

CURRENT DIRECTIONS IN ABORIGINAL LAW/JUSTICE IN CANADA

Craig Proulx

Department of Anthropology
McMaster University
173 Robinson Street
Hamilton, Ontario
Canada, L8P 1Z6

Abstract / Résumé

Many Aboriginal peoples struggle with the Canadian state to re-establish self-determination and self-government over law/justice in rural and urban contexts. This paper discusses directions in Aboriginal law/justice based upon these goals. It surveys embedded political, cultural and socio-economic debates and emerging justice philosophies and practices. This survey aims to assist Aboriginal and non-Aboriginal justice professionals, policy makers and academics in understanding the issues within justice for Aboriginal peoples in Canada.

Plusieurs peuples aborigènes luttent contre le gouvernement canadien pour retablir leur libre disposition et leur autonomie en ce qui concerne la loi/la justice en milieu rural et urbain. Cette étude sur les directions prises dans ces domaines rapporte les débats politique, culturel et socio-économique ainsi que les philosophies sur la justice et des pratiques associées. Le but est d'aider les experts en justice aborigène, les législateurs et les académiciens à en comprendre les enjeux pour les autochtones.

Non-Aboriginals impose and control a legal/justice system that is philosophically and procedurally alien to Aboriginal peoples. Many Aboriginal peoples struggle with the Canadian state to re-establish self-determination over law/justice in rural and urban contexts. The purpose of this paper is to review directions in Aboriginal law/justice [hereafter simply justice] based upon this goal. It surveys embedded political, cultural and socio-economic debates and emerging justice philosophies and practices in this context. Over-representation and controversies over explanatory theories for it are surveyed. Sentencing reforms and debates are included in this discussion. Next a review of Aboriginal discussions of the rationale for justice self-determination is undertaken. Law and order sections of Aboriginal treaties and relevant constitutional sections on justice and jurisdiction are discussed. International debates on justice self-determination for encapsulated populations are the next focus. A discussion of restorative justice and how it relates to Aboriginal peoples' pursuit of justice self-determination follows. Debates about the nature and use of Aboriginal "traditions" and debates about the definition and use of "community" in justice are embedded within the discussions of restorative justice. Controversies over the merits of independent, parallel Aboriginal justice systems versus the merits of incremental approaches that maintain links with the Canadian justice system are surveyed. A discussion of various types of justice alternative measures is included in this section. Some personal research and analysis is offered but the central aim of this paper is to provide interested readers with an accessible entry point into the complex issues that currently structure debates on Aboriginal justice in Canada.

The Problems

Over-representation of Aboriginal peoples in prisons and over-involvement in other areas of justice processing are the central justice problems confronting Aboriginal peoples today. Major studies such as the Law Reform Commission of Canada (1991), Manitoba's Aboriginal Justice Inquiry (1991), and the Royal Commission on Aboriginal Peoples [hereafter cited as RCAP] (1996) "all found discrimination against Aboriginal people in criminal justice and massive over-representation of Aboriginal peoples in carceral institutions" (McGillivray and Comaskey, 1999:17). While all Aboriginal peoples make up only 3% of Canada's total population, "they account for 12% of federal admissions (1989-1994 average) and 20% of provincial admissions" (LaPrairie, cited in Ponting and Kiely, 1997:154-155). In British Columbia, Alberta, Saskatchewan, Manitoba and Ontario on average "Aboriginal rates of incarceration are 8.28 times higher than non-Aboriginal rates" (Ponting and Kiely, 1997:156). Looking inside those

percentages illustrates the particular problems confronting Aboriginal peoples. First, Aboriginal peoples are arrested at a greater rate (up to 29 times) than non-Aboriginals. Second, Indigenous women are over-represented in police and prison statistics and this is increasing. Third, there is a higher rate of recidivism among Aboriginal groups. Fourth, Aboriginal youth are being arrested earlier than non-Aboriginal youth (Smandych *et. al.*, 1995:250-251). Additionally, research indicates that the majority of Aboriginal inmates were incarcerated for urban rather than for rural crimes as had been previously thought (LaPrairie, 1994:15).

Explanations for over-representation vary. I think that colonialism, and the cultural devaluation, social and economic distortion it causes among Aboriginal peoples, is the major controlling condition leading to over-representation. Anomie/strain and social disorganization criminological theories suggest that conformity to societal norms and laws requires social order, stability and integration while disorder and malintegration are conducive to crime and deviance (Akers, 1999:133). Colonialism, as Aboriginal peoples attest below, has destroyed the social order, stability and integration within Aboriginal cultures leading to crime and social disorder. This colonial context affects Aboriginal adaptation to non-Aboriginal social and legal norms and this, as Jackson (1999:204) in discussing Aboriginal women says, "results in increased likelihood of disproportionate involvement with the State justice system and the high probability of return to the cycle of violence and criminality." Colonial assimilationist social policy and laws coupled with culturally different judicial philosophies and practices are central to this process. The retributive ways in which the Canadian criminal justice system has reacted to Aboriginal crime and social disorder resulting from colonialism are also central to over-representation. Sinclair (1997) and McGillivray and Comaskey (1999) describe the history of this process. They discuss the specific social policies and laws that created the conditions that led to the over-representation of Aboriginal peoples in Canada.

Sinclair (1997:6-14) outlines how the colonizers have historically used laws designed to assimilate Aboriginal peoples and "undermine" what they considered to be uncivilized and inferior Aboriginal institutions. Laws were used to actively suppress Aboriginal spiritual practices thereby undermining the spiritual, emotional and intellectual foundations of various Aboriginal cultures (*Ibid.*). Laws forbidding Aboriginal peoples from entering into contracts, selling what they produced or resources they owned were designed to reduce economic competition with non-Aboriginals and to destroy Aboriginal self-sufficiency and stability (*Ibid.*:6). Laws were also passed that allowed the state to remove Aboriginal children from their homes from whence they were "locked up in residential schools" (*Ibid.*).

Overall these laws created conditions of social, economic, intellectual and spiritual despair and disintegration among Aboriginal peoples.

