an Indigenous justice also means only one judicial position that is possibly favourable towards Indigenous litigants. It also cannot be assumed that the single position will always be in favour of Indigenous litigants. Upon entry, the Indigenous

³⁸⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁸⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁸⁶ “Aboriginal Justice Urged” (Saturday March 5/2005) *The Montreal Gazette* A16; and Justice Harry LaForme (LLB ’77) *Supports Native Jurist Appointment*, online: Osgoode Hall Law School <<http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/1ec3ec51d27efbff85256f8e0063bfcd!OpenDocument>>.

Justice would have to swear an oath to decide cases impartially.³⁸⁷ It is conceivable that an Indigenous Justice may understand his or her duties to require deciding a given case against the Indigenous litigants. What can be hoped for is a Justice who possesses familiarity with Indigenous perspectives, who can lend a sympathetic ear to arguments made by Indigenous litigants, and perhaps can take up those arguments and perspectives during deliberations with other members of the Court. The goal of inviting the Court to revisit its precedents will now be described.

7.2 Reconstruction - an Indigenous Right to Internal Autonomy

A proposal will now be made in search of a viable strategy to expand Indigenous jurisdiction over criminal justice. The proposal is for the recognition of a right of Indigenous communities to internal autonomy under s. 35(1), the right to govern the conduct of their own members in accordance with their traditional laws and customs. There is the obvious problem that this does not speak to crimes committed by non-Indigenous persons within Indigenous communities, or crimes committed by members of outside Indigenous communities, or sorting out jurisdiction for urban Indigenous communities. How these issues surrounding jurisdiction can be worked out between Indigenous communities, the federal government, and the provincial governments is beyond the scope of this work. The proposal does in any event provide a decent starting point from which Indigenous communities can try to expand the legal space for realizing their visions of justice. It may also have a certain strategic soundness that avoids problems that have plagued Indigenous rights litigation in the past. This will hopefully be made clear as we now turn to the legal basis of this right to internal autonomy.

³⁸⁷ *Supreme Court Act*, R.S., c. S-19, s. 10.

There is already a firm legal foundation upon which to base this right to internal autonomy, the common law doctrine of Aboriginal rights. Brian Slattery describes the doctrine as follows:

When the Crown gained suzerainty over a North American territory, the doctrine of aboriginal rights provided that the local customs of the indigenous peoples would presumptively continue in force, except insofar as they are unconscionable or incompatible with the Crown's suzerainty.³⁸⁸

An example of this is found in the trial judgment in *Connolly v. Woolrich*:

... yet, it will be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.³⁸⁹

There are concerns with relying on this doctrine when viewed in isolation. The unconscionability exception that Slattery refers to implies imposing Canadian standards of human rights in full force upon certain Indigenous justice practices, such as corporal punishment. It is enough presently to say that Canadian law provides an alternative to this. This will be dealt with in more detail during Chapter 8. The other exception that Slattery refers to, based upon incompatibility with Crown suzerainty, still implies subordination to state sovereignty, a sore point for Indigenous academics. Aboriginal rights at common law are indeed subject to legislative modification, or even abrogation.³⁹⁰ However, the genesis of this doctrine precedes the coming into force of the *Constitution Act, 1982*. It is open to the Supreme Court to elevate the common law right of Indigenous peoples to regulate the conduct of their own members, according to their 'customs and usages', to a constitutional right. While constitutional Indigenous rights are subject to legislative infringement, the infringements must satisfy tests of

³⁸⁸ Slattery, "Making Sense of Aboriginal and Treaty Rights", *supra* note 256 at 201.

³⁸⁹ *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.) at 84; Upheld on appeal in *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Que. Q.B.).

³⁹⁰ Slattery, "Making Sense of Aboriginal and Treaty Rights", *supra* note 256 at 204.

justification. The elevation of Indigenous customs and usages to constitutional rights marks an improvement at least in the sense that legislative interference would have to meet a stricter threshold than would be the case if they remained common law rights.

Justice McLachlin, in her dissent in *Van der peet*, adopted this approach by arguing against the majority's emphasis on contact as a temporal cut-off point, and instead grounding Indigenous constitutional rights in continuity between modern practices and Indigenous customary laws and practices. She states:

Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. ... One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.³⁹¹

Notice that McLachlin also found this approach to be a better reading of the text of s. 35(1). McLachlin's approach provides a starting point to revisit precedent, and pursue recognition of a right to internal autonomy.

There are also other sources of authority that can be used to strengthen the claim to a right of internal autonomy. As a partial digression, it is submitted that Bruce Wildsmith describes the correct application of the principles of treaty interpretation to Indigenous claims to jurisdiction over justice. Principles such as reconciliation with the Crown's interests, and that the Crown can reasonably define the right, should not operate so as to restrict Indigenous claims to control over justice. The Crown historically recognized Indigenous internal autonomy during the treaty process, possibly excepting the modern agreements, and thus their interests were already accounted for. To allow the

³⁹¹ *Van der peet*, *supra* note 231 at para. 247.

Crown to unilaterally define (i.e. limit) the rights to internal autonomy well after the fact does not respect the nature of treaties as solemn agreements. Aside from the treaties themselves recognizing rights to internal autonomy for the Indigenous signatories, the historical context of the treaties lends additional weight to arguments in support of inherent rights to internal autonomy. Rights to internal autonomy had not only been recognized at common law, but had been consistently recognized by the Crown as well.

Another interpretive aid comes from the Royal Commission on Aboriginal Peoples. Recall that *Delgamuukw* hinted at a willingness to hear future arguments on self-government, specifically suggesting the Commission's reports as a potential source of argument. The Commission has endorsed self-government for Indigenous peoples. In attempting to delineate what jurisdictions Indigenous self-government would enjoy in relation to the federal government and the provinces, the Commission included criminal justice within core jurisdictions that should be exercised by Indigenous governments.³⁹² On the other hand, the Commission also endorses the idea that the federal government could intrude upon those core jurisdictions under limited circumstances.³⁹³ Even so, it does present a potent source of argument for an inherent right to internal autonomy.

Litigating for a right to internal autonomy may also avoid some of the pitfalls that have plagued Indigenous rights litigation in the past. One can see how far a broad claim to self-government went during *Pamajewon*. Of course, that case involved high stakes gambling within a reserve. The Eagle Lake and Shawanaga nations did however phrase

³⁹² Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol. 2, part 1, ch. 3 "Governance" (Ottawa: Royal Commission on Aboriginal Peoples, 1993). The Commission recognizes an inherent Aboriginal right to self-government under the Canadian constitution at 213-214, then includes jurisdiction over criminal law and procedure within this right at 217-218.

³⁹³ As per a test of justifiable infringement that was articulated in *Sparrow*. See Royal Commission on Aboriginal Peoples, *Partners in Confederation* (Ottawa: Minister of Supply and Services Canada, 1991) at 36-37.

their arguments in terms of self-government *simpliciter*.³⁹⁴ Going for too much can inspire a counterproductive response, and indeed the Court's response was that rights to self-government would be subject to the *Van der peet* tests. One can by contrast suggest that the internal right autonomy as framed here is too narrow. It does not address the issue of non-Indigenous persons who commit crimes within Indigenous communities for example. It does however have the benefit of framing a narrower right concerning self-determination that is hopefully not so broad as to encourage yet more affirmation of the *Van der peet* tests. It still provides a meaningful start to securing constitutional recognition of rights to traditional justice practices. Furthermore, Henderson does exhort us to constantly strive to decolonize the precedents. Sometimes one has to start small, and work for concessions in increments. If a precedent recognizing internal autonomy is obtained, there is nothing to preclude more litigation afterwards for broader rights in other contexts. A recognized right to internal autonomy may, theoretically speaking, provide a basis of argument for rights in other contexts afterwards.

Furthermore, as previous discussions have made clear, the Court finds itself encouraged to promote state sovereignty at the expense of Indigenous self-determination in situations where Indigenous and non-Indigenous collide in areas such as the allocation of natural resources,³⁹⁵ and revenues from trading.³⁹⁶ The Court tends to favour state sovereignty where the context of the litigation invites the Court to take on the role of a pseudo-legislator in situations that are both very complex and highly political. An argument in support of a right to internal autonomy can make itself more palatable to the

³⁹⁴ *Pamajewon*, *supra* note 244 at para. 6 and 11.

³⁹⁵ *Van der peet*, *supra* 231; *Marshall (no. 1)*, *supra* note 288; and *Gladstone*, *supra* note 191 for example.

³⁹⁶ *Mitchell*, *supra* note 257.

Court by stressing that it does not engage similar concerns. Consider the following commentary from Justices Lamer (as he then was) and Wilson:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups.³⁹⁷

Justice La Forest adds: “Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny.”³⁹⁸ These comments are not completely relevant to our present discussion, since they explained different contexts for justifying the infringement of *Charter* rights. Nonetheless, they can be used to bolster a claim to internal autonomy. A right to internal autonomy does not engage issues of resource allocation or trade revenue, and therefore avoids concerns regarding the institutional competence of the judiciary or the politicization of law. A right to internal autonomy, to use customary law to govern internal relations, fits more within the sphere of criminal law, an area where the competency of the judiciary is well established.

This particular strategy can be perceived as closing off claims to Indigenous rights in particularly important contexts such as access to natural resources. Such is not the intention here. The point is to make a case for an inherent right to internal autonomy, and to make it as strategically viable and as palatable to the Court as possible. It is indeed

³⁹⁷ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 993-994.

³⁹⁸ *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 277.

possible to frame arguments for broader recognition in these contexts as well. For example, if Indigenous groups were able to adduce evidence before the Court of customary laws governing the use of natural resources such as seafood, and their past and contemporary applications in limiting the exploitation of those resources, it may assist in arguments favouring a departure from *Van der peet*, *Marshall*, and *Gladstone*. An argument that might be made for example is that the Crown must not infringe on Indigenous resource rights, any tests for justifiable infringement notwithstanding, if it is demonstrated that Indigenous customary law is in place as a limitation. Crown resource allocations therefore must take into account Indigenous use of the resource as guided by customary law. A detailed overview of such arguments is beyond the scope of this present work.³⁹⁹ Even so, it is possible that in this context a previously recognized right to internal autonomy can strengthen arguments for broader rights. There are however alternatives to constitutional litigation that merit consideration.

7.3 One Alternative: International Human Rights

A possible alternative is that Indigenous peoples can seek redress through standards of human rights found in international law, rather than Canadian domestic law. This is even more so since the *Declaration of Indigenous Rights* makes Indigenous self-determination, and culturally appropriate systems of governance, subjects of international human rights that merit protection. Perhaps Indigenous peoples can pursue an investigation by the High Commissioner of Human Rights of the United Nations who can then issue an advisory opinion or report.⁴⁰⁰ They can also lodge a complaint with the

³⁹⁹ For similar arguments, see Borrows, *Recovering Canada*, *supra* note 316 at 29-51; and “Domesticating Doctrines”, *supra* note 293 at 628-629.

⁴⁰⁰ Office of the High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme* (New York: United Nations, 2008).

United Nations Human Rights Council in the hopes of getting advisory opinions and recommendations.⁴⁰¹ This has some merit, as international condemnation of human rights violations has occasionally convinced nation-states to reform their domestic laws. Examples include the United Nations condemnation and trade embargo, supported by many nation-states, that eventually played a role in convincing South Africa to abandon Apartheid⁴⁰², and the United Nations condemnation that played a role in persuading Canada to amend the *Indian Act* so that Indigenous women would no longer lose their status and benefits under the *Act* upon marrying non-Indigenous men.⁴⁰³

Pursuing a solution before Canadian courts may be preferable for the time being, for the simple reason that Canadian constitutional rights are binding as domestic law, as opposed to a statement on international human rights, which is persuasive. While it is true that condemnations of human rights abuses have persuaded nation states to initiate tangible reforms to their domestic laws, it is also true that nation states have also often ignored such condemnations. Nation-states certainly risk strained diplomatic relations, trade sanctions, and political embarrassment when they are called to task. This has not stopped states from time to time accepting the risks involved in order to exercise their domestic sovereignty in pursuit of their own domestic policies. Examples include allegations of mistreatment of Tamils by Sri Lanka,⁴⁰⁴ perceptions that China has consistently ignored human rights demands or at best has made token gestures to respect

⁴⁰¹ *United Nations Human Rights Council: Institution-Building*, United Nations General Assembly, Resolution 60/251, March 15, 2006.

⁴⁰² Stephanie Nolen, "How would Biko judge South Africa today?: Thirty years after the activist's death, black majority rule is entrenched, but 82 per cent of land remains in the hands of white citizens" *Globe and Mail* (September 12, 2007) A3; Paul Lewis, "Transition in Africa: Mandela Calls to an End to Sanctions" *New York Times* (September 25, 1993) 1.

⁴⁰³ Rudy Platiel, "Background Status Indians: Issue goes back to 1763 Proclamation" *Globe and Mail* (March 18, 1994) GAM; "Assembly of First Nations National Chief Welcomes Appointment of Sandra Nicolas Lovelace to Senate of Canada" *Canada Newswire* (September 27, 2005).

⁴⁰⁴ "Human Rights vs. State Sovereignty" *Toronto Star* (June 5, 2009) A25.

human rights,⁴⁰⁵ and the United States with reference to alleged human rights abuses, including torture, in Iraq and in Guantanamo Bay, Cuba.⁴⁰⁶ And indeed, Canada has refused to endorse the *Declaration of Indigenous Rights* despite considerable political pressure by the international community.⁴⁰⁷

As such, this work will emphasize litigating for Indigenous constitutional rights to criminal jurisdiction. If it is achieved, then hopefully it has legally binding effect as domestic law such as to constrain the Canadian state to respect Indigenous autonomy. Appeals to international human rights standard by comparison rely on political inducement and persuasion. This is not to say that they are mutually exclusive of each other. Indeed, one can anticipate that efforts in one direction can help efforts in the other direction. The *Declaration of Indigenous Rights* certainly commends itself as a valuable interpretive aid for purposes of the constitutional litigation strategy described here. If Canada continues to lose political capital through a stubborn insistence against endorsing the *Declaration*, it can present a powerful motivator for the Court to reconsider its deferential stance that has routinely favoured Canadian sovereignty. Another point to consider is that seeking redress through the Human Rights Council usually requires an exhaustion of possible domestic remedies beforehand. In that light, putting together the strongest arguments possible for Canadian judicial recognition of rights to jurisdiction

⁴⁰⁵ John M. Glionna, "Skepticism greets China's plan to address human rights: The move comes ahead of a review by the U.N., Critics see a public relations ploy" *Los Angeles Times* (November 7, 2008) A4; Glenn Kessler, "Clinton Criticized for not Trying to Force China's Hand: Advocacy Groups Urge her to put Human Rights Front and Center" *Washington Post* (February 21, 2009) A10.

⁴⁰⁶ Colum Lynch, "U.N. Human Rights Chief to Leave Post: High Commissioner has Frequently Clashed with Bush Administration" *Washington Post* (March 3, 2008) A04; Colum Lynch, "U.S. Rebuffs U.N. Requests for Guantanamo Visits, Data on C.I.A. Prisons" *Washington Post* (July 23, 2009) A07.

⁴⁰⁷ Linda Deibel, "Canada's Rights Record Blasted During Review: Submissions to Geneva Council Include Issues Such as Treatment of Indigenous Issues, Immigration" *Toronto Star* (January 13, 2009) A13; Les Whittington, "Canada's Human Rights Stance Questioned: U.N. Commissioner Losing Identity as Champion of Freedom" *Toronto Star* (October 23, 2007) A23.

and self-determination remains an endeavour that merits attention. There is also another alternative.

7.4 Unilateral Self-Determination: From the Grassroots Up

One argument that can be readily made is that it does not seem to amount to self-determination, in spirit or in substance, if it depends on Indigenous peoples having to plead hand in mouth for permission to exercise control over justice from Canadian authorities, whether its legislators or judges. Self-determination in spirit and in substance means that Indigenous peoples practice justice the way that they want to, without having to receive permission from Canadian legal or political authorities. They take control over and exercise justice from the grassroots and up. There is possibly a demonstration of this in the Qsi:qwelstom program of the Sto:lo people. To a certain degree, it depends on being a conventional diversionary and circle process program in order to receive Crown accommodation, and government funding. It is interesting to note however that this program also performs a significant amount of justice work beyond the usual Crown or court referrals. It has often intervened when community members, offenders, victims, and otherwise, have come to them directly without ever calling the police or Crown prosecutors. In a sense, justice is often practiced by the people themselves, and often without seeking the approval or blessing of Canadian officials.⁴⁰⁸

This idea does have a certain appeal, but one must also recognize that it has its practical limits. The idea of practicing justice in the background underneath the radar of the Canadian legal system can only go so far. If Canadian police, for example, catch an Indigenous offender committing a crime and then make an arrest, the Canadian justice

⁴⁰⁸ Palys & Victor, *supra* note 209; Wenona Victor, "Searching for the Bone Needle: a journey in coming to understand Aboriginal Justice" (2006) 11:1 Justice as Healing.

system exercises control from that point onwards. Canadian justice officials may of course relinquish a degree of control to the Indigenous community, but often only on their own terms. The capacity of Indigenous communities to unilaterally practice justice from the grassroots up will always be, given present realities, happenstance at best. In a sense, this is the whole point behind litigating for a constitutional right to internal autonomy, notwithstanding that it involves an initial plea to Canadian judicial and legal authority. The intention is to carve out a jurisdictional space within which Indigenous peoples can practice justice the way they want to. The intention is to force a shared understanding with the Canadian legal system that emphasizes, "This is ours now. You can't touch this from this point onwards." There is one remaining issue to discuss.

7.5: Making It Viable

As an aside, even if there is a constitutionally recognized right to internal autonomy, there is an important issue that needs to be considered. Recall that Canadian accommodations of Indigenous justice practices include sentencing circles, Indigenous courts, diversionary programs, and correctional programs. Implicit in these accommodations is a dependency on Canadian governments to fund them. Contemporary adaptations of Indigenous justice practices that resemble restorative justice require monetary resources for treatment programs, facilities, operational costs, and human resources such as volunteers or paid staff.⁴⁰⁹ For example, the Mi'kmaq Justice Institute had apparently made some progress in dealing with crime in Mi'kmaq communities and received the Canada Law Day Award in 1998. However, maintaining a minimum of operating staff and a volunteer base was challenge enough within a small community.

⁴⁰⁹ Stuart, *supra* note 60 at 117-119; See also Karen A. Souza and Mandeep K. Dhami, "A Study of Volunteers in Community-Based Restorative Justice Programs" (2008) 50:1 Can. J. Crim. 31.

With shrinking financial resources, volunteer participation declined as well. The growing lack of financial and human resources meant the Institute was unable to meet the growing demand for justice programs in the communities. The staff were laid off in 1999 due to insufficient resources.⁴¹⁰ Inadequate resources can spell trouble for the success of the restorative initiatives. Stenning and Robert state:

... an increasing resort to conditional sentences for relatively "high-risk" Aboriginal offenders, combined with a lack of resources within Aboriginal communities to support such offenders and to help them avoid breaching the conditions of their sentences, may be resulting in disproportionately high numbers of Aboriginal offenders being incarcerated for breach of sentence conditions, thus increasing the overall incarceration of Aboriginal offenders. In other words, paragraph 718.2(e), as applied in combination with the conditional sentence provisions of the 1996 sentencing reforms, may actually be having the very opposite effect from that which was intended.⁴¹¹

The Royal Commission has noted that funding for Indigenous justice initiatives has been dominated by a pilot project mentality whereby justice initiatives are accorded modest sums, and with very short time commitments (e.g. one to three years). Once the initial time commitment expires, support for the initiative evaporates as budgetary resources are allocated elsewhere, leaving communities unable to pursue any long term goals with respect to Indigenous crime and recidivism.⁴¹²

There are at least two ways of avoiding this. The first way is a spin on the need for a judicial sledgehammer that Bell refers to. Without jurisprudence that enlarges the scope of s. 35(1) rights that gives Indigenous peoples a strong constitutional foundation to demand more, negotiations cannot hope to obtain much in the way of resources to support Indigenous justice systems. Leonard Mandamin, while he was a private lawyer, elaborated on this point as follows:

One last point which is very important: every Commission that has come out has said that this should be negotiated with the possible exception of Manitoba, which went further on it. You

⁴¹⁰ McMillan, *supra* note 19 at 258-260.

⁴¹¹ Stenning & Robert, *supra* note 374 at 88.

⁴¹² *Bridging the Cultural Divide*, *supra* note 173 at 294-302.

cannot negotiate if you do not have something to negotiate with. If you do not have the authority or the jurisdiction or the de facto position, then it is extremely difficult to negotiate, because the only thing you have left is your own people's misery, and that's a fine negotiating position.

If one talks about a negotiated process then one had better take a serious look at ensuring that Aboriginal people have cards to play in negotiation. Otherwise, it will be a fine exercise here and I will go back to Alberta and listen to justice department opinions that say you cannot do that, or go into court, after listening to the RCMP describe the fine list of measures that they are taking, and defend the Aboriginal people who are charged after a donnybrook between the Natives and Whites and only the Natives are charged. That is what happens today.⁴¹³

Consider also this statement from the Law Reform Commission of Canada:

Further, although funds must be allocated immediately, a short-term perspective is not appropriate. Aboriginal justice systems may be expensive in the short-term, but in the long-term, there would be a return on the investment. The expense can be rationalized by looking at the saving that would come partly from the fact that the rest of the justice system, the correctional system in particular, would be required to deal with fewer Aboriginal persons. But beyond that, restoring social control to communities could help reverse the process of colonization that has created the problems Aboriginal persons face in the justice system. Their increased social control should result in lower crime rates and a lesser need for the use of any justice system.⁴¹⁴

A judicially recognized right of internal autonomy and arguments that community-based alternatives offer a better investment of resources could significantly strengthen the negotiating position of Indigenous peoples in the pursuit of greater control over justice. This position could then procure significant monetary concessions from Canadian governments such as to make Indigenous jurisdiction over justice meaningful. Another route is for Indigenous communities, if opportunities exist for it, to pursue their own economic development. Examples include natural resources industries such as fisheries and tourist industries. It could lessen Indigenous reliance upon outside sources of funding, which in turn can mean greater legal and political autonomy.⁴¹⁵

The remainder of this dissertation will proceed on the assumption that an Indigenous right to internal autonomy is recognized under s. 35(1). This may seem like a

⁴¹³ Leonard Mandamin, "Aboriginal Justice Systems" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Supply and Services, 1993) at 298-299.

⁴¹⁴ *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, Report no. 34 (Ottawa: Law Reform Commission of Canada, 1991) at 87.

⁴¹⁵ For a detailed discussion of this, see *Restructuring the Relationship*, *supra* note 392, vol. 1, part 2 at 775-1014.

dubious assumption to some, but it is necessary to enable subsequent discussions. If an Indigenous right to internal autonomy and an expansion of Indigenous criminal jurisdiction become reality, another important issue arises. That issue is the potential for abuse of power by Indigenous authorities. There is a tension between preventing the abuse of collective power against Indigenous individuals, and expanding the legal space for the operation of Indigenous traditions of justice that emphasized the collective good. The next chapter will fully explain this tension and consider how best to address it.

CHAPTER 8: ADDRESSING THE TENSION

If and when Indigenous peoples obtain constitutional rights to substantive jurisdiction over criminal justice, those rights come with increased collective power for Indigenous communities. With that power there is also increased potential for abuses of collective power against Indigenous individuals. This engages the time worn debate of whether a society should prioritize the collective good or individual liberty. It also raises important questions that are specific to justice in Indigenous communities. Should the power of Indigenous collectivities be emphasized so that they can promote harmony, traditional values, and responsibilities? Should the rights and liberties of the Indigenous individual be emphasized instead to prevent power abuses by Indigenous leaders? There is an apparent tension here. The goal of this chapter is to explore how the tension involved with the application of the *Charter* to Indigenous approaches to justice can be addressed. The discussion now turns to describing in more detail the tension between collective power and individual liberty as applicable to Indigenous justice.

8.1 Collective Power vs. Individual Liberty

8.1.1 The General Tension

It can be fairly said that any given society is faced with a fundamental issue when developing a system of governance. A society may deem individual liberty and the freedom to pursue self-interest to be of paramount value. This implies limiting collective power over the individual. Another society may deem that empowering the collective to pursue the good of the whole is of paramount value. Protecting individual rights against collective power becomes correspondingly of less value. There is a tension between the

two concepts.⁴¹⁶ Emphasizing one will be at the expense of the other. The fundamental issue faced by any society is how to address this tension. Societies often try to accommodate both concepts, although in practice their political systems can end up placing greater emphasis on one relative to the other. Each concept may be thought of as opposite ends of a spectrum, whereby any given society may end up on its own place on the spectrum.

Western democracies have tended to adopt approaches that favour the individual liberty end of the spectrum. Classical Liberalism is one example of such an approach.⁴¹⁷

Loren Lomasky describes Classical Liberal theories of rights as follows:

Liberals take rights very seriously; they are the heavy artillery of the moral arsenal. ... For one viewing from outside the liberal church, this insistence on respect for rights will seem somewhat mysterious, if not bordering on fanaticism. Rights block the realization of otherwise alluring social ends – for example, those of a redistributive nature intended to advance overall welfare or equality. They also impede paternalistic interventions designed to prevent individuals from doing harm to themselves.⁴¹⁸

Hasan Hanafi suggests that Islamic understandings of society take a more balanced approach. Individual rights are not completely subordinated to collective power, but the individual is still understood as having responsibilities towards the collective whole which cannot be neglected for the sake of pursuing self-interest. Hanafi explains:

Many individuals and institutions are responsible for the good management of civil society and the promotion of its values: the individual, the family, the state, and nongovernmental institutions. They are inseparable given the importance and the commitment of all to the common cause.

⁴¹⁶ For examples of recent studies that explore this debate, see Pakel Mekka, “Collective Agents and Moral Responsibility” (2007) 38:3 *Journal of Social Philosophy* 456; Shavarsh Khachatryan, “Problematic Issues Concerning the Freedom of Association and Group: Collective Rights in Armenia” (2007) 3 *B.Y.U.L. Rev.* 639; Edmund S.K. Fung, “The Idea of Freedom in Modern China Revisited” (2006) 32:4 *Modern China* 453; Robert Sugden, “What We Desire, What We Have Reason to Desire, Whatever We Might Desire: Mill and Sen on the Value of Opportunity” (2006) 18:1 *Utilitas* 33.

⁴¹⁷ See for example C.B. McPherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962); John Locke, *Second Treatise of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1960).

⁴¹⁸ Loren Lomasky, “Classical Liberalism and Civil Society” in Simone Chambers & Will Kymlicka (eds.) *Alternative Conceptions of Civil Society* (Princeton: Princeton University Press, 2002) 50 at 55.

The individual is responsible for himself as well as for others. He cannot shirk his responsibilities, because Islam enjoins upon all believers ordering the right and preventing the wrong (*al-amr bi'l-ma'ruf we al'nahy 'an al-munkar*).⁴¹⁹

He then describes the role of government in this approach:

The state is not an oppressive institution but a guarantor of human rights and responsibilities. Political power is wielded by representatives freely chosen by the people, as suggested by the old expression *ahl al-hall we'l-aqd* (literally, “those who loosen and bind”), namely, those who speak on behalf of the people. Political power is based on a contract between the ruler and the representatives of the people. The people must obey the chosen ruler as long as he is applying the law.⁴²⁰

This tension between collective power and individual rights is relevant to the issue of Indigenous control over justice in two specific contexts. One context is a conflict between Western liberal emphases on individual liberty and Indigenous traditions that emphasize the collective good. The second context is a conflict between the crime control and due process models of criminal justice. The first context is dealt with just below.

8.1.2 Indigenous Collective Values vs. Western Individual Rights

Pre-colonial Indigenous societies can be said, within very general terms, to have placed a greater relative emphasis on the good of the collective. The Dene of the Canadian north for example had very strict rules concerning the hunting of game, and the distribution of the products of the hunt. Failing to distribute meat so as to ensure that everyone was provided for or failing to observe spiritual taboos so as to ensure the availability of game were violations of customary law. Particularly serious or repeated violations could lead to permanent exile from the community because the offender endangered the well-being of the entire community.⁴²¹

⁴¹⁹ Hasan Hafani, “A Reflective Islamic Approach” in Simone Chambers & Will Kymlicka (eds.) *Alternative Conceptions of Civil Society* (Princeton: Princeton University Press, 2002) 171 at 182.

⁴²⁰ *Ibid.* at 183.

⁴²¹ Ryan, *supra* note 11 at 33-34.

Western liberal democracies have placed a greater emphasis on individual rights relative to Indigenous customary law. This has drawn criticism from Indigenous academics. Gordon Christie opposes the imposition of legal structures that reflect Western liberalism on Indigenous communities. Liberal theory emphasizes the autonomy of the individual, the individual pursuit of the good life. This in turn is reflected in a legal structure that emphasizes individual freedom, autonomy, and rights. Indigenous concepts of pursuing the good life are quite different. The individual is understood in the context of broader relationships with the Indigenous community and its other members. Indigenous cultures promote values of responsibility to the community and to others. An individual was expected to contribute to the good of the collective, and often even to subordinate self-interest if it helped enhance collective well-being.⁴²²

This was often the case in subject matters that Western democracies would typically treat as being the subjects of individual liberty. An example of this is seen in different viewpoints regarding the distribution of material goods. Western notions of private property emphasize the rights of the individual holder to exclude others from possession, even the state under normal circumstances. The state may acquire public property, and levy taxes in order to acquire funds to finance public policies, and thereby achieve some redistribution of wealth. Nonetheless, an individual may use whatever resources are left to him or her, after taxation and perhaps state acquisition, to acquire as much property as the individual desires and can afford. The individual is usually not under any legal obligation to use his or her material goods to look out for the well-being of others, even when aware of the homelessness or starvation of others. Charity and philanthropy are at the discretion of the individual property holder.

⁴²² Gordon Christie, "Law, Theory, and Aboriginal Peoples" (2003) 2 Indigenous L.J. 67.

Many Indigenous societies by contrast emphasized an overriding concern to ensure that the material needs of everyone were seen to, and a corresponding de-emphasis on the individual acquisition of material wealth. Jesuit Father Ragueneau said of eastern Indigenous peoples:

No hospitals [shelters] are needed among them, because there are neither mendicants nor paupers as long as there are any rich people among them. Their kindness, humanity, and courtesy not only make them liberal with what they have, but cause them to possess hardly anything except in common. A whole village must be without corn, before any individual can be obliged to endure privation. They divide the produce of their fisheries equally with all who come.⁴²³

The Lake Babine utilized their balhat ceremonies as a method of achieving the equitable distribution of wealth. Chiefs and other notable authorities used balhats to distribute goods to other community members in displays of generosity. It was also during balhats that material goods were provided to community members who needed them.⁴²⁴

According to Christie, it is the Elders of an Indigenous community who pass these values from generation to generation in a system of non-coercive transmission. The imposition of liberal legal structures amounts to oppression for failing to respect the collective autonomy of Indigenous communities, for promoting the pursuit of individual self-interest at the expense of Indigenous cultural values of responsibility, and for disrupting the system of non-coercive transmission.⁴²⁵ Turpel-Lafond expresses concerns that the applying the *Charter* to Indigenous communities has the potential to be highly disruptive of traditional governance systems using customary law. She describes it in this way in the context of Indigenous individuals challenging customary laws:

The other possible challenge, the internal challenge, is conceivable when a member of an Aboriginal community who feels dissatisfied with a particular course of action the Aboriginal government has taken, or envisages taking turns to the *Charter* for recognition of a right. This is an equally, if not more, worrisome prospect. This kind of challenge would be a dangerous

⁴²³ Reuben G. Thwaites (ed.), *The Jesuit Relations and Allied Documents* (Cleveland: Burrows Brothers, 1897), v. 43 at 271.

⁴²⁴ Fiske & Patrick, *supra* note 15 at 60-61.

⁴²⁵ Gordon Christie, "Law, Theory, and Aboriginal Peoples", *supra* note 422.

opening for a ruling by a Canadian court on individual versus collective rights within an Aboriginal community. It would also break down community methods of dispute-resolution and restoration, or place limits on the re-establishment of such methods.⁴²⁶

On the other hand, Roger Gibbins warns us that there are dangers involved with an absence of individual rights protections in contemporary Indigenous communities. He states:

The *Charter* takes on additional importance when we realize that individual rights and freedoms are likely to come under greater threat from Indian governments than they are from other governments in Canada. This is not because Indians are particularly insensitive toward individual rights, although the desire to protect collective rights could well encourage such insensitivity. The threat to individual right and freedoms comes from the size and homogeneity of Indian communities rather than from their "Indianness" per se. Indian communities tend to be small and characterized by extensive family and kinship ties, and it is in just such communities that individual rights and freedoms are most vulnerable.⁴²⁷

With Indigenous communities, it is not just a simple dichotomy between the collective and the individual. There is an additional layer or dimension. As Gibbins' excerpt makes clear, contemporary Indigenous communities are often characterized by strife between rival clans or families. Those families often compete with each other for political power and control over monetary resources. When a family wrests the reins of power for itself, it often exploits that power to the benefit of its own members and to the exclusion of rival families.⁴²⁸ Here is one possible example:

The elementary school on the Dakota Tipi reserve just south of Portage la Prairie, Man., is slated for over \$1000,000 worth of renovations this year. But the 13 students registered there will not benefit from the upgrade because they have all been transferred to other schools. Instead, the refurbished Building #29, as it is known, will house Fixer's, the first and only bar on what was formerly an alcohol-free reserve. It may seem strange that a bar should end up in a building slated for a school, but a look at the articles of incorporation for the non-profit Fixer's shows that the venture is intended to be used for "educational" purposes and for the "promotion of aboriginal culture." In fact, one of the owners is Calvin Chaske, the federal government's on-reserve Native Alcohol and Drug Abuse Program coordinator. This is nothing too out of the ordinary on a reserve where the public health nurse is a convicted cocaine trafficker and where one of the main economic activities is reputed to be the federally-funded import of peyote, a form of the hallucinogenic drug mescaline. Derived

⁴²⁶ Turpel-Lafond, *supra* note 8 at 41.

⁴²⁷ Roger Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government" in J. Rick Ponting (ed.) *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart Limited, 1986) 369 at 374-375.

⁴²⁸ For general discussions of this, see Bruce G. Miller, "The Individual, the Collective, and the Tribal Code" (1997) 21:1 *American Indian Culture and Research Journal* 185; and Robert B. Porter, "Strengthening Tribal Sovereignty", *supra* note 106.

from cactus buds grown in New Mexico, and a favourite substance for individuals requesting it for traditional native religious and medicinal applications. All this is going on under the stewardship of Dakota Tipi chief Dennis Pashe, who has run the reserve since 1974 with the help of a tight-knit inner circle of immediate family and friends. According to the Dakota Action Group (DAG), a faction of radical aboriginal reformers, Mr. Pashe's regime is corrupt even by the woeful standards set by Canada's Indians.⁴²⁹

In 1997, Judge Reilly heard a case of domestic assault that occurred in the Stoney Reserve in Alberta. Judge Reilly interpreted s. 718.2(e) as allowing him to order the Provincial Crown to investigate allegations of corruption and intimidation on the Reserve, as they would be part of the background circumstances of the Indigenous offender before his court.⁴³⁰ He described at length the basis for his decision, whereby corruption not only had repercussions for financial administration but also for criminal justice, as follows:

I have seen many cases of alleged domestic violence called for trial or preliminary only to have the Crown withdraw the case for lack of witnesses. I see very little follow up in these matters. I am told by Stoney people that the victims are afraid to testify because even if the offender is convicted and imprisoned the victim will be harassed and punished by his family, and on the reserve she will be without protection.

The Stoney Indian Reserve at Morley is a community of about 3000 people, divided into three First Nations, the Wesley, the Bearspaw, and the Chiniki. It has been one of the richest reserves in Alberta enjoying oil and gas revenues as high as sixty million dollars in the seventies when its population was only 1500 people. Residents have their houses supplied to them by the Tribal Administration and their utilities are paid out of the oil and gas revenues which are now about nine million a year.

Residents of the reserve have described it to me as a 'prison without bars', and a 'welfare ghetto'. I am told that it has the highest number of suicides, the highest number of children in care, and the highest number of prescription drug addicts of any reserve in Canada. The 'paid for' housing and utilities create a security which most are afraid to leave, but beyond that unemployment is over 90%.

The 'ghetto mentality' is an attitude of hopelessness in which people are resigned to the fact that there will never be enough for everyone and survival requires getting enough for yourself, no matter what the cost to others. There is a powerlessness that results in weak people dominating weaker people as the only way that they can feel any sense of self worth. This results in family violence, school violence, and violence in the community.

⁴²⁹ John Collison, "Ottawa demands a belated reckoning [Dakota Tipi reserve]" 24:31 *Alberta Report* (July 14, 1997) 16 at 16-17; See also Canada, 37th Parliament, 2nd Session, *House of Commons Debates (Hansard)*, 138:54 (February 6, 2003) at 1455 for a past reference to the federal government having taken over financial management of the Dakota Tipi band.

⁴³⁰ *R. v. Hunter* (1997), 52 Alta. L.R. (3d) 359 (Prov. Ct.).

For many years I have been asking why it is that this reserve which should be so prosperous has so many poor people, has such a low level of education, has such horrendous social problems, and has such an apparent lack of programs to deal with those problems.

Since trying to get justice programs started myself I have at least found people who will explain the problem to me, and the explanations include allegations of political corruption that one would associate with the dictatorship of a banana republic.⁴³¹

And again:

Over and over, in the conversations I have with Stoney people and non-Stoney who have worked on the reserve, the finger is pointed at Chief John Snow as a significant factor. If the allegations which I will now set out are shown to be false, I will most humbly apologize to Chief Snow. If they are true, he is guilty of a self-interest and exploitation of his people that is unbelievable for a so-called democratic community lying between the great City of Calgary and the beautiful Rocky Mountains.

He is only one of three chiefs, but being first elected in 1969, and remaining chief until now with the exception of 1992 to 1996, he has dominated the political scene at Morley for most of the last thirty years.

He has two Honourary Doctorates and is given credit for writing the book, *These Mountains are our Sacred Places*. He is an ordained United Church Minister and has recently served as head of the All Tribes Presbytery of United Church for all reserves in Alberta.

He speaks of improving the lot of his people but during his years as chief there appear to be no responsible positions filled by Stoney People and no lasting programs. In 1991 he fired 17 teachers at the Morley Community School and there are still outstanding law suits against the Stoney Educational Authority for wrongful dismissals. I am told that since his return to power in 1996 the employment of over 80 people, has been terminated, 80% of them are Stoney. Among those laid off are all of the members of the Stoney Tribal Police, the school principal, Allen Elkin, and the vice-principal, MaryAnna Harbeck, and just this week the acting principal, Janet Embacher.

I am told that the school has an enrolment of about 650, but that attendance is about 250, and that the reason for the absenteeism is largely bullying and intimidation. In this community where there is so much instability and where a continuity of teachers would seem to be so important it is mystifying that a chief who is concerned about his people would create instability at the school with these firings. The explanation that is given to me is that he deliberately interferes with Stoney education because the less educated his people are, the more he is able to dominate them.

I am told he did not send his children to the school at Morley, but used his position as Chief to have a separate school bus take them to Springbank Community School.

I have attended the Nakoda Lodge on a number of occasions. This lodge is an enterprise owned by the Wesley First Nation, but I am advised the Snow uses it as his personal business. I am told that he and his extended family use the facilities without paying and most of their food is obtained by taking it from the lodge. I am also informed that he freely uses the receipts as his own income. It was reported in the Canmore paper shortly after the election last year that the Federal Government had made a grant of \$100,000.00 for improvements to the Lodge. With tourism the most profitable industry in the Bow Valley it may be a very serious indication of his self interest and lack of concern for his people that he gets money for this and not for the badly needed programs to deal with social problems. It may also be a matter of

⁴³¹ *Ibid.* at 362-363.

interest to Canadian taxpayers that the Government pays money for what should be a profitable business on its own.

I have seen hundreds of logging trucks taking logs off of the Reserve. I am told that the value of logs removed is about fifty million dollars. Chief Snow publicly criticizes the logging but I am informed that he was doing it himself, and there is a suspicion that he received large sums of money from logging firms to help him win the election, and that one of his first acts as Chief was to discontinue law suits started by the former administration to recover stumpage fees on behalf of the Stoney First Nations from those that were logging. I am told the one of the defendants was Philomene Stevens, now the Chief of the Bearspaw First Nation. My understanding is that the title to the lands that comprise the Stoney Indian Reserve is in the name of Her Majesty the Queen in trust for the Stoney People, and that all of the resources on that land are the common property of all of the people. It seems to me that if individual Stoney people were selling timber to logging companies they were in fact stealing it from their community, and the companies that were buying it were buying stolen property. If nothing is being done about this exploitation of the Stoney people due to the self interest of their chiefs it is a matter that should be being investigated by the Federal or Provincial Crown.

I have attended the Administration Building in Morley for the purpose of assessing the possibility of having a Court sitting there. I have been shown the Council Chamber and told that it is never used by the Chiefs and Council because there are too many people who come there begging for favours from their elected representatives. I am told that all meetings are held in hotels off of the reserve, and some in places as far away as Nevada and Arizona.

I am told the misappropriation of funds by Aboriginal Chiefs and Councils is accepted practice on many reserves. I am told by Stoney people that the way government works on the reserve is that the candidate with the most relatives wins and then he and his family share the spoils.⁴³²

There is an apparent tension here. Vesting greater power in Indigenous communities, unchecked by individual rights standards, enables those communities to subordinate individual autonomy. The examples described above also makes it clear that the greater power can have a corrupting influence. The additional dimension of familial rivalry means that the abuse of power over the individual takes on a particular shade. If a family wrests the reins of power for itself, that family can set the 'collective goals' for the Indigenous community at large. The pursuit of such 'collective goals' can end up being to the benefit of the dominant family, and to the neglect or even persecution of rival families. On the other hand, vesting Indigenous individuals with individual rights can frustrate the pursuit of collective goals by a community, assuming that such goals genuinely reflect the desires of most of the

⁴³² *Ibid.* at 363-365.

community and not just a dominant family. This is because Indigenous individuals are legally empowered to challenge the pursuit of those goals, and the application of community law to themselves. This is the first context in which the debate of collective power vs. individual rights is relevant to Indigenous control over justice. The second context has to do with the nature of criminal justice.

8.1.3 Crime Control vs. Due Process

Herbert Packer describes two different models of criminal process, the Crime Control and Due Process models. Each embodies two different sets of values that compete with each other regarding how the criminal process is structured, and what goals the process pursues.⁴³³

The Crime Control model attaches primacy to maximizing the efficiency with which the process detects crime, apprehends, convicts and then punishes offenders.⁴³⁴ The ultimate objective is the punishment at the end of the process. Packer's starting point is that deterrence is utilitarian in that it strives for the social benefit of decreased crime. It tries to use the certainty of punishment following the commission of a crime to persuade people *a priori* against committing crime. This however should not be the exclusive goal of punishment. If it were, then the preventative aspect could only be realized by the absolute certainty of punishment following commission of a prescribed act. That certainty can only be assured by not allowing the accused to claim any exculpatory justifications (defences) for the act. This is not desirable in Packer's estimation because it leaves the criminal law without a firm foundation for assessing blame, and because it leaves citizens unable to plan their actions with such certainty as to avoid 'entanglement

⁴³³ Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, California: Stanford University Press, 1968) at 153.

⁴³⁴ *Ibid.* at 158.

with the criminal law'. Packer argues that exculpatory justifications and the prospect of punishment following commission of prescribed acts should be combined together in a harmonious system of punishment that promotes crime control. It not only strives to prevent crime *a priori*, but also strives to guide and persuade citizens towards moral and law abiding habits. The idea is that it is made clear to citizens that certain types of conduct will lead to criminal sanction, while others will not.⁴³⁵

If crime control is prioritized, it comes at the expense of legal rights during the criminal process. This is because legal rights compromise the efficiency in detecting and then sanctioning offenders that is valued by the Crime Control Model.⁴³⁶ For example, rights to search and seizure and against arbitrary detention can limit the ability of police to gather evidence. The rights to silence and to counsel can limit the ability of the police to interrogate suspects. The presumption of innocence and the right to silence make it harder for the state to procure a conviction during trial.

The Due Process Model places reliability as the paramount value instead of efficiency. Efficiency, if taken too far, can lead to erroneously punishing an innocent individual. The process must instead ensure there is a reliable foundation upon which to justify punishing an accused. For example, frailties and inconsistencies in the evidence must be revealed by cross-examination. Confessions should be reliable, freely given, and not the product of coercion or deception. The presumption of innocence must oblige the state to adduce enough reliable evidence to justify convicting the accused.⁴³⁷ Packer describes the tension with the Crime Control Model this way:

⁴³⁵ *Ibid.* at 62-70.

⁴³⁶ *Ibid.* at 158-160.

⁴³⁷ *Ibid.* at 164-165.

The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual. Furthermore, the processes that culminate in this highly affective sanction are seen as in themselves coercive, restricting, and demeaning. Power is always subject to abuse – sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to controls that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, although no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.⁴³⁸

Packer argues quite persuasively that there is an inherent tension between the Crime Control and Due Process models. Prioritizing one comes at the expense of the other. This aspect of criminal process blends with the tension between Indigenous collective values and individual rights to produce a particularly acute tension that is specific to Indigenous aspirations for control over justice.

8.1.4 The Tension Involved with Indigenous Control over Justice

The tension between the Crime Control and Due Process models is tied in with the collective good vs. individual liberty dichotomy. In so far as societies want to preserve their collective security, they would want to enhance the efficiency with which their criminal justice systems can detect, investigate, and then prosecute criminal activity. It has been argued, for example, that in the wake of 9/11, Western democracies are tempted to make strong moves in favor of Crime Control to address the threat of terrorist activity, even at the considerable expense of individual rights.⁴³⁹ Other scholars have stressed the need for due process safeguards in order to protect individual liberty against wrongful conviction, intimidation, and other abuses of power by authorities.⁴⁴⁰

⁴³⁸ *Ibid.* at 165-166.