McGillivray and Comaskey (1999:34-41) give a history of the colonial "social policies" that the state used to "instil Anglo-Canadian citizenship by eliminating Indianness". Residential schools and the forced adoptions of the sixties sweep were central tools in this process. When Aboriginal parents protested and tried to remove their children the state "made it an offense for any parent to interfere with the education of their child who was taken and placed in an educational system like that" (Sinclair, 1997:7). A cycle of dysfunction began where these children "did not learn how to be caring parents (or responsible self-governing adults) [and] their children in turn learned dysfunctional parenting patterns" (Monture-Angus, 1999:23). This cycle continues to cause dysfunction today leading to involvement with the criminal justice system (McGillivray and Comaskey, 1999; Monture-Angus, 1999; Alfred, 1999; Adams, 1995). Many consultants I interviewed for my own in-progress research with a Native Community Council Diversion Project in Toronto said that their childhood experiences of dysfunctional parenting, resultant low self-esteem and internalized colonial stereotypes were central to their involvement with the justice system (Proulx, 2000).

Overall, then, these colonial laws and social policies led to a devaluation of Aboriginal culture, the destruction of healthy and integrated Aboriginal identities and communities and economic dependence on welfare (Monture-Angus, 1999; Alfred, 1999; Adams, 1995). These agency-robbing (Bhattacharyya, 1995:61) laws and policies have, over time, created powerlessness, despair, disillusionment and social disorganization among Aboriginal peoples leading to increasing levels of Aboriginal crime and subsequent incarceration (Proulx, 2000).

When these Aboriginal offenders entered the criminal justice system they confronted a system based on colonial Euro-Canadian laws and practices that were, by and large, philosophically and procedurally alien to them. Euro-Canadian interactive etiquettes, legal notions of uniformity and equality, culture-bound judicial discretion coupled with sentencing practices that have not taken into account the special circumstances of Aboriginal peoples all discriminated against Aboriginal peoples leading to over-representation (Proulx, 1997; RCAP, 1996; Quigley, 1994; Ross, 1996; 1992; R. v. Moses, 1992). Hence, early colonial assimilative policies ramifying into present-day Aboriginal communities combined with a colonial justice system that has not, until recently, recognized its own oppressive colonial roots has led to over-representation. Overall, then, the justice system fails to provide justice for most Aboriginal people due to its colonialist foundation.

Some commentators, however, think that this failure is more than simply a matter of colonialism. Discriminatory justice processing based on cultural difference is seen as the principle reason for failure of the justice system for Aboriginal peoples (Stevens, 1997:29-21; RCAP, 1996:27; Turpel, 1993:164; Giokas, 1993:187; Monture-Angus and Turpel, 1992:244; Hamilton and Sinclair, 1991:16). The underlying assumptions of the mainstream justice system (crime as an offense against the state and justice as adversarial, product oriented, role specialized) are valorized by the non-Aboriginal system over "traditional" Aboriginal assumptions (crime as interpersonal offense and justice as restorative, process oriented, non-role specialized) leading to three domains of culturally insensitive legal concepts and procedures (Little Bear, 1997:286-291; Paul, 1997:37; Stevens, 1997:29-31; Stuart, 1997, 1995a,b, 1994; Griffiths and Belleau, 1995; Ross, 1996, 1994, 1993, 1992, 1989; Dumont, 1993; Rudin and Russell, 1993; Turpel, 1989-90).

Culture conflict is manifested in three ways. First, over-policing based on stereotypical thinking about drunken Indians, and under-policing, based on the belief of the inherent criminality of Aboriginal peoples which makes crime unnoteworthy and therefore not warranting police response, exemplifies this procedural insensitivity (Ponting and Kiely, 1997:156-157; RCAP, 1996:35-38). Second, courts and judges operate under a one-justice-system-fits-all "interpretative monopoly" based on non-Aboriginal conceptions of equality for all (Turpel, 1989-90). This misses the fact that treating everyone the same doesn't necessarily treat everyone equally. Inequities in fine option programs illustrate this problem (Quigley, 1994). Until recent legislative guidelines in sentencing (*R. v. Gladue*, 1998; *R. v. A.G.A.*, 1998; Bayda, 1997, *R. v. Manyfingers*, 1996) sentencing was interpreted by judicial discretion based on culturally specific notions of deterrence, punishment and uniformity to protect against sentencing disparity. Minute attention was given to unequal economic and demographic circumstances of Aboriginal offenders due to judicially mandated starting point sentences and uniformity considerations (RCAP, 1996:43-45, 239; Quigley, 1994:275-281). Little consideration was given to Aboriginal ideas on social dysfunction, healing and restoration. It remains to be seen whether new sentencing guidelines in Section 718.2 (d) and (e) of the Criminal Code (discussed below), which require consideration of the unique circumstances of Aboriginal offenders in sentencing, will change judicial interpretative repertoires (Bayda, 1997). Third, culturally different Aboriginal interactional etiquettes are problematic for the formal justice system. Non-Aboriginal lawyers and judges misinterpret Aboriginal interactional etiquettes such as non-interference in another's life despite perceived degrees of wrong-head-

edness or dysfunction, or the unwillingness to openly confront or contradict authority figures. This results in lack of proper representation, faulty judicial decision making and guilty verdicts (Green, 1998, 1995:48; Turpel, 1993a:174-176; Ross, 1992:13, 17-18; Monture and Turpel, 1992:243, 269). This culture conflict thesis maintains that only recognition of the cultural difference of Aboriginal peoples, and reforms and new practices based upon it, will guarantee culturally appropriate justice.

Some of these culture conflict concerns have been recognized by legislators resulting in the sentencing reforms of section 718.2 (d) and (e) in Part XXIII of the Criminal Code and *R. v. Gladue* (1998). The idea of s.718.2 (d) and (e) is that judges "must not deprive the offender of his liberty if less restrictive sanctions may be appropriate in the circumstances. Also, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for the offender, with particular attention to the circumstances of an aboriginal offender" (Judge J. Johnstone, 1998:3). This amendment has been used in at least 74 cases since it became law in September 1996 (Howard, 1999:A3). The problem as I see it is that few judges have any real experience of the "circumstances" of Aboriginal peoples in Canada thereby sorely limiting their interpretative resources. Additionally, many Canadian judges who cherish the liberal constitutional principle of equality before the law, may have difficulties overcoming this culturally specific bias in order to be able to interpret Aboriginal circumstantial difference (Proulx, 1997:23-25).

The above problems with judicial interpretation and bias come into clearer focus when the characteristics of the "typical" Canadian judge are examined. Judge Omatsu (1997:3-4) points out that judges as a group are typically "married, overwhelmingly male, of British or French ancestry, in their mid-fifties, Judeo-Christian, born into the middle or upper classes, were successful lawyers and had limited trial experience." Of these judges only 263 are women and of these there is only a small percentage that are of a visible minority. (Omatsu does not give statistics on how many Aboriginal judges there are or how many of them are female.) Judicial adherence, whether conscious or subconscious, to the above gendered experiences, colonial discourses and legislative practices "position subjects and produce their experiences" thereby constructing subjectivities of judges through their experiences" (Scott, 1992:25-26). The pre-bench experience of these judges, therefore, constructs their subjectivities in the manner that Scott suggests. These experiences then play a crucial role in sentencing, making unbiased interpretations of the unique circumstances of Aboriginal offenders questionable at best. Whether the judiciary can overcome these

problems thereby reducing one of the possible causal factors in over-representation remains to be seen.

R. v. Gladue (1998) furthers legislative clarification on sentencing Aboriginal offenders. It instructs judges to consider the circumstances of Aboriginal offenders in deciding whether to impose incarceration, and provides the possibility of using restorative justice alternatives to incarceration (discussed below) while maintaining the traditional goals of sentencing. Judicial notice must be taken of systemic discrimination, culturally specific community background factors and Aboriginal conceptions of justice and sentencing. Additionally, *R. v. Gladue* (1998) directs judges and prosecutors to adduce relevant evidence of these circumstances so that they may be considered in sentencing.

Once again the above problems with interpretation and bias must be considered in considering these instructions. But, more importantly, how will judges and lawyers adduce this relevant evidence? Few judges and lawyers have insider knowledge of community dynamics. There is documented religious, political community factionalism and gender discrimination (McGillivray and Comaskey, 1999; LaRocque, 1997; Depew, 1994:36; Boldt, 1993) in both reserve and urban contexts. How will judges and lawyers ascertain which of the Aboriginal cultural experts they consult for relevant evidence are giving disinterested non-political and non-gendered opinions on what is relevant evidence? Even the best evidence may contain hidden Aboriginal agendas and bias that judges and lawyers will miss due to lack of knowledge about Aboriginal peoples and their community dynamics. For example, Aboriginal women are justifiably concerned that self-designated "traditional" male leaders will give gender-biased "cultural" evidence denigrating women's concerns over widespread intimate violence within Aboriginal communities (McGillivray and Comaskey, 1999; LaRocque, 1997).

Rudin (1999:7) also raises some practical questions in this domain:

How will relevant information come before the court where the offender is unrepresented? In the case of represented accused persons, what is to be done if defense counsel do not do the job they should in terms of making submissions on sentencing to the court? What if defense counsel, even if they wish to make appropriate submissions, do not know how to go about finding out the resources available in the community for the particular offender? These types of situations are likely to occur. Indeed, they might well be the norm. The Court assumes that pre-sentence reports will play a very significant role in these types of sentencings. For the pre-sentence report to have an impact however, the person preparing the report must have sufficient

knowledge and understanding of Aboriginal people to obtain the necessary background information from the offender and his or her family, and also sufficient knowledge of community resources—particularly Aboriginal-specific resources—to make intelligent suggestions to the judge. While there may well be some people employed by provincial probation services capable of performing this role, it should not be assumed that they are present in every jurisdiction. The systemic and direct discrimination faced by Aboriginal people in the criminal justice system does not magically stop at the probation office.

Rudin is also concerned about where “judges, particularly in the absence of diligent defense counsel, [will] find the resources necessary to allow them to embark upon a realistic s.718.2 (e) inquiry” (*Ibid.*). Judges and lawyers may come to rely too heavily on under-manned and under-funded courtworkers and justice personnel to do this work. Rudin is concerned about who will pay for this additional work when funding is already limited and taxed. Additionally, who will pay for the training and re-training of new and existing courtworkers who will do these investigative tasks (*Ibid.*)? Nonetheless Section 718.2 and *R. v. Gladue* are welcome innovations in sentencing as they attempt to respond to the results of colonial oppression and culture conflict. However, it remains to be seen if these sentencing reforms, should the above issues remain unaddressed, will have any substantive effect on over-incarceration of Aboriginal peoples.

I will now turn to the problems some researchers have with the culture conflict thesis. Some researchers charge that culture conflict explanations ignore the diversity of Aboriginal peoples and their approaches to justice while promoting a homogenous view of both (Clairmont, 1994:2, 3-4; LaRocque, 1997). Others charge that the comparison of “contemporary Western and traditional Native legal ideas” set up “false dichotomies, where the adversarial nature of modern-day courts becomes a straw man” (Warry, 1998:173).

Still others maintain that Aboriginal justice problems have less to do with inequities of culturally different justice processing than on underlying structural inequities in Canadian society. Drawing on criminological studies from the USA, Australia and New Zealand and comparing them to Canada, LaPrairie states “that those most likely to be represented in prison populations come from the most disadvantaged segments of society” (1994:12-13). Therefore, there should be less focus on cultural difference in justice processing and more focus on underlying causes such as dispossession of land, unemployment, poverty, lack of education and poor housing in both rural and urban contexts. LaPrairie believes that the concentration on

culture conflict is the result of the political idea "that culture is at the heart of Aboriginal self-government and the settlement of various land and other claims" (*Ibid.*:13). Expanding the use of culture conflict "to incorporate concerns such as disproportionality in the criminal justice system, has widened the political agenda and, at the same time, provided more scope and legitimacy to a growing 'Aboriginals servicing Aboriginals infrastructure'" (*Ibid.*). LaPrairie (1994:xvi-xvii, 1995c:529) thinks that who controls the justice system is less important than changing the socio-economic and demographic circumstances that force people into criminal behavior in the first place. LaPrairie (1994:76-78) also cautions that there is not equality of victimization in the commission of crime, judicial processing and over-representation. Working in four urban centres, LaPrairie provides evidence of social stratification among urban Aboriginals and shows that some inner city urban Aboriginals are more likely to offend, be processed and sent to prison than less economically and demographically challenged urban Aboriginals. In addition, LaPrairie shows that the quality of Reserve life, whether positive or negative, has a major effect on urban involvement with the justice system. Hence, when looking at over-representation we must be cautious about the use of cultural/political explanations and avoid blanket applications of structural variables to all Aboriginal peoples.

Depew (1994:32-33) also criticizes culture conflict explanations and solutions based upon them because it is unclear how they will empower policing practices in different contexts and deal with divergent community needs brought on by historical change and modernization. Appeals to re-establish ideal "traditional" Aboriginal practices of sharing, communal solidarity and consensus in government and social control tend to ignore current disintegrated and factionalized community social, economic and political circumstances (*Ibid.*:35). Depew encourages "a more realistic appraisal of the Aboriginal policing environment and its relationship to concepts of 'culture conflict'" in view of unstable and contested political situations in particular community contexts (*Ibid.*:36). Unconsidered attempts to replace non-Aboriginal justice with culturally different Aboriginal justice ignores situational interaction in communities at "a level of cultural complexity that should not be confused or equated with reified or fictionalized cultural differences between Aboriginal peoples and non-Aboriginal Canadians" (*Ibid.*:36). Depew (1996:31-32) also decries the functionalist approach to Aboriginal justice. He thinks there is too great a focus on individual and dyadic relationships in crime causation and the restoration of health rather than on "the genesis of justice problems and responses that are nested within...wider political, economic and social structures."