⁴³⁹ Conor Gearty, “Reflections on Civil Liberties in an Age of Counterterrorism” (2003) 41 Osgoode Hall L. J. 185; Lucia Zedner, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” (2005) 32:4 J.L. & Soc’y 507.

⁴⁴⁰ For recent examples, see Arne F. Soldwedel, “Testing Japan’s Convictions: The Lay Judge System and the Rights of Criminal Defendants” (2008) 41:5 Vand. J. Transnat’l. L. 1417; Hannah Quirk, “Identifying Miscarriages of Justice: Why Innocence in the UK is not the answer” (2007) 70:5 Modern Law Review

These issues are also relevant to Indigenous aspirations for control over criminal justice. If Indigenous societies were to make contemporary use of punitive sanctions, such as public shaming and corporal punishment, the objectives behind them could be deterrence and public denunciation of crime. They would have a crime control emphasis.⁴⁴¹ Restorative justice methods, even though they eschew reliance upon imprisonment, can also be thought of as having a crime control emphasis.

Kent Roach articulates a contrary view. He describes Packer's two models as overly simplistic, and constructs two additional models. One is the Punitive Model of Victim's Rights. This model shares many similarities with the Crime Control Model, and opposes the Due Process Model for similar reasons. There are two key differences however. One, it is no longer a state interest in preserving public order that is pitted against an accused's rights. It is the rights of the victim, for sanction against the wrong done to that individual victim, and against further re-victimization within the criminal process, that are pitted directly against an accused's rights. Second, it is reflexively critical of the Crime Control Model in that it highlights the failures of the system to prevent victimization of individuals, whether it involves a failure to encourage reporting crime, or to prevent a second victimization within the process itself, or to enhance actual security for potential victims (e.g. security cameras, neighbourhood watches). Roach's other model is the Circle Model. This is essentially a description of restorative justice and its critique of the punitive inclinations found among Western justice systems.⁴⁴²

759; W. James Annestad, "The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants: A Look at the Task Force 134 Process and the Future of Detainee Prosecutions" (2007) 410 *Army Law* 72.

⁴⁴¹ Whether public shaming had a primarily deterrent emphasis or a primarily re-integrative emphasis along the lines of restorative justice may have depended on the particular Indigenous society and its culture.

⁴⁴² Kent Roach, "Criminology: Four Models of the Criminal Process" (1999) 89 *J. Crim. L. & Criminology* 671 at 711.

Roach explains why restorative justice justifies a whole new model in alternative to the Crime Control Model as follows:

Restorative justice provides a genuine alternative to crime control or due process. The latter models focus on the state, either as the primary victim of crime or the perpetrator of rights violations, and largely act upon offenders and victims. The crime control model imposes punishment on the offender while giving the victim at best indirect recognition and no tangible repair. It embraces a model of justice which is "pre-occupied with the past to the detriment of the future." The due process model in turn encourages the offender to deny responsibility for the crime and because of its professional and adversarial orientation alienates the offender, the victim and the larger community. It focuses on rights to the exclusion of duties, including the duty to repair the harm.⁴⁴³

Despite Roach's insistence on depicting restorative justice as a separate model, restorative justice can be understood as having a crime control emphasis if a more flexible understanding of crime control is adopted than was originally intended by Packer.⁴⁴⁴ Recall Daly's position that retributive and restorative justice systems both assess punishments but with different goals. Restorative justice prescribes punishment with a view towards rehabilitation and reintegration. Restorative justice does strive for crime control. It simply pursues it in a different way. It strives to reduce crime and further the public good by dealing with the root causes of crime, reforming an offender to prevent future recidivism, and improving relationships within the community at large. In that light, Indigenous traditions with parallels to restorative justice do have a certain crime control emphasis. And this crime control emphasis does tie in with the pursuit of collective goals in Indigenous communities.

Indigenous customary law and value systems have generally been depicted as emphasizing the good of the community as a whole, at least relative to the individualist

⁴⁴³ *Ibid.* at 711.

⁴⁴⁴ Rehabilitation of offenders is a primary focus of restorative justice. Packer all but rejected rehabilitation as a justification for punishment because he felt that there was far too much uncertainty and ignorance surrounding offender rehabilitation, and this in turn may result in injustices 'done to offenders who are treated differently because of assumed differences in the needs to which their penal treatment is supposed to respond.' *Supra* note 421 at 66-67. Packer emphasized persuasion against crime *a priori* and persuasion towards moral and law abiding conduct as the goals of punishment.

emphasis of Western liberal rights. Indigenous justice practices that have a crime control emphasis, whether it be public shaming, or corporal punishments, or restorative resolutions, can be used to further the objectives of Indigenous customary law and values. They can address the underlying causes of Indigenous criminality. They can rehabilitate Indigenous offenders. They can further harmony and co-operation in Indigenous communities. They can deter Indigenous individuals from violating customary law. They can inculcate traditional values in Indigenous people, offender and otherwise.

In contrast to this are Western standards of legal rights. Liberal theories of governance place value in a certain sphere of autonomy surrounding the individual upon which the state should not intrude. This often takes the form of civil liberties such as freedoms of expression, association, and religion. This sphere of individual autonomy takes on very particular features in a criminal justice context (i.e., the Due Process Model). These features include rights against unreasonable search and seizure, the presumption of innocence, the right to silence, the right to a fair trial, the right to have a case heard before an impartial judicial authority, and others.

The presence of both Indigenous methods of justice and liberal legal rights during the criminal process within the same social field can produce a particularly acute tension that is not easy to address. If Indigenous individuals apply for enforcement of liberal legal rights against an Indigenous traditional justice system, it can lead to those individuals not being subject to any process or any sanction at all. Examples could include findings that police conducted an illegal search of the accused's premises, or that they violated the right to counsel. A potential result is that evidence will be excluded, meaning that no case can be made against an Indigenous accused. Such instances can

frustrate the capacity of Indigenous methods of justice to further the realization of collective goals. Jonathan Rudin and Dan Russell state:

The difficulty with allowing *Charter* challenges against alternative dispute resolution systems is that, at their core, these challenges represent philosophical disagreements between members of the community. The person initiating the *Charter* challenge is seeking to have the community's justice system conform to fit the prevailing Canadian norms of causality and criminality. The success of the individual's *Charter* claim would lead to the destruction of the collective attempt to create an alternative system that responds to the needs of the community as a whole.⁴⁴⁵

On the other hand, consider what may happen when an Indigenous justice system prioritizes the collective good over individual liberty to the point of not including any sort of checks and balances in the name of tradition. Suppose that an Indigenous justice system sets as its priorities the promotion of collective harmony, the deterrence and denunciation of crime through traditional punitive sanctions, and the reduction of Indigenous crime and recidivism rates. If Indigenous community leaders prioritize these goals, then they may desire to enhance the power of their justice system to subject the Indigenous individual to the will of the collective. This can lead to a corresponding de-emphasis on individual rights, on the presence of any checks and balances, because they limit the power of the collective over the individual. With greater power over the individual comes greater potential for abuse of that power. Examples can include punishing an Indigenous individual who is not factually guilty of an offence, or coercing the individual into consenting to a particularly harsh and onerous resolution. The tension is not an easy one to address. That is not to say that we should not try though. This paper will now take a particular approach to addressing that tension.

8.2 Culturally Sensitive Interpretations of Legal Rights

The concept being advanced here is one of modifying legal rights to be more accommodating towards Indigenous justice practices. Thomas Isaac, in the context of

⁴⁴⁵ Rudin & Russell, *supra* note 160 at 51.

applying the *Charter* to Indigenous communities, argues in favour of striking a balance between Indigenous modes of governance that emphasize collective well-being and individual rights as follows:

Indeed, the necessity for aboriginal collective rights can be found, to some degree, in the need to protect the well-being of individual aboriginal persons. Therefore, if the authority of aboriginal governments and aboriginal rights are exercised in a manner that does not protect the well-being of their individual members, the justification for an absolute interpretation of collective rights is questionable. Aboriginal individuals are equally entitled to have their individual rights and freedoms protected as all other Canadians. In effect, there must be a rational balance of collective and individual rights, as in so many other areas of Canadian law.⁴⁴⁶

The Royal Commission on Aboriginal Peoples has adopted a similar approach as follows:

“... the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples.”⁴⁴⁷

This approach of culturally sensitive interpretations of legal rights commends itself as a workable method of addressing the tension. It tries to bring in the best of both worlds. It aspires to prevent legal rights from altogether eroding justice practices grounded in Indigenous cultures that emphasized the collective good, while also providing an Indigenous individual with culturally sensitive and meaningful modes of redress against potential abuse of collective power. There are however at least two objections to this approach. The first one is discussed below.

8.2.1 Continued Colonialism

It could be argued that culturally sensitive interpretations of legal rights is itself a colonial imposition since it requires Indigenous justice practices to adjust themselves to bear some resemblance, even if limited, to Western standards of rights protections. It is therefore inconsistent with self-determination, an objective that this dissertation affirms.

⁴⁴⁶ Thomas Isaac, “Canadian Charter of Rights and Freedoms: the Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 448.

⁴⁴⁷ *Bridging the Cultural Divide*, *supra* note 173 at 268.

If Indigenous community leaders want a justice system that heavily favours collective power, without any safeguards against abuses of collective power, that certainly represents an exercise of self-determination. It would not however be well advised.

If Indigenous communities obtain self-determination over criminal justice, individual rights must be accounted for somehow. It is recommended that they embrace culturally sensitive interpretations of legal rights as a voluntary exercise of self-determination. Consider this article on an Indigenous police force in Saskatchewan:

Saskatchewan's first self-administered police force was formally established in May, and polices the Carry the Kettle, Little Black Bear, Okanese, Peepeekisis and Star Blanket First Nations east of Regina. It has received the first blow to its public image after receiving a complaint from a family after a teenager's arm was broken while in custody. Colleen Stevenson, who lives on the Carry the Kettle First Nation, wants to know how her 15-year-old son, Timothy, suffered a broken arm while in custody of the File Hills First Nations Police. "I don't see how a man in a uniform with an obligation to protect the community is out there inflicting pain, breaking bones," she said.

Timothy Stevenson was with another person when he was arrested last week. He was kept in custody for 12 hours and said he was denied medical attention. He was never charged with any offence. Police Chief Ralph Martin, who oversees seven officers, confirmed that the injury occurred while the teen was in custody. He has met with the family to discuss the case, but the police force has made little information about the incident public. In response to this lack of information, Timothy Stevenson's grandfather, Delmar Runns, alleges the poor treatment of a resident is not an isolated incident. "I think, for myself, we should go back to the RCMP, because the tribal police are overreacting," Runns said. "They're overdoing it."

The province's public complaints commission says it's aware of the allegation about the teenager, but hasn't received a formal complaint. It could investigate itself or turn the matter over to an outside police force.⁴⁴⁸

Note how perceived abuses of power led to at least one local demanding that outside authorities take matters over to set them right. If Indigenous justice systems are to enjoy the support of community members, some allowance has to be made for individual rights and preventing power abuses. Self-determination must embrace some form of rights protection, and culturally sensitive interpretations of legal rights represent a workable method of realizing it. There is, however, another objection that is closely related.

⁴⁴⁸ "Saskatchewan's First Aboriginal Police Force Faces Questions of Conduct" (September 2007) *First Nations Drum* 23.

8.2.2 No Longer Tradition?

Culturally sensitive interpretations of legal rights is an endeavour that by its nature involves incorporating laws and practices that were not previously features of Indigenous traditional law into that law. This invites the question of whether the results can truly be categorized afterwards as Indigenous. Can a new set of laws that blends together both Indigenous and Western legal concepts still be thought of as reflecting Indigenous beliefs and value systems? Can it still be called Indigenous traditional law? One could answer no. That however does not necessarily have to be an undesirable answer from the perspective of Indigenous peoples, especially if Indigenous communities themselves decide to pursue that route. To understand why this is so, it is helpful to explore a particular understanding of the nature of law that comes from a body of legal theory known as legal pluralism. That understanding is that law is a dynamic force that evolves over time through interactions with other legal systems.

Legal pluralism as a field of legal theory can be characterized by at least three interrelated features. The first essential feature is the claim that there may be multiple legal orders co-existing within the same social field. Legislative bodies and courts are not the only sources of law within a given social field. There exist other legal orders, not recognized as the official law of the state and often operating only within a specific locale or only among certain groups of people. Nonetheless, these orders operate to regulate the conduct of at least some people within a social field. They form part of the totality of what is the law within a given social field.⁴⁴⁹

⁴⁴⁹ Sally Engle Merry, "Legal Pluralism" (1998) 22 Law & Soc'y Rev. 869 at 870-871; Roderick MacDonald, "Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism" (1998) 15 Ariz. J. Int'l & Comp. L. 69 at 76.

A second essential feature is a relatively more generous understanding of what is law. Law can include methods of social regulation and normative ordering that do not possess the forms of written statutes, regulations, and judicial precedents. Of course, this begs the question of just how much gets characterized as law and where the boundaries, if any, get drawn. Kleinhans and MacDonald describe it this way:

... the objection is apparently methodological: legal pluralism lacks a criterion for distinguishing non-State law from anything else that has a normative dimension (e.g. social practice, economic forces, religion, etc.), and this is said to be revealed in the inadequacy of attempts by legal pluralists to find a term for "non-State law." Without a proper pedigree-based definitional criterion of identity, the project of legal pluralists collapses insofar as its aim is to explore how diverse legal phenomena interact.⁴⁵⁰

Regardless, at least some scholars agree that Indigenous customary law qualifies as a form of law capable of constituting a legal order within a social field.⁴⁵¹

The third essential feature marks an emphasis on the dispersion of power in contemporary societies. The power to regulate conduct and set standards for power does not reside solely within state institutions. There exist within a social field multiple loci of power, variable in their spheres of influence and the amount of power they hold. These loci of power in turn exert their influence to regulate behaviour within certain segments of society. The exertion of such influence is not necessarily marked by punitive sanctions, but can be shaped by more subtle forces such as persuasion or ingrained social expectation. Roderick MacDonald describes this as follows:

Furthermore, normativity cannot be equated with institutional organization (especially with the specialized office of the law-application-courts) but is secreted in patterns of defence and contestation to tacit (and occasionally, virtual) claims of authority. Processes of human interaction are infinitely more varied than those suggested by a myth of law that gives priority to legislatively announced claims of right and judicial adjudication of these rights. Finally, because families, cultural communities, workplaces, neighbourhoods, bureaucratic organizations, commercial

⁴⁵⁰ Martha-Marie Kleinhans & Roderick A. MacDonald, "What is a Critical Legal Pluralism?" (1997) 12 C.J.L.S. 25 at 32-33. See also B. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 J. L. & Soc'y 192.

⁴⁵¹ *Ibid.* at 32; Merry, *supra* note 449 at 872-873; Luke McNamara, "The Locus of Decision-Making in Sentencing Circles: The Significance of Criteria and Guidelines" (2000) 18 Windsor Y.B. Access Just. 60 at 66-71.

enterprises and an almost infinite variety of other locations of human interaction are seen as sites of legal regulation, the root conceptions of normative interaction within and among them must themselves be plural.⁴⁵²

These concepts can be said to be already in motion as between Indigenous peoples and Canadian state institutions, as reflected in the limited accommodations of their justice practices. Greater fields of autonomy (i.e. self-determination) are of course goals for many Indigenous peoples. What is important for our present discussion is an understanding of law that builds on the first and third features of legal pluralist theory. State law and other legal orders are seen as being in a process of constant and ongoing interaction. They are engaged in a constant dialogue, and in a constant dialectic of power and counter-power, with each other. Each shapes, changes, and influences the contours of the other. State law may recognize the merits of the ideas of other normative orders, and incorporate them. Written statutes may codify those ideas, or judges may use them in their decisions. Other legal orders also appropriate and adopt state law concepts. State law is both constitutive of and constituted by other normative fields.⁴⁵³ Roderick MacDonald states: “Different legal regimes are in constant interaction, mutually influencing the emergence of each other’s rules, processes and institutions.”⁴⁵⁴

This understanding of law is important because it asserts that law is neither an isolated nor a static unit. Law is a dynamic phenomenon. Our knowledge of Indigenous history prior to contact may be limited. Even so, can any Indigenous people assert with confidence that their laws and practices were exactly the same 1,000 years ago as they were 600 years ago? Can any Indigenous people assert with confidence that their laws remained unchanged through the ages notwithstanding interactions with other Indigenous

⁴⁵² MacDonald, *supra* note 449 at 77; See also Merry, *supra* note 449 at 870-871.

⁴⁵³ Merry, *supra* note 449 at 880-886.

⁴⁵⁴ MacDonald, *supra* note 449 at 77.

groups, whether it was through trade or migrations or other forms of interaction? An example may be in order. The basis of Iroquois traditional law is the Great Law of Peace. In simple terms, the Great Law sets out the governing structure of the Iroquois Confederacy. The Clan mothers selected the chiefs. The chiefs resolved disputes, and governed the general affairs of the Confederacy. They could be deposed if the Clan mothers decided they were not doing a good job or behaved in a manner not befitting the position. The cornerstones of the Great Law of Peace were 1) Peace 2) Responsibility (to the people as a whole) and 3) Reason. Peace was more than the absence of war, it was a state of mind that each member of the Confederacy was to strive for so that the Confederacy could reach for and sustain a state of genuine harmony. The origins of the Great Law of Peace are tied to a figure known as the Peace Maker. He was Huron by birth. He spent years preaching the message of the Great Law of Peace until it gained general acceptance among the Iroquois, whose existence had previously been marked by violent feuding.⁴⁵⁵

The Peace Maker may be identified as a point of genesis for Iroquoian law. What however do we know of law among the Iroquois prior to the Peace Maker? The violent feuding may suggest complete lawlessness beforehand, but do we know that for certain? Were the warring factions feuding out of a sense of obligation to seek honour or vengeance? What the Peace Maker does signify is that the Iroquois people made a choice to depart from the status quo and accept a new law. There may have been divisions among the Iroquois over the Great Law with some initially reluctant to embrace it. The Iroquois in the end did not cling to the past but instead adopted something new, something that had not been 'traditional', because it better met the needs of their time.

⁴⁵⁵ George-Kanentiio, *supra* note 12 at 23-25 and 98-99.

Indigenous societies need not flinch from a selective adoption of Western legal concepts just because they are different. Such an exercise could merely amount to another step in the millennia-old evolution of law among Indigenous peoples. One could of course persist with the objection that it still practically represents an obligation to depart from what had been traditional law. Canadian legal and political institutions, enjoying far greater power, have the leisure of according only minor accommodations of Indigenous perspectives on justice. Indigenous peoples by comparison can find themselves under considerable pressure to acquiesce in Canadian state policy that insists on the full scale application of the *Charter*. The reply here is that, at the least, culturally sensitive interpretations of legal rights may provide a better alternative for preserving Indigenous justice traditions than the usual insistence on the full application of the *Charter*. Culturally sensitive interpretations of legal rights provide an opportunity for Indigenous communities to pursue a balance between their own legal principles, and Western legal principles, on terms that are acceptable to the communities as opposed to the unilateral application of the *Charter*. Principles in Canadian constitutional law, as we will see in later discussions in this chapter, may be such that the Canadian state cannot necessarily force Indigenous peoples to accept the full application of the *Charter*. Indigenous law can still remain Indigenous law if Indigenous peoples choose to incorporate Western legal concepts according to their contemporary needs. It may be imperative for them to do so.

There is reason to believe that Western modes of rights protection may be relevant to the needs and realities of contemporary Indigenous communities. Indigenous peoples live in a far different world than the one prior to contact. It is a world

that runs on money and technology. It is a world suffused with relationships of hierarchy and power. This presents challenges for present-day Indigenous governance. Robert Porter argues that a critical issue for modern Indigenous sovereignty is infighting. Porter identifies one of the causes of infighting as competition for economic opportunities. This includes competition for revenue from economic development, for example, casino profits. This in turn spurs competition for political power. With greater political power comes greater access to economic opportunities.⁴⁵⁶ Consider this description of corruption provided by Robert Shepherd and Russell Diablo:

In 2000, for example, government support for a Toronto-based addictions centre, Pedhabun Lodge, was cut off after it was disclosed that \$110,000 in treatment money was used to send employees to California. In Alberta, unfavourable publicity forced the Samson Cree tribal government to cancel a 12-day trip to Hawaii for 55 members. That same year, the Director of the Saskatchewan Indian Gaming authority had used provincial government money to travel with his wife to Barcelona, Brisbane, Paris, and London.⁴⁵⁷

This competition for political power and economic opportunities can have implications for justice in Indigenous communities. Suppose that a particular family or faction secures economic and political power to become the elite of an Indigenous community. A potential concern then is that the elite can use justice processes to oppress their rivals, and to maintain their elite position. Ross Gordon Green and Kearney F. Healy state:

... it is worth remembering that, throughout human history, criminal law has often served to protect powerful elites. For example, criminal law in Imperial Rome had much to do with stabilizing the Roman Empire. Nero, branding the early Christians as criminals, was acting to consolidate his power. The Romans quickly learned to employ criminal sanction as a way of protecting their empire.⁴⁵⁸

⁴⁵⁶ Porter, "Strengthening Tribal Sovereignty", *supra* note 106 at 78-79.

⁴⁵⁷ Robert Shepherd & Russell Diablo, "A Government-First Nations Dialogue on Accountability: Re-establishing Understanding on the Basics of a Complex Relationship" (2005) 15:2 Native Studies Review 61 at 62.

⁴⁵⁸ Ross Gordon Green & Kearney H. Healy, "Aboriginal Notions of Justice: Questioning Relationships of Force" in Wanda D. McCaslin (ed.) *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 61 at 64.

There are numerous documented instances of powerful elites around the world using their resources to corrupt the administration of justice to their own benefit. Examples include allegations of corporate executives receiving preferential treatment from law enforcement officials to avoid inspection of their business activities⁴⁵⁹, of organized criminals bribing police and other public officials to avoid prosecution⁴⁶⁰, of organized criminals and state officials co-operating with each other in pursuit of mutual profit⁴⁶¹, of political elites compromising judicial independence to avoid successful prosecution for their own corruption⁴⁶², of political elites using the police to undermine political opponents⁴⁶³, of anti-corruption investigators having been sidelined to avoid further investigation⁴⁶⁴, and of police abusing their powers to advance their own material interests.⁴⁶⁵

It could of course be said that such social realities do not reflect Indigenous ideals. The current state of affairs in Indigenous communities represents an undesirable loss of hold by tradition on the lives of Indigenous people.⁴⁶⁶ How far back though can the clock be turned? Yes, Indigenous traditions of governance, responsibility, and interpersonal relationships may have contemporary relevance for Indigenous peoples.

⁴⁵⁹ “How Flexible Should the Law Be Against Criminal Corporate Executives?” 52:4 *Beijing Review* (January 22, 2009) 46; Wolfgang Hetzer, “Corruption as Business Practice? Corporate Criminal Liability in the European Union” (2007) 15:3/4 *European Journal of Crime, Criminal Law & Criminal Justice* 383;

⁴⁶⁰ José De Córdoba & David Luhnnow, “Mexican Officials Allege Drug Cartel Infiltrated Attorney General’s Office” *Wall Street Journal – Eastern Edition* (October 28, 2008) A8.

⁴⁶¹ Serguei Cheloukhine & Joseph King, “Corruption Networks as a Sphere of Investment Activities in Modern Russia” (2007) 40:1 *Communist & Post-Communist Studies* 107.

⁴⁶² “Trying Times for Taiwan’s Judiciary” *Global Agenda* (January 31, 2009) 10; “Blame the Judges” 49:16 *Africa Confidential* (August 1, 2008) 6; “Berlusconi Fiddles, Italy Burns” 388:5859 *Economist* (July 19, 2008) 59;

⁴⁶³ Diane E. David, “Law Enforcement in Mexico City: Not Yet Under Control” (2003) 37:2 *N.A.C.L.A. Report on the Americas* 17; Bohdan Harasymiw, “Policing, Democratization and Political Leadership in Postcommunist Ukraine” (2003) 36:2 *Canadian Journal of Political Science* 319.

⁴⁶⁴ Lydia Polgreen, “Nigeria Reassigns Corruption Fighter, Motive is Hazy” *New York Times* (December 29, 2007) 3.

⁴⁶⁵ Theodore P. Gerber & Sarah E. Mendelson, “Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?” (2008) 42:1 *Law and Society Review* 1; Mark Ungar, “Contested Battlefields: Policing in Caracas and La Paz” (2003) 37:2 *N.A.C.L.A. Report on the Americas* 30.

⁴⁶⁶ Monture-Angus, *supra* note 144 at 35-36.

Those traditions however somehow have to make their mark in a social setting that lends itself very well to the formation, and perpetuation, of relationships that are marked by inequities of wealth and power. With such relationships comes greater potential for abuse of power. Is it a realistic hope that we can completely avoid the need for formal safeguards against governing power in today's world? The selective incorporation of Western legal concepts does not need to amount to an abandonment of tradition. It can amount to an evolution of Indigenous law that better meets contemporary needs. This is nonetheless a complicated approach because it involves synthesizing many different and often contradictory legal principles. As it turns out, Canadian constitutional law provides a vehicle for realizing the culturally sensitive interpretation of legal rights.

8.3 Canadian Law and Culturally Sensitive Interpretation

To begin with, s. 35(1) of the *Constitution Act, 1982* will for present purposes be assumed to include Indigenous rights to criminal jurisdiction. Section 7 of the *Act* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The principles of fundamental justice are considered to provide many of the philosophical underpinnings of the criminal justice system. Justice Lamer (as he then was), had this to say about s. 7 in the context of criminal law: "... the principles of fundamental justice are to be found in the basic tenets of our legal system."⁴⁶⁷ Sections 8 to 14 provide more specific legal rights, such as the right to counsel, the right to a fair trial, the right against arbitrary detention, and the right to be presumed innocent until proven guilty beyond a reasonable doubt. They are considered more specific examples of fundamental justice in

⁴⁶⁷ *Reference re Section 94(2) of the Motor Vehicle Act, B.C.*, [1985] 2 S.C.R. 486 at 503. [hereinafter *Motor Vehicle Reference*]

the context of criminal justice. The question becomes how would these legal rights impact upon Indigenous rights to criminal jurisdiction under s. 35(1)? Which legal authority would be used to resolve such a conflict?

In *Dagenais v. Canadian Broadcasting Corporation*, Chief Justice Lamer stated:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.⁴⁶⁸

Dagenais mandates assessments of salutary and deleterious effects on constitutional rights when seeking a balance between conflicting constitutional rights. Chief Justice Lamer states:

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.⁴⁶⁹

If Indigenous individuals were to assert their *Charter* rights against Indigenous justice systems grounded in s. 35(1) rights, Canadian courts may have to engage in a similar analysis. The salutary effects of Indigenous practices would be measured against the deleterious effects upon legal rights (and vice versa). *Dagenais* mandates examining a large number of factors in deciding how to balance constitutional rights when they conflict. When it comes to conflicts between legal rights and Indigenous rights to justice practices, the courts may have to examine a whole range of factors, such as the need to safeguard against the conviction of innocent persons, the need to prevent the emergence of police states, the need to ensure fairness in criminal proceedings, the cultural beliefs of an Indigenous group, Indigenous over-incarceration, as well as others.

⁴⁶⁸ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at para. 72.

⁴⁶⁹ *Ibid.* at para. 73.

Dagenais is a constitutional legal doctrine that can facilitate the culturally sensitive interpretation of legal rights. Firstly, it explicitly mandates a non-hierarchical balancing between constitutional rights such that legal rights should not be given clear preference over Indigenous justice practices. Second, the salutary vs. deleterious effects analysis provides a mechanism whereby courts would have to give serious consideration to Indigenous perspectives on justice. Indigenous perspectives on justice, and the potential benefits of Indigenous approaches to justice would have to be considered in the analysis. *Dagenais* doctrine may provide a workable doctrine for realizing culturally sensitive interpretations. Realizing this in the real world is however another matter. It is to that subject that the discussion now turns.

8.4 Realizing the Culturally Sensitive Interpretation of Legal Rights

It must be stated at the outset that culturally sensitive interpretation of legal rights actually involves addressing two different kinds of tension. One source of tension is between protecting individual liberty through *Charter* rights and maintaining legal space for Indigenous traditions that by comparison place greater emphasis on the collective good. As previously mentioned, the *Dagenais* test provides a workable method to address this tension. A more difficult source of tension is the one between competing jurisdictions. Assume that Indigenous communities have jurisdiction over criminal jurisdiction. Indigenous individuals seeking protection of their liberty against Indigenous criminal justice systems through the *Charter* invites the application of legal principles from an outside jurisdiction. This jurisdictional clash may entail Indigenous laws being modified to ensure compliance with the *Charter*, a legal document that derives its authority from Canadian federal and provincial jurisdictions. Indeed, under the Canadian

federal government policy on First Nations' Self-Government, the *Charter* must apply to Indigenous governments.⁴⁷⁰ This policy is reflected in provisions in self-government agreements negotiated with Indigenous groups requiring the application of the *Charter*. These include the Nunavut agreement⁴⁷¹, the Sechelt Agreement⁴⁷², and the Nisga'a agreement.⁴⁷³ The realization of culturally sensitive interpretation of legal rights necessarily has to address both tensions.

Another aspect of Indigenous rights jurisprudence may be helpful in addressing the tension involved with jurisdictional conflict. Assume that the right to internal autonomy that was proposed in Chapter 7 becomes a feature of Canadian law. Canadian laws and policies that infringe the right to internal autonomy would have to meet the *Sparrow* tests of justifications, which include the fiduciary obligation to act honorably in the interests of Indigenous people, and to consult Indigenous peoples with respect to their right. As an alternative scenario, imagine that Indigenous peoples assert rights to justice practices under the *Van der peet* tests that are not yet proven in court. Obligations under s. 35(1) are extensive enough to require consultation with Indigenous peoples when Canadian governments are or should be aware that their actions will infringe upon Indigenous rights that potentially exist. Chief Justice MacLachlin states:

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it ...⁴⁷⁴

⁴⁷⁰ *The Government of Canada's Approach to Implementation of the Inherent and the Negotiation of Aboriginal Self-Government*, *supra* note 347.

⁴⁷¹ *Nunavut Act* (1993, c. 28).

⁴⁷² *An Act relating to self-government for the Sechelt Indian Band*, *supra* note 302.

⁴⁷³ *The Nisga'a Final Agreement*, *supra* note 300, ch. 2, article 9.

⁴⁷⁴ *Haida*, *supra* note 312 at para. 35. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

MacLachlin adds: ‘The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties.’⁴⁷⁵ These stringent duties may include accommodating the Indigenous interest until a claim is resolved.⁴⁷⁶ Though the requirements of the duty may vary with the circumstances, they must at a minimum ‘... be consistent with the honour of the Crown.’⁴⁷⁷ The duty is broad enough to encompass the potential, although as yet unproven, interests of Indigenous peoples. These Crown duties also apply when the Crown acts in a manner as to affect treaty rights.⁴⁷⁸ The *Haida* doctrine also recognizes that a Canadian government may, under certain circumstances, have constructive knowledge that its actions are adversely affecting the potential rights of Indigenous peoples.

Whether the proposed right to internal autonomy triggers the fiduciary obligation and duty of consultation under *Sparrow*, or whether *Haida* triggers duties of consultation for asserted yet unproven rights to justice practices, s. 35(1) jurisprudence can be interpreted as obliging the federal government to alter its policy requiring the application of the *Charter* in full force. The reasoning is as follows: Canadian governments are imputed with knowledge that the application of individual constitutional rights to Indigenous peoples can have impacts on traditional methods of governance that may be undesired by Indigenous peoples themselves. Canadian governments must therefore consult with Indigenous peoples with respect to whether the *Charter* will apply to their systems of governance, or how it will apply. *Haida*, even though decided in the context

⁴⁷⁵ *Ibid.*, *Haida* at para. 37.

⁴⁷⁶ *Ibid.* at para. 38.

⁴⁷⁷ *Ibid.* at para. 38.

⁴⁷⁸ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

of Indigenous land interests pending final litigation, also makes it clear that duties of consultation may require accommodation of Indigenous interests, at least where there is strong evidence to suggest that those interests may be protected by s. 35(1). The idea is that the duty of consult does not mean that the federal government can simply insist on the wholesale application of the *Charter*. They may be required to accommodate Indigenous alternatives. Consider also that the Supreme Court has also held that reconciliation goes to the very essence of s. 35(1). Consider this passage from *Haida*:

Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises". This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.⁴⁷⁹

The *Dagenais* test, the non-hierarchical balance between competing constitutional rights, becomes the goal of consultations. Crown duties to consult require a departure from the policy requiring the application of the *Charter* in full force. The tension of jurisdictional conflict is partially addressed because the application of *Charter* rights to Indigenous justice systems, whether in full force or in modified forms, becomes a matter of consultation, negotiation, and accommodation rather than of unilateral imposition.

This may present a way to address jurisdictional conflict as it concerns Canadian legislators. There remains a problem of jurisdictional tension when it comes to the judicial branch. Recall that *Dagenais* presented a workable solution to the first tension of individual liberty versus collective good. The application of the non-hierarchical approach and the salutary versus deleterious effects analysis itself presents a problem of jurisdictional conflict because claims to *Charter* rights against Indigenous justice systems would be heard in Canadian courts presided over for the most part by non-Indigenous

⁴⁷⁹ *Haida*, *supra*, note 312 at para. 20.

judges. Both Turpel-Lafond and Monture-Angus have the same basic objection to this reality, that the Non-Indigenous judges would view the issues through their own cultural lenses. Their interpretive exercises would reflect their own Eurocentric biases, and be suffused with insufficient sensitivity towards Indigenous perspectives.⁴⁸⁰ This is a valid objection, but there are perhaps there are at least two ways to deal with it.

One possibility is the establishment of a court system for Indigenous communities. Of course, this raises an issue unto itself about imposing Western legal structures which will be considered in more detail during Chapter 9.⁴⁸¹ The point is that court systems presided over by Indigenous judges provides opportunities for meaningful Indigenous involvement with the application of *Dagenais*. It provides a forum conducive to applying *Dagenais* in such a way that legal rights are interpreted with sensitivity towards the cultural values of Indigenous communities. In this respect, the American experience has a lesson to offer. An important part of Frank Pommersheim's writings is the concept of American Indian tribal court systems as interpretive communities. Despite a number of federal statutes imposing restrictions on tribal court jurisdiction⁴⁸², these interpretive communities have the opportunity to work cultural values and traditions into their adjudications.⁴⁸³ Pommersheim describes it this way:

Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated. .. The process of decolonization can *never* lead back to a precolonized society. ... this does *not* mean, however, that liberating forces cannot synthesize the best of indigenous past and present. Confidence, balance, and respect for roots are key elements

⁴⁸⁰ Turpel-Lafond, *supra* note 8 at 41-42; Monture-Angus, *supra* note 144 at 144-152.

⁴⁸¹ For a discussion of this, see *Bridging the Cultural Divide*, *supra* note 173 at 227-232.

⁴⁸² The *Major Crimes Act*, 18 U.S.C. s. 1153., removes a large number of indictable offences (e.g. murder, assault causing serious bodily harm, robbery) from tribal court jurisdiction. The *Indian Civil Rights Act*, 25 U.S.C. s. 1301-3., requires tribal courts to use adversarial procedures where an accused pleads not guilty, and provides Indian accuseds with legally enforceable rights that mirror those found in the American Bill of Rights. (e.g. right to a lawyer, right against unreasonable search and seizure)

⁴⁸³ Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995) at 58, 61-136.

in this process. The exercise of wise choice among competing possibilities offers the best likelihood for an optimal future. The riprap created by these forces provides an opportunity for tribal courts to forge a unique jurisprudence from the varied materials created by the ravages of colonialism and the persistence of a tribal commitment to traditional cultural values.⁴⁸⁴

This phenomenon apparently does occur in practice. James Zion has this to say: “What actually takes place in many tribal courts is that customary principles and procedures are applied ... Rather than articulate Indian common law principles in decisions, many tribal judges unconsciously apply tribal values in cases in a way that outsiders cannot see.”⁴⁸⁵

Court systems for each Indigenous group can interpret legal rights differently to reflect the needs and traditions of that particular group. Mark D. Rosen states:

Presently, each tribe's courts are empowered to provide their own interpretations of "due process," "equal protection," "search and seizure," and the like, without review from federal courts. The result is that due process means one thing in Manhattan, another in the 25,000 square miles of Navajo land, and yet something else on the Winnebago reservation.⁴⁸⁶

It is also conceivable that appellate courts, which are another feature of American Indian tribal court systems, can become a feature of Indigenous court systems.⁴⁸⁷

This addresses the tension of jurisdictional conflict in the sense that Indigenous criminal justice systems would be free to willingly incorporate *Charter* rights, perhaps in modified forms, into their own laws. The tension is dissolved by (modified) legal rights becoming internal to Indigenous criminal justice systems, and therefore no longer external. This only represents a partial solution though because it must be kept in mind that any such courts, appellate or not, may be subject to being overturned by the Supreme Court. However, if reserving one seat for an Indigenous justice becomes standard

⁴⁸⁴ *Ibid.* at 99; See also Mark J. Wolff, “Spirituality, Culture and Tradition: an Introduction to the Role of Tribal Courts and Councils in Reclaiming Native American Heritage and Sovereignty” (1994-1995) 7 St. Thomas L. Rev 761.

⁴⁸⁵ James Zion, “Taking Justice Back: American Indian Perspectives” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Supply and Services, 1993) at 311.

⁴⁸⁶ Mark D. Rosen, “Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: of Tribal Courts and the *Indian Civil Rights Act*” (2000) 69 Fordham L. Rev 479 at 483.

⁴⁸⁷ *Bridging the Cultural Divide*, *supra* note 173 at 278-279.

practice, this coupled with Indigenous court systems would go a long way towards ensuring that the application of *Dagenais* would not occur entirely in a non-Indigenous space. It must be conceded that this involves only one seat being reserved for an Indigenous justice. This may be as good as we can be hope for, though, in addressing the tension of jurisdictional conflict in the judicial branch though. It does, after all, have the possible benefit of ensuring that Indigenous perspectives enter the deliberations.

Another approach, and one that may be complimentary to the establishment of Indigenous courts, is for Indigenous communities to draft their own charters. Communities can perform their own their own interpretive exercises using *Dagenais* to produce charters that both safeguard against power abuse, and retain cultural sensitivity. Although the Royal Commission released its reports before *Dagenais* was handed down, it is helpful to consider this excerpt:

The Aboriginal charter would also serve as an interpretive tool for the courts of the non-Aboriginal justice system in applying the Canadian Charter to the laws and acts of Aboriginal governments. In this way, the concern about having judges of the non-Aboriginal system pronounce on the validity of an Aboriginal nation's laws or acts would be largely alleviated, since the values underpinning such legislation or acts should be readily discernable in its charter.

... Where a self-government treaty includes an Aboriginal charter among its provisions, it would appear that courts would be bound to seriously consider the terms of this charter in interpreting any related provisions of the Canadian Charter.⁴⁸⁸

⁴⁸⁸ *Ibid.* at 266-267. This discussion was initially made with reference to s. 25 of the Charter, which reads: "The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including ..." It is unclear whether this provision is a complete bar to *Charter* rights applying to Indigenous governance rights under s. 35(1), or whether it merits the balanced approach implied in the culturally sensitive interpretations of legal rights instead, since the Supreme Court has not addressed this issue directly. For arguments in favour of s. 25 operating as a complete bar to the *Charter* applying to Indigenous governance rights under s.35 (1), see Kerry Wilkins, "... But we Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53; and Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall L.J. 61. Peter Hogg and Mary Ellen Turpel-Lafond argue that the Supreme Court is unlikely to interpret s. 25 as a complete bar to the *Charter* applying to Indigenous governance, since this context had not been contemplated by the original drafters of the *Charter*. See "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1997) 74 Can. Bar Rev. 187. Brian Slatery argues that s. 25 could interpreted such that s. 35(1) rights to self-government are left intact, but the exercise of self-government powers could be subject to *Charter* review. See "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 26. Thomas Isaac argues that

Such charters could hopefully invite deference from the Courts by demonstrating that safeguarding against power abuse has been taken into consideration, and that a sincere effort at applying *Dagenais* has been made. It also offers another approach to addressing the tension of jurisdictional conflict when it comes to Canadian political leaders. The charters can be used as negotiations where ideally the federal government can be convinced to accommodate Indigenous alternatives when it comes to rights protection. The next four chapters are where we see examples of how culturally sensitive interpretations of legal rights can work.

s. 25 should be interpreted in such a manner as to achieve a balance between the collective rights implicit in s. 35(1) and the individual rights of the *Charter*. *Supra* note 434. See also Jane M. Arbour, “The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003) 21 Sup. Ct. L. Rev. 3. For an argument that s. 25 requires that *Charter* rights be interpreted through the lens of Indigenous cultures, see Timothy Dickson, “Section 25 and Intercultural Judgment” (2003) 61 U.T. Fac. L. Rev. 141.

CHAPTER 9: CULTURALLY SENSITIVE INTERPRETATIONS OF RIGHT DURING THE SENTENCING PROCESS

The remaining chapters will formulate a set of specific proposals for Indigenous charters of rights. This exercise is bound to raise controversy. Some of the controversies have already been identified and potential responses have been articulated. There is one remaining controversy, that this exercise presumes to set standards of justice for all Indigenous societies. The perceived imposition of outside standards of justice can indeed be a sensitive issue. Canada, for example, often encouraged Indigenous communities to use family group conferences, similar to the conferences used in New Zealand, as a restorative justice boilerplate. This policy has met with objections that Indigenous communities have a right to use their own particular justice traditions and in a way that responds to the needs of their own communities.⁴⁸⁹ Implementation proved difficult due to the reluctance of parents and R.C.M.P. officers to cooperate with the program. A Sto:lo leader may have provided an insight as to why, “We don’t want to know what others are doing; we want to know what we did.”⁴⁹⁰ Indeed, Sto:lo Elders emphasized that the Sto:lo people had their own ways. There was also the perception that falling in with the Family Group Conference boilerplate was a path to being co-opted, and continued colonization, a lesson they felt they had learned from the Maori themselves ironically.⁴⁹¹

⁴⁸⁹ See for example Gloria Lee, “The Newest Old Gem: Family Group Conferencing” in Wanda D. McCaslin (ed.), *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 308; It is interesting to note that by now the Family Group Conferences are themselves often perceived as not being a genuine reflection of Maori approaches to justice.

⁴⁹⁰ Miller, *supra* note 4 at 156-157.

⁴⁹¹ Victor, “Searching for the Bone Needle”, *supra* note 408. Juan Marcellus Taori for example has argued that the New Zealand government exploits the Family Group Conferences to disempower the Maori and contain Maori autonomy within very narrow limits. See “Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand” in Wanda D. McCaslin (ed.), *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 313.

Imposing uniform standards of rights protections on all Indigenous communities is not the intention. The intention is to provide a springboard for further discussion. The concept of Indigenous charters of rights has been around for some time, but specific suggestions for what such charters could look like has not previously been explored. The specific proposals made here are not intended to bind any Indigenous communities, but to provide illustrative examples of how culturally sensitive interpretations of legal rights can work. It is conceivable and even encouraged that Indigenous communities would tailor their own specific charters to their own traditions and to their own needs.

Nine specific rights will be discussed during this and the next three chapters. They are the right to be heard before an independent judge, the right to natural justice, the right to a fair trial, the right to counsel, the right against unreasonable search and seizure, the right to silence, the presumption of innocence, the right against cruel and unusual punishment, and the exclusion of evidence as a remedy. For each discussion, there will be four subsections. The first subsection will provide an overview of Canadian jurisprudence on that right. The second subsection will describe how that right potentially creates problems for Indigenous traditions of justice. The third section will apply *Dagenais* to articulate culturally sensitive interpretations of the right. This subsection will occasionally draw on comparative insights from the United States and Australia in constructing such interpretations. The fourth subsection will deal with practical or theoretical objections to the proposals.

Before we begin this, it is necessary to address another issue. At some previous points I have stressed that we need to be careful not to essentialize Indigenous peoples and their methods of justice, or reduce them into a simple pigeon-hole that perpetuates a

questionable dichotomy against Western justice systems. My subsequent treatment of conflicts between Indigenous methods of justice and *Charter* rights, and my treatment of the issue during Chapter 8, can come across as engaging in the same kind of exercise.

Several points can be offered in response to this concern.

First, I would affirm that one must of course be honest and candid about the diversity that exists between various Indigenous societies. Nonetheless, one can also notice that Indigenous approaches to justice sometimes share certain common threads, bearing in mind even then that the precise details may vary from one Indigenous society to another. In a sense, this identification of common threads is necessary to enable meaningful explanations of why certain *Charter* rights can create significant difficulties for many, if not all, Indigenous societies.

Second, at a number of points during subsequent discussions, differences between the justice methods of Indigenous societies will emerge. These will be pointed out and explained.

Now we begin the discussion with those rights that are relevant during the sentencing phase of conflict resolution.

9.1 Right to be heard Before an Independent Judge

9.1.1 Canadian Jurisprudence

Section 11(d) of the Charter reads:

Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

This provision contains at least three different rights. The words ‘presumed innocent’ describe the right to insist that the state establish guilt beyond a reasonable doubt before

an accused can be convicted. The word ‘impartial’ speaks to the procedural fairness, or natural justice, of an accused’s hearing. These two sets of rights will be dealt with in their own subsequent discussions. The third set of rights is encapsulated by the word ‘independent’, which speaks to a separation of the judiciary from legislative and executive authority, as well as other sources of outside interference (e.g. popular opinion). It is this feature of s. 11(d) that will be the focus of the present discussion since it has potential repercussions for how authority in Indigenous communities is structured.