Both of these positions are relevant. To clarify, neither LaPrairie nor Depew completely reject culture conflict explanations. Indeed, LaPrairie (1994:13) surveying cross-cultural criminological evidence states that "cultural and socio-economic marginality ... are often interchangeable." LaPrairie and Depew are simply calling for a wider view of the parameters of the problem and proposed solutions than the culturalist position may offer. Yet both of the commentators tend to write as if these structural problems are largely class based (LaPrairie, 1995c:526; 1994:xiv) or based on internal Aboriginal political favoritism and factionalization (Depew, 1994:36), rather than problems of systemic discrimination based upon cultural difference. That these systemic causes exist is not disputed. But the original and continuing causes of these did not spring fully formed from the head of some god. Rather, they are partly the result of colonialism/modernization and its effects on both Aboriginal and non-Aboriginal peoples (Alfred, 1999; Monture-Angus, 1999; RCAP, 1998:46-48; Turpel, 1993a:167; Finkler, 1992; Jackson, 1988:6-7). Long-term devaluation of Aboriginal peoples' cultures and practices and denial of equal distribution of political and economic power between Aboriginals and non-Aboriginals is still based on views of Aboriginal peoples as primitive, lazy, without modern institutions and incapable of functioning without the paternal and superior hand of non-Aboriginals (Alfred, 1999; Monture-Angus, 1999; Ponting and Kiely, 1997:164). Taken-for-granted colonial attitudes and practices still control how non-Aboriginals view and treat Aboriginals (Hazlehurst, 1995) and they are a major "part of a chain linking oppression and self-destruction" (RCAP, 1993:53).

The McEachern decision in *Delgamuuku v. A.G.* (1991), although successfully appealed, demonstrates the continued prevalence of these beliefs in Canadian society. This is manifested in the "legal theory of culture" that undermines the use of precedent in Canadian courts (Bell and Asch, 1997:64-71). *Delgamuuku v. A.G.* (1991) is emblematic of the use of precedent based on the legal theory of culture that Aboriginal peoples must face inland claims cases. Cases such as *Re Southern Rhodesia* and *Hamlet of Baker Lake* (*ibid.*), wherein an incorrect definition of culture that was biased against First Nations, were used as precedents to form this legal theory of culture which, in turn, were used to deny Aboriginal land claims.

The four major elements of this legal theory of culture are:

1. Allows for the possibility that human beings may live in groups and yet not live in a society;
2. Allows for the possibility that societies can exist that are not 'organized' only with respect to some aspects of social life;

3. Allows for the possibility that organized societies exist that do not have jurisdiction over their members and their territory;
4. Allows for the possibility that organized societies exist where there is no 'ownership', particularly with respect to land (*Ibid.*:65).

This interpretative repertoire, though gradually being broken down within the community of Canadian judges, is part of the above non-Aboriginal devaluation of Aboriginal peoples and their culture. Fear of difference and devaluation of Aboriginal culture still underpins Aboriginal and non-Aboriginal relations. My research with the Native Community Council Diversion Project at Aboriginal Legal Services of Toronto indicates that many of the following discriminatory attitudes are also manifested in criminal proceedings (Proulx, 2000).

Cultural conflict arguments do have validity, however, because they undermine the social, political and economic inequities that cause crime and criminal justice responses to crime (RCAP, 1996:33-46). Non-Aboriginal cultural discrimination and control in one institutional sector "fitting together to feed or reinforce distinctions in other institutional sectors" create a "web of institutional interdependencies," which forecloses on unfettered access to education, labour/business and housing for Aboriginals (Ponting and Kiely, 1997:167). To my mind this systemic denial of access based on cultural difference, though "difficult to prove" (Warry, 1998:170), is a prime mover in structural inequities that control Aboriginal lives leading to high levels of social disorder and crime. Thus writers such as LaPrairie and Depew may be placing the cart before the horse by valorizing structural causes over culture conflict as the prime cause for Aboriginal over-representation.

An Aboriginal Solution

Many Aboriginal peoples think self-determination and self-government will solve their justice problems in both culture conflict and structural domains (RCAP, 1996:175-176). I will now focus on how this political goal undermines approaches to the "new justice" (LaPrairie, 1998) that Aboriginal peoples seek.

Aboriginal peoples never surrendered their historical inherent right to self-determination and self-government (Mitchell, 1994:304-306). This right was granted by the Creator (Worme, 1994:77) and is also based on "their ancestors' original and long-standing nationhood and their use and occupancy of the land" prior to contact (Boldt, 1993:25). The Royal Proclamation of 1763, which is interpreted to acknowledge Aboriginal rights, is also used to legitimate their inherent right (*Ibid.*:26). Victorian treaty guarantees of

Aboriginal jurisdiction over peace and good order on Reserve lands are also used to legitimate this right (Henderson, 1994a:53-55; RCAP, 1996:223-234). Treaties and the oral agreements of the signatory Chiefs "establish that if a treaty does not expressly delegate authority to the Crown such authority remains under Aboriginal control" (Henderson, 1994a:55). Moreover, "it is the treaties that establish our relations with Great Britain and Canada and not the federal Criminal Code" (Worme, 1994:78) and "no parliamentary sanction is required to bring a treaty into legal existence" (Henderson, 1994a:55). Despite these precedents Canadian governments between 1867 and 1982 consistently denied and frustrated all attempts to recognize inherent rights and "maintained complete jurisdiction over Native people" through the Constitution Act of 1867, the Indian Act and the Criminal Code (Rudin and Russell, 1993:44).

The Constitution Act of 1982, and the inclusion of the Canadian Charter of Rights and Freedoms in it, gave Aboriginal peoples new tools in their struggle for self-determination/government. Section 35 (1) of the Constitution states that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed" (RCAP, 1996:220). Despite concerns about the word *existing* (RCAP, 1996:221-223; Rudin and Russell, 1993:45) in section 35 (1) various commentators believe that it "gives constitutional scope for Aboriginal self-government in matters relating to the establishment of justice systems" (RCAP, 1996:224; see also Dunlevy, 1994:29; Nahanee, 1993:368; Rudin and Russell, 1993:45-46). Section 35 (1) protects Aboriginal peoples from future governments "taking away rights that they had granted by legislative and land claim agreement" and can be used as "a basis to assert an inherent right of Native people to live under their own justice systems without the need for any enabling legislation or delegation of power from a legislature" (Rudin and Russell, 1993:45). Obligations to honor the peace and good order clauses of the Victorian treaties are, therefore, "made an integral part of the Constitution of Canada by section 35 (1) and any subsequent law that is inconsistent with these clauses 'has no force of effect'" (Henderson, 1997:1). Section 25 of the Constitution Act provides a further buttress to Aboriginal self-government in justice. It states that:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal process of Canada including: (a) any rights and freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights and freedoms that

now exist by way of land claims agreements or so may be acquired (Rudin and Russell, 1993:46).

The legal use of these clauses is intensely debated. Non-Aboriginals may use Section 15 of the Charter of Rights and Freedoms to challenge Aboriginal justice systems as special treatment (*Ibid.*:470; R. v. Willocks, 1994). More importantly, current federal positions interpret these clauses differently with regard to the inherent right to self-determination and self-government. Even though Canada has accepted that Aboriginal peoples have a right to self-determination, it still wants to soften the right by excluding secession within this right (James Sakej Youngblood Henderson, personal communication, 2000). Additionally, federal and provincial governments fear the constitutional consequences of a non-legislated third order of government (*Ibid.*). Both the federal and provincial governments jealously and fractiously guard the divisions of power guaranteed by Sections 91 and 92 of the Constitution Acts of 1867 and 1982. The recent British Columbia Liberal Party provincial Supreme Court challenge of the Nisga'a Treaty is emblematic of political fears of a third order of government not mandated by the Constitution (Mickleburgh, May 16, 2000: Pp. A2). (To my mind this action is also emblematic of fear mongering and cynical political power seeking through media manipulation of voters uneducated in the intricacies of the Constitution.) This fear extends to jurisdiction over criminal justice matters leading to the promotion of government controlled initiatives in justice over self-governing Aboriginal justice.

It should be noted that the Aboriginal Justice Strategy (1998:30) supports the Inherent Right Policy of the federal government toward Aboriginal peoples. It is concerned with "working within the existing Canadian justice system to build mainstream Aboriginal cooperative partnerships that will support the development of better, and sustainable, justice systems, programs and policies to meet Aboriginal needs consistent with the implementation of the justice elements of the Inherent Rights Policy of Self-Government" (*Ibid.*:2). The three primary components of the Aboriginal Justice Strategy are policy development and support, community-based funding agreements and the Aboriginal Justice Learning Network (*Ibid.*:3). However, the Mid-Term Evaluation of the Aboriginal Justice Strategy (1998:30) recognizes the problems of following the Inherent Rights Policy. It states that the "practical challenges" governments face in implementing the policy have been problematic (*Ibid.*). The Aboriginal Justice Strategy has, therefore, "made efforts to address this consideration" in a manner "more consistent with the more recent Gathering Strength Approach of the federal government" (*Ibid.*:30). As a result issues of Aboriginal capacity and cooperative partnership building over time are receiving greater focus than

the Inherent Rights Policy. I think that this policy shift is also the result of federal/provincial problems with the division of powers discussed above and the federal government's preference for incremental non-constitutional approaches to federalism and justice. Hence, the federal approach, though laudable in intent, still wriggles off the hook of Aboriginal self-determination and self-government preferences.

Aboriginal peoples are also using international fora to pressure the Canadian State to recognize Aboriginal self-determination. Self-determination, "means that peoples must determine their own destiny" and this was affirmed by the International Court of Justice in the Western Sahara case "where it was held that it is not proper for the state to determine the destiny of a people" (Monture-Angus and Turpel, 1992:255). International human rights norms in Articles 1 and 7 of the International Covenant on Civil and Political Rights, ratified by Canada in 1976, require that all prisoners must be treated with respect and dignity due to the "inherent dignity of the human person" (*Ibid.*). Hence, Monture-Angus and Turpel think that "blind application of criminal justice norms and institutions to Aboriginal peoples may be inconsistent with Canada's international legal obligations to respect the rights of Aboriginal peoples to self-determination" (*Ibid.*). They think that the unilateral imposition of Canadian criminal law is illegitimate because there has not been a "formal and complete definition of [Aboriginal peoples'] pre-existing and inherent Aboriginal rights [and] treaty rights with regard to Canada's international human rights obligations" (*Ibid.*). Further buttresses for Aboriginal claims derive from Article 8 of the International Labor Organization Convention of 1989 which states that "due regard must be given to customs and customary laws" and the United Nations' Declaration on Indigenous Rights of 1988 which "included the right of indigenous peoples to have their specific characteristics recognized by the political institutions and legal systems of a country" (Hazlehurst, 1995:xi). By and large, however, the Canadian State has fought hard at the United Nations to limit international legislation giving greater self-determination to Indigenous peoples (Venne, 1998:91-92, 119-122).

Current Directions

Social, political, economic and cultural diversity between Aboriginal peoples and within reserves and cities is a central variable in current directions in Aboriginal justice. Varying degrees of consensus on self-government, differences in status, religion, gender, rural versus urban and cultural/community awareness make a single solution to justice problems impossible (Monture-Angus, 1999:21, 29; *R. v. Manyfingers*, 1996:29-30; Henderson, 1995:2; Dunlevy, 1994:8-9; Giokas, 1993:192-194). Each com-

munity will have to determine the type of justice arrangement that suits it best (Stuart, 1997). This diversity, therefore, effects all of the debates and actions taken in Aboriginal justice.

Prior to any real progress both Aboriginal peoples and non-Aboriginal peoples must de-colonize their minds. The "us" versus "them" mentality pervading much justice rhetoric must be eradicated (Turpel, 1994:210). Difference must be recognized but should not be the only criteria upon which to build new justice. A new inter-cultural dialogue based on "a healthy dose of lived experience and self-awareness of convergence and connections [while] thinking concretely and sympathetically" is necessary to create new justice. This requires that non-Aboriginals reject "romantic projections of perfect cultural regimes with superior concepts of goodwill... [that] are disconnected from the real experiences of Aboriginal people across the country" (*Ibid.*). Turpel wants to create a "critical cultural capacity that is internal to the criminal justice system," and this requires de-colonized reflection and conversation on the part of non-Aboriginals (*Ibid.*:211).