The Supreme Court, in *R. v. Valente*, described the three essential features of judicial independence under s. 11(d). The first feature is security of tenure. This means that a judge cannot be dismissed except for just cause, such as corruption or misconduct speaking to bad character. Establishing just cause requires a hearing by a body that is independent from both the judiciary and the authority that appoints judges (i.e. the executive). The judge must have an opportunity to be heard during that proceeding. This protects judges from interference and arbitrary dismissal by the other branches of government. The second feature is security of remuneration. Judicial remuneration must be set by law and not subject to arbitrary interference by the executive. The third feature is administrative independence, whereby the judicial branch has control over matters such as assigning judges to judicial districts and assigning judges to pending cases.⁴⁹²

The Supreme Court has, since *Valente*, refined its jurisprudence on security of remuneration. Before a federal or provincial government can increase or reduce judicial remuneration, they must establish a commission for the purpose of producing a report on judicial salaries and benefits, along with recommendations on what those salaries and benefits should be. The commission must be independent from the executive, legislative,

⁴⁹² *R. v. Valente*, [1985] 2 S.C.R. 673.

and judicial branches alike. They must also be effective and objective. The recommendations are not binding on the legislative or executive branches, but they must still be given serious consideration. If a government decides to depart from the recommendations, they must justify it according to a standard of simple rationality. Budgetary policies that reduce the salaries of everybody on the public purse will be *prima facie* rational. A policy that affects only judicial salaries will require a fuller explanation. Judges are not permitted to negotiate remuneration with the executive or legislative branches since this is fundamentally inconsistent with judicial independence. They may however simply express concerns about salaries and benefits to governments. Judicial salaries must also be set no lower than a basic minimum level for the office of a judge. The reason for this is the idea that public confidence in the judiciary would be lost if their salaries were so low as to make them appear vulnerable to political manipulation.⁴⁹³

9.1.2 The Conflict

Suppose that an Indigenous individual for whatever reason suspects that community authorities hearing his or her case are not independent from powerful political forces in the community. If he or she applies to a non-Indigenous Canadian court for a right to be heard before an independent judge, the application can contemplate that Indigenous criminal justice systems adopt forms of judicial authority resembling those of common law court systems. At the heart of the conflict is that the application of s. 11(d) to Indigenous communities would involve imposing authority structures that are

⁴⁹³ *Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 [hereinafter the *Remuneration Reference*].

inconsistent with how Indigenous authority was structured, even accounting for diversity between different societies. This can create difficulties in at least three contexts.

The first context involves Western legal systems investing a considerable amount of power into the office of the judge. A judge can, within the limits of the law, impose a resolution over the objections of both the state and the accused. Rupert Ross expresses a perception that investing so much power into such a figure is inconsistent with Indigenous notions of communal-based power, a dispersion of power to the members of the community at large.⁴⁹⁴ Philmer Bluehouse and James Zion contrast a Navajo Justice and Harmony Ceremony against Western adjudication as follows:

The dynamics of mediation and adjudication are different. Adjudication uses power and authority in a hierarchical system. A powerful figure [the judge] makes decisions for others on the basis of “facts” which are developed through disputed evidence, and by means of rules of “law” which are also contested by the parties ... In sum, adjudication is a vertical system of justice which is based on hierarchies of power, and it uses force to implement decisions.

In contrast, mediation is based on an essential equality of the disputants. If parties are not exactly equal or do not have equal bargaining power, mediation attempts to promote equality and balance as part of its process. It is a horizontal system which relies on equality, the preservation of continuing relationship, or the adjustment of disparate bargaining power between the parties.⁴⁹⁵

This contrast between centralized judicial authority and dispersed community-based authority has some justification in the ethnographical literature concerning some Indigenous societies. The Cree and Ojibway apparently dealt with most infractions through informal negotiations between the kindred of the disputants, and subsequent reparations. It was only for the most serious offences, such as murder, witchcraft, and repeated theft, that the community as a whole would sit together as a community council. Even then, it was the community at large that decided what sanction was to be used.⁴⁹⁶

⁴⁹⁴ Ross, *supra*, note 70 at 205-208.

⁴⁹⁵ Philmer Bluehouse & James Zion, “Hozhooji Naat’aanii: The Navajo Justice and Harmony Ceremony” (1993) 10:4 *Mediation Quarterly* 328 at 328-329.

⁴⁹⁶ Coyle, *supra* note 6 at 622-624.

One must be careful however of generalizing. It cannot be said that authority concentrated in select individuals was never a feature of any Indigenous society. Recall that among the Sanpoils and Nespelems, a headman could condemn somebody to whipping for various offences. Consider also the political structure of the Iroquois. The primary unit of social organization in Iroquois society was the clan, an extended family with a shared identity, and an association with an animal totem. The nine clans were the Bear, Beaver, Deer, Eel, Hawk, Heron, Snipe, Turtle, and Wolf. All nine clans existed among the Seneca, Cayuga and Onondaga nations. Only the Bear, Turtle, and Wolf clans existed among the Oneida and Mohawk nations.⁴⁹⁷ The Iroquois were a matriarchal society. The elder women had the greatest say in clan affairs.⁴⁹⁸ The clan was itself a political unit. The Grand Council of the Confederacy was composed of fifty *sachems* or chiefs. The Onondaga were represented by fourteen chiefs, the Cayuga ten, the Seneca eight, and the Mohawk and Oneida nine each. The Tuscaroras were placed among the Oneida and Cayuga when they entered the Confederacy approximately 270 years ago. It is through those two nations that they were represented at the Council.⁴⁹⁹ When a *sachem* had to be replaced, whether by death, illness, or misconduct, the women of his clan made the initial selection for a new *sachem*. The clan usually had to be unanimous in their selection. The rest of the clans then had to provide unanimous agreement. The Grand Council then had to approve the selection, which was then usually a formality.⁵⁰⁰

Cases of witchcraft required a hearing before the Grand Council itself. The reason was that the practice was seen as a threat to the community as a whole. If

⁴⁹⁷ George-Kanentiio, *supra* note 12 at 70-72.

⁴⁹⁸ *Ibid.* at 53-56.

⁴⁹⁹ *Ibid.* at 122. Donald S. Lutz "The Iroquois Confederation Constitution: An Analysis" (1998) *Publius: The Journal of Federalism* 28:2 99 at 110-112.

⁵⁰⁰ George-Kanentiio, *supra* note 12 at 95-97.

somebody was caught practicing witchcraft, he or she could be killed on sight. If not, the person who observed the practice could bring an accusation before the Grand Council. The witch would then be brought before the Council to face up to the accusation. If the witch made a full confession, with a promise to never do it again, a full pardon was granted. If the witch did not, then witnesses were examined regarding the facts. If the council was satisfied that the accusation was proven true, the witch was then sentenced to death. The witch was led away to punishment by whoever volunteered to perform the execution, for which there was apparently no shortage.⁵⁰¹

It is apparent that some Indigenous societies did concentrate considerable authority in a select few individuals. It may be fair to say that the degree to which power was dispersed to the members of the community at large and away from central authority figures, and the form taken by authority structures, varied with each particular Indigenous society. If an Indigenous society did emphasize dispersed community-based authority, an incompatibility can be seen with requiring appointed judges under s. 11(d). The requirement of independent judges can also pose problems in two other contexts.

Another difficulty is that the process by which one becomes a judge and the process by which an Indigenous person becomes an Elder are different. Each process emphasizes different credentials. Consider the judicature provisions of the *Constitution Act*, 1867.⁵⁰² Under s. 96, the Governor General may appoint the judges of the superior, district, and county courts in each province. Under s. 97, judges are to be selected from the provincial bars. Under s. 99(2), they face mandatory retirement at age 75. Each of

⁵⁰¹ Lewis Morgan, ed. by Herbert M. Lloyd, *League of the Iroquois*, vol. 1 (New York: Dodd, Mead, and Co., 1901) at 47-51.

⁵⁰² *Constitution Act*, 1867, (U.K.), 30 & 31 Victoria, c. 3.

these provisions, if applied to Indigenous justice processes as a necessary accompaniment of judicial independence, presents problems for Indigenous conceptions of authority.

Section 96 conceivably represents an interference with Indigenous self-determination in that the authority to appoint justice authorities lies in the hands of non-Indigenous authority and outside the Indigenous community itself. Parliament obliged Indigenous societies to adopt a band council system instead of using their traditional governance systems, inspiring critiques of colonial imposition. The application of s. 96 could inspire similar critiques because a Canadian authority continues to hold the ultimate decision over who is vested with judicial authority in Indigenous communities.

Section 97 presents a problem in that it would require a judge in an Indigenous community to hold membership in the bar. Judicial appointment advisory committees also emphasize that a candidate for a judicial office should have distinguished him or herself through an outstanding legal career.⁵⁰³ Indigenous conceptions of authority do not require this type of formal credential. An Indigenous Elder typically acquires authority through a combination of seniority, and having lived an exemplary life in accordance with community values. Monture-Angus and Turpel-Lafond state:

Within aboriginal communities, the equivalent actor to the judge is the Elder. This is not to say that the Elder is the same thing as a judge or assumes that role. Elders are the most respected members of aboriginal communities. Elders are respected because they have accumulated life experiences and hold the wisdom of the community in their hearts and minds. Although it is a qualitatively different value, this respect for a person's knowledge of their culture and language, and for their wisdom, is the equivalent to respect for impartiality in European-based systems.⁵⁰⁴

This emphasis on seniority, exemplary living, and accumulated wisdom often resulted in very specific protocols in some Indigenous societies. The Lake Babine people for example attached authoritative significance to certain names. Possession of the name

⁵⁰³ See for example Ontario Judicial Appointments Advisory Committee, *Policies and Process* (Toronto: 2005) at 3.

⁵⁰⁴ Turpel-Lafond & Monture-Angus, *supra* note 33 at 246.

conferred privileges such as the authority to decide certain matters, or the privilege to engage in certain activities during the balhat feasts. Possession of the name however also required obligations, such as looking out for the economic and spiritual well-being of the community, and living an exemplary life. A candidate who aspired towards obtaining a name had to convince the clan holding that name to sponsor him. The conferral of the name was complete when the candidate gave away gifts at a balhat feast to community members that were commensurate with the prestige of the name.⁵⁰⁵

This is not to say that similar notions of authority are lacking in Western legal systems. The Ontario Judicial Appointments Advisory Committee for example stresses as candidate requirements various qualities such as a “commitment to public service”, “politeness and consideration for others”, “moral courage and high ethics”, and a “reputation for integrity and fairness”.⁵⁰⁶ The Committee demands three or more references to verify that the candidate possesses such qualities.⁵⁰⁷ The point is though that Indigenous conceptions of authority focus squarely on a combination of seniority, character, example, and wisdom while not placing an emphasis on formal legal training or experience. Requiring bar membership may present a problem in that many if not all recognized Indigenous Elders would not be eligible for a judicial appointment.

Section 99(2) can be problematic for Indigenous conceptions of authority in that it imposes a cap on participation in justice that from an Indigenous perspective can seem arbitrary and artificial. Why should an authority’s participation suddenly come to a halt upon reaching a set age? If anything, an Elder’s authority to participate in matters of justice would only increase as he or she exceeds that age.

⁵⁰⁵ Fiske & Patrick, *supra* note 15 at 50-54, 86-91.

⁵⁰⁶ Ontario Judicial Appointments Advisory Committee, *supra*, note 503 at 3-4.

⁵⁰⁷ *Ibid.* at 9.

In summary, the second context in which s. 11(d) creates problems for Indigenous justice is that it envisions selecting justice authorities with a somewhat different set of criteria than what has been characteristic of Indigenous conceptions of authority. The Royal Commission summarizes the difficulties in this way:

In Aboriginal justice systems, the qualifications for those who are respected as learned in the law are likely to be quite different from those set out in the judicature provisions. The respect accorded the judgment of certain elders does not derive from their being members of a provincial bar, and to the extent that their judgments are based on precedents, they are not found in non-Aboriginal reports. If, as we believe, the Aboriginal right of self-government includes the right to establish justice systems that reflect distinctive Aboriginal values, it makes little sense, as a matter of either constitutional law or policy, to apply provisions that would undermine that purpose.⁵⁰⁸

The third context is that judges and Elders are each seen as exercising different modes of authority. As previously mentioned, a judge can impose a resolution over the objections of the Crown and the accused. The power carried by an Indigenous Elder is often seen to be of a less coercive sort. The Elder is depicted as more of a spiritual guide and teacher than an adjudicator. The Elder gently inculcates traditional values in a person, and provides guidance towards the path to a good life, rather than coercing any compliance with expected norms. Rupert Ross describes an example of this as follows:

... I continually had the impression that most (but not all!) elders were uncomfortable with the coercive role of a Western judge, and because my exposure to traditional teachings over the last few years guess that their traditional roles were very different indeed. I recall, for instance, an elder who came to the court one day in a small northern community and was introduced to us as such. When the judge turned to him on a particular case and, out of respect, asked him what he would recommend as a proper sentence, his response caught all of us by surprise: he replied that it was not for *him* to tell someone else what was right!⁵⁰⁹

Turpel-Lafond and Monture-Angus add:

Elders are feared as well as respected. The fear does not grow out of the concern that the Elder will punish or hurt you. The fear exists because the Elder knows you, your family and your community. She or he can see your faults clearly and, therefore, to meet with the Elder is to accept that any wrongdoing on your part is, in a sense, known to all. You must confront your own faults along with your virtues. This system emphasizes a willingness to accept your own lack of wisdom and to learn from the Elder. It encourages responsibility for your behaviour and reflection on how to live harmoniously in a community.⁵¹⁰

⁵⁰⁸ *Bridging the Cultural Divide*, *supra* note 173 at 231.

⁵⁰⁹ *Supra* note 70 at 223.

⁵¹⁰ *Supra* note 33 at 246.

This contrast, as Ross' own excerpt hints, is overly simplistic. The reason is that, depending on the norms of a particular Indigenous society, an Elder's authority sometimes did have coercive aspects. Cree and Ojibway Elders, for example, apparently warned offenders either publicly or privately against repeating the same behaviour. As previously mentioned, repeated offences could lead to banishment or public shaming.⁵¹¹ Michael Jackson describes an example of Elder's use of authority with a more coercive emphasis. A young Coast Salish woman in British Columbia had been charged with shoplifting. Her community addressed the matter through a ceremonial dinner that included family members and community Elders. She had been the holder of a ceremonial rattle, which was of importance during Longhouse ceremonies. During the dinner, it was made clear to her that her action brought shame not only to herself, but also her family. The consequence was that she could no longer be the keeper of the rattle for a year. When the provincial court judge was made aware of the seriousness of such a decision within the context of Coast Salish culture, an absolute discharge was granted.⁵¹²

The authority wielded by Elders often focused on spiritual guidance towards an ideal life. That authority however sometimes did have coercive aspects that were specific to each given Indigenous society. Even allowing for these coercive aspects though, it is reasonable to suggest that many, if not all, contemporary Indigenous Elders may still feel a certain discomfort at taking on an office that confers powers such as issuing arrest warrants and setting terms of imprisonment.

9.1.3 The Proposal

There are at least three essential features for the proposal.

⁵¹¹ Coyle, *supra* note 6 at 623-624.

⁵¹² Michael Jackson, "In Search of the Pathways to Justice", *supra* note 326 at 207-208.

9.1.3.1 Protection of Independence

The idea here is simple. Indigenous communities, instead of the Governor General, can appoint their own judges, and structure their own appointment processes. They can use judicial appointment advisory committees but they would not necessarily be required to. They can also decide to use alternative appointment processes that best fit their needs and wishes. Alternatives can include election (which is how some American tribal court judges are appointed), or by consensus among the community Elders.

Once a community court judge is appointed, the judge is to be protected by the three features of judicial independence, security of tenure, security of remuneration, and administrative independence. There is a reason for insisting on this. Some critics suggest that many of the social ills that plague Indigenous communities can be traced back to the *Indian Act* forcing those communities to adopt elected band councils instead of their customary forms of governance. This policy has been blamed for disrupting the traditional place of women in Indigenous society by forcing patriarchal structures on Indigenous communities, creating a class of powerful Indigenous elites who do not govern with the best interests of the community in mind, and disrupting the generation to generation transmission of traditional values.⁵¹³ The critics often suggest that if this aftermath could be undone, and a return made to traditional modes of governance, then emulating an Anglo-Canadian style separation of powers would be unnecessary.⁵¹⁴

Whatever troubles may be laid at the feet of the *Indian Act*, the fact remains that Indigenous people now live in a world that is far different from the one preceding the

⁵¹³ For examples of these critiques, see Monture-Angus, *supra* note 144 at 141; and Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 56-68.

⁵¹⁴ Monture-Angus, *ibid.* at 14 and 141-145; Ross, *supra* note 70 at 205-210.

Indian Act. It is again fair to ask just how far back the clock can be turned. An inescapable feature of the contemporary world is the pervasive presence of monetary currency as the medium of exchange. Most, if not all, contemporary Indigenous communities cannot escape the need to designate individuals with the responsibility of administering monetary resources. This is a reality that even many Indigenous peoples of the Canadian north have to deal with. For example, the 2005 Budget Address of the Government of Nunavut announced a revenue base of \$972 million.⁵¹⁵ With control over money comes greater power. And with greater power comes increased capacity to interfere with matters of justice in the community. Threatening to withhold services from somebody involved with a dispute, or bribing somebody to give a false account of events, are hypothetical examples of how control over money can be abused to corrupt justice in the community. Where community judges are concerned, the threat to reduce salary or withhold payment can interfere with the performance of judicial duties.

There is another reason for insisting on the three features of judicial independence. It does not take much to imagine how familial strife in Indigenous communities can affect justice processes. Suppose that a powerful family enjoys a monopoly on governing power, law enforcement, and money in a community. Now imagine that the offender is a member of that powerful family, while the victim is a member of a rival but less powerful family. The powerful family can exert pressure on the victim to acquiesce in an especially lenient resolution for the offender, or to not pursue any resolution at all, against the victim's wishes. Now imagine instead that the victim is a member of the powerful family, while the offender is a member of the rival

⁵¹⁵ The Honourable Leona Aglukkaq, Minister of Finance (Nunavut: Second Session of the Second Legislative Assembly of Nunavut, 2005) at 6.

but less powerful family. The powerful family can exert its power to intimidate those sympathetic to the offender against attending the process, while ensuring that those hostile to the offender attend. A chorus of disapproval is voiced against the offender, pushing for especially harsh measures against the offender. The reason for insisting on judicial independence is so that the judge can act as an umpire between the families to ensure that the process and resolution is fair for all concerned. If a judge is to have the capacity to act as an umpire between a more powerful family and a less powerful family, the judge must be protected by the three features of independence against interference by the more powerful family. Otherwise, the powerful family will be able to dismiss the judge without just cause, or threaten a reduction in salary, or otherwise interfere with judicial office. The details of how a community court judge can fulfill the role of umpire will be explained in the section dealing with “Natural Justice”.

Indigenous communities can also be afforded flexibility in how they enforce those three features of judicial independence. Matters such as remuneration or whether there is cause to dismiss do not always have to be determined by a commission. A hearing to determine cause to dismiss can be heard before the Elders of the community, or the broad membership of the community. Both those who seek dismissal and the judge would have opportunities to present their viewpoints. Once both sides have been heard, the Elders or the community at large (by plebiscite) could then decide whether there is cause to dismiss. Hearings to determine remuneration could be similarly structured, where financial administrators and judges present their concerns regarding salaries and benefits.

9.1.3.2 Knowledge of the Local Charter

This concept assumes that an Indigenous community has its own Indigenous charter of rights in place, as an alternative to the Canadian *Charter of Rights and Freedoms*. The idea is that a community court judge does not need a law degree and membership in a Canadian bar as qualifications. The judge need only possess knowledge of the community's charter. This is not meant to exclude other criteria that Indigenous communities may want (e.g. good character). The point is that knowledge of the local charter would be the only formal qualification required for purposes of a culturally sensitive interpretation of s. 11(d).

The American experience offers a valuable lesson. Not all American tribal courts require their judges to have law degrees or bar memberships. Under some tribal codes, somebody who has completed a paralegal program approved by the Supreme Court or who was regularly practiced as a lay advocate before the tribal court for five years can qualify as a judge. Attendance at the National Judicial College is mandatory.⁵¹⁶ Under the Blackfeet tribal code, only a high school education is required.⁵¹⁷ The Ely Shoshone Code does not impose any educational requirements, but simply insists on good moral character, a minimum age of 30 years, and not being a member of the Tribal Council.⁵¹⁸ Under the Hopi tribal code, there are no educational requirements for probationary judges. Probationary judges must however complete a training course designated by the

⁵¹⁶ See for example *The Absentee Shawnee Tribe of Oklahoma Tribal Code* (circa 1999), s. 102.

⁵¹⁷ *The Blackfeet Tribal Code* (circa 1999), s. 2; *The Chitimaca Comprehensive Codes of Justice* [Last Amended April 15, 2003], s. 303; *Stockbridge-Munsee Tribal Code*, ch. 1, s. 1.6(M); *The Law and Order Code of the Fort McDowell Yavapai Community, Arizona*, Adopted by Resolution No. 90-30, subsequently amended [Includes Amendments dated 2000] includes the caveat that the candidate must complete any additional training required by the tribal council, s. 1-18.

⁵¹⁸ *Ely Shoshone Tribal Law and Order Code* [Last Revised: 2000], ch. 1-2, s. 01.

Tribal Chairman to be considered for permanent appointment.⁵¹⁹ The position of Chief Judge requires a law degree and membership in any American bar.⁵²⁰ The Oglala Sioux tribal code calls “for knowledge of the Oglala Sioux Code and court procedures and understanding of State and Federal law and court procedures.”⁵²¹

The only insistence is that the prospective judge have knowledge of the local charter, whether that involves an actual training program, or having simply read that charter, or reciting it back to appointing authorities, or whatever proof of knowledge an Indigenous community decides is required. Consider also s. 24 of the *Charter*:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

A point behind insisting on the use of Indigenous community judges, and requiring knowledge of their local Indigenous charters, is to create courts of competent jurisdiction for purposes of s. 24 that will enforce those charters.

This idea may run afoul of Supreme Court commentary on s. 24. According to *R. v. Mills*, a court having that competent jurisdiction often depends upon a statutory grant of jurisdiction over the offence and the accused, as is the case with provincial criminal courts⁵²² or appeal courts.⁵²³ Courts of superior jurisdiction in each province have all the historic jurisdiction of the high court in England, subject to statutory limitations, and are therefore courts of competent jurisdiction under s. 24. The superior court jurisdiction

⁵¹⁹ *Hopi Indian Tribe Law and Order Code*, ch. 3, s. 1.3.4.

⁵²⁰ *Ibid.*, ch. 3, s. 1.3.3.

⁵²¹ *Oglala Sioux Tribe: Law and Order Code*, ch. 1, s. 2-4.

⁵²² *R. v. Mills*, [1986] 1 S.C.R. 863 at 955-956.

⁵²³ *Ibid.* at 958-959.

will not displace the jurisdiction of other courts of limited jurisdiction.⁵²⁴ These criteria led to the Supreme Court deciding that a preliminary inquiry was not a court of competent jurisdiction under s. 24. Culturally sensitive interpretation however, as well as *Dagenais*, envisions that *Charter* standards can be relaxed instead of always being applied with full vigour. Community court judges do not need to be held up to the *Mills* standards of courts of competent jurisdiction. Requiring community court judges to possess knowledge of their respective Indigenous charters vests them with competency to enforce those charters for purposes of s. 24. This discussion may seem more relevant to the exclusion of evidence, which indeed forms a subsection of Chapter 12. The present point though is to make s. 11(d)'s demands for judicial independence less onerous than would often be the case in order to accommodate towards Indigenous perspectives on authority in criminal conflicts. Formal qualifications need only include knowledge of the local charter, and not a law degree or a particularly distinguished legal career.

9.1.3.3 Our Own Qualifications

The idea is that beyond the insistence on the three features of judicial independence, and on knowledge of the local charter, Indigenous communities are otherwise free to set whatever qualifications for judges they see fit. One can readily see that good character will always be one of those qualifications. The American Indian tribal codes described above all require that. Another example comes from the proposed Akwesasne justice code. Article 6, Section 9(C) emphasizes moral and spiritual qualities almost exclusively as follows: "The Justices are selected on the basis of their own exemplary behaviour; impartiality, their ability to be mindful of the code, the moral fibre and needs of the community; as well as having compassion for both the accused and the

⁵²⁴ *Ibid.* at 956.

victims of the offenses committed.” The American tribal codes typically require 25 or 30 years as a minimum age as well. One can imagine other possibilities such as completing a course on local culture, or completing a course on mediation and arbitration, and so on.

9.1.3.4 Accommodating Traditional Authority

Even though this proposal suggests that Indigenous justice systems include community court judges with some features that are characteristic of common law judges, and emphasizes a separation of roles between judges and Elders or other culturally significant authorities, those systems can still be structured in such a way as to maximize the room for traditional modes of authority to operate. This can happen in more than one way depending on a given community’s preferences. Persons with traditional authority (e.g. Elders) can attend a proceeding in an advisory capacity, much like sentencing circles. Their advisory capacity can extend not only to the resolution for a particular case, but also their understanding of their customary law. ‘Advisory’ may not be an accurate word for what is envisioned by this proposal. So long as the participants reach a genuine consensus, it becomes binding on the community court judge such that he or she must approve it. Another way to structure it is that the participants can discuss and deal with the matter outside of the court system. Once their meetings produce a consensus, they can come to court to communicate to the judge a binding resolution. This is how the Navajo Peacemaker court works. Opposing sides are encouraged to try and settle their matter outside the court system first with the assistance of a trained Peacemaker. Once they reach an agreement, it becomes binding and is entered as a judgment of the court.⁵²⁵

⁵²⁵ Jayne Wallingford, “The Role of Tradition in the Navajo Judiciary: Reemergence and Revival” (1994) 19 Okla. City U.L. Rev. 141; Zernova, *supra* note 55 at 19-20.

An obvious concern arises when the various participants cannot reach a consensus. There is a way to dealing with this. The community court judge can put two choices to the participants. The first choice is to remand the matter so that the participants have further opportunities to reach a consensus. Judge Barry Stuart relates that sentencing circles deal with a multitude of interests, some of them widely divergent or even oppositional to each other. For this reason, significant discussions leading up to a sentencing circle, and adjournments after a first sentencing circle, are often necessary.⁵²⁶ The second choice is for the participants to agree to the judge making a binding decision based on the voiced concerns of all the participants. In this respect, a community judge is not so much a full-fledged judge but more of an arbitrator with some judicial powers who affords the parties maximum opportunity to craft their own resolution. This may seem odd given that ethnographical literature often insists that consensus was a frequent feature of Indigenous justice processes. The point is though that the choice is up to the community participants. They can adjourn for further opportunities to resolve matters, or they can allow the judge to ‘break the tie’ based on the participants’ feedback.

9.1.4 Objections

9.1.4.1 Same as Before

One part of the proposed resolution involves the use of community courts and judges. An objection might be that this is not anything new. We have seen sentencing circles or diversionary approaches before. How does this represent community empowerment or an improvement on the piecemeal accommodation that is embodied in sentencing circles and such? The answer is that there is a very important difference. Indigenous community courts will apply customary law instead of Canadian law. A

⁵²⁶ *Supra* note 60 at 81, 86.

reality that has hung over Indigenous sentencing initiatives is that the judge can veto a proposed resolution. This veto is often used when the judge decides, on the basis of Canadian statutes and precedent, that an offence is too serious to merit community-based resolutions. The proposal described here holds that it is the community and their traditional authorities that decide what to do about a given conflict, whether it is jail time, or community-based resolutions, or banishment, or corporal punishment, or even corporal punishment and community-based resolutions used together. It removes the veto associated with judges applying Canadian law. The community and their traditional authorities also describe what the customary law is to the community court judge, which becomes binding.

There are of course potential problems with identifying what that customary law is. George Zdenkowski relates this as follows: “How is the customary law identified? What is the mode of proof - by anthropologists? If Indigenous Elders provide oral evidence of customary law, can they be cross-examined as experts? Can a trial judge competently rule on the issue?”⁵²⁷ Resolving these issues may not be as difficult for purposes of the proposal. Zdenkowski’s query presupposes establishing customary law in a court setting that is required to apply state legislation, often uses adversarial procedures, and usually insists that alleged matters be proven to a standard of proof (e.g. balance of probabilities). If an Indigenous community has preserved its customary law, is it really necessary to insist on holding that law up to common law standards of evidentiary reliability and standards of proof? Why should an Indigenous community judge simply not accept the community’s representations of customary law at face value?

⁵²⁷ George Zdenkowski, “Customary Punishment and Pragmatism: some Unresolved Dilemmas” (1993) *Indigenous Law Bulletin* 33.

This proposal is after all about community empowerment. There is of course the possibility that a community court judge will hear more than one version of community law from the various participants. Even here, the judge can afford the participants the same two choices. They can adjourn for further discussion, or they can agree to the judge coming up with a resolution. This latter option involves a judge making a decision as to resolution, and not necessarily deciding who gave the correct version of customary law.

There is a more significant problem with ascertaining what customary law is. Recall that colonialism has been blamed for the disruption of traditional value systems. For example, residential schools in Canada reflected a policy of forcing Indigenous peoples to abandon their traditional cultures. A consequence of colonialism may be that a good deal of traditional knowledge may be lost to an Indigenous community, including customary law for resolving conflict. Traditional authorities may therefore not be in a good position to communicate to the community court judge what the customary law had been. One can expect that anthropologists or historians performing ethnographical studies may be able to assist a community in reclaiming its customary law.

There is however the possibility that anthropologists or historians may be unable to recover knowledge of what the customary law had been. If this is the case, it is not necessarily fatal to the proposed role for Indigenous communities in justice proceedings. What is to stop an Indigenous community from setting new customary laws that address contemporary realities? Who says that the type of process envisioned by the proposal cannot mark a new point of genesis for a community's customary law? Pat Sekaquaptewa describes what she calls Hopi common law. Tribal courts make their decisions based on a number of sources, written statutory instruments of the Hopi

Council, Hopi custom as communicated to tribal court judges by community Elders and other members, and state legislation where no other source of law provides an answer. Hopi court judges always strive to incorporate custom as much as possible in their decisions. Hopi common law however does not always include what was customary prior to colonization. It can and does include newer customs that reflect a changed world and a different set of needs. Hopi common law therefore includes elements of the past, but also newer elements.⁵²⁸ She elaborates further as follows:

It is also important, however, to divide "custom" into "traditional practices" and "current local practices." The Hopi judges have found that these are not always the same, although both may be considered legal and either may be a basis for establishing new legal standards in the tribal common law. No culture is static and the legal norms of all societies evolve. Further, in recent history, at least five Hopi villages have experienced a break-up of the governing clan and society system which has permanently altered traditional clan rights in and power over lands and population. Although I will not go into a detailed discussion here, there are times when Hopi trial judges will seek to discern not only a traditional legal norm but also the current practice as legal norm at the village level. Old law is not always still good law.⁵²⁹

Nothing prevents Indigenous communities from adopting new customary laws that will bind community court judges, even if they have lost knowledge of past customary law.

9.1.4.2 Minimal Qualifications

Another part of the proposed resolution is that community court judges require only knowledge of the local Indigenous charter, and not any other requirements such as a law degree. This may raise some eyebrows. In Western legal systems, requiring judges to hold law degrees, bar membership, and a legal career of significant length and achievement, gives an assurance that they have the analytical and intellectual capacity to resolve the cases that come into their court. The proposal therefore may seem like it does not demand a very high standard of education or competence from Indigenous community court judges. Consider however that the insistence on Western judges having

⁵²⁸ Pat Sekaqualptewa, "Evolving the Hopi Common Law" (2000) 9 Kan. J.L. & Pub. Pol'y 761.

⁵²⁹ *Ibid.* at 777.

their formal qualifications makes more sense in light of the nature of Western law. Western law takes on various forms such as state legislation, regulations, and judicial case law. Given the way that Western societies choose to structure their laws, it makes sense to require lawyers and judges to learn them through formal educational processes.

If an Indigenous justice system uses customary law, then this is not so much of a concern. The law comes from a different source, and works in a different way. Sakej Henderson describes the dynamics of customary law in this way:

At its core, law and its need to be just are not abstract. Behind its arcane theories, artificial reasoning and phrases, law is part of a world full of people who live and move and do things to other people. The law lodge has a rhythm of transformation toward justice, which is guided by an elusive human spirit. Law represents that quest. It is a consciousness that attempts to reason from assumptions and commitments to create imaginary purposes and practical results. It is more than a compendium of written text, called either a constitution or legislative statutes or posited rules. It is more than the underlying conceptions or values or customs expressed in text; more than its manifestations or reflections. Justice is a normative vision of the human spirit unfolding, a product of shared thoughts and consciousness. It is a product of a community's beliefs and imagination. It is the shared consciousness that makes a person feel as if they belong to a community. It is the frontier line between power and imagination. Like all visions, it is subject to the evaluation of the community and to transformation.⁵³⁰

Given this nature of customary law, do we really need to insist on formal educational requirements to obtain an assurance of judicial competency? The community communicates its customs, which become binding on the community court judge. An Indigenous community can choose to structure its laws as written statutes, and insist that its judges hold formal requirements such as a law degree. The point is that Indigenous communities do not need to be forced to adopt all the trappings associated with Western judges on account of the *Charter*. The proposal is a culturally sensitive interpretation of s. 11(d) in that it maximizes the room for the operation of traditional modes of authority and customary law, if an Indigenous community chooses to use such. Again, the

⁵³⁰ Henderson, "Indigenous Legal Consciousness", *supra* note 140 at 26.

Indigenous community judge becomes more of an arbitrator with some judicial powers rather than a full-fledged judge.

A great deal of the discussion has emphasized that the community's proposals as to customary law and resolutions are binding on a community court judge. This is subject to an important caveat. Indigenous community court judges are to serve a purpose beyond merely rubber-stamping all the proposals that come their way. Community court judges are to hold the participants in the process to standards of natural justice. A proposal put forward by the participants will bind a judge only if that judge is satisfied that the participants have behaved in accordance with the standards of natural justice. This will be explored in the next section on natural justice rights.

9.1.4.3 Corrupted Selection

There is a potential problem in that judicial independence in Indigenous communities can be compromised from the very start, during the selection process. It is conceivable that more powerful factions can use their influence to ensure that selection processes are tipped in their favour. This would have the result that powerful factions have their candidates selected as community court judges. The 'ear of the community courts' would already be bent in their favour. There are two ways of addressing this.

One idea is that perhaps Indigenous communities can structure selection processes to deal with this. If one family is known to be particularly powerful for example, the number of candidates or nominees that the family can have on the community bench can be limited. This of course can falter in practice if the powerful family exerts its influence during the very creation of a selection process. There is another way of addressing it.

The next section of Chapter 9 will explore both how community court judges will hold the parties to standards of natural justice, and how they will themselves be held to natural justice. One of the proposals for this will be the creation of Indigenous appeal courts. The idea is this: If a judge is selected from a powerful family, that judge must uphold natural justice, even if this means deciding cases on their merits against the powerful family without fear of interference. The prospect of an appeal before an Indigenous appeal court hangs like a Sword of Damocles so as to oblige the community court judge to uphold natural justice. The next section will now explore the issues involved with applying *Charter* standards of natural justice to Indigenous justice systems.

9.2 Natural Justice

9.2.1 Canadian Jurisprudence

Judicial independence speaks to shielding judges from interference by political authorities and administrators. Judicial impartiality speaks to a judge deciding a case fairly on the merits in accordance with the binding law instead of his or her own personal prejudices, preferences, and biases. In describing what impartiality requires, the Supreme Court quoted with approval this commentary on a European human rights convention:

The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.⁵³¹

As this excerpt implies, impartiality requires not only deciding a case free of bias but precluding even the appearance of a judge being biased against one of the parties. The Canadian Judicial Council, which can hear complaints into the conduct of judges and recommend a dismissal where appropriate, set out the following as a standard:

⁵³¹ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press, 1969) at 156, quoted in *R. v. Valente*, *supra* note 479 at 686.

Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.⁵³²

Judicial impartiality imposes the judicial duty accord procedural fairness to all parties to a dispute. Chief Justice Lamer stated that procedural fairness in criminal proceedings is a requirement of the principles of fundamental justice under s. 7 of the *Charter*.⁵³³ The Royal Commission on Aboriginal Peoples says of natural justice:

These rules protect the integrity of the decision-making process in three ways: (1) they ensure that the individual has a right to be heard by the decision maker before the decision is made; (2) they require that justice not only be done but be seen to be done; and (3) they ensure that the individual's case is decided by decision makers who have not pre-judged the case as a result of information received before the hearing or personal relationships involved with those involved in the case.⁵³⁴

The combined requirements of judicial impartiality and natural justice may be problematic for Indigenous approaches to justice in three ways.

9.2.2 The Conflict

9.2.2.1 Perpetual Disqualification by Reason of Personal Ties

Natural justice standards obviously have a very strong role to play when an accused pleads not guilty and demands a fair trial. This is a whole subject of analysis unto itself and will be discussed in detail during Chapter 10. *Charter* standards of natural justice also have repercussions for Indigenous justice practices that resemble restorative justice. Restorative justice idealizes a process with less adversarial competition and less emphasis on formal rules. A 'side effect' of this endeavour is that a restorative process can become corrupted if there is a power differential between the participants. Without formal rules to impose consistency and fairness, and without lawyers to play the role of advocates, the process can in practice produce unfair results. Michael Coyle explains:

⁵³² *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council of Canada, 1998) at 29.

⁵³³ *Motor Vehicle Reference*, *supra* note 467 at 512-513.

⁵³⁴ *Bridging the Cultural Divide*, *supra* note 173 at 275.

Critics of ADR argue that the resolution of disputes with a legal content, outside the procedural safeguards of the court process, risks leading to the exploitation of parties who are not equipped to bargain as equals with the powerful... Critics argue that without the information available under court discovery processes and without access to a third-party neutral with power to enforce the law without regard to rank or wealth, disputants who lack resources or strong alternatives to negotiation are vulnerable to being ignored or exploited by those with greater resources.⁵³⁵

He adds, “Some commentators have pointed to empirical evidence that negotiation parties that enjoy a significant power imbalance appear more prone to non-cooperative, manipulative, or exploitative behavior.”⁵³⁶

Some commentators have pointed out that the fairness of consensus-based processes is especially crucial in Indigenous communities. In Indigenous communities, some of them very small, where everybody may know everybody else and where some will enjoy greater power and influence than others, can it be taken for granted that an accused will be treated fairly? Can a small community always be trusted to treat a victim fairly? Mary Crnkovich makes this comment:

..., that “the community” is a relatively homogeneous unit. This assumption overlooks the fact that even relatively small settlements are segmented by such considerations as wealth, gender, family connections, inherited or acquired authority, and so on. Unless these inequalities are acknowledged and attended to, they can easily undermine the equality with which the pursuit of a common good is assumed to endow the sentencing circle.⁵³⁷

David Cayley further adds:

A place is not always a community. For many native groups, a settled way of life is no more than two or three generations old. Old family rivalries persist in the new circumstances and are complicated when the new political structure created by elected band councils is overlaid on older patterns of influence and authority. The assumption that there is an identity of interest in these circumstances is questionable.⁵³⁸

It raises an interesting dilemma. If small Indigenous communities adopt the proposal of community court judges, will a community court judge ever be able to

⁵³⁵ Michael Coyle, “Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?” (1998) 36 Osgoode Hall L.J. 625 at 647.

⁵³⁶ *Ibid.* at 649. The commentators he refers to are C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd ed.) (San Francisco: Jossey-Bass, 1996) at 334; and R.J. Lawicki *et al.*, *Negotiation* (2nd ed.) (Chicago: Irwin, 1994) at 401-402.

⁵³⁷ Cayley, *supra* note 65 at 206. The quote is Cayley’s description of Crnkovich’s views in his words.

⁵³⁸ *Ibid.* at 207.

preside over a case where he or she is not personally connected one way or another to one of the parties involved? If the *Charter*'s insistence on the appearance of impartiality, along with the Canadian Judicial Council guidelines that are implicitly a part of that standard, is imposed upon Indigenous communities would it result in community court judges perpetually having to disqualify themselves from hearing cases? Would a community court judge ever be able to hear any case in the community?

One could suggest that community judges be Indigenous but from a different community. Judge Mandamin for example is Ojibway, and the T'Suu Ti'na did not appear to have a problem with him presiding over their Peacemaker court. An Indigenous community may however, assuming they accept the proposal of community court judges, wish to have their own community members serve as judges. The Hopi Law and Order Code, for example, states a clear preference for members of the Hopi tribe as judicial candidates. Chapter 3, sections 1.3.3 and 1.3.4 read:

1.3.3 QUALIFICATIONS OF CHIEF JUDGE. Any person (Hopi Preference) admitted to practice before the Supreme Court of the United States, or any United States Circuit Court of Appeals, or the Supreme Court of any state of the United States who is over the age of 30 years and who has never been convicted of a felony, or, within the year just past, of a misdemeanor, shall be eligible to be appointed Chief Judge of the Tribal Court of the Hopi Tribe. The work status of the position shall be full-time.

1.3.4 ASSOCIATE TRIAL JUDGES. Any member of the Hopi Tribe of Indians over the age of 25 years who has never been convicted of a felony or, within the year just past, of a misdemeanor, shall be eligible to be appointed probationary associate judge of the Trial Court of the Hopi Tribe. All probationary associate judges must successfully complete a course of training as a prerequisite to be nominated-by the Tribal Chairman for a permanent appointment.

The Akwesasne justice code likewise insists that Justices appointed under the code be members of the Mohawk community of Akwesasne.⁵³⁹ In this respect, an insistence on the appearance of impartiality may be problematic if it amounts to forcing Indigenous communities to appoint outsiders as judges against their wishes.

⁵³⁹ *Supra* note 159, Article 6, Section 9.

9.2.2.2 Personal Knowledge and Dispute Resolution

Another potential problem stems from requiring judges not to pre-judge a dispute on the basis of personal knowledge obtained prior to the hearing. The Royal Commission on Aboriginal Peoples suggests this creates difficulties in the following way:

For instance, many Aboriginal justice initiatives rely heavily on the involvement of clan leaders and elders and on the participation of the community at large. The reason for their involvement is precisely because they have personal knowledge of the individual and her or his family. As noted earlier, the application of rules of natural justice depends on a great deal on the tasks to be accomplished by a decision-making body. To the extent that Aboriginal justice systems are healing-based systems, they would naturally want to involve those who know and understand the offender. It is precisely these individuals who can craft decisions that meet the person's needs and develop options that lead to healing and change.⁵⁴⁰

Donald McKay Jr. stressed that community members will possess more intimate knowledge of both the offender and the victim than would a sentencing court judge from outside the community.⁵⁴¹

The previous discussion on a right to be heard before an independent judge emphasized a separation of roles as between community court judges and Elders. The Elders act in an advisory capacity, while the judges accept the proposals so long as standards of natural justice are upheld. This separation of roles may not entirely alleviate the problem involved with prior knowledge of a dispute though. It may be practically impossible for a community court judge not to know something of a dispute prior to it being heard. Rupert Ross asks: "How, we ask, can anyone 'come a stranger' to any case in a tiny community? Doesn't everyone know almost everyone else?"⁵⁴²

Even if community court judges are not Elders, an Indigenous community may want to insist that they still possess a significant degree of cultural and moral authority. Such authority may have a role in the performance of a community court judge's duties

⁵⁴⁰ *Bridging the Cultural Divide*, *supra* note 173 at 277.

⁵⁴¹ Interview with Donald McKay Jr. (13 December 1994) Cumberland House, Saskatchewan. Cited in Ross Gordon Green, *supra* note 131 at 105.

⁵⁴² *Supra* note 70 at 207.

and in the active resolution of disputes in the community. Even if Indigenous justice systems are structured to maximize the role of the community and customary law, it does not necessarily preclude a community court judge from taking an active role in resolving disputes. Elizabeth E. Joh describes a frequent practice in American tribal courts:

Advocates of the current system point to instances where tribal judges take the disputing parties aside, away from the courtroom, and suggest informal resolutions to disputes. Thus, the tribal court judge is recast in the role of tribal mediator, the traditional elder whose aim is to restore harmony to the group.⁵⁴³

Ideally the community members themselves come up with a resolution. That is not to say that the community court judge cannot lend a helping hand. This ‘helping hand’ can involve the use of personal knowledge of the parties and their dispute to facilitate a resolution. Here again the insistence on certain standards of natural justice may be highly disruptive, either by perpetually disqualifying community court judges, or by preventing them from acting in a constructive role during disputes and against community wishes.

9.2.2.3 Equality vs. Hierarchy

A third problem arises in that natural justice may impose visions of equality that are inconsistent with how some Indigenous societies were structured. Natural justice strives for equal access to justice, and the parties’ equal right to convince a tribunal that theirs is the correct position. One may be tempted to think of Indigenous societies as having egalitarian societies void of social hierarchy. That however becomes overly simplistic. Some Indigenous societies did have very substantial hierarchical features in their social organization. Lake Babine social organization for example differentiated between *dineeze*’, those who held names, and the *ts’akeze*’, who were basically commoners. This is not to say that social mobility was non-existent. A *ts’akeze*’ could

⁵⁴³ Elizabeth E. Joh, “Custom, Tribal Court Practice, and Popular Justice” (2000/2001) 25 Am. Indian L. Rev 117 at 123.

earn a name through the sponsorship of his or her clan and the giving of appropriate gifts at a balhat. What is nonetheless clear is that *dineeze*' held privileges that the *ts'akeze*' did not.⁵⁴⁴ This includes privileges concerning justice as follows:

Shaming practices make clear the social distinctions between those who have names and those who do not. ... Nor can persons without a name independently shame a chief; they can, however, appeal to their own chiefs to act on their behalf. Chiefs are obliged to treat everyone with respect and can be scolded for not doing so. They are to show pity for others; when they do not do so they bring shame to themselves. Similarly, people without names cannot turn to the balhats to reconcile disputes without the assistance of their chiefs, who may prefer to settle such problems outside of the feast system. In fact, reconciling disputes, while a core function of the traditional balhats, is no longer as common inside as it is outside the balhats hall, where delicate negotiations and interventions can take place slowly, without public attention, and with greater ease now that people live closely together.⁵⁴⁵

One can imagine that if standards of justice insist on uniform standards of privileges during justice processes, it may be seen as an external imposition on customary laws that recognized different sets of privileges according to social rank and hierarchy. For example, what if a Lake Babine man without a name invokes natural justice to insist that he has a right to directly present allegations against somebody whom he perceives as having wronged him, when the Lake Babine community may prefer that he seek the endorsement of the appropriate clan chief first?

9.2.3 The Proposal

Before delving into how certain difficulties presented by natural justice can be dealt with, it is helpful to explore how a community court judge can hold community members to natural justice in ways that are culturally sensitive. There are two sides to this coin. One is protecting the rights of the offender, and the other is the rights of the victim. First though, the discussion will deal briefly with the issue of hierarchy.

⁵⁴⁴ *Supra*, note 15 at 50.

⁵⁴⁵ *Ibid.* at 100.

9.2.3.1 Hierarchy

If hierarchical structures exist among Indigenous societies, it does not necessarily entail incompatibility with natural justice. For example, if a Lake Babine commoner obtains an endorsement from an appropriate clan chief and that clan chief brings the commoner's concerns into the discussions, do we really need to feel concern over the fact that the commoner was not able to participate directly in the discussions? A community judge can accommodate the operation of hierarchies, and their concomitant sets of privileges and procedures, so long as they operate to address legitimate concerns. A caveat may be necessary though. If traditional hierarchies and procedures operate unfairly such that a person is denied any opportunity to have his or her concerns addressed (e.g. no clan chief will endorse a legitimate complaint) then a judge may be justified in allowing that person to speak directly to the community court. Now the discussion turns to how natural justice can protect the rights of the offender.

9.2.3.2 Natural Justice for the Offender

As previously mentioned, an accused has a right to procedural fairness under s. 7 of the *Charter*. If an Indigenous offender lacks support in the community, he or she may be vulnerable to the exploitation of a power differential enjoyed by community factions who are hostile to the offender. This can result in a chorus of disapproval voiced against an offender that demands especially harsh sanctions. Joyce Dalmyn observes that such realities have tainted sentencing circles:

... if the feather gets passed around and no-one makes any comment whatsoever, I have heard a judge state, right on the record, "Well it's clear that because nothing has been said, obviously they're not willing to say anything good about this person therefore I can only draw the conclusion that there's no sympathy for this person and I have to use the harshest penalties available to me."⁵⁴⁶

⁵⁴⁶ Quote is in Ross Gordon Green, *supra* note 131 at 113.

Ross Gordon Green also cautions: “A concern with these community sentencing and mediation approaches is that local involvement should not become a forum for the application of political pressure to the advantage of local elite and to the detriment of politically unpopular or marginalised offenders or victims.”⁵⁴⁷

There is a way for a community court judge to deal with this. Where an in-court circle process is used, a community judge can insist that there must be at least one participating community member who is willing to speak positively on behalf of the offender. There is related precedent for this coming from two American tribal court systems. Chapter 2, section 1-176 of the Colville Tribal Law and Order Code requires that “...Before imposing sentence, the judge shall allow a spokesman or the defendant to speak on behalf of the defendant and to present any information which would help the judge in setting the punishment.” The Supreme Court of the Navajo Nation has stated:

Before the Navajo people adopted the adversarial system, a Navajo who was charged with allegations against the public order always had the right to have someone speak on his behalf.

This longstanding cultural practice, which is imbedded in the Navajo concept of fairness and due process, no doubt, contributed to enactment of 7 N.T.C. § 606 by the Navajo Tribal Council in 1959. This section, while prohibiting the appearance of professional attorneys in the Navajo courts, permitted any defendant to “have some member of the tribe represent him.” The same section also provided that if a defendant “has no such representation, a representative may be appointed by the judge.”⁵⁴⁸

These statements were made more in the context of lay advocates as a tribal court adaptation of the right to counsel. This is an issue that will be covered in more detail during Chapter 11. These statements are nonetheless valuable for the general concept that they convey. That concept is an insistence that an offender not stand alone against an overwhelming consensus of disapproval, and that any positive information concerning the offender must be accounted for in reaching a resolution. But how is natural justice to

⁵⁴⁷ *Ibid.* at 114.

⁵⁴⁸ *Boos v. Yazzie*, No. A-CV-35-90 (Navajo 09/24/1990), para. 31-32.

be enforced if this practice is not observed? One suggestion is that a community court judge can insist that proceedings adjourn until there is a community member willing to come forward and say something positive about the offender. A judge may even consider suspending proceedings *sine die* (indefinitely) until the community is willing to abide by the practice.

Of course, the circle process is not the only potential method of resolving disputes. Having the participants hold their discussions outside the courtroom setting and then presenting their resolution to the judge is another model. It is then obviously more difficult for a community court judge to monitor the fairness of this type of discussion. Judge Fafard expressed his reservations as follows:

I guess I want to ensure some consistency you know, because you have several accused charged with the same or similar offenses, I want to make sure that the dispositions are fairly consistent, but I guess the greater thing is that it affects so many different people in that one community, that I'm almost afraid of some political influence. Because it touches on so many people, and I just sort of felt that maybe I should be there to ensure that politics doesn't get involved, that you don't have a powerful family dictating to a weaker family, that kind of thing.⁵⁴⁹

Ross Gordon Green suggests that mediators provide an 'outside of court' alternative as follows: "... trained and experienced community members could eventually perform the facilitation function currently performed by judges during circle sentencing."⁵⁵⁰ This is indeed a feature the Navajo Peacemaker Court whereby Peacemakers, who are trained in mediation and Navajo culture, oversee the out of court discussions between disputants.

This however is not the only way to ensure that there is fairness. A community court judge still has a role when a resolution is brought for his or her approval. If the offender appears to be consenting to a rather harsh resolution, then the community court judge can be under a duty to make certain inquiries. Knowledge that the offender is on

⁵⁴⁹ Interview by Ross Gordon Green over telephone with Judge Claude Fafard (16 December 1994). Cited in *supra* note 131 at 111-112.

⁵⁵⁰ *Supra* note 131 at 112.

the other side from a more powerful family, or that the resolution is severe in relation to an apparently minor offence, can also trigger a duty to make inquiries. The inquiries can include whether the offender's consent to the resolution is genuine, and whether the offender was subjected to coercion or intimidation outside the courtroom setting. The judge might also inquire as to who was present during the discussions with a view towards ascertaining if there was anybody present who was friendly or sympathetic to the offender. The judge might also inquire if positive information about the offender was presented during the discussions. If the judge is not satisfied that the offender is being treated fairly, he can likewise adjourn proceedings or suspend them *sine die* until natural justice is observed. Much of the discussion in this work centres on offender rights. This particular discussion on natural justice however must also consider the rights of victims.

9.2.3.3 Natural Justice for the Victim

Protecting the rights of an accused against the power of the state may not be the only consideration when it comes to the application of the *Charter* to criminal justice. Recall that *Dagenais* requires striking a balance when constitutional rights come into conflict. This means that at least in theory the constitutional rights of a crime victim can come into conflict with the constitutional rights of the accused. This can lower the threshold of protection for the accused's rights. Consider this excerpt from *R. v. Lyons*:

Nor do I find it objectionable that the offender's designation as dangerous or the subsequent indeterminate sentence is based, in part, on a conclusion that the past violent, anti-social behaviour of the offender will likely continue in the future. Such considerations play a role in a very significant number of sentences. I accordingly agree with the respondent's submission that it cannot be considered a violation of fundamental justice for Parliament to identify those offenders who, in the interests of protecting the public, ought to be sentenced according to considerations which are not entirely reactive or based on a "just deserts" rationale. The imposition of a sentence which "is partly punitive but is mainly imposed for the protection of the public" ... seems to me to accord with the fundamental purpose of the criminal law generally, and of sentencing in particular, namely, the protection of society. In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional

considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.⁵⁵¹

The protection of society from crime is therefore a legitimate purpose of sentencing that must be taken into account in determining whether there has been a violation of the s. 7.

It can also mean that the rights of a victim to life, liberty and security of the person except in accordance with the principles of fundamental justice under s. 7 can come into direct conflict with the accused's rights to the same. An example is *R. v. Mills*, which involved a constitutional challenge to *Criminal Code* provisions that limited the availability of third party records to an accused.⁵⁵² This case applied *Dagenais* to a conflict between the right to full answer and defence (i.e. to use the records for cross-examination), and the victim's right to privacy in relation to the records, both protected under s. 7 of the *Charter*. In weighing this conflict, the Court looked at a large number of factors, including the need to prevent the conviction of innocent persons, the use of evidence of questionable probative value that could distort the search for truth during a trial, the right to maintain a confidential identity when desired, and the importance of confidential information to a trust-like relationship.⁵⁵³

Another facet of this is that the prosecution, and not just the accused, is entitled to procedural fairness during criminal proceedings. This also represents a source of protection for a crime victim. The prosecution, supported by the power of the state, would not normally be susceptible to coercive tactics on the part of the accused. The prosecution participates fairly in the process on behalf of the victim, and can pursue measures to protect the victim, either in final resolution (e.g. peace bond, jail term) or in

⁵⁵¹ *R. v. Lyons*, [1987] 2 S.C.R. 307 at para. 26.

⁵⁵² *R. v. Mills*, [1999] 3 S.C.R. 668.

⁵⁵³ *Ibid.* at para. 76 and 89.

the interim (e.g. no contact condition as a part of bail release). Restorative justice idealizes the direct participation of the victim in the process itself. This however has the effect of removing the state from the process as the surrogate participant. Indigenous justice practices that resemble restorative justice may therefore engage a victim's *Charter* rights under s. 7 if they do not provide adequate protection to the victim.

Restorative justice idealizes providing a crime victim with the opportunity to speak to his or her fears, concerns, and interests in a safe atmosphere, and in complete honesty. By explicitly incorporating the victim's dialogue into the process, the victim's interests and concerns will be addressed by the resolution.⁵⁵⁴ One advantage that restorative justice claims over traditional sentencing practices is an increased capacity to inspire contrition and responsibility in the offender. This is seen as integrally bound up with the victim's participation in the restorative process.⁵⁵⁵ By including victim participation, and reaching a resolution that accounts for the victim's concerns and interests, restorative justice claims to provide a result that serves the victim better than state administered punishment. By effectively addressing the offender's behaviour, the victim also stands to benefit. The benefits can include the victim's safety, even after the victim has suffered serious violence (e.g. domestic violence).⁵⁵⁶ Rudin and Roach express it this way in the context of domestic abuse in Aboriginal communities:

Although some Aboriginal women who have been victimized by crime have opposed some sentencing innovations, other Aboriginal crime victims who participated in the development of innovations, such as the Hollow Water Community Holistic Circle Healing, have argued that community sanctions better protect Aboriginal victims and communities than imprisonment. A properly tailored community sanction addressing the causes of offending, and attempting to protect victims, may be a more meaningful response to crime, and have better chance of reducing

⁵⁵⁴ Rupert Ross, *supra* note 70 at 148-149; Stuart, *supra* note 60 at 45-47.

⁵⁵⁵ Cayley, *supra* note 65 at 219-220.

⁵⁵⁶ Allison Morris and Loraine Gelsthorpe advance this argument in the context of domestic violence against women. See "Re-visioning Men's Violence against Female Partners" (2000) 39:4 *How. L.J.* 412.

high rates of crime victimization among Aboriginal people than yet another short, routine, and temporary stay in prison.⁵⁵⁷

There are critiques however that suggest that the ideal can proved flawed and unrealistic in practice. There are some crimes which by their very nature involve a considerable power imbalance between offender and victim. Sexual assault and domestic assault are obvious examples that occur frequently in some Indigenous communities.

Hughes and Mossman describe the argument of Barbara Hudson as follows:

For Hudson, it is important to acknowledge how power relationships within society affect the commission of the crime. She suggested, for example, that social inequality which “pushes so many young men into economic marginality” may prompt them to use violence to establish their claims to racial and gender superiority. As a result, she argued that differential power relationships are completely different in domestic, racial and sexual crime, by contrast with property offences and other types of “economic survival” crimes. Thus, she expressed concern that victim-offender mediation processes, which make the relationship between victim and offender central – displacing the relationship between offender and state – may “reproduce and reinforce the imbalance of power in a crime relationship, rather than confronting the offender with the power of the state acting on behalf of (in place of) the victim”⁵⁵⁸

Annalise Acorn points out that domestic abuse often follows patterns of apology (by abuser) and forgiveness (by the victim) that sustain a relationship of power over the victim. Restorative justice replicates that pattern with its expectations of apology and forgiveness. Without having to face retribution or a permanent severance of the relationship, the restorative process can end up reinforcing that relationship of power whereby the abuser continues the pattern of abuse against the victim.⁵⁵⁹

⁵⁵⁷ Jonathan Rudin & Kent Roach, “Broken Promises: A Response to Stenning and Roberts’ “Empty Promises””, Colloquy on ‘Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders’, (2002) 65:1 Sask. L. Rev. 1 at 30-31; For a similar argument involving domestic violence in the United States, see Peggy Grauwiler & Linda G. Mills, “Moving beyond the Criminal Justice Paradigm: A Radical Restorative Justice Approach to Intimate Violence” (2004) 31:1 Journal of Sociology and Social Welfare 49.

⁵⁵⁸ Hughes & Mossman, *supra* note 55 at 65-66, referring to Barbara Hudson, “Mitigation for Socially Deprived Offenders” in A. von Hirsch & A. Ashworth (eds.) *Principled Sentencing: Readings on Theory and Policy* (2nd. Ed.) (Oxford: Hart Publishing, 1998) 206 at 247. See also Roach, “Changing punishment at the turn of the century”, *supra* note 54 at 271-273.

⁵⁵⁹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: U.B.C. Press, 2004) at 74; Stephen Hooper and Ruth Busch also argue that caution and informed discretion are necessary before a case of domestic violence should be referred to a restorative justice process. Victim safety should take priority before any other objective, reconciliation between the parties included. See “Domestic

Acorn also argues that the very nature of the restorative process itself is intrinsically tipped in favour of the offender. If the process brings out the offender's life circumstances, and reasons why the crime was committed, it can generate a certain emotional momentum towards favouring the offender. It can encourage a feeling of fellowship towards the offender, a desire to welcome the offender back in as the prodigal son, that ends up prioritizing the offender's suffering over that of the victim.⁵⁶⁰ This in turn produces pressure upon the victim. The victim will be expected to extend understanding and forgiveness to the offender on the road to repairing relationships. The process may frown upon the victim for not meeting this expectation. If the victim will not comply, she is seen as acting against her own interests, against the interests of the broader community, imposing isolation upon both herself and the community, and sabotaging a legitimate effort to promote harmony.⁵⁶¹ The standardized expectations of restorative process favour the offender over the victim.

As previously mentioned, Indigenous communities are often infused with power relationships that can corrupt restorative processes. This can compound the difficulties involved with applying restorative justice to offences that involve a significant power differential between the offender and the victim. The vulnerability faced by victims of crime during restorative processes can then be multilayered and especially intense. One of Sherene Razack's concerns with the use of community-based sentencing in Indigenous communities is that they reflect gender imbalance in those communities. Indigenous communities are suffused with patriarchal power structures that replicate Canadian forms

Violence and the Restorative Justice Initiatives: The Risks of a New Panacea" (1996) *Waikato Law Review* 101.

⁵⁶⁰ *Ibid.* at 150-158.

⁵⁶¹ *Ibid.* at 75-76.

of governance. It is male Indigenous leaders who pursue community-based sentencing initiatives to the benefit of male Indigenous offenders who commit crimes against Indigenous women.⁵⁶² She describes one similarly expressed position as follows:

In the Northwest Territories, the Status of women Council has also been clear that women's relationship to community is fraught with contradictions. The Council's report on violence identifies as problematic community denial of abuse, alcohol used as an excuse for violent behaviour, and the fact that 'some of our worst abusers may be community leaders.'⁵⁶³

Bruce Miller relates that abuse of power against Coast Salish women plagued the South Vancouver Island Justice Education Project. Coast Salish Elders (often from powerful families) would try to convince female victims to acquiesce in lighter sanctions for offenders under the Project rather than the usual justice system by using a variety of tactics, including attempts at laying guilt trips, attempted persuasion at covering up or dropping the allegations, the threat of witchcraft to inflict harm, or threatening to send the abuser to use physical intimidation. Some women felt that the problem was exacerbated by the fact that some of the Elders were themselves convicted sex offenders, which left them wondering how seriously their safety and concerns would be addressed. The ultimate result was the end of the Project in 1993.⁵⁶⁴

Indeed, it has been argued that the lighter sanctions can themselves undermine the safety of the victims by minimizing the harm done to them. Sherene Razack, while not directly implicating restorative processes, has this to say:

... Canada's history of colonization pervades the legal environment just as extensively as do historical and social attitudes towards women, and it becomes impossible to untangle which factor is contributing most to lenient sentencing of Aboriginal males accused of sexual assault. For instance, Nahanee and Nightingale both note that the stereotype of the drunken Indian still operates to ensure that alcohol abuse is viewed as more significant for Aboriginal than for white offenders. What is interesting, however, is the gendered response to this stereotype. For an Aboriginal man accused of rape, alcohol abuse can be seen as a mitigating factor, sometimes a

⁵⁶² Razack, *supra* note 513 at 77-78.

⁵⁶³ *Ibid.* at 66.

⁵⁶⁴ Bruce Miller, *supra* note 4 at 198-199; See also Evelyn Zellerer & Chris Cunneen, *supra* note 327 at 257.

root cause of the violence against women. For an Aboriginal woman who is raped, however, intoxication becomes a form of victim-blaming.⁵⁶⁵

Razack argues that such an approach can create an unsafe environment for Indigenous women. She describes one such position, albeit in a different context, as follows:

Pauktuutit, the Inuit Women's Association of Canada, as Nahanee, launched a constitutional challenge of sentencing decisions on the basis that lenient sentencing of Inuit males in sexual assault cases interferes with the right to security of the person and the right of equal protection and benefit of the law of Inuit women. Nahanee emphasizes Pauktuutit's position that 'sexual exploitation of the young must stop because it is not "culturally" acceptable, and it is not part of Inuit sexual mores and practices. Cultural defence in this context, both Nahanee and Pauktuutit stress, minimizes the impact of sexual assault on Inuit girls and women, a minimizing made possible by the view that Inuit women are sexually promiscuous.'⁵⁶⁶

Judge Barrett of the British Columbia Provincial Court had this to say in *R. v. J. (H.)*:

There have been instances when Canadian judges were persuaded to bend the rules too far in favour of offenders from Native communities or disadvantaged backgrounds. When that happens a form of injustice results; specific victims and members of the public generally are given cause to believe that the justice system has failed to protect them.⁵⁶⁷

The common thread in these arguments is that lighter sanctions trivialize harms done to victims, and this in turn can lead to a sense in a community that causing harm will not lead to any meaningful sanction. Potential offenders know that there is little risk involved. Potential victims, particularly vulnerable people such as women or children, end up in an unsafe environment. The Royal Commission on Aboriginal Peoples adds:

If family violence is addressed without proper concern for the needs of the victims, two dangerous messages are sent. The first is that these offences are not serious. This message puts all who are vulnerable at risk. The second and more immediate message is that the offender has not really done anything wrong. This message gives the offender licence to continue his actions and puts victims in immediate danger.⁵⁶⁸

If Indigenous processes with restorative emphases do not give sufficient consideration to victim safety, both during discussions and the subsequent resolution, it can compromise not only the victim's rights to natural justice but also his or her right to

⁵⁶⁵ *Supra* note 513 at 71.

⁵⁶⁶ *Ibid.* at 71.

⁵⁶⁷ *R. v. J. (H.)*, Court file no. 1095FC, Reasons for Sentence, 17 January 1990 (Pr. Ct. B.C.) 1.

⁵⁶⁸ *Bridging the Cultural Divide*, *supra* note 173 at 269; See also Curt T. Griffiths & Ron Hamilton, "Spiritual Renewal, Community Revitalization and Healing: Experience in Traditional Aboriginal Justice in Canada" (1996) 20:2 *International Journal of Comparative and Applied Criminal Justice* 289.

security of the person under s. 7. It then becomes crucial to explore how a community court judge can prevent such abuses. Just as with the offender, the judge can insist that at least one person sympathetic to the victim attend and speak during a process. Chief Justice Robert Yazzie of the Navajo Supreme Court declares: “What, you might say, if the victim is being coerced? That is why we have the victim’s relatives attend.”⁵⁶⁹

Sometimes even the very presence of the victim during a circle process can be perilous. Donna Coker notes that abusive men have sometimes attacked abused spouses immediately following a Navajo peacemaker session.⁵⁷⁰ The nature of domestic assault and sexual assault may be such that the victim wishes to remain in hiding in the interim. What a community court judge can do, when dealing with such offences, is allow the victim to provide input to the process through a proxy, even over the objections of the offender and his or her supporters. Coker is indeed adamant that Peacemaking processes should not insist resolutely on a victim’s attendance if it is too dangerous for her.⁵⁷¹

What do we do when the process is designed so that the actual discussions take place outside of the courtroom? As previously mentioned, Hollow Water generated considerable success in the context of pervasive sexual abuse. Ross Gordon Green ascribes this in part to the program ensuring that support teams were assigned to work with both the offender and the victim. The victim and offender would not be brought together into the restorative process until they were both ready to face each other. As such, it is apparently possible to address even serious power imbalances with intervention

⁵⁶⁹ Robert Yazzie, “The Navajo Response to Crime” in Wanda D. McCaslin (ed.) *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 121 at 131.

⁵⁷⁰ Donna Coker, “Enhancing Autonomy for Battered Women” (1999) 47 U.C.L.A. L. Rev 1 at 82.

⁵⁷¹ *Ibid.* at 82-83.

prior to the restorative process itself.⁵⁷² A community court judge may, for certain offences such as domestic and sexual assault, insist that support teams be provided to both the offender and the victim in the interim until a resolution is worked out.

What remedy is available though when the offender and/or supporters use coercion or intimidation against the victim? Adjourning proceedings *sine die* is hardly an adequate remedy because opportunities to address victim safety are left in limbo. There is a suggestion here for when a community court judge learns that the offender's side has tried to intimidate the victim's side. The judge can impose terms of resolution, whether that involves amending the resolution proposed by the participants or rejecting it outright, that prioritize the victim's safety over any objections by the offender and his or her supporters. This does necessarily mean an automatic abandonment of any rehabilitative measures and recourse to incarceration. It is questionable whether automatic recourse to jail promotes victim safety in a meaningful way. Diane Bell relates that Aboriginal women in Australia were concerned about how incarcerating Aboriginal men often resulted in a violent rebound upon themselves.⁵⁷³

A restraining order may be a standard term in such situations. A community court judge may be justified in going even further in the right situation. If a community court judge decides that the offender poses a serious threat to the victim and deems that removal is necessary, banishment from the community is an option that is also culturally sensitive. The terms of an order do not need to confine themselves strictly to the offender

⁵⁷² *Supra* note 131 at 94-95. See also Stuart, *supra* note 60 at 45-47.

⁵⁷³ Diane Bell, "Aboriginal women and the recognition of customary law in Australia" in Bradford W. Morse & Gordon R. Woodman (eds.) *Indigenous Law and the State* (Dordrecht, Holland: Foris Publications, 1988) 297 at 304.

either. Coker provides a description of how Navajo Peacemaking can make creative efforts geared towards the safety of domestic violence victims as follows:

Peacemaking also provides a forum for the victim's family to intervene on her behalf. For example, in one case an uncle was a copetitioner with his niece. The uncle expressed concern that his niece's daughters took her husband's side in arguments and that both the father and the daughters verbally and physically abused the mother.

In addition to encouraging family participation, Peacemaking may also provide a mechanism for transferring material resources to the victim, thus lessening her economic and social vulnerability. This could occur in three ways. First, the abuser or his family or both may agree to provide *nalyeeh* (reparations) in the form of money, goods, or personal services for the victim. *Nalyeeh* is a concrete recognition that the harm of battering is real and that responsibility for it extends beyond the individual batterer. In addition, both abuser and victim are likely to be referred to social service providers and to traditional healing ceremonies. The assistance given by agencies and by traditional healers often results in increased community and governmental material support. Finally, the victim's family may overcome past estrangement from the victim and agree to provide her with assistance.

Though it is not clear that extending such assistance to include goods, services, or both is now a common practice in Navajo Peacemaking, such an extension appears congruent with traditional Navajo practices. Assistance of this kind may alter the battered woman's material conditions and decrease her vulnerability to ongoing battering. For example, his family members may agree to such help as loaning a car or providing transportation. Her family members may agree to spend the night with her on a rotating basis. In addition, bank accounts may be changed or split so that she has greater financial independence. The agreement may also include assistance with job training, employment, or childcare. The subsequent reorganization of the financial priorities of the batterer's extended family may serve to emphasize the injustice done to the victim and, at the same time, to decrease the victim's vulnerability to the batterer's control.⁵⁷⁴

If Indigenous communities adopt the proposal involving community court judges, a community court judge can certainly explore these types of options. A community court judge also need not confine protective terms to only the offender. If other people besides the offender participated in intimidating the victim the community judge may well consider issuing restraining orders against them as well.

This is not intended as an extensive catalogue. It is meant to show that community court judges can be creative and practicality-oriented when they decide, as a matter of natural justice, that the safety of the victim is to receive the highest priority. What I have discussed so far is methods by which a community court judge can enforce

⁵⁷⁴ *Supra*, note 570 at 45-46.

natural justice. This of course has not spoken to how we can expect community judges to hold themselves to standards of fairness when personal connections to the parties themselves may be unavoidable. It is to that subject we now turn.

9.2.3.4 Necessities and Appeals

A starting point for resolving this issue is that common law courts have recognized that it may be necessary for a judge to hear a case despite partiality or the appearance of bias. The Supreme Court of Canada stated with approval this passage from a textbook: “A person who is subject to disqualification [by reason of bias] at common law may be required to decide the matter if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice.”⁵⁷⁵ The Australian High Court declares:

... the rule of necessity is, in an appropriate case, applicable to a statutory administrative tribunal, as it is to a court, to prevent a failure of justice or a frustration of statutory provisions. That rule operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment. There are, however, two prima facie qualifications of the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule does apply, it applies only to the extent that necessity justifies.⁵⁷⁶

This doctrine has also been recognized by the American Ninth Circuit Court of Appeals⁵⁷⁷ and by the United States Supreme Court.⁵⁷⁸

This doctrine may be adapted to the particular realities of Indigenous communities. There is the possibility that in large Indigenous communities in urban

⁵⁷⁵ Stanley A. de Smith & Lord Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action*, (5th ed.) (London: Sweet & Maxwell, 1995) at 544; quoted in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*; *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1998] 1 S.C.R. 3 at para. 6 [hereinafter the *Remuneration Reference* (no. 2)].

⁵⁷⁶ *Laws v. Australian Broadcasting Tribunal* (1990), 93 A.L.R. 435 at 454.

⁵⁷⁷ *Malone v. City of Poway*, 746 F2d 1375, 1376 (9th Cir 1982).

⁵⁷⁸ *United States v. Will*, 449 US 200, 213-14 (1980); *Evans v. Gore*, 253 US 245, 247-48 (1920).

centers, such as Winnipeg and Toronto, community court judges can be assigned to cases where they will not be personally tied to one or more of the parties. It may be a different story in small rural communities. It could be said that in such communities, if they use a community court system, the doctrine of necessity has ongoing relevance. The doctrine of necessity can be adapted to prevent a constant demand on community court judges to disqualify themselves to avoid the appearance of bias. In other words, community judges do not necessarily have to provide the appearance of fairness and impartiality as long as they actually are being fair and impartial in the performance of their duties.

Can weaker parties trust community judges, left only to their own discretion, to be impartial when they are personally tied to the other party? Rachael Field discusses problems with gender bias in Australian Family Group Conferencing programs. Conference convenors are supposed to be impartial mediators who are present only to ensure that the parties reach a fair resolution. Field asserts that this does not bear out in practice. Convenors can take an active role and drive matters towards a resolution that reflects their own preferences. If a convenor is ‘a misogynist’ or is unimpressed with what he sees as ‘difficult’ behaviour by a female juvenile offender, then that offender may be faced with unfavourable bias during the conference.⁵⁷⁹ She adds:

And as long as the mediation profession remains unregulated and relatively unaccountable, and convenor training is not uniformly or consistently provided, there is no way of ensuring that all conferences are convened by someone who is trained adequately on gender issues.⁵⁸⁰

David Weisbrot is sympathetic to the idea of Indigenous community courts in Australia, but not without measures taken to ensure natural justice. He expresses this with reference to the Australian Law Reform Commission on recognizing customary law as follows:

⁵⁷⁹ Rachael Field, “Victim – Offender Conferencing: Issues of Power Imbalance for Women Juvenile Participants” (2004) 11:1 Murdoch U.E.J.L. at para. 37.

⁵⁸⁰ *Ibid.* at para. 39.

If the Commission is serious about recognizing Aboriginal custom and jurisprudence, then the most effective way of achieving this would be to establish a semi-autonomous Aboriginal community court system applying customary law with an emphasis on mediation and conciliation, with jurisdiction parallel (as a minimum) to Courts of Petty Sessions, and appellate review available only for allegations of denial of natural justice.⁵⁸¹

The suggestion is that there be Indigenous courts of appeal that are available when community court judges fail to uphold natural justice.⁵⁸² Many American Indian tribes have courts of appeal.⁵⁸³ There is some hesitancy in setting out in detail what these courts would like look, whether there should be one pan-Indigenous court of appeal, or one for every Indigenous tribe, or regional courts of appeal. For the most part the details of how these courts would be constituted would be left to Indigenous peoples themselves if they choose to go this route. There are however two ideals that merit consideration. One ideal is that appellate court judges possess a sufficient degree of competency to hold community court judges to natural justice. The Royal Commission on Aboriginal Peoples, while endorsing the concept of Indigenous Appellate Courts, states: “Whatever appellate structures are developed, they will have to develop expertise in addressing the unique issues that might arise from the operation of Aboriginal justice systems.”⁵⁸⁴ The details of this expertise, whether that involves a law degree or other qualifications, would be for Indigenous peoples to decide. The second ideal is that the appellate court judges would be both Indigenous, and not related to or personal friends with anybody in the community from which an appeal rises. This attempts to bring together the best of both worlds. Should natural justice fail at the community court level, an appellate forum

⁵⁸¹ David Weisbrot, “Comment on the ALRC Discussion Paper: *Customary Law*” (1981) 1:1 Aboriginal Law Bulletin 3.

⁵⁸² Roche for example considers the availability of external judicial review as a necessary means of ensuring fairness between the parties that use restorative processes, *supra* note 55 at 208-212 and 216-221.

⁵⁸³ These include the Cherokee, Crow, Grande Ronde, and the Ho-Chunk. See *National Conference of Appellate Court Clerks*, online: <<http://www.appellatecourtclerks.org/links.html>>. Others include the Absentee-Shawnee, the Pawnee of Oklahoma, and the Chippewaw, See *National Tribal Resource Justice Center*, online: <<http://www.tribalresourcecenter.org/courts/details.asp?36>>.

⁵⁸⁴ *Bridging the Cultural Divide*, *supra* note 173 at 279.

provides not only impartiality in fact but also avoids even the appearance of bias. It also insists that the appellate court judges be Indigenous, so that appeals are heard in an Indigenous space as opposed to a non-Indigenous space.

What is to happen when an appellate court decides that a community court judge has not upheld natural justice? A suggestion that can be made is that appellate courts can provide the same remedies that a community court judge should have. If the process was abused against a marginalized offender, the appellate court can set aside the resolution and order that proceedings be suspended *sine die* until the community justice system proceeds in such a way that fairness is accorded to the offender. If the process is abused against a vulnerable victim, the appellate court can then explore solutions and set out a resolution that prioritizes the victim's safety.

Whether or not appeals should be allowed to the Supreme Court is an issue that will be avoided within this work. For the present it is enough to suggest that Indigenous appellate courts can serve a meaningful purpose by ensuring that community court judges discharge their duties to uphold natural justice. If appeals are to be allowed before the Supreme Court, for complicated issues of law for example, it would ideally be in a forum where reserving a seat for an Indigenous justice becomes standard practice. Now it is time to explore in some detail a facet of the potential relationship between community courts and Indigenous appellate courts.

9.2.3.4 Recorded Reasons

An idea worth exploring is requiring community court judges to provide recorded reasons in certain circumstances. The idea behind recorded reasons is so that Indigenous courts of appeal have a basis on which to assess whether community court judges have

been impartial in potentially troublesome situations. The Supreme Court has recently adopted a ‘functional approach’ to when judges are required to provide written reasons for their decisions. Some of the principles of that functional approach are:

1. The delivery of reasoned decisions is inherent in the judge’s role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

...

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.
6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge’s conclusion is apparent from the record, even without being articulated.
7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge’s reasons provide the equivalent of a jury instructions.
8. The trial judge’s duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge’s decision.⁵⁸⁵

The New South Wales Court of Appeal affirmed that there is as much a duty to: “to give reasons in an appropriate case as there is otherwise a duty to act judicially, such as to hear arguments of counsel and hear evidence and admit relevant evidence of a witness.”⁵⁸⁶

The idea here is that community court judges be required to give recorded reasons under certain circumstances. One circumstance is where a resolution is proposed to the community court judge, but the judge is personally tied to one of the parties, or it is known that one side of the dispute is significantly more powerful than the other. The judge may not have to elaborate reasons for the resolution itself, but would ideally disclose his conclusions as to whether the parties have behaved in accordance with natural justice. Suppose that the offence is sexual assault for example, and that the

⁵⁸⁵ *R. v. Sheppard*, [2002] 1 S.C.R. 869 at para. 55.

⁵⁸⁶ *Pettitt v. Dunkley*, [1971] 1 N.S.W.L.R. 376 (C.A.), at pp. 387-88.

proposed resolution involves community service, therapy for the offender, probation, but otherwise does not include a term of incarceration. The judge may well disclose in reasons that the resolution reflects genuine consensus between the parties by elaborating that a support team was always around the victim in the interim, the identities of the members of that support team, and the activities of the support team. The judge may also disclose that he or she inquired of the victim, or the support people, whether the consent was genuine and that the victim or the support people affirmed as much. As another example, a judge may disclose the name of a specific community member who spoke positively of the offender, and generally what that member said about the offender. Reasons may also include an inquiry as to whether the offender's consent to the resolution was genuine.

Another situation arises when a judge is tied to one of the parties and is either called upon to arbitrate during a deadlock, or rejects a proposed resolution. In this situation, two sets of reasons may be necessary. The first set discloses either the fact of the deadlock, or reasons for rejecting a proposed resolution. For example, a judge may disclose his or her finding that specific individuals friendly to the offender attempted to harass a victim of domestic violence into going along with a very light resolution for the offender. A second example could be a finding that no one participated in the discussions who was willing to say anything positive about the offender. The second set of reasons discloses the resolution that the judge imposes, and the rationale for it. Using the domestic violence situation again, the judge may explain the terms of a resolution that favours the victim and explain how it is designed to ensure the safety of the victim. As another example, suppose that a judge is invited to break a deadlock with arbitration.

Assume then that the judge decides to use community-based resolutions that emphasize rehabilitation even though the offender had inflicted substantial harm. In addition to disclosing the fact of deadlock, the judge could disclose in reasons why he or she believes the offender is a good candidate to take a chance on for community-based measures.

Canadian authorities prior to *Sheppard* were reluctant to impose a duty to produce written reasons on judges because they had the potential to impose heavy administrative burdens on the court system.⁵⁸⁷ One could see a similar concern if a community court system is adopted. Such a system does not need to insist though that its judges write out reasons. A system could videotape its proceedings or audio record them so that transcripts are available when required. In these situations, a community court judge could audibly speak out his or her reasons for the decision so that there would be a record for appeal. American tribal court decisions have extolled the production of video recordings⁵⁸⁸ or transcripts⁵⁸⁹ in order to make a record available to an appeal court.

9.2.4 Objections

9.2.4.1 External Imposition

Indigenous peoples might object to their own processes being held to common law standards of fairness. As paternalistic as this may sound, contemporary events have often borne out that there may be a need for it. Indigenous scholars and Indigenous peoples themselves have touted consensus and the collective good as features of Indigenous justice. In this light, consider what the application of natural justice is meant to prevent. If a stronger party coerces other parties into a resolution to its benefit and to

⁵⁸⁷ *R. v. MacDonald*, [1977] 2 S.C.R. 665; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Barrett*, [1995] 1 S.C.R. 752.

⁵⁸⁸ *Crow Tribe of Indians v. Bull Tail*, 2000 Crow 8 (Crow 10/12/2000); *Fort Peck Assiniboine and Sioux v. Howard*, No. 057 (Fort Peck 11/38/1988).

⁵⁸⁹ *St. Peter v. Colville Confederated Tribes*, 2 CCAR 2 (Colville Confederated 09/28/1993).

the detriment of the weaker parties, does this reflect genuine consent? If vulnerable victims are compelled to acquiesce in resolutions that do not address their safety, does this further the collective good? Natural justice can complement rather than detract from Indigenous approaches to justice as articulated by Indigenous peoples. Is there truly anything objectionable to the use of adapted standards of natural justice to insist that consensus be genuine in fact? The use of natural justice can also enhance the pursuit of the collective good by ensuring that all victims of crime have their safety addressed, not just those who are tied to powerful elites. Emma Larocque for example states: “All original cultures exercised strict mores and taboos to regulate sexual relations.”⁵⁹⁰ In other words, the protection of all community members from harm was an objective that resonated in the justice practices of many Indigenous societies. If contemporary justice processes emphasize only offender re-integration, even at the expense of protecting victims and otherwise vulnerable members of the community, it can be difficult to think of this as a genuine reflection of Indigenous traditions of justice. Perceived differences between Indigenous approaches to justice and natural justice may be more imagined than real.

9.2.4.2 Foreign Authority Structure

The idea here is that it is fundamentally inconsistent with Indigenous authority structures, ideally housed within the communities themselves, to be overseen by appellate courts that reflect Western authority structures. The presence of appeal courts for Indigenous societies that did not have such structures may seem problematic. In the end, the proposal for Indigenous appeal courts is intended only as a last recourse when all else

⁵⁹⁰ Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” in Michael Asch (ed.) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 75 at 84.

fails. The proposals strive to afford Indigenous communities every opportunity to use their community law to resolve disputes at a local level. The proposed resolutions of the community are binding subject to an important caveat. That caveat is that Indigenous community court judges hold communities to culturally sensitive standards of natural justice that ensure that consensus is genuine, and that they genuinely reflect the collective good of all (e.g. vulnerable victims or marginalized offenders). The proposal also tries to accommodate allowing Indigenous communities to select their own members as community court judges despite the normal insistence of Western standards of natural justice that judges be free of the appearance of bias. The community court judges do not necessarily have to convey a formal appearance of freedom from bias so long as they actually are impartial in their decisions. Pragmatism suggests however that one must account for the possibility that community court judges, left unregulated, may abuse their power to the benefit of parties connected to them. Then, and only then, would Indigenous appeal courts play a role in Indigenous justice.

9.2.4.3 Fallacy of Recorded Reasons

The idea here is that recorded reasons may be inadequate to ensure the natural justice is upheld since a judge may through clever wording use those reasons to obscure the real (biased) basis for the decision. The reply to this is that the reasons need not be the sole basis for appeal. If a system of video recordings or audio recordings leading to transcripts is available, an Indigenous appeal court also has insight into what has been brought to the community judge's attention, and the conduct of the community judge beyond the reasons themselves. If only written reasons are available, an Indigenous appeal court could allow interested parties to present evidence in support of a position

that natural justice was not upheld. There is some hesitancy in making detailed suggestions as to what standards of proof and rules of evidence, if any, Indigenous appeal courts should use. This would be for Indigenous peoples themselves to decide. Two hypothetical examples will be described simply to suggest how this could possibly work. Suppose a community judge indicates in written reasons that the victim was not subject to any intimidation, even though both the victim and a support team member indicated that members of the offender's family harassed the victim. The ensuing resolution imposed very minimal measures upon the offender. If both the victim and the support team member provide sworn statements or *viva voce* testimony to an Indigenous appeal court, this could provide a sound basis for appealing the judge's approval of the resolution. Now suppose that a community judge indicates in written reasons that members of the offender's family were present thereby making consent to a harsh resolution valid. If the offender and members of his or her family provide sworn statements that the family members were excluded from the discussions, there is likewise a sound basis for appeal.

9.2.4.4 Logistical Problems

Certain measures, such as support teams, can impose onerous burdens in terms of administration, time and resources. Natural justice in that sense may be unrealistic. There is a reply to this. The Royal Commission argues that Indigenous peoples gaining control over criminal justice would not be an overnight affair. There would have to be a transitory phase wherein Indigenous communities would have to remain in partnership with the standard justice system. As Indigenous communities become more capable and more accustomed to administering justice, they could then gradually assume full control

over justice.⁵⁹¹ The point here is that Indigenous communities should not take on more than they can handle, at least not in the interim. Offences where the offenders enjoy considerable power over victims are one context where an Indigenous community should not assume responsibility unless they are ready. It can hardly be called justice if victims of domestic violence or sexual assault remain unsafe in their own communities because the justice systems cannot adequately address their concerns. The Peacemaker Court of the Grand Traverse band in Michigan does not use peacemaking for domestic assault precisely in recognition of the power imbalance involved.⁵⁹² In summary, an Indigenous community should not accept responsibility for certain offences unless they are prepared to devote serious consideration, time, and resources to issues of victim safety.

Most of these discussions involve using peacemaking or restorative processes when an offender has apparently accepted responsibility for committing an offence. That leaves open questions of what happens when an accused pleads innocence, and therefore leads to the next chapter.

⁵⁹¹ *Bridging the Cultural Divide*, *supra* note 173 at 175-176.

⁵⁹² Nancy A. Costello, "Walking Together in a Good Way: Indian Peacemaker Courts in Michigan" (1999) 76 U. Det. Mercy L. Rev 875 at 884, fn 66.

CHAPTER 10: CULTURALLY SENSITIVE INTERPRETATION OF RIGHTS DURING THE TRIAL PHASE

10.1 The Presumption of Innocence

10.1.1 Canadian Jurisprudence

Situations where an Indigenous offender asserts innocence against criminal charges raise interesting issues about conflicts between legal rights and Indigenous methods of justice. The first such issue is discussed here. A long cherished tenet of criminal law in common law jurisdictions has been the insistence that the state prove guilt beyond a reasonable doubt before an accused can be sanctioned. The classic statement of the requirement of proof beyond a reasonable doubt is found in the English case of *Woolmington v. Director of Public Prosecutions*, where Viscount Sankey wrote:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.⁵⁹³

This “golden thread” is now a constitutional right under s. 11(d) of the *Charter* which reads:

Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Whether a law violates the presumption of innocence depends upon that law's effect on the verdict rendered by the trier of fact. If the law creates the possibility of conviction, despite the trier of fact having a reasonable doubt as to guilt, the right to be presumed innocent is infringed.⁵⁹⁴ In the years since 1982, the net for catching laws that *prima*

⁵⁹³ *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.).

⁵⁹⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

facie violate the presumption of innocence has been cast very wide. Requiring the trier of fact to presume an essential element of the offence, the intent to traffic a narcotic in one's possession for example, unless the accused proves otherwise on a balance of probabilities violates s.11(d).⁵⁹⁵ Requiring a presumption of a collateral fact necessary to lay a charge (the accused was in care and control of a vehicle) as opposed to an essential element (the accused was in an intoxicated state) also violates s.11(d).⁵⁹⁶ Requiring presumption of a relevant fact, like for example that an accused was living off the avails of a prostitute he was regularly in the company of, unless the accused raises evidence to the contrary violates s.11(d).⁵⁹⁷ Requiring the accused to prove a defence to a charge on a balance of probabilities, insanity for example, also violates s.11(d).⁵⁹⁸

One could say that the presumption of innocence goes to considerable lengths to tip findings of fact in favour of the accused. Consider this directive from the Supreme Court on how trial judges are to instruct the jury on the presumption of innocence:

The trial judge should instruct the jury that: (1) if they believe the evidence of the accused, they must acquit; (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit; (3) even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which they do accept.⁵⁹⁹

The discussion will now explore how these principles may come into conflict with Indigenous methods of justice.

10.1.2 The Conflict

Part of the difficulty involved stems from the fact that criminal trials as we know them were often not seen among pre-contact Indigenous societies. The Iroquois did have

⁵⁹⁵ *Ibid.*, *R. v. Oakes*, at 132-135.

⁵⁹⁶ *R. v. Whyte*, [1988] 2 S.C.R. 3.

⁵⁹⁷ *R. v. Downey*, [1992] 2 S.C.R. 10.

⁵⁹⁸ *Chaulk*, *supra* note 594 at 1328-1335.

⁵⁹⁹ *R. v. W.D. [D.W.]*, [1991] 1 S.C.R. 742.

trials for witchcraft, a notable exception. Even here, our knowledge of the details of such trials is rather lacking. The point is that many Indigenous societies did not find it necessary to establish guilt through a formal adjudicatory process. An Indigenous society often did not bother with any sort of community intervention unless its members, or a majority of them, were satisfied that an offence had occurred. Once the community at large was satisfied that an offence occurred, contesting the allegations was often frowned on for it was seen as denying responsibility. Joan Ryan describes Dene practice in the context of theft from a trap as follows:

This offence would be reported to the head man (*k'aowo*) in camp and he would then speak "harsh words" to the person who had stolen the fur. The thief would be asked to acknowledge his theft and to return the fur (or another of equal value) to the person from whom it had been stolen.