Henderson, discussing dishonored treaties (1994b:422-428), explains how non-Aboriginal peoples must recognize that "there is a lack of an authentic social contract with Aboriginal peoples" and that "the imperial acts that created the Criminal Code and the structure of its administration were applied to Aboriginal peoples without their consent." Henderson thinks that non-Aboriginals must stop believing that justice, legitimacy and authority derives from "biological descent—as a birthright of the Crown and the English" (*Ibid.*). Government and justice should be a matter of consent rather than descent, self-interest and expediency and, therefore, non-Aboriginals must accept treaty incorporation into "national federalism [and] into a new multicultural Canada" (*Ibid.*).

Monture-Angus (1994:222-232) thinks that de-colonization demands dispelling the myths that distort our justice conversations and that render our relationships dysfunctional. Myths that the task of justice self-government is too difficult, and non-Aboriginal fears about multiple Aboriginal criminal codes, must be dispelled. Additionally, myths that suggest "that alternative dispute resolution practices (ADR) mirrors Aboriginal reality" should be "rejected" in favor of Aboriginal peoples "recovering our distinct ways of being" at the community level while taking account of the new "grave social ills" facing communities (*Ibid.*:226-227; see also Monture-Angus, 1994b). Aboriginal peoples must reclaim their traditional systems of law that are family/kinship based and have confidence that they can work today. To do this Aboriginal peoples must "learn to live in a de-colonized way again" by refusing to accept "the myth of white superiority" while "advocating truly Aboriginal responses" (*Ibid.*). This involves rejecting ac-

commodationist discourse and practices. Accommodation will not change the central problem with justice: the state will still have the power to define what justice is, not Aboriginal peoples (*Ibid.*:228-229). Monture-Angus (1999:33) says that non-Aboriginals must understand how "the dominant system's monopoly on the definitions of both legal and political terminology holds the book open to a page where the oppression of Aboriginal peoples is still writ large." Monture-Angus thinks that Canadians must de-colonize their minds by critically examining how culturally specific legal ideologies, such as constructions of legal equality and practices such as precedent, continue to oppress Aboriginal peoples (*Ibid.*:32-33). I would add the need to reject legal centralist dogma in favor of the adoption of legal pluralist theories and practices of justice. The only way to create a "renewed relationship between Aboriginal peoples and Canadians is an examination of the concepts we are building our relationship with." Examining and then relinquishing the exclusive power to define in law is one mode of de-colonization that is a necessary prerequisite for justice for both Aboriginal and non-Aboriginal peoples.

De-colonization of both Aboriginal and non-Aboriginal minds is clearly a crucial direction in justice. Without it we are doomed to the same cycle of mistakes and exploitation. One of the central ways de-colonization has been proceeding in criminal justice, apart from constitutional debates and changes to sentencing philosophy/practice, is through the recovery, adaptation and promotion of self-governing community-based restorative justice.

Some Aboriginal people and criminologists see restorative justice as a direction to de-colonize justice, to create justice systems that work for people rather than the prison industry and to return the control of social disorder to communities. Some criminologists are critical of "after-the-fact... get tough" solutions to social disorder and crime such as three-strike sentencing, incarceration and capital punishment (Hahn, 1998:3-4). This reactive approach to justice is undermined by a "nothing works" attitude toward rehabilitation, and sensationalist media depictions of violent crime supported by populist conservative politicians who advocate lock-em-up deterrence despite evidence that suggests that "this has had little effect on crime rates in general or on violent crime" (*Ibid.*:4; 29). Hahn presents a proactive alternative to the futility of the above interpretative repertoires and practices in a three-pillar approach that involves community policing, community corrections and restorative justice (*Ibid.*:61).

Restorative justice rejects the above adversarial, retributive approach and concerns itself with "the broader relationship between offender, victim and the community" (Bazemore and Umbreit, 1994:13-14, quoted in Hahn, 1998:133-134). Crime is "more than simply law breaking—or a violation of

government authority" that can be deterred or treated individually. Instead the focus in criminal behavior is on "the injury to the victims, communities and offenders" (*Ibid.*). The offender must understand, accept responsibility for and attempt to make restitution to the victims and the community for his/her crimes. In addition, the community becomes "involved in supporting victims, holding offenders accountable and providing opportunities for offenders to reintegrate into the community" (Carey, 1996:153, in Hahn, 1998:135). Some of the tools used in American restorative justice programs are reintegrative shaming (Braithwaite, 1989), mediation, intermediate sanctions, restitution, community service programs, and community prosecution and defense programs (Hahn, 1998:140-155).

Restorative justice is intimately tied to the political goals of self-determination and self-government for some Aboriginal peoples (Hoyle, 1995:146). Many Aboriginal peoples reject non-Aboriginal retributive justice and its reliance on incarceration (RCAP, 1996:164). Claiming cultural conflict with the imposed non-Aboriginal justice system, as discussed above, restorative justice provides a model to de-colonize justice for these Aboriginal peoples. They want to move away from abstract, rationalistic and universalistic theories of justice in the Eurocentric tradition toward defining justice and themselves in terms of "their awareness of their knowledge, traditions and values" (Henderson, 1995:2). It is about "re-learning how we are supposed to be" and re-learning "our traditional responsibilities" after years of colonial oppression in foster care, residential schools, under the Indian Act and the Criminal Code (Monture-Angus, 1995a:5). Restorative justice is conceived of as "healing" because social disorder and crime are seen as illnesses to the spiritual, emotional, physical and mental well-being of individuals and the community that must be treated through traditional means (Lee, 1996). Part of this process involves reconciling the accused with his or her conscience through counselling by Elders/community members. It involves reconciling with the individual or family who has been wronged through offender acceptance of responsibility and restitution. It empowers individuals and assists in reclaiming community ownership of justice (LaPrairie, 1995c:533; LaPrairie and Diamond, 1992). Overall, then, restorative justice involves the reclamation of justice responsibility and jurisdiction from the non-Aboriginal system.

A central thrust of community restorative justice is the reclamation and re-application of traditional justice philosophies and practices that were lost due to the imposition of the non-Aboriginal justice system. The revival of the Gitksan Wet'suwet'en clan-based potlatch/feast justice system (Green, 1998:145; RCAP, 1996:4, Hoyle, 1995:154) or the five tiered Longhouse justice system of the Mohawks at Kahnawake are both examples of

Aboriginal peoples "taking their traditions and attempting to revitalize them in a modern justice system" (Dickson-Gilmore, 1997:48-51). Pre-colonial traditional forms of dispute resolution ranging from confession, compensation and reconciliation mediated by Elders (Hoyle, 1995:146) to banishment (Warry, 1998:175) are all being resurrected and incorporated in new justice systems by various Aboriginal peoples.