If the offender refused to do this, the senior people gathered and confronted him. He was placed in the centre of the circle and people gave him "harsh words" about his inappropriate actions. They demanded he acknowledge his guilt and promise to return the fur. This stressed the importance of restoring harmony within the community, reconciliation with the person he had offended and compensation through replacement of the fur. Once that was done, no further action was taken and no further mention of the offence was made.⁶⁰⁰

Rupert Ross suggests that this prioritization of owning up and taking responsibility may still have contemporary relevance in the Canadian north in this way:

There are other pressures to plead guilty as well. One comes from the cultural perspective that the proper thing to do is to always acknowledge your misdeeds as quickly as possible, then ask for assistance so that you can both make amends and avoid repeating them in the future. Another comes from the fact that pleading "not guilty" forces others to come forward and speak publicly against you in a hostile or critical manner, a burden that should not be placed on them if at all possible.⁶⁰¹

The presumption of innocence can potentially interfere with an Indigenous society's desire to encourage a member to accept responsibility when the society at large is satisfied that the member has committed an offence. The presumption of innocence holds out the prospect of not being subject to any sanction at all and can therefore encourage an

⁶⁰⁰ *Supra* note 11 at 33-34.

⁶⁰¹ *Supra* note 70 at 209.

offender to ‘hedge his bets’ against the community. It provides an incentive to get out of owning up to the offence before the community and as a result can erode the community’s desire to promote responsibility and the collective good.

Furthermore, the erosion of that desire can entail a tangible cost to an Indigenous community. The sentiment behind the presumption of innocence is captured by this timeworn adage: “I would rather see ten guilty men go free than one innocent man go to jail.” The idea is that liberal democracies are willing to accept a certain social cost to avoid the state having too much power to sanction the possibly innocent. Rinat Kitai describes the social cost in this way:

There is no disputing that the strict standard of proof exacts a high price from society, namely, the cost of the acquittal and release of a considerable number of offenders and the consequent danger to public safety. The acquittal of an offender violates the rule of law. It causes injury to all actual and potential victims of the deeds of released offenders. The high standard of proof weakens the element of general deterrence amongst the public, thereby exposing the public to the risk of becoming the victims of offenses. The potential offender’s knowledge that there are many obstacles to convicting him at trial gives him hope of evading punishment for his actions and thereby decreases the element of personal deterrence. Indeed, the overall objectives of punishment are undermined by the acquittal of guilty offenders. There are those who posit that there is a miscarriage of justice whenever a verdict fails to reflect the factual truth, let alone when a multitude of offenders escape conviction and punishment.⁶⁰²

It is not hard to see how these concerns apply to Indigenous communities trying to deal with crimes committed by their own members. Indigenous communities are often plagued by any number of social ills expressed through crime including widespread sexual abuse, domestic abuse, offences committed while intoxicated, drug trafficking, and offences committed by Indigenous gangs. If an Indigenous community at large is satisfied that such offences have occurred, would that community be willing to absorb the social cost of sexual molesters, gang members, drug dealers, and alcoholic offenders slipping through the net created by ‘proof beyond a reasonable doubt’ for the sake of avoiding that one innocent man being sanctioned? The presumption of innocence can

⁶⁰² Rinat Kitai, “Protecting the Guilty” (2003) 6 Buff. Crim. L.R. 1163 at 1166.

undermine the capacity of an Indigenous community to deal with threats to its collective good.

On the other hand, neglecting to hold collective power to prosecute crime to a standard of proof can itself result in grave injustice. Consider the story of Donald Marshall Jr., a Mi'kmaq man. Marshall had been walking late at night while still a teenager in 1971 with a Black teenager named Sandy Seale. They came across two white men named Roy Ebsary and Jimmy McNeil. Ebsary, while intoxicated, mistook an attempt at panhandling by the two youths as an attempt to mug him. Ebsary stabbed Seale in the stomach with a knife and then Marshall in the arm. Marshall ran away while Seale subsequently died in hospital.⁶⁰³ Marshall was sentenced to life imprisonment for murdering Seale.⁶⁰⁴ What is relevant to our present discussion is how the investigation and prosecution leading to his conviction was carried out. The Sydney police officer in charge of the investigation, John McIntyre, was so convinced that Marshall was guilty that he set out to pin the death on Marshall even to the deliberate exclusion of contrary possibilities that he was aware of. For example, MacIntyre was aware of two witnesses, Maynard Chant and John Pratico, who stated seeing two men matching the descriptions of Ebsary and McNeil at the scene but did not see Marshall stab Seale. He coerced and induced Chant and Pratico to change their stories into seeing Marshall stab Seale.⁶⁰⁵ The Crown Prosecutor was aware that these witnesses had given prior inconsistent statements, but did not forward them to defence counsel for Marshall.⁶⁰⁶ Defence counsel did not actively seek out these statements despite being aware of them, and despite obtaining

⁶⁰³ *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Province of Nova Scotia, 1989) at 19-26.

⁶⁰⁴ *Ibid.* at 15.

⁶⁰⁵ *Ibid.* at 39-67.

⁶⁰⁶ *Ibid.* at 71-72.

witness statements having been a standard procedure in their practice. These statements could have been used to challenge the credibility of supposed eyewitnesses to Marshall stabbing Seale. John Pratico testified that he ran home after seeing Marshall stab Seale. Barbara Floyd, after reading news of this testimony, contacted one of Marshall's lawyers to tell him that Pratico had actually been in a church parking lot after the incident. Floyd was dismissed by a "You're too late" by the lawyer, and this was never followed up.⁶⁰⁷

Marshall was not released from prison until 1982, after the R.C.M.P. re-investigated the matter at the initiative of another lawyer acting for Marshall.⁶⁰⁸ The Nova Scotia Court of Appeal overturned his conviction in 1983.⁶⁰⁹ Marshall was subjected to a presumption of guilt that was not subject to rebuttal throughout the events leading to his conviction, even by his own defence lawyers. Marshall's case illustrates to us that safeguarding against innocent conviction remains necessary. Would Marshall's conviction have been any less of an injustice because the conviction was handed out by a Mi'kmaq justice system instead of the Canadian justice system? There is evidently a certain tension between safeguarding the presumption of innocence and certain Indigenous notions of justice. The question becomes how to deal with this tension.

10.1.3 The Proposal

The starting point of the resolution is that a community court is an independent and impartial tribunal for purposes of s. 11(h). The extension of this is that a sanction cannot be visited upon a member of an Indigenous community unless it has been decided within the community court that his or her actions are such as to warrant community

⁶⁰⁷ *Ibid.* at 72-77.

⁶⁰⁸ For the re-investigation, see *ibid.* at 91-109. For the years spent in prison and release on bail in anticipation of his conviction being overturned, see *ibid.* at 109-11.

⁶⁰⁹ *Ibid.* at 117.

intervention. This amounts to a prohibition against an aggrieved party privately and unilaterally seeking vengeance against an offender. Among the Mi'kmaq for example, revenge and fighting were both legitimate ways to pursue redress against offences. Sometimes disputants would try to resolve their differences by having men from both sides engage in a physical confrontation. An aggrieved party could also declare an intention to seek revenge against an offender (e.g. murder). Once that declaration was made, there was no turning back. It had to be seen all the way through.⁶¹⁰ MacMillan details how a family feud erupted in a Mi'kmaq community, starting in 1997. A Mi'kmaq man had an affair with somebody else's partner while he was drunk. Several men assaulted him, giving him a life threatening head injury that required hospital treatment. These men were apparently themselves subjected to reprisal assaults, with one of them getting both of his legs broken. This in turn inspired counter reprisals. The ultimate result was a cycle of threats and violence that lasted several years.⁶¹¹ One may be inclined to dismiss this as criminal assaults and lawlessness. A better explanation may be that this was a contemporary expression of Mi'kmaq justice, a contemporary expression of a right to unilaterally and privately seek vengeance against an offending party. What is particularly revealing is that nobody was charged because the code of silence in the community obstructed police investigative efforts.⁶¹²

Prohibiting private vengeance may seem like a paternalistic imposition of an external standard, but consider the potential effects of allowing private vengeance to continue unabated. Is the cycle of violence that manifested in the Mi'kmaq community really a desirable turn of events for any contemporary Indigenous community? It may be

⁶¹⁰ MacMillan, *supra* note 19 at 71-74.

⁶¹¹ *Ibid.* at 347-351.

⁶¹² *Ibid.* at 347.

especially dangerous to allow in Indigenous communities where some families or factions enjoy greater power relative to others. It may be a recipe for allowing a more powerful family to establish unbridled tyranny over the community. The question then becomes how are facts determined when guilt or innocence becomes a contested issue?

Firstly, the party seeking to establish that an offence has occurred should be required to present the allegations before the community court and evidence in support of those allegations. ‘The party’ does not have to mean a prosecuting lawyer. Indigenous communities may well decide that their trial processes do not have to replicate every single feature of Western trial systems. ‘The party’ can include the aggrieved party itself, who may want to present the allegations directly in a manner analogous to that of a civil forum. If Indigenous communities use police forces (a subject that will be broached later), the police can themselves present evidence obtained as a result of their investigations. The point is however that the process should involve a presentation of the allegations before the community court, and *some* evidence in support of those allegations.

Once that threshold has been met, there remains the issue of how to decide whether the commission of an offence is established. As previously mentioned, consensus is often touted as a feature of Indigenous justice practices. The idea advanced is here is that an insistence on consensus can be used as a culturally sensitive safeguard instead of a formal standard of proof beyond a reasonable doubt. One example of this is seen in the Akwesasne Justice Code. Article 6 - section 1(c) reads, “A conviction of a serious offense is only to be found when all Justices on the Tribunal reach a consensus.” Article 6 - section 2(c) is a verbatim duplicate of section 1(c) except that “grievous” is substituted for “serious.” In the definitions section of the Code (Article 8), a tribunal is a

hearing consisting of three Justice Chiefs. The rule of consensus also applies to minor offences, where mediation and settlement are required. Article 6 - section 3 reads:

A minor offence is heard by two Justice Chiefs. It shall be the duty of the Justice to attempt to mediate the matter until a settlement is reached. If a settlement cannot be reached after all parties are heard, the Justices will reach a consensus and then pronounce the findings.

The idea embodied in these provisions can readily be adapted to the proposals involving community court judges. If an accused contests the allegations, a panel of more than one community judge can be required to hear the case. Unanimous consent can be required of the panel before the accused can be convicted. The possible uses of consensus are not necessarily limited to community court judges though.

The jury as we know it may not have had an equivalent among even those Indigenous societies that used trials. Christopher Gora however suggests that the jury system can be adapted to act as a bridge between the Canadian justice system and Indigenous cultural traditions.⁶¹³ Standard jury selection procedures emphasize the thorough randomness of the process such that non-Indigenous jurors from outside an Indigenous community are likely to sit on a jury for the trial of an Indigenous accused.⁶¹⁴ With Indigenous control over justice there is the potential to have jurors drawn exclusively from members of the community decide whether an offence has occurred.⁶¹⁵ This can comport roughly with the historical observation that the community at large had

⁶¹³ Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) Windsor Y.B. Access Just. 156.

⁶¹⁴ *Charter* challenges by Indigenous accuseds to this reality have uniformly been unsuccessful. For challenges that attempted to have the jury panel drawn from the district where the accused resides instead of where the offence was committed, see *R. v. Bear* (1993), 90 Man. R. (2d) 286 (Q.B.); and *R. v. F.A.* (1993), 30 C.R. (4th) 333 (Ont. Ct. of Justice (Gen. Div.)). For unsuccessful attempts to have the jury drawn exclusively from the smaller Indigenous community where the accused resided instead of the larger judicial district see *R. v. Nepoose* (1985), 85 Alta. L.R. (2d) 18 (Q.B.); and *R. v. Yooya*, [1995] 2 W.W.R. 135 (Sask. Q.B.). For similar challenges coupled with applications to change venue to the accused's community itself, see *R. v. Redhead* (1995), 42 C.R. (4th) 252; and *R. v. West* (1992), Docket No: Prince George 21151 (B.C.S.C.).

⁶¹⁵ Gora suggests something similar though his commentary is better understood as jurors being drawn for juries constituted under the *Criminal Code*. *Supra*, note 613 at 178-179.

to be satisfied that an offence occurred before community intervention was merited. The structure of the court itself can also be adapted to reflect cultural mores. Gora explains:

The organization of the courtroom is quite different from that of the traditional council. Certainly, there is a wide variety in traditional layouts, but some consistent themes emerge. For instance, when the disposition of an offender is being considered, he/she is the one who must face the victim, the elders and the rest of the community. There is an element of public shaming at work, a process of reckoning and atonement which seeks to restore harmony. In the common law courtroom, however, it is the judge, as representative of the interests of all people, who faces the audience. The accused sits with his/her back turned to the community and the victim is not accorded a particular position in the process. This foreign atmosphere can be alienating for the victim as well as for the members of the community and is not conducive to the goal of consensus decision-making that is fostered in customary situations. ...

A possible reform would be to recognize "native gathering ergonomics" and foster a more relevant environment by modifying the seating arrangement in the courtroom. Thus, for example, the accused and the Crown would sit facing the judge who would be surrounded by the audience. In this way, an atmosphere of collective input is created, a symbolic union of judge and community, similar to the way in which the elders sitting at the council table were surrounded by other members of the community. The jury could still be seated to one side in order to have a clear view of the proceedings. And the victim, seated in the audience, would, in effect, be mingled with and surrounded by her/his neighbours. There could even be some accommodation made when she/he has to testify. Another possibility is the traditional circular arrangement where all parties -- judge, jury, accused, victim and community members -- are bound together in a way that promotes the aboriginal customary spirit of reconciliation and reintegration.⁶¹⁶

The idea then is that a jury comprised of community members, its structure culturally adapted, must reach consensus in order to decide that an offence has occurred. It represents a culturally sensitive safeguard.

The obvious danger here that Gora identifies is that power structures in Indigenous communities can plague this sort of trial process just as much as restorative processes.⁶¹⁷ If all the jury members are tied to powerful elites then they can assert consensus against a marginalized accused despite a preponderance of evidence speaking to innocence. If both the accused and some of the jury members are tied to powerful elites, those jury members can prevent consensus despite a preponderance of evidence supporting conviction. In *R. v. Fatt* the Crown successfully applied for a change of venue for a murder trial away from the accused's Dene community because there was evidence

⁶¹⁶ *Ibid.* at 177.

⁶¹⁷ *Ibid.* at 180.

that the community favoured the accused over the victim.⁶¹⁸ In *R. v. K.I.*, the victim was a teenaged girl who had been sexually assaulted. She and the accused were related both to each other and to most of the other community members. The victim was pressured by several members to withdraw the charges, and was frequently criticized for making the allegations to begin with. The Crown obtained a change of venue on the basis that trying the accused in the same district as his community risked mental harm to the victim, as well as her not giving honest testimony under intimidation.⁶¹⁹ The ideas of a jury drawn from the community itself and the requirement of consensus have the potential to comport roughly with the theme of the community itself being satisfied that an offence has occurred. If power relations pose too great a threat to the integrity of such a structure however, it may well behoove an Indigenous community to go with consensus by panel of community court judges instead. It may be better this way since an Indigenous appeal court would ideally have access to the records of the proceedings themselves as well as the judges' reasons should an injustice occur.

In summary, these proposals try to be culturally sensitive by incorporating a celebrated theme of Indigenous justice, consensus, into the fact finding process. It also strives to produce a meaningful safeguard by avoiding having that fact finding determined solely by the unfettered discretion of one individual.

10.1.4 Objections

10.1.4.1 Still Encourages Guilty Pleas

The idea here is that even if there is a safeguard different from proof beyond a reasonable doubt, it can still encourage accuseds to enter not guilty pleas and avoid

⁶¹⁸ *R. v. Fatt*, (1986) 54 C.R. (3d) 281 (N.W.T.S.C.).

⁶¹⁹ *R. v. K.I.*, [1990] N.W.T.R. 388 (S.C.).

responsibility. There are two replies to this. One is that Donald Marshall's story illustrates the dangers involved with not allowing an accused to assert innocence. In this day and age, accuseds in Indigenous communities should somehow be allowed to assert *bona fide* defences to the allegations. The second reply is that there is still plenty of room to persuade an accused to accept responsibility outside of the courtroom process itself. Recall that Elders in Indigenous societies often exercised gentle persuasive authority rather than coercive authority. Nothing should really stop an accused from willingly accepting responsibility under such persuasion. Ross describes an example of this:

I recall, for instance, a young man charged with smuggling liquor into his dry reserve community. His lawyer urged him to plead "not guilty," because the search methods by which the alcohol was found were in breach of his rights under the *Charter of Rights and Freedoms*. After a month-long adjournment, the young man came back to court, without a lawyer and entered a plea of "guilty" instead. He explained that he had consulted with the elders who had spoken of their wish that the community be alcohol-free for the health of all. Because of that, he told us he had chosen not to "use the whiteman's law to go against the wishes of the elders," even though he knew he could have.⁶²⁰

There is still another objection, but one that stems from opposing concerns.

10.1.4.2 Increased Risk of Conviction

A possible contention is that not holding Indigenous processes to proof beyond a reasonable doubt increases the risk of convicting the innocent. One must also be cognizant that in Indigenous communities, as in mainstream Canadian society, the possibility of false or flawed accusations is a danger. Even if all the community members or every panel member of community court judges reach a consensus that the accused is guilty, those members or judges may be adding their voices to consensus despite having a reasonable doubt. There are two replies to this.

The first reply is that even if insisting only upon consensus does increase the risk, that in and of itself is not necessarily offensive to *Charter* standards. Consider section 1

⁶²⁰ *Supra* note 70 at 209-210.

of the *Charter*, which reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In *R. v. Oakes*, the Supreme Court set out a series of tests for determining whether infringements upon *Charter* rights are justified under s. 1. Chief Justice Dickson states:

First, the objective which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”.. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified... There are in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”.⁶²¹

The *Oakes* test has frequently been called upon to justify lowering the standard of proof to the balance of probabilities or even placing the onus of proof on the accused. The Supreme Court has often made a distinction between laws that resolve competing interests or protect vulnerable groups, and laws that pit the state as a singular antagonist against the accused.⁶²² The former deserves a greater degree of deference. The latter deserves greater scrutiny under the *Charter*. An example of where protecting a vulnerable group resulted in greater tolerance for a violation of the presumption of innocence is *R. v. Downey*.⁶²³ The accused was charged with living off the avails of another person’s prostitution, contrary to s. 212(1)(j) of the *Criminal Code*. At issue was s.212(3), which provides that evidence that a person is habitually in the company of a

⁶²¹ *Supra* note 594 at 138-139.

⁶²² *Irwin Toy*, *supra* note 397; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

⁶²³ *Supra* note 597.

prostitute is proof of living off the avails of prostitution, in the absence of evidence to the contrary. This presumption was challenged as a violation of the right to be presumed innocent. The Supreme Court agreed that it created the possibility of conviction despite the existence of a reasonable doubt.⁶²⁴ The majority found that the violation was justified under s. 1. Justice Cory applied the rational connection test as follows:

In order to be valid the measures taken must be carefully designed to respond to the objective. Yet the proportionality test can and must vary with the circumstances. Parliament is limited in the options which it has at hand to meet or address the problem. Rigid and inflexible standards should not be imposed on legislators attempting to resolve a difficult and intransigent problem. Here, Parliament has sought, by the presumption, to focus on those circumstances in which maintaining close ties to prostitutes gives rise to a reasonable inference of living on the avails of prostitutes. This is not an unreasonable inference for Parliament to legislatively presume, as it cannot be denied that there is often a connection between maintaining close ties to prostitutes and living on the avails of prostitution.⁶²⁵

The Court held that requiring an accused to raise evidence to the contrary to defeat a presumption of an essential element of the offence was justified, for the sake of protecting to women as a vulnerable group.

Another exception applies when the facts are presumed because of considerable repercussions for the administration of justice. An example is *Chaulk*, where the Court held that requiring the accused to prove insanity on the balance of probabilities was justified since requiring the Crown to prove sanity beyond a reasonable doubt would have tremendous repercussions for the administration of justice, such as the costs of hiring experts to prove the accused's sanity, and the resulting time delays and case backlogs.⁶²⁶

Courts are also often willing to relax the standard of proof for regulatory offences. In *R. v. Wholesale Travel Group Inc.*, a majority of the Court held that requiring an accused to prove due diligence on the balance of probabilities as a defence to a regulatory

⁶²⁴ *Ibid.* at 34.

⁶²⁵ *Ibid.* at 36-37.

⁶²⁶ *Supra* note 594 at 1337.

offence was justified under s.1.⁶²⁷ Justice Cory went so far as to say that the impugned law did not violate the presumption of innocence. His conclusion was based upon a contextual approach to *Charter* rights. *Charter* rights mean different things in different contexts. The presumption of innocence has a certain meaning in the context of “true criminal offences”, and a different one in the context of “regulatory offences.” To treat the presumption of innocence differently when it came to regulatory offences depended upon two justifications. His first justification was the licensing justification. When a person (individual or corporate) engages in a regulated activity, that person consents to accepting responsibility towards the public, and the consequences for the public that may flow from engaging in that activity. The second justification was the vulnerability justification. Requiring the accused to prove due diligence was necessary for the sake of protecting society, especially its vulnerable members.⁶²⁸

In summary, Supreme Court jurisprudence on s. 11(d) has frequently shown deference to legislation that has enacted *prima facie* violations of the presumption of innocence. The Court has recognized in its analyses under s. 1 that constant insistence upon proof beyond a reasonable doubt can entail considerable social costs. One could of course suggest that the threshold for regulatory offences was lowered because the sanctions typically involve fines instead of incarceration. What is interesting to note is that in *Downey* and *Chaulk* the Court was still willing to lower the threshold when imprisonment was a distinct possibility (e.g. for living off the avails of prostitution) on the basis of rationales such as easing the administration of justice and protecting

⁶²⁷ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. Lamer C.J.C. and Sopinka J. at 204. LaForest J. at 209-210.

⁶²⁸ *Ibid.* at 224-234.

vulnerable groups in society.⁶²⁹ It is therefore reasonable to accommodate Indigenous approaches to justice with a similar rationale. Certain crimes threaten the collective well-being of Indigenous societies, such as gang activity, offences tied to substance abuse, drug trafficking, sexual and domestic abuse of vulnerable members. The use of consensus need not be strictly held to proof beyond a reasonable doubt in recognition that it may comport roughly with Indigenous notions of justice, and that proof beyond a reasonable doubt may result in harmful social costs to Indigenous communities. There is also a second and perhaps even better reply to the objection.

The second reply is that consensus, even if it is not held to proof beyond a reasonable doubt, can still provide a meaningful safeguard against convicting the innocent. Christopher Gora notes that in the North West Territories, Crown prosecutors, defence lawyers, and members of Indigenous communities alike were under a perception that local juries tended to acquit more often than in judge alone trials.⁶³⁰ The juries in these cases did of course receive instructions from the judge concerning proof beyond a reasonable doubt during these trials. Gora hints that more than this judicial direction may be involved though, in this way: “Defence counsel, on the other hand, were more apt to believe that the verdicts might in fact be appropriate given such factors as the jury’s more intimate knowledge of the circumstances, including the motive of the complainant, or their reasonable doubt as to the facts and so on.”⁶³¹ If consensus becomes the defining feature of deciding whether an offence has occurred, we may not actually know for

⁶²⁹ The Court in *Downey* was considering s. 195(1) (now s. 212(1)) of the *Criminal Code* which makes living off the avails of prostitution an indictable offence with a maximum punishment of ten years imprisonment.

⁶³⁰ *Supra* note 613 at 172. Gora notes that statistics of these matters are not kept in the N.W.T., but that it was simply a commonly shared perception among the various participants (at fn 87).

⁶³¹ *Ibid.*

certain whether it will lower the threshold in practice. For all we know it may result in more convictions or less convictions depending on a number of factors, including the particular facts that come before community juries or community court judge panels, and the community's knowledge of the events in question. Consensus may not necessarily result in a higher or lower threshold. It is simply different from proof beyond a reasonable doubt. It ideally provides a culturally sensitive but still meaningful safeguard against sanctioning the innocent. This however is not the only problem that arises when an accused asserts innocence, as we will see in the next discussion on the accused's right to adversarial procedure during a trial.

10.2 Adversarial Trials

10.2.1 Canadian Jurisprudence

In *R. v. Swain*, Chief Justice Lamer said: "The principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused person have the right to control his or her own defence."⁶³² There is also one particular facet of adversarial justice that is worth noting for purposes of our discussion, the right to cross-examine the witnesses against the accused. Justices Cory, Iacobucci, and Bastarache had this to say in *R. v. Rose*: "... the right to make full answer and defence has links with the right to full disclosure and the right to engage in a full cross-examination of Crown witnesses, and is concerned with the right to respond, in a very direct and particularized form, to the Crown's evidence."⁶³³ Justice Cory also has this to say in *R. v. Osolin*:

⁶³² *R. v. Swain*, [1991] 1 S.C.R. 933 at 936.

⁶³³ *R. v. Rose*, [1998] 3 S.C.R. 262 at 319.

It is of essential importance in determining whether a witness is credible. Even with the most honest witness, cross-examination can provide the means to explore the frailties of testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing.⁶³⁴

There are other facets of adversarial procedure that are enshrined as *Charter* rights, such as the right to disclosure of the Crown's case and the right to closing address and so on. It is however the bare requirement of adversarial procedure and the right to cross-examine that are particularly problematic for Indigenous approaches to justice, as we will now see.

10.2.2 The Conflict

Recall that restorative processes are designed to promote relationship reparation and community harmony. The mere presence of adversarial procedures is seen as a threat to this pursuit. Rupert Ross argues that the use of adversarial processes in Indigenous communities can create problems as follows:

... western law puts people through adversarial processes, necessarily *adding* to the feelings of antagonism between them. Traditional teachings, not surprisingly, suggest that antagonistic feelings within relationships are in fact the *cause* of antagonistic acts. Traditional law thus requires that justice processes must be structured to *reduce*, rather than escalate, that antagonism.⁶³⁵

The right to cross-examine also presents potential difficulties. Cross examination in common law court rooms is often very confrontational. Consider the following questions from a sample cross-examination relating to shoplifting:

It was during this time that you saw Mr. Andrews put the bottle in his bag correct?

It is also correct that after putting the bottle in the bag, Mr. Andrews remained in the eye care area for a time?

During that time he continued to look at various items?

Now after leaving the eye care area he did not directly leave the store did he?

He went to the cashier?

⁶³⁴ *R. v. Osolin*, [1993] 2 S.C.R. 313 at 663.

⁶³⁵ *Supra* note 70 at 271.

And as far as you know he never purchased any items?

Then there was actually no need for him to go to the cashier?

In fact he spoke with the cashier for a time?

You never spoke with the cashier about what he talked to her about?

After speaking with the cashier Mr. Andrews then left the store?

Now the bottle of eye solution found in his bag is large isn't it?

And when Mr. Andrews emptied his bag in the office, the bag was open at that time?

So after Mr. Andrews put the bottle in his bag, he never closed it?

There were also other items in the bag?

Specifically there were a number of books weren't there?

When you stopped him outside the store he was co-operative?

He never tried to run away did he?

In fact, he never balked at all about going with you to the store office?

Once the bag was emptied, Sir, did he not say, "I forgot all about that bottle in my bag as I was looking for my eye solution."?

In fact, whilst in the office he continued to protest his innocence didn't he?

Your store policy is simply if a person leaves the store without paying for an item the police are called, right?

Prosecute all shoplifters?

And that, Sir, is why we are here today?⁶³⁶

The questions are not outright rude but they are still confrontational in that they constantly question the witness' understanding and representations of the events. Not only can the tone of the questions themselves be confrontational, but some of the grounds upon which a witness can be cross-examined can amount to personal attacks. Witnesses other than the accused can be confronted with evidence of bad character.⁶³⁷ The accused

⁶³⁶ Lee Stuesser, *An Advocacy Primer* (2nd. ed.) (Scarborough, Ontario: Thomson Carswell, 2005) at 168-169.

⁶³⁷ *R. v. Bell* (1930), 53 C.C.C. 80 (Alta. C.A.); *R. v. Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.). Cross-examining co-accuseds on bad character is also legitimate. See *R. v. Leon-Uzarraga* (1998), 123 C.C.C. (3d) 291 (B.C.C.A.); *R. v. Kendall* (1987), 57 C.R. (3d) 249 (Ont. C.A.).

can be confronted with evidence of bad character if the accused asserts his or her good character during examination-in-chief.⁶³⁸ Other grounds include bias (e.g. improper or tainted motive to testify against one of the parties)⁶³⁹, interest (e.g. standing to benefit materially or emotionally from the outcome of the proceeding)⁶⁴⁰, and corruption (e.g. deliberate fabrication or attempting to suborn such from another witness).⁶⁴¹

Many Indigenous societies had ethical standards of personal interaction that prohibited saying “hostile, critical, implicitly angry things about someone in their presence”.⁶⁴² Cross-examination can invite an Indigenous witness to speak negatively of somebody present during the process. Some of the recognized grounds for cross-examination can by their very nature involve questions that direct negative commentary towards the witness as well. Cross-examination can be problematic for many Indigenous societies in that it invites the commission of cultural *faux pas*. A Hopi witness once expressed indignation towards the cross-examination tactics of a non-Hopi lawyer as follows: “He hasn't sat up there once, and had any kind of devious answer to anything. In fact, he--if I had to say that he was badgered by Mr. Keith. "Answer me! Yes or no! Yes or no!" Hopi way, we don't practice like that. Not even in the kiva, and you men know that.”⁶⁴³ Borrows also has this to say:

While presenting evidence in an adversarial setting is a harrowing experience for most people, it can be especially troubling for Elders from certain groups, for whom such treatment is tantamount to discrediting their reputation and standing in the community. Apart from the tremendous strain placed on the individual enduring this experience, the process represents a major challenge to the

⁶³⁸ *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.); *R. v. McFadden* (1981), 28 C.R. (3d) 33 (B.C.C.A.).

⁶³⁹ *R. v. McDonald*, [1960] S.C.R. 186.

⁶⁴⁰ *R. v. Teneycke* (1996), 108 C.C. (3d) 53 (B.C.C.A.); *R. v. Bencardino* (1973), 24 C.R.N.S. 173 (Ont. C.A.); *R. v. Stevenson* (1971), 5 C.C.C. (2d) 415 (Ont. C.A.).

⁶⁴¹ *R. v. P. (P.N.)* (1993), 81 C.C.C. (3d) 525 (Nfld. C.A.); *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.).

⁶⁴² *Bridging the Cultural Divide*, *supra* note 173 at 207.

⁶⁴³ Justin B. Richland, “‘What are you going to do with the Village’s Knowledge?’ Talking Tradition, Talking Law in Hopi Tribal Court” (2005) 39 *Law & Soc’y Rev.* 235 at 249.

culture more generally. To directly challenge or question Elders about what they know about the world, and how they know it, 'strains the legal and constitutional structure' of many Aboriginal communities. To treat Elders in this way is a substantial breach of one of the central protocols within many Aboriginal nations, a fundamental violation of the legal order somewhat akin to requiring judges to comment on their decision after it is written. To subject Elders to intensive questioning demonstrates an ignorance and contempt for the knowledge they have preserved, and a disrespect and disdain for the structures of the culture they represent. Yet such behaviour is mandated by the Canadian legal system.⁶⁴⁴

This commentary is made in the context of Elders giving oral evidence that is relevant to Indigenous rights litigation under s. 35. It is however easy to anticipate similar concerns during a criminal trial in an Indigenous community. If an Elder is a material witness to what happened, cross-examining on mistaken observation, character, motives behind the testimony, or suggestions of fabrication can become very disrespectful towards the Elder. It could amount to an especially serious cultural taboo.

The commission of cultural *faux pas* during cross-examination can also raise problems that are multi-layered. Ross points out that subjecting Indigenous women and children who have been victimized by domestic or sexual abuse to an aggressive cross-examination can also amount to a second victimization inside the court room.⁶⁴⁵ Judy Atkinson adds:

Recently, a number of underage girls testified in a criminal trial to their alleged long-term sexual abuse at the hands of a senior community policeman. The policeman was defended by the Aboriginal and Islander Legal Services. In court the girls were subjected to the usual discriminatory, degrading cross-examination, which aims to prove that the accused is the victim and that the girls were the abusers. If this experience has done nothing else, it has shown these young women and their mothers that it is futile to seek help or protection from the western criminal justice system.⁶⁴⁶

Western styles of cross-examination can not only violate cultural taboo, but violate taboo in an especially serious manner by inflicting emotional or even psychological harm on already vulnerable victims. How can this kind of conflict be addressed?

⁶⁴⁴ Borrows, *Recovering Canada*, *supra* note 316 at 91-92.

⁶⁴⁵ Ross, *supra* note 70 at 202-203.

⁶⁴⁶ Judy Atkinson, "Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward" (1990) 2:46 Indigenous Law Bulletin 6.

10.2.3 The Proposal

One possible solution is to keep adversarial trials as a distinctly separate process from those processes that resemble restorative justice. There remains a problem in that some Indigenous societies may want to collapse fact finding and restorative processes together into the same process. An example of this is provided by the Akwesasne Justice Code. Anyone participating in a trial of a serious offence may present evidence to the Tribunal of Justices hearing the case (Article 6, Section 5). Justice Chiefs are also encouraged to consider all affected interests in the community in reaching a decision. Article 6 - sections 5(e) and 5(h) state that the Justice Chiefs ask the accused, the accuser, and witnesses both to explain what happened, and what they think would be a just and equitable solution to the matter. Implicit in this may be that the Justice Chiefs can ask questions of anyone who presents evidence. Indeed, a Grand Tribunal of Justices that hears an appeal from a trial may ask any party involved to provide an oral statement (Article 6, section 8). The Akwesasne Code's processes do involve ascertaining the truth of what happened, but with a more inquisitorial emphasis. Restorative objectives and fact finding are both collapsed together into the same process.

A solution that is presented here is to limit the scope of fully adversarial trials to more limited circumstances. The idea is that restorative processes can still be used in situations where it is clear that the accused performed a criminal act, but the reasons why remain unclear. Rupert Ross describes one such scenario:

As a separate issue, it should be noted that many of the charges in the North occur when the accused is so intoxicated that he or she claims no memory of the event. At present, offenders must choose either to plead guilty on the basis of police summaries or to call for a full-blown trial so they can hear from the witnesses directly. If they choose a trial, their plea of "not guilty" really just means "I don't know." That all-or-nothing scenario could be avoided through a more informal pretrial process, where witnesses relate what took place either directly to the accused

(though perhaps in a less adversarial manner) or indirectly, to a group whose word and judgment the accused accepts.⁶⁴⁷

Another scenario could be where the accused performed the deed, but has had a troubled life and/or performed the act in an extremely emotional state. The facts of *Gladue* are worth noting. The accused killed her common law husband because she became enraged both by his being with another woman, and by his verbal taunts. The victim had also physically abused her in 1994. While her trial was pending, she was undergoing counseling for alcohol and drug abuse.⁶⁴⁸

Acting in self-defence can be a complete defence to charges such as assault or murder under the *Criminal Code*.⁶⁴⁹ As radical as it may sound, it is conceivable that even self-defence cases could be excluded from fully adversarial trials. Even if the accused had to defend him or herself from harm, the community may want to know why that necessity arose to begin with and how to deal with it. The incident itself may have occurred due to a family feud, and therefore signal to the community that there are relationships in need of repair. That the accused had to act in self-defence would ideally lessen the sanctions, if any, that would have to be faced personally. In the meantime, the restorative process provides the community with an opportunity to ascertain why the incident occurred and how to resolve community tensions. The point is that for cases where the accused apparently did something causing harm, Indigenous communities need not insist on the ‘all or nothing’ proposition that comes with adversarial trials.

There are however situations where it may be appropriate to insist on fully adversarial trials. These situations would involve where there is a live issue as to whether

⁶⁴⁷ Ross, *supra* note 70 at 245-246.

⁶⁴⁸ *Gladue*, *supra* note 191 at 695-698.

⁶⁴⁹ Sections 34 and 35 of the *Criminal Code*.

the accused even performed an act meriting community intervention to begin with. One example may be where only circumstantial evidence is provided against the accused. Another situation may be eyewitness testimony under circumstances where its reliability is open to question (e.g. identification occurred in circumstances of poor lighting, the witness is shortsighted).

The remaining issue is that even where fully adversarial trials are used, there remain problems with the use of cross-examination. The Royal Commission on Aboriginal Peoples recognizes it may still be necessary to allow an accused to vigorously challenge prosecution evidence in order to establish *bona fide* defences.⁶⁵⁰ Their suggestion for realizing this is to structure cross-examining questions in a culturally sensitive format. The commission describes this as follows:

The practice of making a point not by simply asserting it but by presenting a narrative, perhaps drawn from another time and place, to illustrate the point or lesson, has deep roots in Aboriginal societies. Aboriginal counsel might well develop a style of questioning witnesses that draws on this narrative tradition. Narratives might be drawn from the extensive repertoire of 'Trickster' stories so common among Aboriginal peoples in Canada.⁶⁵¹

Using this approach, the sample cross-examination taken from *The Advocacy Primer* could be reworded as follows:

The Trickster, as a figure of legend, often conveyed many qualities? Some of them of often contradictory, yes?

The Trickster could show great wisdom and foresight, but he could also show absent-mindedness. Correct? He was also often disposed towards friendly conversation with those around him, yes?

Suppose the Trickster comes into a lodge of several brothers as a visitor. He sees several medicine pouches, furs, and various works of art that capture his interest. One medicine pouch in particular catches his fancy. He is well aware that the brothers will require payment in order for him to receive the pouch. He has brought beads to compensate the brothers. He places the pouch inside his satchel so that he can admire the other belongings that he sees in the lodge. One of the brothers is close by. The Trickster, feeling a spirit of warmth and friendliness at that time, begins to converse with that brother. The Trickster has his attention absorbed by the words of friendship that he shares with the brother. When the conversation concludes, he walks out of the lodge with the pouch still in his satchel. Is it possible that on this occasion the Trickster was forgetful?

⁶⁵⁰ *Bridging the Cultural Divide*, *supra* note 173 at 207.

⁶⁵¹ *Ibid.* at 207-208.

Could this story of the Trickster finish as follows? One of the other brothers kept close watch on the Trickster. This particular brother was charged with keeping watch over the goods of the lodge, and did his duties as best he could. He honestly believed that the Trickster was up to no good. The brother did not realize that the Trickster had beads for the brothers, but had forgotten to give them to the brothers. When the Trickster is confronted, the Trickster realizes that he has been forgetful and explains himself. The Trickster even shows the beads that he has brought for the brothers to show his good faith.

This is made up, but it does show how culturally sensitive modes of cross-examination can work. This does not have to be limited to cross-examination. Examinations-in-chief can also be presented in narrative form to avoid saying hostile or angry things against somebody. The Queensland Criminal Justice Commission has recommended the use of narrative format for examinations-in-chief of Indigenous witnesses.⁶⁵²

10.2.4 Objection

The key objection to this concept is that it invites imposing sanctions or obligations on an accused in situations where the accused is normally entitled to a 'not guilty' verdict. Why should an accused face any consequences if he was too intoxicated to form intent? Why should an accused face any consequences if he had to act in self-defence? Kent Roach points out that determining what is criminal conduct is a highly subjective and normative exercise.⁶⁵³ What is conduct warranting state intervention changes from society to society, and from time to time within the same society. Canada itself has demonstrated that. Under Canadian common law, intoxication is a defence to offences with a specific intent, an intention to produce consequences beyond the action itself. An example would be assault with intent to resist arrest. Intoxication was not a defence to offences with general intent, such as simple assault.⁶⁵⁴ In *R. v. Daviault*, the Supreme Court ruled that the *Charter* required that intoxication be a defence to general

⁶⁵² *Aboriginal Witnesses in Queensland's Criminal Courts* (Brisbane: Queensland Criminal Justice Commission, Goprint, 1996) at 91.

⁶⁵³ Roach, "Changing punishment at the turn of the century", *supra* note 54 at 259-260.

⁶⁵⁴ *R. v. Lemky*, [1996] 1 S.C.R. 757.

intent offences as well where that intoxication produces a state akin to automatism.⁶⁵⁵

Parliament responded to this with s. 33.1 of the *Criminal Code*, which reads:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

One could suggest that s. 33.1 reflects increased recognition that there is something blameworthy in self-induced intoxication that leads to harm relative to the previous state of the law. Also, Western societies had in the past frequently criminalized certain forms of sexual behaviour such as pre-marital sexual relations and homosexuality, but no longer do so. If Canadian society can alter the standards of acceptable behaviour, whether through increased or decreased criminalization, why can Indigenous societies not enjoy the same privilege as well? Roach's point about subjectivity and normativity becomes apparent here.

Indigenous societies need not blindly accept the 'all or nothing' proposition that comes with adversarial trials. Ideally whatever sanctions or obligations are involved would be accepted willingly by an offender as part of the process of reaching consensus. An example of this can be found from an anecdote that does not arise from within any Indigenous culture, but is still particularly illustrative. Mas Oyama, a famous karate master, stood up for a young girl who was being harassed by a man. The man pulled out a knife and attempted to stab Oyama. Oyama delivered a punch to the man's head with

⁶⁵⁵ *R. v. Daviault*, [1994] 3 S.C.R. 63.

such force that it killed him. Japanese courts decided that Oyama acted in self-defence. Oyama however was still personally overcome with guilt over the man's death. He went to the farm where the man's widow and child resided. He worked for the wife on her farm until she was satisfied that he was remorseful.⁶⁵⁶ The lesson for us here is that even in situations that qualify for defences recognized under Western law, there can still be room for Indigenous peacemaking to operate. Is there anything that truly precludes an Indigenous accused from willingly accepting certain sanctions or obligations during restorative processes? Ideally the sanctions or obligations faced by the accused would often be lessened in recognition of the circumstances, particularly if the accused has sympathetic parties who are there to participate in the process. Susan Olson and Albert Dzur add: "Rather than relying on procedural justice to achieve a black-and-white determination of legal guilt, restorative justice aspires to substantive justice and recognizes that it may often be gray."⁶⁵⁷ It can also be imagined that the process can decide that no sanctions or obligations are required for the accused personally, while focusing on other aspects of the conflict (family feud for example). The only caveat of course to all this is that community court judges ensure that the processes adhere to natural justice, who are in turn held to standards of impartiality by the appellate courts. Thus far we have reviewed the appropriateness of, and ways to resolve potential conflicts in the application of Charter rights designed to ensure fairness. There are other Charter rights designed to ensure a balance between state authority and personal privacy which also give rise to potential conflicts in the context of Indigenous justice systems.

⁶⁵⁶ Michael Lorden, *Mas Oyama: The Legend, The Legacy* (Burbank, California: Unique Publications, 2000).

⁶⁵⁷ Susan Olson & Albert Dzur, "The Practice of Restorative Justice: Reconstructing Professional Roles in Restorative Justice Programs" (2003) *Utah L. Rev.* 57 at 64.

CHAPTER 11: CULTURALLY SENSITIVE INTERPRETATION OF RIGHTS DURING THE INVESTIGATIVE STAGE

11.1 Right against Unreasonable Search and Seizure

11.1.1 Canadian Jurisprudence

Section 8 of the *Charter* reads “Everyone has the right to be secure against unreasonable search and seizure.” An important preliminary issue is “What does s. 8 protect?” The Supreme Court has consistently maintained that the right against unreasonable search and seizure protects a person’s reasonable expectations of privacy. In *R. v. Edwards*, the Court listed a number of factors to be considered in assessing whether a person has a reasonable expectation of privacy in the context of search and seizure by state authorities:

- 1) presence at the time of the search;
- 2) possession or control of the property or place searched;
- 3) ownership of the property or place;
- 4) historical use of the property or item;
- 5) ability to regulate access;
- 6) existence of a subjective expectation of privacy; and
- 7) objective reasonableness of that expectation.⁶⁵⁸

The list is non-exhaustive. The reasonableness of the expectation is to be assessed on the totality of the circumstances.⁶⁵⁹

A search and seizure must usually must be permitted by prior and written authorization (a warrant) provided by someone impartial and capable of acting in a

⁶⁵⁸ *R. v. Edwards*, [1996] 1 S.C.R. 128 at 145-146.

⁶⁵⁹ *Ibid.* at 145.

judicial capacity to be considered reasonable.⁶⁶⁰ The authorization must be based upon reasonable and probable grounds that the evidence, items, or persons to be searched or seized will be found at the location in question.⁶⁶¹ An investigative authority, in a criminal law context, cannot provide itself with its own written authorization to conduct a search or seizure. An investigative authority in such circumstances is not deemed to be impartial or capable of acting in a judicial capacity. The search must also be carried out in a reasonable manner (i.e., not in an abusive fashion).⁶⁶²

If a search and seizure is conducted without written and prior authorization, it is *prima facie* unreasonable. This presumption of unreasonableness can however be overcome by proof of factors which support the reasonableness of the search or seizure.⁶⁶³ Canadian jurisprudence recognizes exceptions whereby warrantless searches can be deemed reasonable. One is where the accused consents to the search. Investigative authorities must inform the accused his or her constitutional right not to consent, and of the consequences of consent (i.e., the evidence may be used against him).⁶⁶⁴ Warrantless searches are also reasonable in circumstances of necessity or urgency where police would not be able to obtain the evidence if they took the time and effort to obtain a warrant. However, exigent circumstances do not create a blanket exception. Whether exigent circumstances justify or help justify warrantless searches along with other circumstances is to be assessed on a case-by-case basis.⁶⁶⁵ Furthermore, investigative authorities can seize items in plain view.⁶⁶⁶ Searches incidental to arrest can

⁶⁶⁰ *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 160-162.

⁶⁶¹ *Ibid.* at 167-168.

⁶⁶² *R. v. Collins*, [1987] 1 S.C.R. 265 at 278-279.

⁶⁶³ *Hunter v. Southam*, *supra* note 647 at 161.

⁶⁶⁴ *R. v. Borden*, [1994] 3 S.C.R. 145.

⁶⁶⁵ *R. v. Silveira*, [1995] 2 S.C.R. 297 at 370-371.

⁶⁶⁶ *R. v. Ruiz* (1991), 68 C.C.C. (3d) 500 (N.B.C.A.) at 509.

also be justified without a warrant. Such searches must be pursuant to a valid objective, such as assuring the safety of arresting officers, assuring the removal of objects that the accused may use to escape, and procuring evidence of a crime for which the accused has already been charged.⁶⁶⁷

Glen Luther describes the fundamental purpose of s.8 as follows: “Sections 8 and 9 are first and foremost, limitations on police power.”⁶⁶⁸ This is viewed as critical to preserving liberty in Canada, and preventing the emergence of a police state. For example, in *R. v. Storrey*, Justice Cory stated:

Section 450(1) (now 495(1)) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offences of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state.⁶⁶⁹

In *R. v. Stillman*, the police seized scalp hairs and buccal swabs from the accused even though he refused consent. The Court came down strongly on this occurrence, offering the following rationale:

It serves as a powerful reminder of the powers of the police and how frighteningly broad they would be in a police state. If there is not respect for the dignity of the individual and the integrity of the body, then it is but a short step to justifying the exercise of any physical force by police if it is undertaken with the aim of solving crimes. No doubt the rack and other stock in trade of the torturer operated to quickly and efficiently obtain evidence for a conviction. Yet repugnance for such acts and a sense of a need for fairness in criminal proceedings did away with those evil practices. There must always be a reasonable control over police actions if a civilized and democratic society is to be maintained.⁶⁷⁰

A more recent statement is provided in *R. v. Mentuck*: “A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state.”⁶⁷¹

⁶⁶⁷ *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 186.

⁶⁶⁸ Glen Luther, “Police Power and the Charter of Rights and Freedoms: Creation or Control?” (1986/1987) 51 Saskatchewan L. Rev. 217 at 218. Section 9 of the *Charter* reads, “Everyone has the right not to be arbitrarily arrested or detained”.

⁶⁶⁹ *R. v. Storrey*, [1990] 1 S.C.R. 241 at 249.

⁶⁷⁰ *R. v. Stillman*, [1997] 1 S.C.R. 607 at 660.

⁶⁷¹ *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512 (S.C.C.) at 537.

11.1.2 The Conflict

11.1.2.1 Police in Contemporary Indigenous Communities

One might think offhand that police forces as we think of them have no basis in the Indigenous past and that there may not be any conflict between Indigenous methods of justice and the right against unreasonable search and seizure. William Newell states that when the Grand Council of the Iroquois met for a witchcraft trial, the nation took matters in hand by bringing the offender to justice.⁶⁷² George-Kanentiio also states that responsibility for obtaining satisfaction for the victim of a crime rested with the family or clan of the victim.⁶⁷³ This may entail investigative activity to discover who performed the deed. On the other hand, Arthur C. Parker writes, “There were no houses for punishment, no police. The standard of behavior was enforced by means of ostracism and by social persecution.”⁶⁷⁴ No society however, Indigenous societies included, has ever been able to fully escape the need to investigate wrongdoing and to employ some measure of force to preserve order. It seems clear that Indigenous peoples, in their daily lives, were usually involved in activities other than enforcing the law and investigation of crimes. Activities such as hunting, fishing, and farming come readily to mind. Yet they may have been willing to act as enforcers and investigators as and when the occasion demanded it. What would not have been a part of pre-contact Indigenous practice is a formal, professional, and centralized police agency that enforces the law and actively investigates crime on a full-time basis. This conclusion may be strengthened by the observation that private justice was occasionally exercised by some Indigenous societies

⁶⁷² William B. Newell, *Crime and Justice Among the Iroquois Nations* (Montreal: Caughnawaga Historical Society, 1965) at 47-51.

⁶⁷³ George-Kanentiio, *supra* note 12 at 99.

⁶⁷⁴ Arthur C. Parker, *An Analytical History of the Seneca Indians* (Rochester: New York State Archaeological Association, 1926) at 29.

before contact.⁶⁷⁵ One of the key points behind modern police forces is to prevent the exercise of private justice.

If this particular form of policing does not resonate with pre-contact practices, it has not stopped many Indigenous communities from establishing their own police forces staffed by their own community members. As an example, the Royal Canadian Mounted Police has entered into community police service agreements with Indigenous communities in British Columbia, Prince Edward Island, Saskatchewan, and the Yukon. Other bands, including the Siksika in Alberta, have entered into tripartite agreements with federal and provincial governments.⁶⁷⁶ Akwesasne has its own Mohawk Police Service.⁶⁷⁷ Even when Indigenous communities use modern police services, the officers often use approaches that resonate with traditional values. Indigenous police officers have often used methods analogous to community enforcement. Robert Depew writes:

Native policing may be observed to operate in the context of reciprocal constraints that are derived from a variety of social relationships and, therefore, is shaped and directed by the interests of the wider community. The obvious theoretical implication here is that non-urban, traditional native communities are structured in such a way that community responses to crime and deviance are likely to take precedence over those of a formal, centralized police agency, at least in certain circumstances.⁶⁷⁸

A survey of police officers working in Indigenous communities conducted by Chris Murphy and Don Clairmont found a recurrent theme in many of the responses. Officers often found that they had to develop a more informal style of police work to be effective. This included giving breaks for minor offences, getting to know everybody in the community, encouraging people to settle disputes outside of the justice system, and

⁶⁷⁵ Newell, *supra* note 672 at 53-54.

⁶⁷⁶ *First Nations Policing Agreements* (Ottawa: Solicitor General of Canada, Ministry Secretariat, 1992). Robert H.D. Head, *Policing for Aboriginal Canadians: the R.C.M.P. Role* (Ottawa: Royal Canadian Mounted Police, 1993).

⁶⁷⁷ Lysane Cree, "Mohawk Community-based Policing" (1999) 14:3 Canadian Human Rights Foundation Newsletter 12.

⁶⁷⁸ Robert Depew, "Policing Native Communities: Some Principles and Issues in Organizational Theory" (July 1992) 34 Can. J. Crim. 461 at 463.

involving community agencies in problems that arose. Murphy and Clairmont were unsure whether this reflected practicality on the part of the officers, or whether it was produced by the traditional values of the community.⁶⁷⁹

11.1.2.2 The Collective Good

Previous discussions made clear that there are certain types of crime that pose serious threats to contemporary Indigenous communities. Offences brought about by substance abuse, and drug trafficking are two examples. Indigenous gang activity also poses a very significant threat. It can be readily imagined that Indigenous communities may look upon police forces as an expedient way to deal with these and other threats to their collective well-being. Police forces can actively investigate such crimes, and deal with threats to public safety as they occur. In fact, one can anticipate that police methods will not always have a conciliatory approach and instead be quite forceful. In the Mohawk community of Kanasetake, newly elected Grand Chief John Gabriel fired the incumbent police chief Tracy Coon for being ‘soft on crime.’ The criminal element in question was Mohawk gangsters tied to the Hells Angels, and reportedly conducting marijuana grow and cigarette bootlegging operations in the community. Gabriel then brought in Indigenous police officers from outside reservations with a view towards cracking down on these operations. The response was swift. On January 12, 2004, Gabriel’s house was burnt to the ground. The gang members barricaded the newly hired police chief and over 40 officers inside their own detachment for over 36 hours.⁶⁸⁰ The crisis ended when Quebec’s public security minister, Jacques Chagnon, brokered a deal that allowed for the release of the barricaded officers, and the appointment of Mohawk

⁶⁷⁹ Chris Murphy & Don Clairmont, *First Nations Police Officers Survey* (Ottawa: Solicitor General of Canada, Minister Secretariat, Ottawa, 1996) at 41-42.

⁶⁸⁰ “Crime Gangs get free roam on Canadian Indian Reserves” *The Boston Globe* (February 1, 2004) A6.

peacekeepers from nearby Kahnawake as the interim police force.⁶⁸¹ Events such as this illustrate both the potential threat posed to an Indigenous community by gang activity, and the need for law enforcement to deal with that threat, and possibly in forceful fashion (e.g. SORT team tactics). As another example, an Indigenous community may decide that it wants to ban the consumption of drugs and alcohol, and prevent the importation of such substances. Therefore the community may want to empower its police force to detect and investigate such activities.

In summary, certain types of crime threaten the collective well-being of contemporary Indigenous communities. Modern police forces may not reflect pre-contact Indigenous practices. Indigenous communities may however desire to use them as an expedient means to deal with threats to their collective well being. The conflict arises in that s. 8 limits the powers of police to investigate crime and thereby take action against certain activities that threaten the collective well-being of Indigenous communities. The question becomes how to address such a conflict.

11.1.3 The Proposal

The starting part of the resolution is this: that Indigenous police officers must apply for a warrant before a community court judge based on reasonable and probable cause before a search can be conducted. This is however exactly that, a starting point. There are other contours in the Supreme Court's jurisprudence on s. 8 that commend themselves very well to a suitable way to address the conflict. In addition to the aforementioned exceptions, whereby warrantless searches are reasonable, the test of reasonable expectation of privacy as applied by the Court through several cases has produced a variety of results. A warrantless search of an individual's private residence

⁶⁸¹ Benoit Aubin, "A Chief in Exile" *Maclean's* (February 23, 2004) 26.

will usually attract a high degree of scrutiny under s.8.⁶⁸² Searches which intrude upon the bodily integrity of a person, such as strip searches, rectal searches, and taking blood samples, likewise invite a high degree of scrutiny.⁶⁸³ However, a lower expectation of privacy has been found in other contexts. A lower expectation of privacy applies when customs officers exercise their duties at border crossings and airport terminals.⁶⁸⁴ The Court has also found there is no reasonable expectation of privacy in materials deposited in the garbage for public collection.⁶⁸⁵ A lower expectation of privacy also applies to students when school authorities conduct searches and seizures. School authorities or police then need only reasonable suspicion that a crime is occurring or has occurred within a school setting. It is a lower threshold than reasonable and probable grounds.⁶⁸⁶

The *Edwards* criterion for determining reasonable expectations of privacy requires a Court to look at the totality of the circumstances. The previous discussion makes it clear that this can result in lowering the level of protection under s. 8. The *Edwards* criteria therefore provide workable mechanisms for incorporating Indigenous perspectives into the analysis. Indigenous cultural viewpoints can speak to the criteria of subjective expectation of privacy, objective reasonableness of the expectation, and the totality of the circumstances. This can result, where an Indigenous community's traditions and contemporary needs become relevant, in modifying the requirements of a valid search under s. 8. An example of how this can work is provided by the Hopi Tribal Court. In *Hopi Tribe v. Kahe*, Kahe had not been seen by his neighbours for more than a

⁶⁸² *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 29.

⁶⁸³ *R. v. Pohoretsky*, [1987] 1 S.C.R. 945 at 949, *R. v. Greffe*, [1990] 1 S.C.R. 755 at 795.

⁶⁸⁴ For border crossings, see *R. v. Simmons*, [1988] 2 S.C.R. 495 at 528-529. For airport terminals, see *R. v. Monney*, [1999] 1 S.C.R. 652 at 678-679.

⁶⁸⁵ *R. v. Patrick*, [2009] S.C.J. no. 17.

⁶⁸⁶ For the scope of school authority searches, see *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 at 421-422; For a recent statement on the scope of police authority to conduct searches within school, see *R. v. A.M.* (2008), 293 D.L.R. (4th) 187 (S.C.C.).

day. One of his neighbours, feeling concern, asked the Hopi police to look for him. The police complied with this request and found him. Upon finding him, the police then asked for his licence and then conducted a search of his vehicle. They found alcohol, which was illegal, leading to his subsequent conviction. The Hopi Court found that the initial search for Kahe was justified as a welfare check. The subsequent demands for a licence and vehicle search were not.⁶⁸⁷ In holding that the initial search was justified, the Court held standards for justifying searches were to be determined by "...customary and traditional ways of the Hopi people. Because of the extended family system, Hopi people look out for and take care of each other. It is Hopi to be concerned about the welfare of your family and neighbors and to make sure that they are okay."⁶⁸⁸ On the surface this may not sound like a big deal since the subsequent search of the vehicle itself was not permissible. Consider however the possibilities if Indigenous communities in Canada adopt a similar analysis based on concerns for the well-being of all. If such an initial check ends up exposing evidence of a crime within plain view, Indigenous police then have a legitimate basis to seize that evidence and then search the location in question. Now suppose that police receive calls out of concern for a battered spouse or somebody who is being sexually abused. Traditional concerns for the well-being of all can justify the police making an initial entry into the residence to ensure the safety of the victim. Questions asked of the victim or other residents upon initial entry, evidence in plain view, or any information or observations that are readily apparent to the officers without actually making a search, could be used to apply to a community court judge for a warrant to search the residence. There are other exceptions as well.

⁶⁸⁷ *Hopi Tribe v. Kahe*, 21 Indian L. Rep. 6079 (Hopi Tribal Ct. 1994).

⁶⁸⁸ *Ibid.* at 6079.

It is well known that Indigenous notions of property are often different from those of Western society, the former having a greater emphasis on the collective good. Suppose that a clan leader, or an Elder, or a person of similar traditional authority gives consent to a police officer to conduct a search and seizure in relation to the accused's residence or belongings. If an Indigenous accused accepts the leader's authority as a matter of traditional belief, an argument could be made that the accused has a lower expectation of privacy. A sample clause in an Indigenous charter of rights could read like this: "When a peace officer has reasonable grounds to believe that a person has committed an offence, that peace officer may search that person's residence without warrant provided that consent has been given by a recognized Elder of that person's clan."

When the Supreme Court has applied the *Edwards* criteria, its analyses of whether there exists reasonable expectations of privacy also include analyses of whether a refusal to lower the threshold of permissible searches entails an unacceptable social cost. In *Simmons*, Chief Justice Dickson wrote:

I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function.⁶⁸⁹

In *M.(M.R.)* we also read:

A reasonable expectation of privacy, however, may be diminished in some circumstances. It is lower for a student attending school than it would be in other circumstances because students know that teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school.⁶⁹⁰

Indigenous perspectives on reasonable expectations of privacy, coupled with threats to community well-being, can operate in a similar fashion to lower the threshold

⁶⁸⁹ *Supra* note 684 at 528.

⁶⁹⁰ *Supra* note 686 at 414.

for permissible searches. One example is where an Indigenous community considers it necessary to prohibit the consumption or importation of alcohol and drugs, due to a crime endemic brought on by substance abuse. Consider the facts from *R. v. Hatchard*:

The Big Trout Lake First Nation is a remote, fly-in reserve community in Northwestern Ontario. The community airport is off-reserve and a bus takes those arriving in the community from the airport to the community. As a part of a concentrated campaign against drugs and alcohol abuse, the community had passed a prohibition by-law pursuant to section 85(1) of the Indian Act ... which permitted the searching by a “special constable, a band constable or any other authorized peace officer,” of any person and the baggage of any person entering the reserve in order to search for intoxicants. The First Nation, as part of the campaign, had instituted a regular system of community patrols which stopped persons as they entered the reserve in order to search for drugs and alcohol.

The First Nations officials received a tip from a drug and alcohol employee that the accused was returning to the community with drugs for the purpose of trafficking. The Ontario Provincial Police were absent from the community at the time and did not have the manpower to assist the First Nations officials. There was no resident justice of the peace in the community and the First Nation officials had not obtained a search warrant.⁶⁹¹

Justice Stach then noted: “The search was part of the collective effort of a remote Aboriginal community to remove from its midst the social destructiveness of intoxicants and admission of the real evidence obtained in the search will not bring the administration of justice into disrepute.”⁶⁹² The Royal Commission states:

If a court were to find that such actions did contravene the Charter, the problems that would be created are apparent. Attempts by a community to control activities it regards as detrimental to its overall health would be seriously impaired if it were required to conform to a balancing of individual and collective rights that did not take into account that community’s culture, traditions and needs.⁶⁹³

A clause in an Indigenous charter of rights could read like this: “When the government of our community declares that drugs, alcohol, and other prohibited substances present a serious threat to the well-being of our community, a peace officer may, without warrant, conduct a search of a person and his or her personal effects on the basis of reasonable belief that the person is in possession of drugs, alcohol, or another prohibited substance.”

The words ‘reasonable belief’ still set a threshold on the validity of the search and

⁶⁹¹ *R. v. Hatchard*, [1993] 1 C.N.L.R. 96 (Ont. Ct. of Just.).

⁶⁹² *Ibid.*

⁶⁹³ *Bridging the Cultural Divide*, *supra* note 173 at 261.

seizure, and so avoids giving community peace officers a complete *carte blanche* to search as and whenever they please. In other words, there still has to be at least some basis or information to found that belief.

One could expect that Indigenous communities may want the threshold similarly reduced when gang activity poses a serious threat. A clause in an Indigenous charter of rights could read: “When a peace officer believes on reasonable grounds that a member of the community is engaged in criminal activity for the benefit of a criminal association, the peace officer may detain and question that person, and may search that person without warrant.” Note that this does not expressly include strip searches. The writer is personally wary of encouraging full strip searches without warrants, though it must be acknowledged that such may be for Indigenous communities themselves to decide. The threshold for searching locations of gang activity, and not gang members themselves, can also be lowered. Another sample clause could read: “A peace officer may apply before a community court judge for a warrant authorizing a search of a private residence or any other site within the community on the basis of the peace officer having reasonable belief that the site is being used to carry out criminal activity for the benefit of a criminal association.” In summary, the *Edwards* tests afford a workable mechanism to incorporate Indigenous concerns and perspectives such as to lessen the protection of s. 8 in appropriate contexts.

11.1.4 Objection

An objection that can be raised is that a collection of exceptions whereby the threshold is reduced to below reasonable and probable grounds, or where warrantless searches are justified, can in effect lead to the creation of police states inside of

Indigenous communities. The exceptions all combine to give police forces inordinate power to subject individual members of Indigenous communities to searches. There are three ways to respond to this. One is that Indigenous cultural perspectives, assuming they still have modern currency, on what an individual can reasonably expect to be kept private from other members of the community may differ significantly from liberal Western notions of individual privacy. The exceptions described here may simply describe the outcome of an objective application of the *Edwards* tests. Indigenous peoples, assuming they still adhere to cultural values and understandings, may themselves not have an issue with lowered expectations of privacy. Second, there may be a social cost involved with a constant insistence on search warrants issued on reasonable and probable grounds. That social cost can stem from threats to the collective well-being of Indigenous communities through certain types of offences such as offences brought on by substance abuse and gang activity. Recall that the collective good was often a cherished principle of Indigenous societies. Indigenous communities may themselves desire to adjust the level of protection in order to deal with threats to their well-being. Third, the level of protection remains meaningful. Even where warrantless searches are authorized, or where the threshold is reduced from “reasonable and probable grounds” to say “reasonable belief”, it does not mean that the officers have a complete *carte blanche* to search as where and whenever they please. There must still be some information to justify the search. Furthermore, an idea that will be developed is that the Indigenous police officers will have to justify searches before a community court judge. This concept will be considered in more detail when the exclusion of evidence as a remedy is dealt with at the end of Chapter 12.

11.2 Right to Silence

11.2.1 Canadian Jurisprudence

Although there does not exist a “right to silence” provision in the *Charter*, the Supreme Court has recognized that the principles of fundamental justice under s. 7 protect a general right against self-incrimination. At the core of the right is allowing an accused to decide whether to provide self-incriminating evidence to authorities, or more broadly speaking whether to say anything at all to authorities.⁶⁹⁴ The accused must be detained by state authorities before the right to silence becomes operative. Upon detention, the right to silence has many facets within the criminal process. It includes a right not to be compelled to testify at trial,⁶⁹⁵ and a right to remain silent during pre-trial investigations by authorities.⁶⁹⁶ If authorities in disguise are used to garner self-incriminating statements, they are prohibited from actively eliciting evidence. They can wait and passively receive the evidence.⁶⁹⁷ There is also the right not to have the trier of fact (jury) invited to make an adverse inference on the basis of not testifying.⁶⁹⁸ If an accused is compelled to testify at a public inquiry, he or she has the right not to have his testimony read into evidence at his or her trial. He or she can also apply for exclusion of evidence derived from the testimony (e.g. real evidence) if it could not have been found or its significance could not have been appreciated but for the testimony.⁶⁹⁹ An accused can be excused altogether from testifying at a public inquiry if it can be established that it would cause undue prejudice at a subsequent criminal trial.⁷⁰⁰

⁶⁹⁴ *R. v. Hebert*, [1990] 2 S.C.R. 151 at 173-175.

⁶⁹⁵ *Ibid.* at 173-175, and *R. v. Noble*, [1997] 1 S.C.R. 874.

⁶⁹⁶ *Ibid.* at 164.

⁶⁹⁷ *R. v. Broyles*, [1991] 3 S.C.R. 595 at 609-612.

⁶⁹⁸ *R. v. Chambers*, [1990] 2 S.C.R. 1293 at 1316, and *Noble*, *supra* note 695.

⁶⁹⁹ *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 561.

⁷⁰⁰ *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 46-47.

As with s. 8, an important concern underlying the right to silence is to prevent the emergence of a police state. At the core of the right is the desire to prevent state authority, at virtually every stage of criminal proceedings, from coercing or tricking an accused into self-incrimination. In *R. v. S. (R.J.)*, the Court quoted with approval this passage from *Thompson Newspapers*: “The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state.”⁷⁰¹ In *Hebert*, the Court had this to say: “The state has the power to intrude on the individual’s physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual’s mental liberty in turn may enable the state to infringe the individual’s mental liberty by techniques made possible by its superior resources and power.”⁷⁰² And later: “The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state.”⁷⁰³

Concerns about preventing the emergence of a police state extend to the trial stage as well. Unlike the general right to silence under s.7, there is a specific provision for a right not to testify at trial, s. 11(c), which reads: “ Any person charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence.” In *R. v. Amway of Canada Ltd.*, the Court said that the underlying purpose of s.11(c) is to prevent the prosecution from compelling the accused

⁷⁰¹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restorative Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 480; quoted in *S.(R.J.)*, *supra* note 699 at 504.

⁷⁰² *Hebert*, *supra* note 694 at 179-180.

⁷⁰³ *Ibid.* at 180.

to supply evidence from his or her own mouth.⁷⁰⁴ As with confessions obtained by coercion or by trickery before trials, the Court also sees compelled testimony as a dangerous road towards a police state. Chief Justice Lamer had this to say in *Hebert*:

The privilege against self-incrimination, like the confessions rule, is rooted in an abhorrence of the interrogation practised by the old ecclesiastical courts and the star Chamber and the notion which grew out of that abhorrence that the citizen involved in the criminal process must be given procedural protections against the overwhelming power of the state.⁷⁰⁵

In summary, the Court has made some strong statements about how the right to silence is necessary to prevent the creation of a police state.

11.2.2 The Conflict

The right to silence has the potential for conflict with Indigenous truth speaking traditions. An illustrative example of this potential conflict comes from the American experience. The *Indian Civil Rights Act* was the product of investigations conducted by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. The chair of the Subcommittee, Senator Sam Ervin, decided to investigate the degree of constitutional protections afforded to American Indians.⁷⁰⁶ John S. Boyden voiced this objection to the right against self-incrimination on behalf of the Ute and Hopi tribes:

The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of "white man's justice," guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint, it is not an elevating experience. We are indeed fearful that the decisions of Federal and State Courts, in light of non-Indian experience, interpreting "testifying against oneself" would stultify an honorable Indian experience.⁷⁰⁷

⁷⁰⁴ *R. v. Amway of Canada Ltd.*, [1989] 1 S.C.R. 21.

⁷⁰⁵ *Supra* note 694 at 174.

⁷⁰⁶ Rights of Members of Indian Tribes: Hearing Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Congress, 2nd Sess. (1968). For a brief history, see Kent McNeil, "Aboriginal Governments and the *Charter*: Lessons from the United States" (2002) C.J.L.S. 73 at 78-85.

⁷⁰⁷ *Ibid.* Rights of Members of Indian Tribes, at 127.

The reason for objecting to the right against self-incrimination was that it was in conflict with truth speaking traditions. The truth speaking tradition was itself considered a meaningful safeguard since the word of an accused was often taken at face value. Hopi and Ute delegates shared an apprehension that accuseds would ‘hide’ behind a right against self-incrimination, try to evade responsibility, and force the burden of proof on the prosecution. The *Charter’s* right against self-incrimination may present similar difficulties if Indigenous societies in Canada also have truth-speaking traditions.

There is also another context worth considering. The Iroquois, and likely other societies as well, were willing to sanction deception as to involvement with an offence. Jonathan Rudin and Dan Russell describe a scenario where three Mohawk youths were charged with various offences:

On Wednesday evening, February 17, 1988, after a drinking bout, Ryan Deer, Dean Horne and a young person under 18, drove to a variety store on the reserve, stole some newspapers and used them to start two fires at abandoned buildings. Later that evening, Deer was apprehended by the Reserve’s police force – the Peace Keepers – and taken to the Quebec Provincial Police Detachment in Longueuil where he was questioned about the fires. **Deer denied having anything to do with the events and subsequently accused the police of attempting to ‘frame’ him for the fires. His accomplices similarly denied their involvement in the affair.** After a police investigation into the matter, the three were charged with arson on March 18th.

Well before the criminal charges were laid however, Deer, Horne and the young offender had second thoughts about their actions. The three admitted their guilt to the Reserve’s War Chief and asked that they be judged according to the laws of the Longhouse. After receiving the consent of the victims of the offences, the offenders and their parents to submit to its jurisdiction, the Longhouse convened on February 22nd.

The Longhouse was convened by appointing members of the Mohawk Nation to sit in consultation in the Longhouse, to hear the facts of the case and determine how it should be resolved. After deliberations lasting a number of days the Longhouse decreed: “Based on the evidence given to us and the statements of guilt of the offenders we find that in conjunction with arson, four other offences were committed; stealing of newspapers, deception, substance abuse and driving while intoxicated.”

Punishment for the offences was dispensed in the following manner (the offences are presented in the order they appeared in the Longhouse judgment):

Theft of newspapers: The three individuals had to apologize to the store owners and pay back twice the cost of the goods stolen.

Alcohol Abuse: As alcohol abuse was a community wide problem, alcohol evaluation programs and workshops were to be established and a professional engaged to help all members of the community who wished to help. The three offenders were required to attend an alcohol evaluation workshop and follow any program designed by the evaluator.

Deception: The three offenders had to make a public apology to the people of the Longhouse for having lied to them with respect to their involvement in the offences. The offenders were also given their first warning according to the custom and practice of the three warning system.

Driving While Intoxicated: The three were forbidden to drive an automobile on the Reserve from sundown to sunrise for one year unless accompanied by a parent or adult appointed for that purpose by the War Chief.

Arson: The three had to apologize to the individuals whose property was damaged and pay full compensation for the damages.⁷⁰⁸

(emphasis added)

Silence before Indigenous police authorities could conceivably be construed as deceit or not telling the truth. To administer punishment for lying to the police, or refusing to speak to them, could potentially conflict with the accused's right to silence under s. 7.

11.2.3 The Proposal

11.2.3.1 Pre-Trial Right to Silence

A theme that is occasionally found in the Court's jurisprudence on legal rights is that the principles of fundamental justice mean different things in different contexts. In *R. v. Lyons*, the Court decided that the accused was not constitutionally entitled to have his dangerous offender hearing heard before a jury.⁷⁰⁹ Justice Iacobucci wrote:

It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness. It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

Suffice it to say, however, that a jury determination is not mandated in the present context. The offender has already been found guilty of an offence in a trial at which he had the option of invoking his right to a jury. Moreover, the procedure to which he was subjected, subsequent to the finding of guilty does not impact on his liberty to the same extent as that initial determination.⁷¹⁰

⁷⁰⁸ Rudin & Russell, *supra* note 160 at 50.

⁷⁰⁹ *Lyons*, *supra* note 551 at para. 74.

⁷¹⁰ *Ibid.* at para. 84-85.

Likewise, in *Swain*, the common law rule allowing the Crown to adduce evidence of the accused's insanity was altered into a general prohibition against that practice. The reasoning was that it compromised the accused's ability to control his defence, and in turn assert his right to liberty unless proven guilty.⁷¹¹ However, once a guilty verdict has been entered, the Crown may then adduce evidence of insanity. There is no longer a danger to the accused's right to control his or her own defence.⁷¹²

One can discern a rough correlation between the nature of the proceedings and the requirements of fundamental justice. Where the accused's guilt or innocence remains an unsettled issue, the requirements of fundamental justice tend to be more stringent. Where the accused has been found guilty, the requirements tend to become more relaxed. The proposal is that when the police are in the process of investigating a crime, when the requirements of fundamental justice should be stricter, a suspect is protected by the right to silence. An Indigenous accused may elect not to speak to Indigenous police officers investigating his or her suspected involvement with a crime. This ideally satisfies s. 7 principles that value the right to silence as a safeguard against the emergence of a police state. It may be an appropriate balance to suspend the operation of a truth speaking tradition until matters proceed to ascertaining guilt or innocence in an adjudicative setting, while allowing a right to silence to remain in force during the investigative stage. The question then becomes what to do when things go past that investigative stage.

11.2.3.2 A Case to Meet Rule

Assume that an Indigenous society in the past required those alleged to have committed transgressions to speak for themselves as part of a truth speaking tradition.

⁷¹¹ *Swain*, *supra* note 619 at 975-977.

⁷¹² *Ibid.* at 986-988.

Now assume that the society wants to revive a truth speaking tradition. A significant issue here is whether an Indigenous accused should be able to assert a right to silence when there is a trial. A suggestion for resolving this is to utilize a modified case-to-meet rule that requires the prosecution to establish a *prima facie* case against an accused, to tender enough evidence which if believed could justify convicting the accused, before the prosecution can call upon the defence to present its case. Once that *prima facie* case is established, the accused is then required to speak on his or her behalf. This reflects a compromise. It can encourage Indigenous accuseds to be forthright during proceedings in compliance with a truth speaking tradition. It can discourage contesting criminal proceedings save where the accused truly wishes to assert his or her innocence. It also operates as a gatekeeper. The requirement of a *prima facie* case would ideally prevent subjecting Indigenous persons to criminal proceedings on the basis of spurious or unfounded accusations. Even so, there remains one more issue to address.

11.2.3.3 Sanctioning Deceit

The Canadian justice system does criminalize lying under certain circumstances. Obstruction of justice is an offence under s. 139(2) of the *Criminal Code*, and is punishable by a term of imprisonment not exceeding 10 years. Even after the advent of the *Charter*, there have been prosecutions for obstructing justice when an accused has lied to a police officer in the course of a pre-trial investigation.⁷¹³ Justice Cory explains:

It is true that a witness has no legal obligation to assist the police in their investigation. ... Yet once a witness does speak to the police in the course of their investigations, they must not mislead the investigating authorities by making statements that are false. The right to say nothing cannot protect a witness from the consequences of deliberately making a false statement.⁷¹⁴

⁷¹³ *R. v. Hanneson* (1989), 71 C.R. (3d) 249 (Ont. C.A.). The Court held that a violation of the right to counsel did not insulate the person detained from a subsequent prosecution for obstructing justice where the inadmissible statements are the *actus reus* of the offence.

⁷¹⁴ *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 819.

There is also perjury, a crime that is punishable to a maximum of fourteen years under s.131 of the *Criminal Code*.

As previously mentioned, Indigenous societies often did attach sanction to deceit. The Iroquois tradition of banishment after lying three times is one example. There is a way to accommodate such traditions. During police investigation, an Indigenous accused has a right to silence. If that right is violated, the accused then has a right to apply for exclusion of evidence under s. 24(2), or other remedies under the general remedial provision of the *Charter*, s. 24(1). However, if an Indigenous accused voluntarily makes a statement with the intention to mislead authorities, then sanctioning deceit should be permissible. It is important to note that saying nothing at all is not obstruction of justice, but a voluntary statement intended to mislead authorities is. In summary, Indigenous societies can sanction deceit where an accused says something with the intention to mislead in circumstances analogous to obstruction of justice or perjury.

11.2.4 Objections

11.2.4.1 Civil Libertarian Objection

The idea of compelled testimony may not sit well with Western civil libertarians, since it in effect subjects an Indigenous accused to an inquisitorial mode of justice. One of the points behind a genuine application of *Dagenais* though is to encourage Western jurists to think outside their own box. Furthermore, this suggestion of a modified case-to-meet rule may not be as offensive to Western standards of rights protection as it appears at first blush. Chief Justice Lamer, although dealing with the context of drawing adverse inferences against an accused who does not take the stand, had this to say:

Once ... the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can be expected to respond ... and failure to do so *may* serve as the basis for drawing adverse inferences ... [Once] there is a

“case to meet” which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes – in a broad sense – compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction.⁷¹⁵

This position has since been abandoned in *R. v. Noble*.⁷¹⁶ Nonetheless, the comment does illustrate that disagreements and changes of course over the scope of the right to silence can occur even among Western jurists. It also suggests that creative solutions can be explored under *Dagenais*, and in pursuit of culturally sensitive interpretations of legal rights. In the end, the proposed solution still provides a meaningful safeguard. It prevents subjecting an accused to spurious or unfounded accusations if there is insufficient evidence to support them. Once a *prima facie* case is made, the truth speaking tradition becomes operative. Within that context, the accused can benefit still from another safeguard. A panel of community court judges, or a culturally adapted jury panel, must reach consensus that the accused committed the act.

11.2.4.2 Conflict with Culture

This objection comes from the other direction, that even the modified case to meet rule goes too far in limiting truth speaking traditions. It is easy to emphasize that pre-contact Indigenous societies did not have the equivalent of modern police services and therefore Indigenous police officers of today would not be persons of cultural or spiritual authority as to be owed cultural truth-speaking duties. This however falls into a trap in that it may fail to account for diversity among Indigenous societies. Consider this example of an investigation carried out by Cheyenne:

Somebody found an aborted fetus in the vicinity of the camp. The discovery was made known to the Council. They believed that the fetus was that of a Cheyenne, but nothing was known about it. The soldier chiefs were consulted, and by them a plan of investigation was produced. The two head chiefs of a soldier society convened their group, while the society announcer was sent out to

⁷¹⁵ *R. v. P. (M.B.)* (1994), 29 C.R. (4th) 209 (S.C.C.) at 227-228.

⁷¹⁶ *Noble*, *supra* note 695.

broadcast the order of the soldiers for all women to assemble in public. When it was seen that all were at hand, the women were ordered to expose their breasts for inspection. The soldier chiefs looked closely at each one to note lactation enlargements of the breast as a sign of recent pregnancy. One girl showed symptoms, and she was charged with the crime, judged guilty, and banished from the tribe until after the Arrows had been renewed.⁷¹⁷

From this example one may suggest that at least some Indigenous societies imbued certain individuals with cultural or moral authority such that they were owed truth-speaking duties by those suspected of crime when matters were still at an investigative stage. It can be readily imagined that contemporary Indigenous communities may desire that individuals with cultural, moral, or spiritual authority serve as police officers. An Indigenous community may also want suspects to observe a truth speaking duty to such officers. Indeed, it must be noted that the longhouse council that was described above attached a warning as a consequence for lying to police.

There are two replies to such an objection. First, one must consider the power that modern day police officers can wield. Police officers are typically armed with fire arms and a baton. When police make an arrest, they often make a frisk search with the point of relieving the suspect of any weapons that the suspect may be carrying. This frisk search does fulfill the legitimate expectation of ensuring the officers' own safety. This does however have the effect of ensuring that the police officers secure the monopoly on deadly force relative to the suspect. The police at that point may then bring the suspect into their detachment for interrogation. The suspect may then be isolated in a cell, or subjected to interrogation alone in a room with more than one officer. The suspect is typically unarmed and alone in a building filled with officers armed with weapons. The potential for coercion and intimidation in such a setting is considerable. Prudence suggests that some checks must still be placed on the inordinate amount of power that

⁷¹⁷ Llewellyn & Adamson, *supra* note 14 at 118-119.

police would enjoy in such situations, notwithstanding any Indigenous truth speaking traditions and their possible contemporary adaptations. Insisting on the right to silence at the investigative stage serves the practical purpose of avoiding police states in Indigenous communities.

Secondly, it must be borne in mind the obstacles that face the contemporary revival of truth speaking traditions to begin with. Western democracies typically insist on the right to silence during both the investigative and trial stages of the criminal process. To accommodate truth-speaking traditions once a case to meet has been established would be a considerable concession to Indigenous communities indeed in the face of civil libertarian insurances on the right to silence. In the end, Indigenous communities, if they value truth speaking traditions, stand to gain. The case to meet rule ideally provides a check against both the emergence of a police state and subjecting an Indigenous individual to spurious or unfounded accusations. Once that case to meet is established, truth speaking traditions are then operative.

11.3 Right to Counsel

11.3.1 Canadian Jurisprudence

Section 10(b) of the *Charter* reads:

Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right; and

A prerequisite to the right to counsel is that the accused must be detained. The test for whether there is detention was described by Le Dain J. in *R. v. Thomsen* as follows:

719. In its use of the word “detention”, s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

720. In addition to the case of deprivation of liberty by physical constraint, there is a detention

within s. 10 of the Charter, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have legal consequences and which prevents or impedes access to counsel.

721. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.
722. Section 10 of the Charter applies to a great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of *habeus corpus* possible.⁷¹⁸

Once there is detention, the police are under an obligation to inform the accused of his right to counsel. This is known as the informational component of the right to counsel, for which there are several rules:

- 1) A detainee must also be informed of access to Legal Aid, where the detainee meets the prescribed financial criteria.⁷¹⁹
- 2) A detainee must be informed of access to duty counsel, who will provide free, immediate, and temporary legal advice, provided such services exist in the jurisdiction. If a toll free number for duty counsel exists, it must be provided.⁷²⁰
- 3) The information provided must be timely, comprehensive, and comprehensible.⁷²¹
- 4) There is no constitutional requirement to determine whether the detainee understands his or her rights, unless that detainee provides positive indications of otherwise.⁷²²
- 5) There is a fundamental relationship between the right to counsel and the right to be informed of the reasons for arrest or detention under s.10(a). If there has been a fundamental or discrete change in the purpose of the investigation, one

⁷¹⁸ *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 649.

⁷¹⁹ *R. v. Bartle*, [1994] 3 S.C.R. 173, at 194-196, and *R. v. Brydges*, [1990] 1 S.C.R. 190.

⁷²⁰ *Ibid.* at 198.

⁷²¹ *R. v. Pozniak*, [1994] 3 S.C.R. 310 at 319.

⁷²² *R. v. Evans*, [1991] 1 S.C.R. 869 at 891.

involving an unrelated or more serious offence, the detainee must again be informed of the right to counsel.⁷²³

6) If an accused initially expresses a desire to consult counsel, but indicates a change of mind, police must inform him of his right to counsel again.⁷²⁴

Once the informational component has been satisfied, the implementation component of the right is triggered. Police must provide the detainee a reasonable opportunity to exercise his right to counsel. There are also a number of rules for the implementation component as follows:

1) The obligation to provide a reasonable opportunity does not arise until the detainee expresses a desire to exercise his right in response to the informational component.⁷²⁵

2) Until the reasonable opportunity has been provided, police may not continue to question or otherwise elicit incriminating evidence from the detainee. They must hold off.⁷²⁶

3) The police may however question or elicit evidence from the accused without the reasonable opportunity where there exist exigent circumstances. Mere evidentiary or investigate expediency does not amount to exigent circumstances.⁷²⁷

4) Jurisdictions are not required to implement a duty counsel system. Where none exists though, the meaning of a reasonable opportunity to consult counsel will be

⁷²³ *Ibid.* at 893.

⁷²⁴ *R. v. Prosper*, [1994] 3 S.C.R. 236 at 274.

⁷²⁵ *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1241.

⁷²⁶ *Ibid.* at 1242.

⁷²⁷ *Prosper*, *supra* note 724 at 275.

affected. The police may be required to wait until the next day to continue their investigations.⁷²⁸

5) If an accused is not reasonably diligent about exercising his right to counsel, the police duty to hold off until a reasonable opportunity is provided is suspended.⁷²⁹

6) A detainee must be provided the opportunity to consult counsel in privacy, whether or not the detainee expresses a desire for privacy.⁷³⁰

7) A detainee may waive his right to counsel, though the standard is high. The waiver must be clear and unequivocal, free and voluntary, and made with full knowledge of the rights being surrendered.⁷³¹

David Tanovich argues that the right to counsel is a particularly important right since it is by representation by counsel that other *Charter* rights are enforced.⁷³² Alan Young also has this to say:

As 'champion' of the interests of the accused, defence lawyers bear the burden of ensuring that their client's constitutional rights have been respected by police, prosecutors and judges. Therefore, in the absence of some institutional mechanism for supervisory, quality control over the process, the implementation of constitutional rights is contingent upon the competency of counsel.⁷³³

This relationship between the right to counsel and other constitutional rights also resonates in the Court's treatment of s.10(b). In *R. v. Manninen* we read, "The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to

⁷²⁸ *Ibid.* at 266-270.

⁷²⁹ *R. v. Tremblay*, [1987] 2 S.C.R. 435 at 439.

⁷³⁰ *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.) at 155.

⁷³¹ *R. v. Smith*, [1991] 1 S.C.R. 714 at 728-729.

⁷³² David Tanovich, "Charting the Constitutional Right of Effective Assistance of Counsel in Canada" (1994) 36 Criminal L.Q. 404.

⁷³³ Alan Young, "Adversarial Justice and the Charter of Rights: Stunting the Growth of the 'Living Tree'" (1997) 39 Criminal L.Q. 362 at 365.

exercise those rights.”⁷³⁴ The Court reiterated this comment almost verbatim in *R. v. Ross*.⁷³⁵ The Court has also recognized that the role of lawyers as defenders of civil liberties is an important justification for allowing the legal profession to establish self-governing bodies (law societies). In *Pearlman v. Manitoba Law Society Judicial Committee*, the Court quoted with approval this passage from the Report of the Professional Organization Committee (Ministry of the Attorney General of Ontario):

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favor in the protection of individual rights and civil liberties against incursions from any source, including the state.⁷³⁶

We will now consider how these principles may conflict with Indigenous approaches to justice.

11.3.2 The Conflict

The concept of a spokesperson or an advocate was not necessarily alien to all Indigenous societies. As previously mentioned, the Navajo Supreme Court declared that a spokesperson speaking on behalf of somebody accused of committing an infraction was a concept that had existed in Navajo traditional law. One must however account for diversity in Indigenous societies. It is conceivable, even likely, that other Indigenous societies may in past times have preferred an ‘accused’ to speak directly for him or herself. What this may translate into, should present day Indigenous societies gain control over justice, is a preference not to include spokespersons or advocates in contemporary processes. The Akwesasne Justice Code for example makes absolutely no mention of any right to counsel. Insisting on a right to counsel may conflict with the

⁷³⁴ *Manninen*, *supra* note 725 at 1242-1243.

⁷³⁵ *R. v. Ross*, [1989] 1 S.C.R. 3 at 14.

⁷³⁶ Ontario Professional Organizations Committee, *Report of the Professional Organization Committee (Ministry of the Attorney General of Ontario)* (Toronto: Ministry of the Attorney General of Ontario, 1980) at 26. Quoted in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887.

desire of Indigenous communities to structure their justice systems in such a way as to not include advocates.

Even if past Indigenous societies did include spokespersons in their processes, there may still be problems. The principles on the right to counsel that were described clearly suggest that the right to counsel involves a lawyer who is called to one of the provincial bars. Admission to a bar typically requires obtaining a Bachelors in Law or Juris Doctor degree in one of Canada's accredited law schools⁷³⁷, completion of a term of legal clerkship under the supervision of a lawyer with enough experience (e.g. four years of practice)⁷³⁸, and a training course that tests a candidate's knowledge of provincial laws and practice skills.⁷³⁹ Even if Indigenous societies are open to the use of advocates or spokespersons in their processes, they may not necessarily want to insist on such exacting qualifications. An Indigenous society for example may be content with good character or reputation for an advocate participating in their process.

These are not the only problems though. Another problem stems from the expected role of a lawyer. All provincial law societies require that lawyers advocate for the best interests of their clients, subject to other ethical standards such as not knowingly misleading the court, and treating opposing parties and lawyers with respect.⁷⁴⁰ This can create problems where an Indigenous society aspires to deal with crime through restorative processes. Larry Chartrand argues that a lawyer's duty of advocacy does not fit well with Indigenous sentencing circles. This duty of advocacy typically requires pursuing the lightest sanction possible under the law during a sentencing hearing. A

⁷³⁷ See for example The Law Society of British Columbia, *Law Society Rules* (2000), rule 2-27.

⁷³⁸ *Ibid.*, rules 2-30, 2-32, and 2-47.

⁷³⁹ *Ibid.* rule 2-44.

⁷⁴⁰ See for example The Law Society of British Columbia, *Professional Conduct Handbook*, s. 3.

sentencing circle involves members of an Indigenous community at large to speak to the judge, and influence the decision. This can involve a number of different opinions on what the best sentence would be, and would not necessarily reflect what the defence lawyer would pursue. Furthermore, sentencing circles are designed to give Indigenous communities at least some measure of control over the process. A defence lawyer advocating a position on behalf of the client can threaten the transformative potential of the process, and devalue the community's role. A defence lawyer challenging the credibility of participants in a sentencing circle can likewise undermine the process.⁷⁴¹

Yvonne Boyer describes two specific examples of how a defence lawyer's functions can prove incompatible with Indigenous community based approaches to justice. The first example is where a lawyer's advice not only undermined the goals behind a sentencing circle, but may also have backfired on the offender:

The defense counsel, police, prosecutor, victim, offender, and community supporters were present. Training sessions had been held, and the judge, prosecutor, and police had been briefed on how the circle works. The defense counsel had not been available to take calls, so the first time he appeared was at the circle itself.