"Traditional" justice is, however, a contested concept. Confusion over the meaning of tradition is a major problem. Non-Aboriginals mistakenly believe that it is past customs "(particular cultural practices)" (Warry, 1998:174) from pre-colonial times that are being revived without reference to historical and cultural change. Rather, it is "tradition (the appeal to values and actions that sustain customs and provide continuity to a social group over time)" (*Ibid.*) that is being revived in new contexts after years of oppression. Moreover, non-Aboriginals criticize the "invented" nature of these revived traditions while ignoring the invention of their own legal traditions (Dickson-Gilmore, 1992). Some non-Aboriginals impose culturally different "external measures of legitimacy" (legal centralist dogma) to judge Aboriginal traditions and to "undermine separate justice initiatives, which rely on tradition as both the blueprint and justification for their autonomy from non-native legal structures" (*Ibid.*:499). Consequently, culturally sensitive traditional sentences given by lower courts have routinely been overturned on Crown appeal "because they violated the letter of Western Law" (Warry, 1998:175).

Some Aboriginals contest whether traditions currently being used in Aboriginal justice initiatives are in fact *réal* traditions. LaRocque (1997:84), in criticizing Hollow Water's use of healing and forgiveness in sexual assault cases, calls for a re-evaluation of it "in light of real traditional justice." Citing anthropological evidence she makes a case that an "eye-for-an-eye punishment-based approach was more common than the use of healing circles in the Aboriginal past" (*Ibid.*:83). LaRocque is concerned with the question of which Aboriginal traditions (punishment or healing) should form the basis of Aboriginal justice. LaRocque raises valid questions about the authenticity of Aboriginal traditions, pan-Aboriginality and who has the power to choose which "authentic" traditions shall be used.

It is clear from the above, then, that solving non-Aboriginal resistance to the use of tradition in justice and resolving Aboriginal concerns about authenticity and power in choosing which traditions will apply are major directions in community-based restorative justice. I believe that the concerns raised by LaRocque will prove to be the more difficult to solve because of the diversity of situational community dynamics. Differentials in the power to define within Aboriginal communities may prove as problematic as the

power to define currently held by non-Aboriginals. The difference will be that Aboriginals will contest with Aboriginals rather than non-Aboriginals simply imposing their definitions.

Community is also a major direction in Aboriginal justice. Throughout the justice literature the consensus is that self-government in justice is best germinated in "the community". The community is the site and entity that will be involved in judging/sentencing/healing offenders, and in restoring victim's rights, thereby empowering its members and itself. Justice will be more accessible, fair and culturally sensitive than state justice because of the use of local/traditional practices and local jurisdiction. However, the nature of community and its role in Aboriginal justice is intensely debated. LaPrairie (1998:76) thinks, "simply invoking the use of community [to] solve a range of justice problems is probably overly-simplistic" and ignores a number of important community issues.

How community is defined is problematic. Assumptions that Aboriginal communities are static and locked into a communal and egalitarian ethos have been proven to be unfounded (LaPrairie, 1995c:523). Social, economic and political change has broken down this ethos yet much justice literature is still "nostalgic" for this community definition (Depew, 1996:28). Additionally, definitions of community as territorially and ethnically bounded are less useful for defining justice policy. The permeability of Reserve boundaries, rural-urban migration, urban life and urban-Reserve connections render previous community conceptions unrealistic. Hence, prior to the institution of any justice initiative, conceptions of community that undermine them must be scrutinized. Cookie-cutter definitions of community that ignore change are counter-productive. Diverse communities will require diverse justice philosophies and practices.

Who defines and represents community must also be interrogated. Entrenched local elites may manipulate Band lists to determine who can be a community member (Anderssen, 1998:A1, A8), thereby controlling who participates in justice. Additionally, the choice of new justice practice may define community. Judges using sentencing circles can define community on the basis of a larger set of interested parties in a geographic region, whereas community in family group conferencing may be restricted to people with a "particular relationship to the offender and victim" (LaPrairie, 1998:65). Without a deep understanding of community dynamics judges are prone to using unrepresentative communities (Crnkovich, 1996). The negative role of Band factionalism, social, economic and political stratification in the representation of community cannot be ignored (Ross, 1996; Green, 1995). When participation is limited by "a self-selecting group and no effort is made to ensure that a cross-section of the community partici-

pates," then justice will be perceived as non-representative and illegitimate because it benefits certain individuals over the community as a whole (*Ibid.*). The RCAP (1996:275-277) noted these problems and recommended the creation of Aboriginal appellate bodies on a nation-to-nation and/or national pan-Aboriginal basis as a remedy for these issues.

Current justice discourse assumes high levels of community involvement and participation in community justice (Stuart, 1996c). Yet these assumptions must be situationally investigated (LaPrairie, 1998:66). Self-government in community justice will require well-developed internal capacities and resources as well as external funding. Communities may not have the skills, resources and willingness to start and maintain local justice. For example, dealing with occasional as opposed to chronic offenders, or dealing with sexual abuse as opposed to alcohol related violence, requires different skills and resources (*Ibid.*). Relatedly, many communities do not have the "institutional capacity (including police infrastructures, human and financial resources)" to begin to involve themselves with local justice (Depew, 1994:77). Hence, community involvement and participation must not be taken as a given but as an on-going capacity and resource development process.

Unpacking the complexities of "community" beyond the symbolic/political rhetoric of self-government justice discourse is a central justice direction. Uncovering the contextual and situational nature of community, determining the capacity of communities to support local justice and ensuring accountable and legitimate participation for all "may assist local justice approaches to meet both symbolic and real justice needs better" (LaPrairie, 1998:76).

Beyond these baseline issues is one of the central controversies in Aboriginal justice today: should there be separate/parallel Aboriginal justice systems or should there be a continuing partnership with the non-Aboriginal system? Aboriginal peoples who support separate/parallel systems of justice do so because they "feel that they are not well served by the justice system" (Dickson-Gilmore, 1997:47), either conceptually or procedurally (Turpel, 1993a:174-179), as discussed above in the culture conflict thesis. They reject "mere tinkering reform of the criminal justice system on the 'inclusive' model (to ensure equality for all individuals) or minor adjustment/accommodation approaches such as indigenization (red faces in place of white faces) and alternative dispute resolution" (Turpel, 1993a:173; Monture-Angus, 1994b). Many believe that only unfettered, self-determining and governing Aboriginal jurisdiction over justice can heal current social ills and begin to restore Aboriginal peoples' well-being (Alfred, 1999; Henderson, 1995; Turpel, 1993; Monture-Angus and Turpel, 1992).