The circle went as planned, yet there was a major component absent, namely, a feeling of "truthfulness" within the circle. A consensus was reached, and the judge passed the offender recommendations, which were very harsh. The victim and the offender were related, and the offense arose from a longstanding family feud that resulted in serious charges. There was no victim-offender reconciliation.

In the "debriefing" following the circle, however, it came to light that the defense counsel had forbidden the offender to say anything. This simple point corrupted the whole circle process, and the community was left to pick up the pieces, trying to salvage the positive points of the circle experience.⁷⁴²

The second example involves how a lawyer's insistence on remuneration can present difficulties:

⁷⁴¹ Larry Chartrand, "The Appropriateness of a Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives" (Aug 1995) 33 Alta. L. Rev. 874. For a similar critique see Troy Chalifoux, "A Need for Change: Cross-Cultural Sensitization of Lawyers" (1994) 32 Alta. L. Rev. 762.

⁷⁴² Yvonne Boyer, "Community-Based Justice Initiatives of the Saskatoon Tribal Council" in Wanda D. McCaslin (ed.) *Justice as Healing: Indigenous Ways* (St. Paul, Minnesota: Living Justice Press, 2005) 196 at 202.

A few days ago, the justice coordinator in one of the Saskatoon Tribal Council communities asked me to help set up a sentencing circle in the fall. This particular community is advanced in their justice initiatives but realized the problems that lay ahead. The justice committee requested permission to handle the circle without the judge, defense counsel, prosecutor, and the police. It is unlikely that their request will be granted because of the severity of the offense. The defense counsel is a prominent criminal lawyer and has expressed to the justice committee that he wants the circle over with as quickly as possible, since “his time is money.” In desperation, the community has asked me to speak to this individual to try to help him understand the circle process. I doubt that I can change this person’s attitude, and the circle will once again be dishonored.⁷⁴³

Boyer is ultimately of the opinion that lawyers should not have a role in Indigenous community-based justice.⁷⁴⁴ The question now becomes how to deal with these difficulties.

11.3.3 The Proposal

Here again we can draw upon *Lyons* for the theme that *Charter* rights can be structured according to different contexts and different stages of the criminal process. A suggestion can be made with reference to the right to counsel at the investigative stage. The context of police investigation and interrogation attracts a higher degree of protection vis-à-vis the right to counsel. Therefore, the right to counsel as a guardian of an accused’s rights is operative. Even so, there is room to adopt a culturally sensitive perspective. The suggestion is that “right to counsel” need not necessarily mean a licensed attorney or member of the bar. An Australian court developed this idea in *R. v. Anunga*.⁷⁴⁵ In that case, the court articulated a number of guidelines for the interrogation of Indigenous suspects, which have since become known as the Anunga rules. One of the guidelines is that an Indigenous suspect should have a “prisoner’s friend” with him during a police interrogation. The person would not necessarily be a lawyer, but

⁷⁴³ *Ibid.* at 203.

⁷⁴⁴ *Ibid.* at 202; For a similar assertion that those involved with a social conflict may want to assume primary roles in a restorative resolution with a corresponding exclusion of justice professionals, see Susan M. Olson & Albert B. Dzur, *supra* note 55.

⁷⁴⁵ *R. v. Anunga*, [1976] 11 A.L.R. 412 (N.T.S.C.).

someone in whom the suspect will have confidence and will feel supported by. Indigenous communities in Canada may well consider the incorporation of a similar concept if and when they design their own charters. The prisoner's friend need not necessarily be an attorney, but perhaps possess knowledge of the traditional laws of the suspect's community, and basic knowledge of legal rights under the local charter.

The *Anunga* rules have been the subject of favourable comment in the Canadian context. The Report of the Justice Inquiry of Manitoba⁷⁴⁶, the Alberta Justice on Trial Report⁷⁴⁷, and the Law Reform Commission of Canada Report on Aboriginal Peoples and Justice⁷⁴⁸ have all recommended that Canadian police abide by the *Anunga* guidelines when it comes to Indigenous suspects. The existence of organizations such as Native Counseling Services of Alberta⁷⁴⁹ and Aboriginal Legal Services of Toronto⁷⁵⁰ reflect implementations of *Anunga* in Canada. Development of the *Anunga* concept provides Indigenous communities a way to accommodate a *Charter* right to counsel during the investigative stage, but in a culturally sensitive manner.

Previous discussions in this chapter suggested that in limited circumstances adversarial trials may remain important. Such a context may likewise attract a high degree of protection vis-à-vis the right to counsel. This issue may seem especially problematic since the expectation in Canada is that a member of the bar is usually necessary to advocate a criminal accused's cause during a trial. Most provincial

⁷⁴⁶ A.C. Hamilton & C.M. Sinclair, *Report of the Inquiry into the Administration of Justice and Aboriginal People* (Winnipeg: Government of Manitoba – Public Inquiry into the Administration of Justice and Aboriginal People, 1991).

⁷⁴⁷ *Justice on Trial* (Edmonton: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, 1991).

⁷⁴⁸ *Aboriginal People and Justice Administration: a Discussion Paper* (Ottawa: Department of Justice, 1991).

⁷⁴⁹ *Native Counseling Services of Alberta*, online: <<http://www.ncsa.ca>>.

⁷⁵⁰ They also provide a courtworkers program. *Aboriginal Legal Services of Toronto*, online: <http://www.aboriginallegal.ca/court_work.php>.

standards of ethics require that an accused's advocate have bar membership where an indictable offence or the prospect of imprisonment is involved. Consider also section 802.1 of the *Criminal Code*, which reads:

Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

Programs approved by the Lieutenant Governor typically accommodate articling students as a path to admission to the bar.

The American experience is instructive here. Tribal court systems frequently rely on tribal advocates, community members admitted to practice without any educational or examination requirements. The Navajo, Rosebud Sioux and Pine Sioux have apparently gone so far as to administer their own tribal bar examinations.⁷⁵¹ The *Red Cliff Band of Lake Superior Chippewas Tribal Law and Constitution* allows lay advocates to practice before tribal court upon passing a bar exam that tests knowledge of Indian law and the local tribal code.⁷⁵² Perhaps this concept could be adapted to Canada. At a minimum, Indigenous processes could rely upon community members as advocates. Indigenous communities could have their own admission requirements separate from the provincial bar admission requirements, which could include being of good character, instruction in customary law, legal rights under the community's own charter, and so on. As previously mentioned, it was suggested that cross-examination could be structured in narrative format to avoid committing cultural *faux pas*. If lay advocates are used during

⁷⁵¹ Pommersheim, *supra* note 483 at 70-71. For examples of tribal codes providing for Tribal advocates, see *Absente Shaw of Oklahoma Code of Criminal Procedure*, s. 102; *Colville Tribal Law and Order Code*, ss. 1-1-180 to 1-1-186; *Law and Order Code, Fort McDermitt Paiute-Shoshone Tribe of Oregon and Nevada* (which also requires a tribal bar exam), ch. 2, s. 6; *Rules for Practice in the Courts of the Ho-Chunk Nation*; *Swinomish Tribal Code, Title 3 – Tribal Court*, ch. 3, s. 01.240; *The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah*, ch. 1, s. 5-1;.

⁷⁵² *Red Cliff Band of Lake Superior Chippewas Tribal Law and Constitution*, Ch. 4, s. 24.

adversarial trials, they could be required to adhere to such a concept, similar to ethical standards that bind lawyers in provincial bars.

There remains the question of an advocate's involvement during restorative processes. At this point, one can assume that an accused has done *something* that merits community involvement. As such, and in accordance with *Lyons*, one can suggest that the context speaks to lower standards of rights protection. This is not to say that a right to counsel needs to be abandoned altogether, but the advocate's role can be modified to accommodate restorative processes. Larry Chartrand provides suggestions for how the lawyer's (or advocate's) duty of advocacy could be tempered by cultural considerations. Insofar as an Indigenous community utilizes a restorative process, the idea is that the lawyer ceases to be an advocate but more of a resource person.⁷⁵³ Chartrand is not clear what this involves. Perhaps the lawyer limits his role to instructing the participants in unclear areas of law, or pointing out resources that can be used to facilitate community-based resolutions, or options that can be used as conditions of a sentence.

Furthermore, it must be kept in mind that Chartrand is dealing with sentencing circles as an option within the existing Canadian justice system. Suppose that an Indigenous community uses restorative processes, but also allows the option for adversarial processes whenever the accused wishes to plead not guilty. The advocate can be required to discuss the availability of community-based restorative options with the client. The advocate must also discuss the risks involved with participating in that process, that it waives rights to contest the allegations, that it could involve substantial sanctions and restrictions on the client's liberty, and that the advocate would no longer be

⁷⁵³ Chartrand, *supra* note 741.

in substance an advocate within that process. So long as the client is advised of the risks, the advocate will have discharged his or her modified duties to the accused.

This does not however mean that a representative's role has to be completely void of any elements of advocacy during a restorative process. The advocate can remain a guardian of an accused's rights to natural justice. He or she can for example inquire as to whether there are any community members who are willing to speak positively on behalf of the accused, and submit to the other participants that such persons should be present. So long as the accused enjoys the benefits of natural justice, the advocate can 'sit back' and let the participants craft their own resolution. The advocate however is also in place to observe whether or not the accused is being accorded natural justice. If the advocate is of the opinion that a breach of natural justice occurred to the detriment of the accused, and was not addressed adequately by the community court judge, the advocate is then in an excellent position to assist the accused with an appeal.⁷⁵⁴

11.3.4 Objections

11.3.4.1 Competency

The objection is similar to one made concerning community court judges. Obliging aspiring lawyers to obtain a law degree and pass bar examinations assures the public that the legal profession can provide competent services. The objection is that not imposing similar requirements on Indigenous advocates does not seem to insist on a very high standard of competency. The replies are similar to the ones made concerning community court judges. Firstly, one of the premises behind this work is the idea that Indigenous communities should enjoy as much autonomy as possible when it comes to

⁷⁵⁴ For a similar argument on the potential roles of defence counsel during Victim-Offender mediation programs, see Jennifer Gerarda Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" (1994) 43 Emory L.J. 1247 at 1287-1291.

justice. Why shouldn't Indigenous communities, assuming they are open to the idea of advocates for Indigenous accuseds, be able to set their own qualification standards?

Secondly, given the nature of law and processes that one can expect to be developed by an autonomous Indigenous community, is it really necessary to insist on such a high standard of education and skill level? Law degrees and bar examinations are more understandable if a student wants to become a general practitioner that can offer services in civil litigation, real estate, corporate structuring, and so on. Consider however if we need to be so demanding when it comes to advocating within Indigenous justice processes as envisioned by the proposals that have been made here. At the investigative stage, an advocate acting as a 'prisoner's friend' may very well require knowledge of the local Indigenous charter of rights. Instruction on the local charter could be a requirement of admitting a lay advocate to speak before a community court. During restorative processes, the proposal envisions the advocate reducing his or her role to a resource person, and a guardian of natural justice rights and appellate advocate when necessary. During adversarial trials, there would admittedly be a demand for certain skills such as assessing evidence, and cross-examination (perhaps in narrative style). An Indigenous community may be well-advised to provide training in such skills as part of the process of admitting lay advocates to speak before community courts. Given these ideas for the role of lay advocates, it is doubtful if Indigenous communities really need to insist on law degrees and full bar membership.

11.3.4.2 External Imposition

This argument comes from the opposite direction. Insisting on the presence of advocates, even if not full-fledged lawyers, amounts to an external imposition of Western

notions of justice and an infusion of adversarial influences. There are a number of ways to respond to this. The previous discussion on search and seizure expounded the idea that while Indigenous societies are willing to use modern professional police forces to realize the collective good, they may not entirely resonate with what we know about pre-contact Indigenous justice practices. This indicates that Indigenous communities sometimes willingly depart from the past when it is expedient to do so. Furthermore, police forces still present the danger of police states if left with unfettered power. Taking these factors into consideration, it does not seem entirely offensive to various Indigenous notions of justice to insist on a right to a prisoner's friend during the investigative stage. During Indigenous processes that parallel restorative justice, the role of an advocate is purposefully diminished. The advocate is to sit back, act as a resource person, and allow the participants to craft their own resolutions. The role of the community and its members is given maximum room to operate. Acting as a true advocate is limited to when it is necessary to safeguard the accused's rights to natural justice.

It is conceded that where fully adversarial trials are concerned, the proposal here does involve lay advocates acting as Western lawyers and in adversarial fashion. It must be borne in mind however that the previous proposals described here make a considerable concession to Indigenous restorative processes by allowing them to operate in situations where Western law would assert that the accused is entitled to a full defence. Adversarial trials are confined to situations where the accused denies committing the act itself. The disruptive effect of a right to counsel is minimized by confining 'true lawyering' to denials of the act itself, advocating natural justice rights, and appellate advocacy. It is now time to consider legal rights that involve potential final resolutions.

CHAPTER 12: CULTURALLY SENSITIVE INTERPRETATION OF RIGHTS INVOLVING FINAL RESOLUTION

12.1 Cruel and Unusual Punishment

12.1.1 Jurisprudence

Section 12 of the *Charter* reads: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” Much of the Supreme Court’s jurisprudence on this section involves the proportionality of prison terms in relation to the nature of the offence committed. A full discussion of those authorities will not be provided here.⁷⁵⁵ The discussion will focus instead on execution and corporal punishment, which may still be of contemporary relevance to Indigenous communities.

Canada had in the past used the death penalty for murder. This was challenged under the Canadian *Bill of Rights*⁷⁵⁶ on the basis that it violated the *Bill’s* right against cruel and unusual punishment in *R. v. Miller and Cockriell*. Chief Justice Bora Laskin, on behalf of a Supreme Court majority, upheld the *Criminal Code’s* death penalty provisions on the basis that only the method of execution was subject to review under the right against cruel and unusual punishment under the *Bill of Rights*.⁷⁵⁷ In the post-*Charter* context in *United States v. Burns*, the Supreme Court was called upon to decide whether extraditing a person to an American state jurisdiction, without assurances that the death penalty would not be sought, violated that person’s rights under the *Charter*.⁷⁵⁸ The Supreme Court held that such an extradition did violate the *Charter*. This decision was actually based upon s. 7, that extradition without assurances violated rights to life,

⁷⁵⁵ See for example *Smith v. R.*, [1987] 1 S.C.R. 1045; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Latimer*, [2001] 1 S.C.R. 3.

⁷⁵⁶ *Bill of Rights*, S.C. 1960, c. 44.

⁷⁵⁷ *R. v. Miller and Cockriell*, [1977] 2 S.C.R. 680; See also Michael Jackson, “Cruel and Unusual Treatment or Punishment” (1982) *Charter Edition*, 17 U.B.C. L. Rev. 189.

⁷⁵⁸ *United States v. Burn*, [2001] 1 S.C.R. 283.

liberty, and security of the person because execution was a potential consequence of that extradition.⁷⁵⁹ The Supreme Court held that s. 12 did not directly determine the outcome of the case.⁷⁶⁰ The Court did however provide an *obiter* that indicated that execution would be prohibited by s. 12:

It is, however, incontestable that capital punishment, whether or not it violates s. 12 of the *Charter*, and whether or not it could be upheld under s. 1, engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering. It has been rejected by the Canadian Parliament for offences committed within Canada. Its potential imposition in this case is thus a factor that weighs against extradition without assurances.⁷⁶¹

The Court further noted that Canada has a history of wrongful convictions for murder, including Donald Marshall, David Milgaard, Guy Paul Morin, Thomas Sophonow, and Gregory Parsons. The latter four individuals were exonerated by DNA evidence.⁷⁶² The Supreme noted the personal unavailability of any meaningful redress to the wrongfully executed as follows:

In all of these cases, had capital punishment been imposed, there would have been no one to whom an apology and compensation *could* be paid in respect of the miscarriage of justice (apart, possibly, from surviving family members), and no way in which Canadian society with the benefit of hindsight could have justified to itself the deprivation of human life in violation of the principles of fundamental justice.⁷⁶³

It is therefore safe to say that the Court understands both s. 7 and s. 12 as prohibiting execution.

The Supreme Court has also stated that s. 12 prohibits the infliction of corporal punishment. In *R. v. Smith*, Justice Lamer stated:

Finally, I should add that some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of

⁷⁵⁹ *Ibid.* at para. 124-143.

⁷⁶⁰ *Ibid.* at para. 50-57.

⁷⁶¹ *Ibid.* at para. 78.

⁷⁶² *Ibid.* at para. 96-102.

⁷⁶³ *Ibid.* at para. 103.

treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.⁷⁶⁴

This principle has since been affirmed in *Kindler v. Canada (Minister of Justice)*⁷⁶⁵, and *Suresh v. Canada (Minister of Citizenship & Immigration)*.⁷⁶⁶

12.2.2 The Conflict

During Chapter 2, a number of distinctly punitive sanctions among pre-contact Indigenous societies were described, such as public whipping and execution. One could suggest that such sanctions are relics of a bygone age, and that Indigenous justice as presently envisioned has been stripped of its harsher elements, but retains its more benign and holistic elements. Michael Jackson surmises that it does not appear that a right to corporal punishment has been asserted in any contemporary context in Canada.⁷⁶⁷ One can ask whether this reflects a lack of opportunity, or whether Indigenous communities would be willing to carry out such sanctions in more clandestine circumstances.

In this light, consider the case of *Thomas v. Norris*. Mr. Thomas was Coast Salish by ancestry, though he did not identify with Coast Salish culture. The plaintiff was nabbed by several members of the Coast Salish, including Elders, and was forced to participate in a ritual known as Spirit Dancing. He was confined to a long house for approximately four days. During this period he was subjected to several treatments including deprivation of food but not water, dunking underwater, whipping with cedar branches, and being lifted up several times while the others dug their fingers into his sides and bit him. This ritual was initiated at the request of the plaintiff's wife, who hoped that it would cure his alcoholism and improve their marriage. He ended up in the

⁷⁶⁴ Smith, *supra* note 755 at 1073-1074.

⁷⁶⁵ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

⁷⁶⁶ *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3.

⁷⁶⁷ Jackson, "Locking up Natives", *supra* note 51 at 272.

hospital since his pre-existing ulcer was worsened. He ended up suing his assailants for assault, battery, and false imprisonment.⁷⁶⁸ The idea of healing, dealing with the root causes of misbehaviour, and forward-looking correction could be attributed to the men who nabbed Mr. Norris. The resemblance to restorative justice seems to end there. One can just as easily suggest that there are elements of corporal punishment present in the form of whipping, dunking, hoisting, finger digging and biting. What is really telling though is that members from the Coast Salish community unilaterally exercised collective power against an individual against his will. They unilaterally subjected him to some pretty significant physical measures. Depending on the perspective, it has the appearance not of harmonious restorative justice, but of an imposed corporal sanction in pursuit of a collective good.

Thomas v. Norris may not represent an isolated instance either. Marianne Edwards and Clifford Sam died during participation in Spirit Dancing rites. These deaths had nothing to do with forced reform. Both individuals had volunteered for participation. In Edwards' case, it was with the hope of overcoming significant health problems such as kidney failure.⁷⁶⁹ Apparently at least eight people have died since the 1970s.⁷⁷⁰ There is at the very least though suspicion that David Thomas has not been the only individual subjected to the ritual with the idea of forced reformation. One news article states:

Outside critics -- and even some within the First Nations -- are asking whether the closed ceremony fits the modern age. It often begins with a kidnapping, followed by days of forced fasting and other rigours designed to produce a trance, such as the ritual winter purification that preceded Edwards's collapse.

⁷⁶⁸ *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.).

⁷⁶⁹ "Dance to the death; A secretive ritual practised by some native peoples on Canada's West Coast is intended to seek power from the spirits that will help the dancer through life. But the rigours that attend it have killed some dancers and the objections to it grow." *Hamilton Spectator* (April 16, 2005) F6.

⁷⁷⁰ "Recent native longhouse initiation deaths spark investigation, explanation" *Canadian Press Newswire* (January 13, 2005).

"We have to adapt. We have to make changes to accommodate the modern society in which we live when there are chances that there will be tragic accidents," said Doug Kelly, one of the chiefs of the 54 bands of Coast Salish who practise the Spirit Dance. ...

Supporters see the dance as a way to continue their traditions and increasingly as a remedy for the modern evils of alcoholism, drug abuse and poor health. But the deaths, Kelly concedes, have created "a backlash of fear among people who wonder "What the hell those damned Indians are up to'." ...

Some people seek that spiritual turning point voluntarily, but others are forced into it. They are grabbed by men with black-painted faces and carried to the longhouse at the behest of other dancers or family members who feel the person needs reform.⁷⁷¹

Details of this particular use of the ritual remain foggy, not least because the ritual itself is thought of as a secret exclusive to Coast Salish societies that is not to be casually exposed to outsiders. Thomas relates that after his civil suit, he was subjected to beating, threats, and shunning until he was obliged to move away from the Coast Salish community.⁷⁷² This can suggest that the Coast Salish community did not appreciate his exposing the ritual to the lens of an outside legal system, or that they approved of the use of the ritual that he was subjected to, or both.

This discussion has thus far centred on the Coast Salish Spirit Dance ritual. Other Indigenous societies have however used corporal sanctions such as whipping or flogging in the past. Present day use of corporal punishment may offer a certain utility to contemporary Indigenous societies, if they choose to avail themselves of such. Corporal punishment may offer traditional alternatives to incarceration. The idea is a sanction that provides deterrence, and denunciation, but without the long term negative effects associated with imprisonment. The pain of corporal punishment is 'short but sharp', but also does not expose an offender to the hardening effects, criminal culture, and lifestyle of prisons. Corporal sanctions can also provide a supplement to restorative resolutions. This idea can be clarified by elaborating upon a certain context. Writers such as

⁷⁷¹ *Supra* note 769.

⁷⁷² *Ibid.*

Larocque and Razack have raised serious concerns about emphasizing only rehabilitation in addressing offences such as sexual assault. It can jeopardize victim safety by trivializing the harm done to the victim, and by signaling to potential offenders that consequences following harmful conduct will be minimal. Suppose now that a community has to deal with sexual assault. The community decides not to use imprisonment, but instead emphasizes offender rehabilitation through programs that include sexual offender counseling. The community however may decide not to stop there. If that community's ancestors had used corporal punishment in the past, it can have a contemporary role. The community may wish to assess corporal punishment to the offender in addition to the rehabilitative program. It may be the community's way to accord satisfaction to the victim, to express to the victim that her safety is being taken seriously, and to express indignation at the harm caused. It can also announce to the community at large that sexual predation will not be tolerated.

No Indigenous group in Canada has so far openly asserted the use of execution as a method of dealing with crime. In any event, whether it is corporal punishment or execution, the conflict is fairly obvious. Both are expressly prohibited by the Supreme Court's interpretations of s. 12.

12.2.3 The Proposal

12.2.3.1 Execution

The conflict here seems particularly difficult to resolve since express prohibitions are involved. The discussion will begin with execution. The position taken here is that a prohibition against execution under s. 12 should remain in place. This is admittedly a very subjective and arbitrary conclusion on the part of the author. It is however well

worth considering the Supreme Court's commentary on the consequences of erroneously assessed death penalties. If an Indigenous community executes one of its individuals for something that member never did in the first place, what can that community possibly do to make right by that member? Indigenous traditions may contemplate reparation to the executed member's relations of course. Even so, the consequence of executing an innocent individual is irreversible for that individual. If capital punishment is precluded in a contemporary indigenous justice system can the same be said for non-lethal corporal punishment? On this issue, Australian jurisprudence provides some insight.

12.1.3.2 The Australian Experience

An Australian case, *R. v. Joseph Murray Jungarai*, involved a case of domestic homicide. The accused was initially denied bail, but successfully appealed. Chief Justice Forster of the Northern Territory Supreme Court granted the appeal and bail in recognition that the accused was planning on consenting to a traditional punishment of having a spear wound scored upon his leg, and then getting banished into the bush for a fixed period of time. Justice Forster noted that the punishment amounted to retribution and payback within an Aboriginal understanding, and was necessary to diffuse potential reprisal from the victim's family.⁷⁷³ During the sentencing phase of the proceedings however, Justice Muirhead imposed a sentence of six years and six months with a period of parole ineligibility lasting two years and six months. He rejected defence counsel's submission for a suspended sentence of imprisonment (meaning probation subject to good behaviour). He did acknowledge that the accused was subjected to traditional punishment by being beaten unconscious. However, he felt that not imposing

⁷⁷³ *R. v. Joseph Murray Jungarai*, (1981) 9 N.T.R. 30 (N.T.S.C.) at 31-32.

imprisonment would have sent a message that the law did not apply to the Aborigines.⁷⁷⁴

The sentence was upheld on appeal by the Federal Court.⁷⁷⁵

Australian courts have also allowed Indigenous use of corporal punishment to act as a mitigating factor to reduce the sentences handed out to the Indigenous offenders. In *R. v. Jadurin*, the Federal Court heard an appeal against a sentence of four years after the accused had fatally injured his wife after beating her with a pipe. The Court had ultimately dismissed the appeal on the basis that four years was deemed a very lenient sentence for the crime in question.⁷⁷⁶ The Court did however have this to say:

In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; In it is to recognise certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account.⁷⁷⁷

In *R. v. Minor*, Justice Mildren said for the Federal Court:

The reason why payback punishment, either past or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁷⁷⁸

Justice Mildren also noted that it had been a longstanding practice in the Northern Territory to recognize tribal law when it came to sentencing tribal members.⁷⁷⁹

There are additional rationales for this as well. As with the bail cases, there is also recognition that accommodating traditional sanctions is necessary to prevent

⁷⁷⁴ *R. v. Joseph Murray Jungarai*, (November 2, 1981) (N.T.S.C.) [unreported].

⁷⁷⁵ *R. v. Joseph Murray Jungarai*, (June 4, 1982) (F.C. Aust.) [unreported].

⁷⁷⁶ *R. v. Jadurin*, (1982) 7 A. Crim. R. 182.

⁷⁷⁷ *Ibid.* at 187.

⁷⁷⁸ *R. v. Minor*, (1992) 59 A. Crim. R. 227 at 238.

⁷⁷⁹ *Ibid.* at 237.

community tensions from getting out of hand. John Chesterman describes a recent example as follows:

In a recent example, in May 2001 (Toohey 2001) a Northern Territory Supreme Court judge took a payback spearing into account when sentencing an Indigenous man over the death of another Indigenous man. The deceased had been struck on the head and later died after refusing medical treatment. The man who hit him, in a later meeting of the families, was twice speared in the leg and was beaten on the head several times as a customary law response to what he had done. Though not condoning the 'payback', the judge took it into account in her decision to sentence the man to eighteen months' imprisonment for the killing, saying that the customary law 'resolution has proved to be important in avoiding further conflict'.⁷⁸⁰

Another rationale is to avoid excessive punishment, with concerns similar to the right against double jeopardy. The Australian Law Reform Commission notes:

... there is an inevitability about Aboriginal customary processes taking their course regardless of what the courts might do. Thus a physical 'punishment' may be imposed on an offender without any account being given to what the courts have done or might do. Although in practice it appears that some balancing of punishments is done within both systems. Within Aboriginal communities account will usually be taken of the fact that the courts have imposed, or are likely to impose, a penalty.⁷⁸¹

Australian courts have not so much embraced the use of corporal sanctions among Indigenous communities but have tolerated it out of a sense of pragmatism. There is recognition that payback is a culturally meaningful sanction that, coupled with standard prison terms for statutory offences, can impose an excessive burden on Indigenous offenders. There is also recognition that payback can diffuse hostilities in the communities. These insights suggest to us that there is room for compromise where s. 12's prohibition against cruel and unusual punishment is concerned.

12.1.3.3 Punishment by Consent

A frequent theme of the Canadian Supreme Court's interpretation of *Charter* rights in the criminal process is that they can be waived. Waiver of a legal right: "... is dependent upon it being clear and unequivocal that the person is waiving the procedural

⁷⁸⁰ John Chesterman, "Balancing Civil Rights and Indigenous Rights: Is there a Problem?" (2002) 8:2 *Australian Journal of Human Rights* 125 at 142.

⁷⁸¹ *Supra* note 47 at 366-367.

safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.”⁷⁸² The idea is this, that an Indigenous community can assess a corporal sanction if an offender genuinely consents to it, free of coercion or intimidation. The doctrine of waiver is adapted to allow an Indigenous offender to waive his or her right not to be subjected to a punishment prohibited by judicial interpretation of s. 12. It represents a compromise. It accommodates traditional sanctions against an express prohibition. It also does not allow Indigenous communities to subject their own members to it against their will.

Note that a key point of waiver is an awareness of consequences test. There may be concern here that corporal punishment can lead to severe injuries in the form of permanent scarring or fractured bones. The offender therefore should have a right to be informed of the potential outcome of a corporal sanction. Here an Indigenous advocate may also have a role to play. An advocate could perhaps acquire information about the potential medical consequences of a corporal sanction for the offender. The offender is then free to make an informed decision.

12.1.4 Objections

12.1.4.1 Cruel and Degrading

Recall that Justice Lamer interprets s. 12 as prohibiting the use of corporal punishment since it grossly offends society’s sense of decency. This stems from the Supreme Court attaching value to the sanctity of the human body such that directly inflicting physical pain is deemed cruel and degrading.⁷⁸³ Recall as another example that

⁷⁸² *R. v. Clarkson*, [1986] 1 S.C.R. 383 at 394-395.

⁷⁸³ Placing value on the sanctity of the human body also resonates in other aspects of the Court’s jurisprudence. For example, consent to serious bodily harm is not a lawful defence for somebody charged with assault. See *R. v. Jobidon*, [1991] 2 S.C.R. 714.

a full cavity search is an especially serious violation of an individual's rights under s. 8. The objection is that inflicting corporal punishment under any circumstances is inherently cruel and degrading towards the subject, and should never be allowed.

But this in turn raises other questions. Whose sense of decency does the use of corporal punishment offend? Which society finds the use of corporal punishment so offensive? Punishments are, whatever form they take, designed to inflict pain upon the offender. Retributive rationales of punishment seek to inflict pain in proportion to either the moral blameworthiness of the offender or the pain caused by the offender. Utilitarian rationales call upon pain with the purpose of discouraging crime. Carrying out the sanction after conviction communicates to the offender that the pain is a direct consequence of the offender's actions, with the promise of more should misbehaviour occur again. That promise of pain is also made to society as large, letting everyone know what they can expect if they follow the offender's example. It is open to question whether incarcerating offenders is any less cruel and degrading in its effects than corporal punishment. Geoffrey Scarre provides this commentary:

Many people think it admissible for a court to sentence an offender to ten months in prison but not to ten strokes of the birch. Why? It can certainly be argued that a penalty which is swiftly over – though still a deterrent and an effective provoker of thought owing to its power over the imagination – is really more humane, less cruel, than a drawn-out sentence of imprisonment. Putting an offender behind bars for months or years may give him time to reflect upon his acts but it seriously interferes with the course of his life and flouts his autonomy for the duration; it may also induce boredom, frustration, depression, claustrophobic feelings and a sense of helplessness. (It also causes unmerited hardship for family members or others who depend on him for income, services or companionship: a drawback absent in the case of corporal punishment) Although an offender sentenced to a corporal penalty may feel fear and anxiety before the punishment, this can be minimized by ensuring that the administration of justice is swift. In any case, many prisons are themselves fear-inducing places in which inter-inmate violence is common and a spirit of *saue qui peut* prevails. Sending someone to jail means subjecting him to a substantial risk of physical and mental abuse. Setting aside prejudice and political correctness, it is far from evident that incarceration is the 'civilised' alternative to a sharp but brief physical chastisement, after which the subject can spend the night in his own bed.⁷⁸⁴

⁷⁸⁴ Geoffrey Scarre, "Corporal Punishment" (2003) 6 *Ethical Theory and Moral Practice* 295 at 307.

What is cruel and degrading is in the eye of the beholder. The view taken by a beholder may indeed be subject to cultural subjectivity. Present day Western legal systems may not be willing to use corporal punishment due to perceiving corporal punishment as cruel and degrading to the subject. Consider a contemporary Indigenous society in Canada whose ancestors had used corporal punishment. Add to this that many Indigenous people go to prison with the promise of becoming hardened by the experience of incarceration and being exposed to the gangland cultures that exist within prisons. An Indigenous community may therefore find that corporal punishment will often be a preferable, and less cruel, way to resolve criminal conflicts than incarceration. An Indigenous community should be allowed to make use of corporal punishment, subject to offenders willingly undergoing it. Making the choice available to the offender is however a source of objection as well.

12.1.4.2 Offender's Veto

The idea of requiring an offender's consent can be problematic in more than one way. The Australian cases that were mentioned imply that the offenders subjected themselves willingly to payback. It is unclear whether these Indigenous communities enjoyed a prerogative to unilaterally inflict payback absent consent. It is clear that for some Indigenous cultures, authorities could require corporal punishment without an offender's consent. An adulterous Iroquois woman could be subject to public flogging with or without her consent. A Senpoil or Nespelem headman could order whipping with or without the offender's consent. The problem then becomes one of inconsistency with Indigenous traditional understandings of when corporal punishment can be assessed. It can amount to an external imposition of a standard of consent. There is a second problem as

well. If Indigenous communities desire to use corporal punishment as a deterrent sanction, a great deal of that deterrent value is lost if potential offenders know that they can simply veto the application of corporal punishment when they are called to task.

There are two ways to respond to these objections. One is premised around the idea of ‘take what you can get’. Indigenous peoples are faced with a policy that insists on the full application the *Charter* for any accommodations of Indigenous governance. Included within this insistence is an express prohibition against any corporal punishment. Indigenous peoples would not only be faced with this policy but also international standards of human rights. Article 7 of the *International Covenant on Civil and Political Rights* reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁷⁸⁵ This article has been interpreted as including a prohibition against judicial corporal punishment. In *Osbourne v. Jamaica*, the complainant was convicted in a Jamaican court of illegal possession of a firearm, robbery with aggravation and wounding with intent. He was sentenced to fifteen years imprisonment along with hard labour and ten strokes of a tamarind birch stick.⁷⁸⁶ The United Nations Human Rights Committee declared that the use of tamarind birch strokes violates article 7’s prohibition against ‘cruel, inhuman or degrading treatment or punishment.’⁷⁸⁷ The European Court of Human Rights has also declared that judicial corporal punishment violates the Covenant.⁷⁸⁸ To negotiate any room at all for the use of

⁷⁸⁵ *International Covenant on Civil and Political Rights*, Adopted by United Nations General Assembly Resolution 2200A (XXI) of December 16, 1966.

⁷⁸⁶ *Osbourne v. Jamaica*, Communication no. 759/1997.

⁷⁸⁷ United Nations Human Rights Committee, (March 15, 2000) UN doc. *GAOR*, A/55/40 (vol. II), p. 138, para. 9.1.

⁷⁸⁸ *Tyrer v. United Kingdom* (1978), (E. Ct. H.R.), Series A, no. 26.

corporal punishment in the face of such authorities would necessarily require Indigenous communities to make a concession. In this context, the concession takes the form of allowing the use of corporal punishment subject to the free and informed consent of the offender. It presents itself as a compromise in accordance with *Dagenais*, and ideally avoids inspiring a total prohibition under both s. 12 and international law.

The second reply is that an offender's decision may, in the context of contemporary Indigenous practices, involve more than the desire to escape the physical pain involved. Restorative justice purports to inspire contrition and responsibility in the offender. The victim and other community members as well have the opportunity to describe how the offender's actions have affected them. The offender is forced to face up to the consequences. This can lead to contrition, remorse, and an acceptance of responsibility. It can produce a genuine desire for reformation, and to make right by those who have been affected. This ideally provides a stronger assurance that the accused will complete any rehabilitative measures that are agreed upon.⁷⁸⁹

The concept typically involves resolutions such as counseling and community service. They do not involve corporal punishment and may not seem directly applicable. Consider however what is involved. Victims, and those supportive of the victims, are able to communicate directly to the offender how the offender's behaviour has affected them. Where serious consequences are involved, such as those stemming from sexual assault for example, one can imagine that the process can be quite discomfiting to say the least for the offender. Theoretically the process of victim and community confrontation contemplated by restorative justice can inspire contrition in the offender, and in turn encourage an increased willingness to accept corporal punishment as a way to make

⁷⁸⁹ Cayley, *supra* note 65 at 219-220 and 290.

amends. This is admittedly a highly speculative assertion since such an endeavour has yet to put to the test within Canada. It is not an unreasonable one though. Consider that in some of the Australian cases, the offender sometimes made a bail application with the very point of submitting to payback in order to smooth over community relations.

There are additional elements involved with Indigenous justice that vary from Western models of restorative justice (e.g. victim-offender mediation) that can encourage a willingness to accept corporal punishment. Suppose that Elders are present during an Indigenous justice process. Those Elders may communicate cultural values regarding the offense, its consequences, and expectations regarding the making of amends. Those Elders may decide to encourage corporal punishment as a route to re-integration, and making right by those affected. What is to stop an offender from allowing himself to being willingly persuaded to accept the admonitions of the Elders? Justice in some Indigenous societies also had a distinctly clan or familial aspect. Fear of bringing shame upon one's own clan had often been an effective deterrent against misbehaviour. Assume that clan structures remain relevant to a contemporary Indigenous society. What is to stop the clan leaders or Elders from persuading an offender to willingly accept corporal punishment as a way to excise the shame involved?

This may of course seem to approach the borders set by the previous discussions concerning natural justice. The idea being that consent may not be genuine if an offender accepts under the pressure brought upon him or her by a chorus of voices urging acceptance. It can be suggested that the dividing line be marked by the difference between persuasion and coercion. If admonitions from Elders, clan leaders, or other

participants in the process depend on persuasion rather coercion or intimidation, then consent to corporal punishment can be constitutionally valid.

There remains the question of satisfaction to the victim or others affected by the crime, assuming that corporal punishment is intended to fulfill such. Such persons may feel cheated if an offender insists on ‘digging in his heels’. Keep in mind that the proposals for natural justice are meant to even the ‘playing field’ for all concerned. If the victim and supporters are unable to procure assent to corporal punishment from the offender, they can then push for alternative modes of satisfaction. These alternatives could include periods of banishment, onerous terms of community service, and the provision of labour or material reparation to the victim and others affected by the crime. Theoretically an offender may be more willing to agree to alternatives, even onerous alternatives, in the realization that corporal punishment was a legitimate expectation on the part of the victim and others affected. All concerned ideally participate in a setting of genuine equality, and likely play give and take, until a satisfactory resolution is reached.

12.2 Exclusion of Evidence

12.2.1 Canadian Jurisprudence

The efficacy of a law depends upon the availability of remedies as a means of redressing transgressions of that law. *Charter* rights are no exception. In criminal law, the most important remedial provision under the *Charter* is s.24(2), which reads:

Where, ..., a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in proceedings would bring the administration of justice into disrepute.

A prerequisite to the application of s. 24(2) is that the evidence must be obtained in a manner that infringed a *Charter* right. The Court rejected causation as the

determining factor. If there is temporal proximity between the *Charter* violation and the obtaining of the evidence, s.24(2) applies.⁷⁹⁰ However, the concept of causation has not been entirely discarded. If the connection between the *Charter* violation and the evidence is found to be remote, it may be concluded that the evidence was not obtained in a manner that violated the *Charter*.⁷⁹¹

The first case to set out the test for excluding evidence was *R. v. Collins*.⁷⁹² The analysis in *Collins* began with a consideration of the words, "... would bring the administration of justice into disrepute." One possibility for interpreting this provision was to ascertain the views of the community through opinion polls.⁷⁹³ This approach was rejected in *Collins*. The Supreme Court's reasons included the dangers of leaving the determination of constitutional standards to an uninformed public, and a member of the public's lack of sympathy for an accused's rights until he himself becomes an accused.⁷⁹⁴ The Court instead articulated this standard, "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully appraised of the circumstances of the case?" By dispassionate the Court meant unaffected by strong feelings in the community at the time of trial.⁷⁹⁵

To determine whether the administration of justice would be brought into disrepute in the eyes of the reasonable person, *Collins* sets out three sets of factors to be considered:

- 1) Factors involving the fairness of the accused's trial.

⁷⁹⁰ *R. v. Strachan*, [1988] 2 S.C.R. 980 at 1005.

⁷⁹¹ *Ibid.* at 1005-1006.

⁷⁹² *Collins*, *supra* note 662.

⁷⁹³ Dale Gibson, *The Law of the Charter: General Principles* (Calgary: Carswell, 1986) at 236-246, cited in *Collins*, *ibid.* at 282.

⁷⁹⁴ *Ibid.* at 282.

⁷⁹⁵ *Ibid.*

- 2) Factors involving the seriousness of the *Charter* breach. A serious breach supports exclusion. A less serious breach may support admission of the evidence.
- 3) Disrepute brought to the administration of justice by the exclusion of evidence, potentially a mitigating factor against exclusion.⁷⁹⁶

Of the three sets of factors, the first set has by far assumed the greatest importance. Trial fairness involves a distinction between conscripted evidence, and non-conscripted evidence. If the accused was compelled or tricked into participating in the production of self-incriminating evidence, the evidence is conscripted.⁷⁹⁷ If real evidence (e.g., the handgun with the accused's fingerprints) was obtained by information conscripted from the accused in violation the *Charter*, the real evidence will also be deemed conscripted.⁷⁹⁸ There is an exception though. If the real evidence would (not could) have been found without the information conscripted from the accused, it will not affect the fairness of the trial.⁷⁹⁹ If it is determined that admission of evidence would render the trial unfair, it will generally be excluded without consideration of the other two sets of factors.⁸⁰⁰

12.2.2 The Conflict

12.2.2.1 Exclusion as an Alien Concept

At the risk of generalization, it may be said that Indigenous justice practices emphasized hearing everything from anyone who had something relevant to say. For example, under the Akwesasne Code anyone can present evidence before a convening of Justice Chiefs. Where an accused asserts innocence, Article 6 - Section 5, reads:

C. The accuser states the facts surrounding the offense, and presents all physical evidence to the Tribunal of Justices.

⁷⁹⁶ *Ibid.* at 284-286.

⁷⁹⁷ *Stillman*, *supra* note 670 at 655.

⁷⁹⁸ *Ibid.* at 663-664.

⁷⁹⁹ *Ibid.* at 664-665.

⁸⁰⁰ *Ibid.* at 668.

D. Any and all other witnesses state the facts and present any physical evidence they have.

F. The accused states the facts and present physical evidence on his behalf.

G. The Accused may have witnesses state facts and present evidence on his behalf as well as witnesses who will attest to his character.

The very concept of excluding evidence pertinent to the criminal act itself in order to protect the individual against collective power would certainly be alien to Indigenous traditions, even accounting for diversity. Contemporary adaptations of Indigenous justice processes would likely be inclusive enough to include the testimony of Indigenous police officers, themselves subject to the terms of s. 24(2). There is potential conflict between an Indigenous emphasis on “hearing everything” and an Indigenous accused’s right to apply for exclusion of evidence. Imagine the possibilities if an Indigenous accused applies for exclusion of evidence by considering the following hypothetical:

Mr. X is a member of an Indigenous community. After a series of negotiations with federal and provincial governments, that Indigenous community has established a separate criminal justice based on its traditional practices. On the way home, Mr. X stops his car after a police car signals him to pull over. Two Indigenous police officers, both from his community, exit their vehicle and approach Mr. X. They ask him to take a roadside test. He accedes to their request. Another police vehicle with a roadside screening device arrives within 10 minutes. He takes the test, which indicates that he is over the legal limit. The police then inform him of his right to counsel by reading from a standard card. They then arrest Mr. X and drive him to their police detachment. The police then show Mr. X to a phone room. They leave him by himself in the room. Mr. X then picks up the phone, but then places it back on the receiver. He comes out and tells the police officers, “I don’t need a lawyer. I just want to get this over with.” The police officers then take a breath sample from him.

The police did everything right up until the end.⁸⁰¹ Their mistake was that once Mr. X indicated that he did not wish to exercise his right to a lawyer, they were required

⁸⁰¹ Under s. 254(2) of the *Criminal Code*, a police officer may make a demand for a roadside screening test on a reasonable suspicion that the detainee has alcohol in his body while in care or control of a motor vehicle. The officer may do so without informing the accused of his right to counsel. The roadside test must be administered ‘forthwith’ after the demand is made. The Supreme Court held s. 234(1.1) (as it then was) to be a reasonable limit on the right to counsel. Once the roadside test is failed and the police want to take a breathalyzer test that would be admissible in evidence against the accused, the police must then inform the accused of his right to counsel. See *R. v. Thomsen*, *supra* note 718. The police must not attempt to elicit incriminating evidence from the accused until he has been given a reasonable opportunity to exercise his right to counsel, *R. v. Manninen*, *supra* note 725 at 1242. The accused must be allowed to exercise his right to counsel in privacy, whether or not he expresses a wish for privacy. See *R. v. Playford*, *supra* note 730 at 155.

to inform Mr. X again of his right to counsel.⁸⁰² In this scenario it would be open to Mr. X to apply to a 'court of competent jurisdiction' under s. 24(2) to exclude the breath sample from evidence.⁸⁰³ Such a situation could be problematic where Indigenous justice traditions are concerned. If the breath sample is excluded, it means that Mr. X will not be subject to any process at all. A system based on Indigenous traditions may not necessarily want to imprison Mr. X, but attempt to discover the underlying causes of his alcoholism, and deal with those causes as part of the healing process. That system will not be able to do so if Mr. X successfully applies to have the breath sample excluded. Such a result may be harder to countenance due to the fact that the police did not intentionally violate Mr. X's rights. They made a good faith slip at the end.

12.2.2.2 Disrepute in Whose Eyes?

The reasonable person standard in s. 24(2) can also be problematic in that it carries with it a certain cultural assumption that is often, but not always, found in Western democracies. That assumption is that excluding questionably obtained evidence of a crime, even if it is otherwise reliable evidence, is an acceptable cost to pay to avoid allowing the state to have too much power. The reasonable person standard is also uniform in that it is not subject to the vagaries of public opinion, or to be varied to the personal characteristics or beliefs of each member of a community who is apprised of the circumstances of a case. Here again the issue of cultural subjectivity becomes relevant.

⁸⁰² *Prosper*, *supra* note 724 at 276.

⁸⁰³ See *R. v. Mills*, *supra* note 522. A court having that competent jurisdiction often depends upon a statutory grant of jurisdiction over the offence and the accused, as is the case with provincial criminal courts (at 955-56) or appeal courts (at 958-59). Perhaps Mr. X would have to apply to a court of superior jurisdiction. Courts of superior jurisdiction in each province have all the historic jurisdiction of the high court in England, subject to statutory limitations, and are therefore courts of competent jurisdiction under s. 24. The superior court jurisdiction will not displace the jurisdiction of other courts of limited jurisdiction (at 956).

Is this reasonable person standard appropriate for traditional Indigenous approaches to justice? Consider the following quote from Kathy Brock:

To the extent that section 24(2) in any way prevents or inhibits the straightforward prosecutions of mandated criminal law if it is reflexively and unthinkingly applied and evidence is excluded bringing the administration of justice into disrepute, this section has the potential to cause the delegitimation of criminal justice and weaken moral strictures.⁸⁰⁴

Section 24(2) can become problematic for the legitimacy of Indigenous justice systems. As previously mentioned, the whole idea of excluding relevant evidence is alien to traditional processes. It could be fairly said that the exclusion of evidence would in the eyes of a reasonable Indigenous person, at least one of traditional belief, invariably “bring the administration of justice into disrepute.” A reason for this is that if evidence is excluded, it could lead to the accused not being subject to any process at all. In a system that emphasizes healing (victim, accused, and everyone else included) and restoration of community harmony, such a result may be very hard to countenance.

12.2.2.3 Reflexive Exclusion

There is also a prong of s. 24(2) jurisprudence that is cause for concern. Under the *Collins* tests, the exclusion of evidence is vital to preserving the fairness of an accused’s trial. If an accused’s trial is rendered unfair, the evidence will generally be excluded without reference to the other sets of factors. Steven Penney states with reference to the conscripted vs. non-conscripted distinction: “In the context of section 24(2) determinations, this newly formulated conception of the right to silence has become a kind of ‘superright.’”⁸⁰⁵ By its own development of s.24(2) jurisprudence, the Court has convinced itself that excluding evidence is vital to preserving the fairness of trials.

⁸⁰⁴ Kathy L. Brock, “Polishing the Halls of Justice: Sections 24(2) and 8 of the *Charter of Rights*” (1992/1993) 2 N.J.C.L. 265 at 270.

⁸⁰⁵ Steven M. Penney, “Unreal Distinctions: the Exclusion of Unfairly Obtained Evidence under s.24(2) of the Charter” (1994) 32 Alta. L. Rev. 782 at 797.

Dagenais would mandate striking a balance the right to apply for exclusion of evidence under s. 24(2) and Indigenous rights to justice practices. Here the potential conflicts between seem especially sharp and problematic. The trial is either fair or it is not. The evidence is either excluded or it is not. What if the Supreme Court or Canadian politicians insist that s. 24(2) must remain in force at the expense of Indigenous processes? How then can this be characterized as a balance? The Supreme Court perhaps has enough leverage to justify this notwithstanding *Dagenais*. The deleterious effects of a fair trial would have to be weighed against the salutary effects of Indigenous processes. The Hollow Water circles and the Family Group Conferences can be used as examples of remarkable statistical successes for crime reduction and rehabilitation. Yet the fact remains that the Court, by its own jurisprudence, has elevated “fair trial” to a sort of super-right. The Court could rely on previous jurisprudence to conclude that the deleterious effects of an unfair trial exceed the salutary effects of contemporary Indigenous processes. Consider the following passage from *Oakes* concerning the conviction of an innocent person:

An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial.⁸⁰⁶

This comment is made with reference to the presumption of innocence, but it is nonetheless a potent statement on what can happen when an accused is denied a fair trial.

Even within *Dagenais* itself, the freedom of expression was still circumscribed by reference to whether the accused’s trial was kept fair. Jamie Cameron, with partial reference to *Dagenais*, asserts: “Moreover, ... the Court held that the right to a fair trial

⁸⁰⁶ *Oakes*, *supra* note 594 at 119-120.

must prevail when the competing interests cannot be accomplished.”⁸⁰⁷ Jennifer Koshan argues: “Despite the promise of the *Dagenais* case, a model of conflicting rights appears to be entrenched in the courts with the balance perpetually tipped in favour of the accused.”⁸⁰⁸ Despite the Court’s disclaimer against a hierarchical approach, the right to a fair trial has arguably been accorded preferential treatment relative to other *Charter* rights. The Court may very well conclude that the deleterious effects of an unfair trial outweigh any potential benefits of traditional processes. Section 24(2) must of necessity remain in force, at least in situations of conscripted evidence.

12.2.2.4 Social Costs

If the tests for excluding evidence as articulated by the Supreme Court are applied rigidly and mechanically whenever Indigenous accuseds make s. 24(2) applications against their own justice systems, one can expect a social cost to follow. Law and sociology professors at Pepperdine University in California engaged in an extensive study to assess the empirical effects of American jurisprudence, which usually (but not always) requires the exclusion of evidence if it was obtained in the course of violating the accused’s constitutional rights. The study included past studies and a survey of over 450 law enforcement officials in California.⁸⁰⁹ They made a number of findings regarding the effects of the exclusionary rule. There are two that are particularly relevant to our discussion. One finding is the substantial loss of convictions and prosecutions to suppression of evidence hearings, and increased use of plea bargains in anticipation of

⁸⁰⁷ Jamie Cameron, “Dialogue and Hierarchy in Charter Interpretation: a Comment on *R. v. Mills*” (2000) 38 Alta. L. Rev. 1051 at 1064.

⁸⁰⁸ Jennifer Koshan “Aboriginal Women, Justice and the Charter: Bridging the Divide?” (Nov 1998) 32 U.B.C.L. Rev. 23 at 51.

⁸⁰⁹ L. Timothy Perrin *et al.*, “If it’s Broken, Fix it: Moving Beyond the Exclusionary Rule, a New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule” (1998) 83 Iowa L. Rev. 669.

suppression hearings.⁸¹⁰ The second finding is increased criminal recidivism.⁸¹¹ Another study performed in Emory University, California, also concluded that crime rates underwent a sustained increase as a consequence of American exclusionary rules.⁸¹²

Reflexively excluding evidence if it is found to affect trial fairness could be of concern to Canadian society in general, as Brock's and Penney's criticisms suggest. It may be especially problematic from an Indigenous perspective. Indigenous communities may not be willing to accept the social costs involved with excluding evidence. Criminal behaviour, especially certain types of behaviour such as substance abuse, sexual abuse, and gang activity, threatens the collective good of Indigenous communities. The use of s. 24(2) threatens to impair the ability of Indigenous communities to deal with crime by their own members by offering Indigenous accuseds the prospect of not being subject to any process at all. This concern may be especially acute given the nature of the Supreme Court's tests under s. 24(2), which almost always mandates an exclusion of evidence whenever the violation of *Charter* rights is such as to affect trial fairness.

12.2.3 The Proposal

Ross and Cayley suggest a possible solution, a partnership (Ross) or separation (Cayley) of adversarial and restorative processes.⁸¹³ Section 24(2) could continue to

⁸¹⁰ *Ibid.* at 676; This finding was based on National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California 2* (1982); This study stated that 32.5% of all felony drug arrests cleared for prosecution in 1981 to the Los Angeles County Prosecutor's Office were rejected after an initial review because of search and seizure problems; See also Harry M. Caldwell & Carol A. Chase, "The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom" (1994) 78 Marq. L. Rev. 45; This article argues that even though suppression hearings are unsuccessful 80 to 90 percent of the time, defence counsel still go for them often with the hopes of wearing down the prosecution and wringing concessions (at 50-51).

⁸¹¹ Perrin *et al*, *ibid.*; This is also based on *The Effects of the Exclusionary Rule*, *ibid.*; The study found that 46% of individuals freed in California in 1976 and 1977 as a result of the exclusionary rule went on to commit additional crimes within 24 months of their release.

⁸¹² Raymond A. Atkins & Paul H. Rubin, "Effects of Criminal Procedure On Crime Rates: Mapping Out the Consequences of the Exclusionary Rule" Emory University Department of Economics, Working Papers November 1998.

operate in a separate trial process, while remaining inapplicable in the restorative process. There remains a problem. In traditional times, Indigenous justice tended to collapse “determination of guilt” and restorative processes together. This is true of the Akwesasne Code. The Code does allow an accused to plead guilty or not guilty. Yet even when a matter goes to trial on a not guilty plea, Article 6, Section 5 reads in part:

E. The Tribunal of Justices asks the accuser and witnesses in turn, what each thinks would be a just and equitable solution or end to the matter.

H. The Tribunal of Justices ask the accused and each of his witnesses in turn what they think would be a just and equitable solution or end to the matter.

The imposition of s.24 (2) upon such a process could be especially problematic. A search for alternatives may be in order on that note.

12.2.3.1 Comparative Perspectives

American jurisprudence initially developed the exclusion of evidence as a very potent remedy available to criminal accuseds. In *Weeks v. United States*, the United States Supreme Court ruled that evidence obtained by a violation of an individual’s right against unreasonable search and seizure under the Fourth Amendment could not be used against that individual in a federal prosecution. At this point, the exclusionary rule stems only from the federal Constitution and does not cover state prosecution.⁸¹⁴ Subsequent decisions expanded the reach of the exclusionary rule to exclude evidence derivative of the evidence seized.⁸¹⁵ The Court would afterwards draw upon the guarantee of the Fourteenth Amendment not to be deprived of ‘life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws’, to expand the exclusionary rule as a remedy for Fourth Amendment violations to

⁸¹³ Ross, *supra* note 70 at 227-232; and Cayley, *supra* note 65 at 325-327.

⁸¹⁴ *Weeks v. United States*, 232 U.S. 383 (1914).

⁸¹⁵ *Silverthorne Lumber v. United States*, 251 U.S. 384 (1920); *Nardone v. U.S.*, 308 U.S. 338 (339).

state prosecutions.⁸¹⁶ The exclusionary rule was also extended as a remedy for violations of the Fifth Amendment right to silence, and the Sixth Amendment right to counsel.⁸¹⁷ In *Miranda v. Arizona*, the Court held that confessions would not only have to meet common law tests of voluntariness, but also respect the Fifth Amendment right against self-incrimination. An accused must be informed of the right to silence, the right to counsel, and warned that any statement given can be used against that accused in Court. Failure to meet these requirements will result in exclusion of the confession.⁸¹⁸

It is interesting to note that after to this trend of expanding the reach of the exclusionary rule, the Court has often carved exceptions to when it applied. If evidence was recovered from a source independent of police investigation, notwithstanding illegal activity on the part of the police, the evidence will not be excluded.⁸¹⁹ Evidence will also not be excluded if its discovery was inevitable with or without the police illegality.⁸²⁰ The doctrine of harmless error allows illegally obtained evidence to be admitted if the prosecution establishes beyond a reasonable doubt that admitting the evidence could not have contributed to conviction.⁸²¹ Good faith reliance on a search warrant that was defective due to an issuing magistrate's error will also not result in exclusion of evidence.⁸²² This exception was further extended to good faith reliance on an unconstitutional statute.⁸²³

⁸¹⁶ *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Schmerber v. California*, 384 U.S. 757 (1966).

⁸¹⁷ *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

⁸¹⁸ *Miranda v. Arizona*, 384 U.S. 486 (1966).

⁸¹⁹ *Silverthorne*, *supra* note 815.

⁸²⁰ *Nix v. Williams*, 457 U.S. 431 (1984).

⁸²¹ For Fourth Amendment right violations, see *Chambers v. Maroney*, 399 U.S. 42 (1970); For Fifth Amendment right violations, see *Milton v. Wainwright*, 407 U.S. 371 (1971); For Sixth Amendment right violations, see *Moore v. Illinois*, 434 U.S. 220 (1977).

⁸²² *U.S. v. Leon*, 468 US 897 (1984).

⁸²³ *U.S. v. Krull*, 480 US 300 (1987).

Australian law concerning the exclusion of evidence places a great deal of emphasis on judicial discretion. The fairness of an accused's trial is a factor to be considered, but it will not necessarily be determinative. The High Court authority, *Bunning v. Cross*, sets out the following criteria for whether evidence will be excluded:

- (a) the seriousness of the offence;
- (b) the cogency of the evidence;
- (c) the nature of the criminality,
- (d) the ease with which the evidence could have been obtained legally; and
- (e) whether an examination of the legislation indicates a deliberate intent on the part of the legislature to circumscribe the power of the police in the interests of the public.⁸²⁴

Section 138 of the *Evidence Act* of the Commonwealth, passed subsequent to *Bunning*, sets out the criteria for exclusion as follows:

1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
 - (b) in consequence of an impropriety or of a contravention of an Australian law;
- is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

⁸²⁴ *Bunning v. Cross* (1978), 141 C.L.R. 54 at 74-75.

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.⁸²⁵

This provision appears to replicate the *Bunning* criteria, with a few extra additions. Another difference is that subsection one reverses the onus. The common law favoured admission of illegally obtained evidence subject to judicial discretion. The subsection apparently creates a *prima facie* rule favouring exclusion, subject to the prosecution persuading a magistrate that the statutory criteria require admitting the evidence.

There are some valuable lessons here for us. The American rules have not remained stuck in the same analytic grid over time. The rules were initially developed very broadly, and heavily tipped in favour of exclusion. Once that development reached its zenith, the Supreme Court articulated an increasing number of exceptions. This is arguably due to recognition that an automatic rule of exclusion can exact a high social cost, and a need to lessen the bite of the rule in order to lessen that cost. The lesson here is that Canadian doctrine for excluding evidence does not have to stay slavishly wedded to precedent. Canadian law can and should be open to modification. The Supreme Court

⁸²⁵ *Evidence Act 1995* (Cth), s. 138.

has after all declared that judicial treatment of the *Charter* must resemble a ‘living tree’ whereby *Charter* law is not hidebound to the past but adapts and evolves to meet changing times and needs.⁸²⁶ Accommodating Indigenous perspectives on justice in the spirit of *Dagenais* and culturally sensitive interpretation of legal rights can certainly be included within those changing needs. Australian law also offers valuable insight. The Canadian rules usually, but not always, require exclusion when the admission would affect trial fairness. Trial fairness is a factor to be considered under the Australian rules, but not the only one. The Australian rules emphasize exercising discretion that takes into account competing policy objectives. Trial fairness is only one of those objectives. Avoiding the social cost involved with excluding evidence (e.g. a factually guilty criminal walking free) is another policy objective. The lesson for us is that for the sake of accommodating Indigenous perspectives on justice, we need not insist on an inflexible application of the Canadian rules that place primacy on trial fairness. The question now becomes how to utilize these lessons to propose a resolution.

12.2.3.2 Section 24(1) as an Alternative Base of Remedy

It is contended that linking together the exclusion of unconstitutionally obtained evidence and the fairness of a trial is misplaced, at least when it comes to Indigenous approaches to justice. Most common law jurisdictions, excluding the United States, have until recently tended to include evidence obtained by questionable police methods so long as it was relevant to the case being heard. English common law, for example, would only allow exclusion of relevant though questionably obtained evidence in very exceptional circumstances. It was not until the 1950s that English authorities even began to consider

⁸²⁶ *Motor Vehicle Reference*, *supra* note 467 at para. 53.

the question of excluding such evidence. Though cases such as *Kuruma v. The Queen*⁸²⁷ and *R. v. Sang*⁸²⁸ created a new discretion to exclude confessions (not evidence obtained by searches) if they affected the fairness of a trial, it was apparent that the discretion would only be exercised in very exceptional circumstances.⁸²⁹ Before the advent of the *Charter*, the Supreme Court of Canada explicitly rejected the idea that a trial judge may exclude relevant evidence on that basis that it may be unfair to the accused or that its admission would bring the administration of justice into disrepute.⁸³⁰

David Paciocco contends that the link between unconstitutionally conscripted evidence and trial fairness is fallacious. In his analysis, a compulsion to produce information in a setting such as a blood sample or a police line-up before trial is simply not the same thing as compelling the accused to take the stand at his own trial.⁸³¹ To prove his point, Paciocco asks that if evidence is not excluded because the police would inevitably have discovered it without the participation of the accused anyway, does the theory that unconstitutionally conscripted evidence affects trial fairness still hold water? The evidence was after all still obtained in a manner that compelled the accused to produce it.⁸³² In his conclusion, he says that s. 24(2) is about enforcing the *Charter*, instilling respect for the *Charter*, but not the fairness of a trial.⁸³³

An alternative approach is constructed by J.A.E. Pottow. His idea is that s. 24(1), the general remedial provision of the *Charter*, can be used alongside s. 24(2). It provides a more flexible approach to remedying *Charter* violations. Excluding evidence could be

⁸²⁷ *Kuruma v. The Queen*, [1955] A.C. 197 (P.C.).

⁸²⁸ *R. v. Sang*, [1980] A.C. 402 (H.L.).

⁸²⁹ Penney, "Unreal Distinctions", *supra* note 805 at 792.

⁸³⁰ *R. v. Wray*, [1971] S.C.R. 272.

⁸³¹ David M. Paciocco, "Evidence about Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof" (2000) 80 Can. Bar Rev. 433 at 452-453.

⁸³² *Ibid.* at 453.

⁸³³ *Ibid.* at 453.

reserved for the most serious of violations, such as extracting a confession by torture. For less serious violations, s. 24(1) can provide a flexible range of remedies, such as costs against the prosecution, monetary awards or damages, or a reduction of sentencing.⁸³⁴ Of course, Indigenous communities need not restrict themselves tightly to Pottow's suggestions. In drafting their own charters, Indigenous communities can design their own range of remedies, and for which violations. Remedies available under s. 24(1) can run nearly the whole spectrum so as to accommodate the circumstances of each individual case. For first or trivial instances, a verbal warning may be appropriate. For more serious or repeat instances, fines could be levied. For very serious instances or very repetitive occurrences, sanctions such as suspension, payment of damages (e.g. the accused was also physically harmed), or even dismissal can be used.

This is not to say that evidence need never be excluded. Indigenous communities may well decide for themselves that exclusion may be in order where the evidence was obtained in such a manner as to make it unreliable. An Australian case provides an illustrative example of this. In *R. v. Williams & Orr*, five Indigenous youths were charged with rape. Their verbal comprehension levels were estimated to be that of boys aged 7 to 11 years. The Queensland Supreme Court excluded confessions that were obtained by police interrogations. Justice Dowsett stated:

A child, especially an Aboriginal child, should be told that he has a choice to remain silent otherwise it is difficult to see how a court can ever be satisfied that he has freely chosen to speak. If he is to be told, he must be told in a way which he will understand. If care is not taken to explain the matter to him and his comprehension tested to ensure that the advice has assimilated, one may just as well speak to him in Greek ...The absence of a meaningful warning coupled with his (the accused child) being taken to the police station and questioned are, I consider, sufficient external circumstances to create a prima facie case of lack of voluntariness.

⁸³⁴ J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24" (2000) 43:4 Crim. L.Q. 43 459 & (2000) 44:1 Crim. L.Q. 34 & (2000) 44:2 Criminal Law Quarterly 44 223.

It would have been a simple matter to ask (the accused child) to explain to the police, after consulting (in) private with (the JP), his understanding of his right to silence, but no attempt was made to do this.

I cannot be satisfied that the perfunctory warning (the accused child) received, not tested for impact privately by (the JP), was sufficient to negate the oppression of the situation in which he was placed. I doubt that any 14 year old boy could be expected to cope with such a gross attack on his freedom, let alone one with only a limited ability to communicate verbally. Again, the confession must be excluded.⁸³⁵

This commentary is made in the context of the common law rule of confessions, which involves voluntariness and reliability. It does however provide a possible example of where an Indigenous community may wish to exclude evidence. Another example may be where police beat a confession out of an Indigenous suspect. The idea is that Indigenous communities can, if they so choose, exclude evidence in circumstances where exclusion does not hamper an Indigenous emphasis on ascertaining the truth of what has occurred. This proposal however is not immune to objections.

12.2.4 Objections

12.2.4.1 Lack of Incentive

The culturally sensitive approach to s. 24(2) that is proposed here draws upon Pottow's approach of narrowing the circumstances under which evidence should be excluded and calling upon s. 24(1) as an alternative base of remedy. Steven Penney describes potential problems with Pottow's approach as follows:

Even if alternatives to exclusion could be implemented without political initiative (for example, by substituting non-exclusionary section 24(1) remedies for exclusion under section 24(2)), no alternative is likely to be superior to exclusion in optimizing the balance between deterrence and truth-seeking. Non-exclusionary remedies are very likely to generate either too little or too much deterrence. To avoid underdeterrence, alternative remedies must impact police interests severely enough to influence their future conduct. Most Charter violations would warrant only modest compensatory damages. Few victims would find it worthwhile to incur the costs required to obtain these awards. As a result, police would likely consider damage awards a minor cost of doing business. In theory, this problem can be overcome by the use of such mechanisms as class actions, administrative hearings, and non-compensatory remedies (such as punitive damages, statutory liquidated damages, and injunctions). But such initiatives would require significant

⁸³⁵ Quote and case commentary in Alan Robinson "R. v. *Williams & Orrs*: Cigar Store Indians and Juvenile Confessions" (1986) *Aboriginal Law Bulletin* 20.

legislative or judicial innovation, and it is not clear that they would be financially, administratively, or politically feasible.⁸³⁶

The use of s. 24(2) to enforce legal rights under the *Charter* relies upon the accused making an application for the exclusion of evidence. Imagine now if an Indigenous charter limits the circumstances under which the exclusion of evidence is available as a remedy. It can be readily imagined that if an Indigenous accused can only look forward to a verbal warning, or a minor compensatory award, with every prospect of the evidence being admitted and justifying sanction against the accused, that there would be a lack of incentive to even bother with an application under an Indigenous charter of rights. Police may not be particularly dissuaded against unconstitutional practices in the knowledge that remedies may not be particularly onerous for themselves, and with every prospect of the evidence being admitted regardless. This possibility can become even more acute if Indigenous accuseds simply don't even bother with making applications.

There is a way to deal with this. A previous proposal involved setting an Indigenous community to meeting a modified case to meet rule whereby the community has to establish a *prima facie* case before an accused can face sanction. This likely involves a hearing similar to a preliminary inquiry prior to any other procedures that a community may desire such as healing circles. The idea is that during that same hearing, a community court judge can require the community to establish that the evidence against the accused was procured in a manner consistent with the local Indigenous charter of rights. During that meeting, the community court judge can elicit what happened from investigative authorities, as well as the accused. Once everyone has been heard from, a community court judge can then decide whether a rights violation has occurred, and if so,

⁸³⁶ Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under s. 24(2) of the *Charter*" (2004) 49 McGill L.J. 105 at 121.

what the appropriate remedy would be. This concept envisions an inquisitorial mode of justice as a means of overseeing whether there is compliance with the local charter of rights. An accused's participation would be obligatory, but there is nothing to stop an accused from actively seeking a remedy during such a process either. If an accused was coerced into a confession by police, that accused may well feel inclined to seek an exclusion of the confession during the hearing. This idea is not entirely without foundation in either Canadian law either. Whenever the Crown seeks to lead a confession into evidence, a trial judge is required to hold a *voir dire* in order to ascertain whether the confession meets the common law rules regarding voluntariness.⁸³⁷ The Supreme Court has also noted that while the defence has the legal burden of proof to show that the state obtained evidence in an unconstitutional manner, the state will sometimes have a practical onus to demonstrate otherwise since it often possesses superior knowledge of the events in question.⁸³⁸

There is the obvious problem in that requiring this sort of hearing in every single case can pose considerable administrative difficulties for Indigenous justice systems, with the threats of greater resource demands, greater time demands, and a mounting back log of matters that need to be resolved. There is a way to deal with this as well. Just as waiver is available for many *Charter* rights, and for modified Indigenous legal rights that have previously been proposed, waiver can apply here as well. It is certainly conceivable that an Indigenous accused may have absolutely no desire to contest accusations at all. If an Indigenous accused expresses a desire to waive the preliminary hearing, a community court judge can inquire of the accused whether there is awareness that the right to hold

⁸³⁷ *R. v. Erven*, [1979] 2 S.C.R. 1041.

⁸³⁸ *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para. 32.

the community to a *prima facie* case is being waived, and whether there is awareness that the right to have an inquiry as to whether any other rights violations have occurred is being waived as well. It could also be made clear to the accused the benefits from a hearing that could be lost, including compensatory damages, excluding evidence, dismissal of proceedings for lack of evidence, and disciplinary action against police officers. An Indigenous accused would ideally have the benefit of advice from a community advocate as well. The idea of using inquisitorial methods of justice to oversee respect for Indigenous legal rights is however itself a source of objection.

12.2.4.2 Both Remedy and Police Discipline?

The proposal involves collapsing together the judicial function of remedying a violation of legal rights and those functions associated with a police disciplinary commission. The objection is that s. 24(2) is a remedial provision, meant to personally correct for an accused a violation of his or her constitutional rights. Combining this with police disciplinary measures misconstrues the nature of s. 24(2). Jack Watson argues that the use of the word “remedy” has a certain connotation in the context of s.24 as a whole. It is meant to be restorative to a person who has had his constitutional rights violated, and not turn into something which becomes randomly punitive of the public.⁸³⁹ Pottow provides a counter to Watson’s argument, “As currently interpreted, exclusion is an all-or-nothing remedy, in two ways: first, it is the *only* remedy available in the evidentiary realm, and second, it is an *indivisible*, heavy-handed remedy that can easily overshoot the constitutional wrong.”⁸⁴⁰ Pottow’s comment requires some qualification. Section 24(2) is not the only available constitutional remedy for excluding evidence. Under s. 11(d), the

⁸³⁹ Jack Watson, “Curial Incompetence in Criminal Trials: a Discussion of Section 24 of the Charter of Rights and Freedoms in the Criminal Trial Context” (Part 1) (1990) 32 Crim. L.Q. 162 at 167.

⁸⁴⁰ *Supra* note 834 at 67.

right to a fair trial and be presumed innocent, evidence which was **not** obtained in a manner that infringed the *Charter* can be excluded if it would render the trial unfair.⁸⁴¹ Under *R. v. White*, s. 24(1) provides a discretion to exclude evidence that would violate an accused's right to a fair trial.⁸⁴² Neither is the test for exclusion under s. 24(2) as heavy-handed and indivisible as Pottow suggests. In *R. v. Burlingham*, Justice Iacobucci provided this caution against interpreting s. 24(2) too rigidly, "Thus, to the extent that this Court decides to set down such a rule in regard to 'trial fairness', I believe that it should take care not to define that concept so broadly as to allow the 'trial fairness' tail to wag the s. 24(2) dog."⁸⁴³ An example where confessional evidence was not excluded is found in *R. v. Harper*.⁸⁴⁴ Both before and after the investigating police officers fulfilled the informational component of the right to counsel, the accused provided confessional statements with very little initiative on the part of the officers. The Court concluded that the accused would have confessed even if his right to counsel had not been violated. To admit the evidence would not have brought the administration of justice into disrepute.⁸⁴⁵

Pottow's criticism that exclusion can produce effects out of proportion to the constitutional violation is valid nonetheless. Exclusion of conscripted evidence is almost sure to follow, without considering the other sets of factors set out in *Collins*. Some American legislators have seemingly agreed with Pottow as well. In 1995 the American Senate passed the *Violent Crime Control and Law Enforcement Act of 1995*. The bill sought to abrogate the rule of excluding evidence, to remove the immunity of police

⁸⁴¹ A judge has a discretion to exclude evidence of an accused's prior criminal history if its admission would render an accused's trial unfair. *R. v. Corbett*, [1998] 1 S.C.R. 670. In *R. v. Harrer*, [1995] 3 S.C.R. 562, the Court considered whether evidence obtained by an interrogation by non-Canadian officials conducted outside of Canada could still be excluded under s. 11(d).

⁸⁴² *R. v. White*, [2000] 2 S.C.R. 417.

⁸⁴³ *Burlingham*, *supra* note 838 at 263.

⁸⁴⁴ *R. v. Harper*, [1994] 3 S.C.R. 343.

⁸⁴⁵ *Ibid.* at 353-354.

officers from civil liability, and award tort damages against the United States for violation of Fourth Amendment rights. The bill did not pass through the House of Representatives.⁸⁴⁶ That excluding evidence can produce effects out of proportion to the constitutional wrong is possibly more acute in the context of Indigenous approaches to justice. It therefore seems more appropriate to allow Indigenous communities to use s. 24(1) as an alternative base of remedy if they so choose.

This aspect of the proposal however also flies in the face of Supreme Court jurisprudence. In *Burlingham*, the Court stated explicitly that s. 24(2) is not to be used as a source of police discipline.⁸⁴⁷ This reasoning should not be a real impediment to using s. 24(1) for a number of reasons. One is that on a practical level, s. 24(2) is all about obliging authorities to conform to the *Charter*. The police must perform certain obligations when they have detained an accused, or else evidence that they obtain will be excluded. This is an aspect of excluding evidence that American jurisprudence explicitly recognizes. In *United States v. Calandra* the United States Supreme Court went so far as to reject excluding evidence as a personal remedy of the accused, and instead emphasized that excluding evidence was designed exclusively to deter police misconduct.⁸⁴⁸ Another reason is that there is recognition that s. 24(1) can be used as a penalty and a civil remedy in instances of state malfeasance. In *Mackin v. New Brunswick (Minister of Finance)*, Justice Gonthier stated: “In theory, a plaintiff could seek compensatory and punitive damages by way of ‘appropriate and just’ remedy under s. 24(1) of the *Charter*.”⁸⁴⁹ In *R. v. 974649 Ontario Inc.*, the Supreme Court upheld an appellate court’s decision that a

⁸⁴⁶ C.T. Walker, “A Critique of the Prima Facie Exclusionary Rule” (1996) 17:1 N.Z.U. L.R. 94.

⁸⁴⁷ *Supra* note 838 at 270.

⁸⁴⁸ *United States v. Calandra*, 414 U.S. 338 (1974).

⁸⁴⁹ *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. no. 13 at para. 79; See also *Mills*, *supra* note 522.

Justice of the Peace had jurisdiction under s. 24(1) to award legal costs against the Crown for violating the right to disclosure.⁸⁵⁰ Another reason is that the exclusion of evidence can have drastic consequences for Indigenous processes such that it could hardly be deemed a balance under the *Dagenais* test. Section 24(1) provides an alternative source of remedies so that Indigenous perspectives on justice are accommodated, while still obliging investigative authorities to respect *Charter* values.

12.3 Closing Thoughts

Hopefully these discussions have illustrated that it is possible to think creatively about addressing an acute tension between Indigenous approaches to justice and *Charter* legal rights. Western civil libertarians need not blanch at the thought that this exercise necessarily amounts to tyranny in Indigenous communities. It is possible to have meaningful checks against the abuse of power in Indigenous communities, even if they depart significantly from Western standards of rights protection, for the sake of being culturally sensitive towards Indigenous perspectives on justice. Indigenous peoples need not fear this exercise either. It is possible to have rights protections, influenced to some degree by outside legal thought, and still have substantial room for the contemporary adaptations of Indigenous to justice. These proposals are not intended to claim a monopoly on how the tension is to be addressed. They are simply meant as springboards for further discussion of the possibilities. Indigenous communities, in all their considerable diversity, may want to depart from them in ways that best suit their own localized needs. Indigenous communities should be allowed to strike their own workable balances between the use of collective power to pursue the good of the whole and the rights of their individual members.

⁸⁵⁰ *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575.

CHAPTER 13: CONCLUSION

Raven gave the Indigenous peoples of the past spiritual teachings to help them resolve their conflicts. These past methods of justice often emphasized offender reformation, reparation to aggrieved parties, healing, reconciliation, and furthering harmony in the broader community. Others emphasized retribution and vengeance. Raven sees the problems that beset the Indigenous peoples of today, substance abuse, suicide, broken families, and high crime rates. He sees hope in revitalizing the teachings he had provided in the past. Contemporary visions of Indigenous justice, adaptations of past practices, have a potential role in dealing with present day problems. They may become more culturally legitimate in contemporary Indigenous communities than the Canadian criminal justice system. They present alternative methods of dealing with Indigenous crime which are more effective relative to the worsening effects of incarceration, and can heal the damage left behind by Canadian colonialism. Another possibility is the revival of Indigenous punitive sanctions such as corporal punishment to provide short and sharp alternatives to incarceration.

There remain however significant obstacles to realizing contemporary Indigenous visions of justice. One set of obstacles is the fact that Indigenous peoples have minimal legal space within which to realize their own visions of justice. They can usually attain only minor accommodations for their approaches. Canadian laws and policies reinforce legal and political control over criminal justice. The policy reasons for this include avoiding the appearance of being soft on crime, and avoiding the appearance of giving too much away to an Indigenous minority at the expense of a non-Indigenous majority. These combine together such that Canadian leaders are reluctant to accord greater

accommodations that appear to treat Indigenous offenders with a leniency that non-Indigenous offenders do not enjoy. Judicial interpretation of constitutional Indigenous rights helps to sustain the status quo. Inherent Indigenous rights are recognized only after a series of strict tests are met that emphasize that protected activities were practices integral to a distinctive Indigenous culture prior to contact with Europeans. Some principles of treaty interpretation favour the Indigenous signatories, but not all of them do. Some principles such as the reconciliation with Crown interests, coupled with how the Supreme Court has dealt with treaty interpretation in the past, leaves lingering concerns over whether the Court is willing to interpret treaties as including broad rights to criminal jurisdiction. There are at least two possible motivations for this. One is a general tendency of the Court to be deferential to the Canadian state when state interests and Indigenous interests conflict with each other. Another motivation is a desire on the part of the court for Canadian and Indigenous leaders to resolve their differences through negotiation instead of litigation. Indigenous peoples are left with minimal leverage to press for greater accommodations.

The crucial issue then is how Indigenous peoples can expand that legal space and enlarge jurisdiction over criminal justice. First, on the whole, it may be more practical for Indigenous peoples to litigate for broader constitutional rights before the courts before engaging in political negotiations in earnest. The Court's repeated admonitions to resolve issues by negotiations may in a sense be putting the horse before the carriage. Indigenous peoples need a strong foundation in constitutional rights to have a stronger position from which to negotiate effectively with Canadian governments. There may be hope in this in the sense that the Court has on occasion indicated a willingness to revisit

outstanding issues of self-government under s. 35(1) should the right case and facts come before it. The question then becomes how to go about this. The approach that was articulated here was to litigate for a constitutionally recognized right to internal autonomy, a right of Indigenous peoples to govern themselves by their customary laws and usages. This is based on the common law doctrine of Indigenous rights, and Justice McLachlin's dissent in *Van der peet*. The concept is one of elevating the common law doctrine to a doctrine of constitutional rights so that Indigenous peoples can assert greater legal space over justice against Canadian executives and legislators. If Indigenous jurisdiction over criminal justice becomes a reality, it marks the start of a new journey, a journey that Raven readies himself for.

There is however another set of obstacles to realizing contemporary visions of Indigenous justice. If Indigenous jurisdiction over criminal justice does become reality, there is a critical issue that Indigenous communities will have to address. What happens when Indigenous individuals assert their legal rights under the *Charter* against Indigenous justice systems? This possibility is what caused Raven to hesitate before taking flight. This engages the well known tension between individual liberty and the pursuit of the collective good. Emphasizing *Charter* rights can involve the external imposition of Western liberal values that undermine Indigenous visions of justice that emphasize furthering the collective good, and protecting that collective good against harmful criminal activities. If Indigenous justice systems do not make any allowance for due process safeguards, it can lead to abuses of collective power against Indigenous individuals. Examples include innocent individuals being subjected to undeserved punishment, stronger parties coercing weaker parties into lopsided resolutions, and the

use of police forces to intimidate community members. The tension is not an easy one to resolve, but it is one that Indigenous communities must address if they want to advance their visions of justice in contemporary settings in any meaningful sense. A key point behind this dissertation is to break ground and provide springboards for these kinds of discussions.

An approach that should commend itself to Indigenous peoples is the Royal Commission on Aboriginal Peoples' concept of culturally sensitive interpretation of legal rights. The idea is that the legal rights of the *Charter* are reinterpreted so as to provide greater room for the operation of Indigenous methods of justice and yet still provide meaningful safeguards against the abuse of collective power in Indigenous communities. Canadian constitutional law provides a workable mechanism to realize this pursuit. The *Dagenais* doctrine mandates that when constitutional rights come into conflict (e.g. Aboriginal rights to criminal jurisdiction vs. legal rights), then each must be accommodated as much as possible in a non-hierarchical approach. This can imply a blending of older Indigenous teachings and newer Canadian legal principles. This is where Raven grows feathers. The feathers can symbolize new teachings, new ways in which Indigenous peoples see Raven, and new ways that Raven can fly alongside Indigenous peoples as they journey to a new destination.

The remaining chapters are where we get a detailed look at what Raven's new feathers may look like. They construct proposals for addressing the tension in context of eight different *Charter* rights: the right to be heard by an independent tribunal, the right to natural justice, the right to be presumed innocent until proven guilty beyond a reasonable doubt, the right to contest guilt through adversarial procedures, the right

against unreasonable search and seizure, the right to silence, the right to counsel, the right against cruel and unusual punishment, and the right to have evidence obtained in the course of violating constitutional rights excluded.

The right to be heard by an independent tribunal presents a number of difficulties. Canadian and Indigenous legal traditions each emphasized different criteria for vesting persons with authority to hear and resolve criminal conflicts. Canadian modes of judicial authority has certain coercive aspects to it, while Indigenous modes of authority often, but not always, relied on spiritual teaching and persuasion by comparison. The solution that was presented was to establish community court judges who were protected by the three features of judicial independence, security of tenure, security of remuneration, and security of administration. Their role was to ensure that the parties to a conflict behaved fairly towards each other. So long as this fairness was ensured, a community court judge had to adopt the consensus of the parties.

The right to natural justice presents difficulties on account of the doctrine that a judicial authority not be personally connected to any party to the proceedings. The practical effect of this doctrine may be the perpetual disqualification of community court judges given the often closely-knit nature of smaller Indigenous communities. There is however a real need for fairness in criminal proceedings in Indigenous communities, since power dynamics and relationships can be abused to the severe disadvantage of either Indigenous accuseds or victims. The resolution that was proposed was based on a generous understanding of the doctrine of necessity that can shield community court judges from being perpetually disqualified from hearing disputes. So long as community court judges were actually being fair in the discharge of their duties, natural justice will

not have been violated. If the parties have any concerns about a community court judges' fairness, Indigenous courts of appeal and requiring recorded reasons provide possible safeguards as well.

The right to be presumed innocent can present difficulties for Indigenous teachings that encouraged offenders to accept responsibility for their actions instead of hedging their bets through a guilty plea. It can also involve social costs for Indigenous communities when factually guilty offenders exploit the high burden of proof to get off without having to face any sanction. This can frustrate community efforts at exercising crime control over certain activities that threaten Indigenous communities, such as substance abuse, intergenerational sexual abuse, and gang activity. At the same time, the presumption of innocence does serve the real point of preventing the undeserved conviction of the innocent. The solution that was presented here was to use consensus, either by a panel of community court judges or community members, instead of a formal burden of proof beyond a reasonable doubt. Consensus has some basis in Indigenous tradition, and ideally also provides a meaningful safeguard against conviction of the innocent.

The right to use adversarial procedures to contest allegations of misconduct also presents problems. Adversarial procedures are thought to encourage competition and hostility whereas Indigenous processes are designed to promote harmony and healing relationships. Cross-examining witnesses in confrontational or hostile fashion also present risks of committing cultural faux pas. The solution that was presented here was to limit truly adversarial trials to situations where whether the accused committed any wrongful act was in issue, but not for situations where it was apparent the accused did

something harmful but the reasons why remain unclear. Another possible approach was to restructure cross-examination in a narrative format that resembles traditional story telling to avoid committing cultural faux pas.

The right to search and seizure is designed to prevent the police from having too much power to intrude upon what citizens may reasonably regard as their own private affairs. Modern and professional police services may not have had an equivalent in past Indigenous practices, but contemporary Indigenous communities may still want to use them as expedient vehicles for preserving the collective good against harmful criminal activities. Canadian jurisprudence on reasonable expectations of privacy provides a workable mechanism to bring Indigenous perspectives into the analysis. Indigenous philosophies of property holding or the collective good may in appropriate circumstances result in lower expectations of privacy, and therefore justify either warrantless searches where peace officers nonetheless have reasonable basis for their suspicions, or the authorization of warrants on a lower threshold (e.g. reasonable belief) than ‘reasonable and probable grounds’.

The right to silence has the potential for conflict with Indigenous truth-speaking traditions. Part of the solution that was presented here was to allow the right to silence to remain operative while matters were still at an investigative stage in order to prevent a police state. The accused could not be compelled to speak to investigative authorities. However, if the accused voluntarily chooses to mislead authorities in circumstances resembling obstruction of justice, traditional sanctions for deception could become applicable. The other part was to require the accusers to provide a bona fide case-to-meet against the accused. If this requirement is fulfilled, the truth speaking tradition becomes

operative and the accused must say his or her side of the story. This provides some room for truth speaking traditions, but still provides a meaningful safeguard against spurious or unfounded accusations.

The right to counsel also presents certain difficulties. Some Indigenous societies did have the concept of a spokesperson for an accused, but others did not. For the latter, the right to counsel may represent an external imposition. The lawyers' duty of advocacy can also present difficulties for Indigenous processes with a restorative emphasis, since the best interests of the client and the interests of the Indigenous community are not necessarily harmonious to begin with. One possible approach is to adapt the Australian concept of the prisoner's friend, a person who, while not necessarily a member of the bar, can nonetheless look out for an accused's rights when matters were still at an investigative stage. Another approach is to allow for advocates before community courts, though they do not necessarily have to have membership in provincial bars. Their roles can modified during restorative processes so that they become more resource persons than true advocates. Nonetheless, an advocate can remain vigilant for an accused's rights to natural justice during restorative processes, and can assist an accused with an appeal should the accused's rights to natural justice be violated.

Indigenous corporal sanctions may have contemporary relevance in that they are short and sharp punishments that can provide deterrence and retribution, and yet avoid the hardening effects associated with prison life. Corporal sanctions are however expressly prohibited under jurisprudence on the right against cruel and unusual punishment. A solution that was presented here was to allow an accused to waive this right, and voluntary undergo corporal punishment, so long as he or she is properly

apprised of the risks. The writer is of the opinion that the prohibition against execution should remain in place, since someone who is wrongfully executed would have no possible redress.

The right to have unconstitutionally obtained evidence excluded is problematic in more than one way. The whole concept of excluding relevant evidence as a method of checking state power would be alien to any Indigenous notions of justice, which frequently emphasized ascertaining the truth of what happened. The concept potentially raises problems of cultural illegitimacy. The reflexive exclusion of evidence when it is found to have been conscripted can also entail social costs to Indigenous communities as factually guilty Indigenous accuseds get off without any sanction. The solution that was presented here was to limit exclusion of evidence to the most serious cases where it could be said that the evidence was itself unreliable. For other instances, the preference was to rely upon s. 24(1), the general remedial provision of the *Charter*, as an alternative source of remedy.

These proposals are not intended to be the only possible applications of *Dagenais* and culturally sensitive interpretations of legal rights. It is anticipated and recommended that Indigenous communities pursue their own culturally sensitive interpretations of legal rights in order to meet local needs and cultural values. Raven may be cognizant that he taught different things to different peoples. He can still impart different and newer teachings to different peoples in the present day. Each Indigenous society may see Raven, and his feathers, and the colours and shapes of those feathers, with their own vision. Each Indigenous society may choose its own destination. Each Indigenous society may travel its own path, with Raven flying alongside them, to its own destination.

At this point, there may still be lingering concerns about how any of this can be considered truly Indigenous. It is a fair question whether this is how Indigenous peoples would do things, if we assume non-Indigenous Canadians had suddenly disappeared or had packed up and gone elsewhere leaving Indigenous peoples to start over from a clean slate. A plausible answer is certainly no, since by its very nature culturally sensitive interpretation of legal rights unfolds precisely by reference to what Canadian law finds acceptable. But the truth of the matter is that the presence of the Canadian state is a reality that has to be lived with, like it or not. As a matter of practicality, culturally sensitive interpretation of legal rights still represents a relatively better means of securing space for Indigenous visions of justice than the unilateral imposition of the *Charter*. The reason that some of the proposals that have been made here (judges, advocates, and courts) resemble features of common law legal systems, and may therefore invite criticisms that this amounts to mere Indigenization, is that they reflect a real need to prevent power abuses in Indigenous communities that have been well-documented.

An idea that has been touted, albeit infrequently, is that Indigenous legal orders have their own methods of preventing abuses of collective power against individual members.⁸⁵¹ The idea certainly has its appeal. The problem is that there is a paucity of descriptions or literature that conveys the details of such methods, or how they can work in contemporary social settings. If Indigenous peoples want to use methods of preventing power abuses that have a basis in their cultural past, with no reference to Canadian rights standards, there is perhaps an onus on Indigenous peoples themselves to communicate what those methods are and how they can work in contemporary social settings where

⁸⁵¹ James W. Zion & Elsie Zion, "Hazho' Sokee' - Stay Together Nicely": Domestic Violence Under Navajo Common Law" (1993) 25:2 Arizona St. L. J. 407.

inequities of wealth and political power are pervasive. Indeed, the point of this dissertation has been to get this ball rolling, and what I just previously described would be a perfectly legitimate direction for the ball to roll in. The other thing to keep in mind is a reminder that the proposals are meant to maximize the room for community law to operate, leaving in place formal safeguards as fail-safes only after power abuses occur. For example, to allow community proposals to bind a judge, where conventionally it has always been the other way around, would be a significant stride indeed.

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