But jurisdiction is the thorny issue that must be resolved before separate systems can operate. First, the inability of provincial and federal governments to accept Aboriginals as a third order of government is a formidable obstacle. Second, jurisdictional concerns over "the sphere in which autonomous institutions would operate; the matters that would be dealt with and the 'laws' that would apply; and the way in which institutions would interact with each other, and with the non-Aboriginal criminal justice system" are held by Aboriginals and non-Aboriginals alike (McNamara, 1995:12-13; see also Mandamin, 1993). Third, the forms of jurisdiction are also debated. Proposals for tribal courts based upon American models, and territorial-based jurisdiction are perceived to be inadequate because court models are insensitive to Canadian Aboriginal difference, and territorial jurisdiction is problematic for urban or non-status people without a land base (*Ibid.*).

Separate justice systems for urban Aboriginals is a burgeoning debate. The diversity of urban Aboriginals, cross-cutting community membership, their overall lack of cultural awareness, degrees of dysfunction, lack of a land base and Reserve status pose difficulties in creating self-governing structures. Various proposals exist to deal with this issue. They range from the creation of urban Reserves to using an urban revenue base instead of a land base on which to found self-government (Hendrickson, 1994). The extra-territorial model where the powers of land-based Aboriginal nations are extended to urban Aboriginal citizens regardless of their place of residence is another option (Peters, 1995:96). Older ideas such as neighborhood-based self-government which provide cultural havens (Dosman, 1972) within cities are still being considered (Peters, 1995:96). Other proposals include constitutionally entrenching the mobility of Aboriginal rights to ensure that Aboriginal peoples living in mixed communities or outside traditional lands will be able to protect their cultures, languages and traditions (Peters, 1995:94). These rights would not necessarily be tied to a land base and, therefore, could be used as a basis for urban self-government (*Ibid.*). The RCAP (1996:282-283) proposes a community of interest approach based upon bringing together interested institutions and individuals in co-operation with various levels of government who would create self-governing structures based upon their interests.

Each of these proposals has significant problems. For instance, neighborhood-based models have the potential to create a ghetto-like atmosphere (Peters, 1995:96). The extra-territorial model could be challenged under Section 15 of the Canadian Charter of Rights and Freedoms because of fears that different access to different venues goes against guaranteed equality commitments. A case could also be made that this model infringes on individual rights guarantees if some urban Aboriginals are forced to

adhere to the standards set down by these urban self-governing structures. Moreover, this model could fragment Aboriginal communities by causing confusion as to which community members have which rights. Some members would have certain rights and others would not (*Ibid.*:96). Definition of membership and who is given access to services in these urban self-government models is another problematic issue. Finally, opting out of these self-governing models by Aboriginal peoples could deplete the community thereby reducing funding and weakening the viability of self-government (*Ibid.*:98).

All of these issues present serious obstacles for new justice within urban contexts. Problems with internal jurisdiction due to fluid community membership and how that jurisdiction would mesh with the encapsulating formal Canadian criminal justice system are central concerns. The power to define which social control philosophy will become the regnant one could lead to debates over authenticity and legitimacy as competing philosophies are proposed. The representativeness of those chosen to administer new community justice could also present obstacles to the implementation of any justice philosophy and practice. Clearly, new justice for urban Aboriginal peoples will require substantial ethnographic investigation, whether by Aboriginal or non-Aboriginal anthropologists, to deal with the contingencies discussed above. Political imposition must not proceed without prior in-depth inquiry into the lifeworlds of the diverse Aboriginal communities that are contained in different cities.

Other substantial impediments to separate justice systems in both urban and rural contexts include the following: Many non-Aboriginals, still captive of the inclusive legal centralist model of justice, see anarchy in the "notion of scores of Indian Bands across the country enacting their own criminal law" and, therefore, obstruct progress toward that goal (Dafoe, 1992:D2, cited in McNamara, 1995:13). They also fear that individual rights will be trampled due to a focus on collective rights (Webber, 1993:140-145). Fears of Aboriginal peoples having an advantage unavailable to non-Aboriginal peoples and fears that "separate Aboriginal institutions will be to the material disadvantage of Aboriginal peoples" resulting in further "ghettoization" have also been expressed (*Ibid.*:148-151). Aboriginal women are concerned that equal rights protections for women under the Charter will be trampled upon by separate systems operating under the exclusive jurisdiction of neo-colonialist brown patriarchy (Nahanee, 1993:373; Jackson, 1996). Issues of capacity and resources to manage separate systems plus factionalized political control over justice, as discussed above, may hamstring separate systems. Finally, LaPrairie (1995:180) thinks that separate justice systems will not help solve the severe economic, education,

social and personal disadvantages that cause crime. At best they will only be a more sensitive way to manage the continuing social destruction wrought upon Aboriginal people by these structural forces.

All of these fears are valid and must not be ignored. But I agree with Monture-Angus (1994a) that we should not be scared off because we think separate systems are too difficult. Additionally, I think it is unfair that non-Aboriginals demand that, prior to agreeing to separate systems, any Aboriginal system must be perfect and have all of the bugs worked out of it. The non-Aboriginal system is not perfect and evolves to meet changing circumstances. Why do non-Aboriginals have difficulties accepting this for separate Aboriginal systems? Time, good will and patience are required if separate systems are to become a reality. Nevertheless, Aboriginal and non-Aboriginal fears of power loss and political/bureaucratic self-interest have led to the idea of justice partnership.

Many Aboriginal people do not want to jump too quickly into separate justice systems. Although they may want separate systems in the future and do not want to be "fenced in" within the "existing concepts and premises of the Canadian criminal justice system," they recognize that time must be spent "anticipating distinct justice systems" (Turpel, 1993a:180). Turpel thinks "the interlocking elements [between justice practices] require discussion, definition and acceptance by Aboriginal peoples - not more imposition" (*Ibid.*). Mandamin (1993:280), while discussing what parallel justice systems would look like and possible instability and administration problems within them, thinks there will be advantages to links with the Canadian criminal justice system. The criminal justice system offers "stability, consistency, compatibility and resource support" (*Ibid.*). As such it can serve as an "incubator empowering the Aboriginal justice system and as a support for Aboriginal justice systems in dealing with criminal conduct not responsive to Aboriginal correction" (*Ibid.*:304). The RCAP (1996:302) thinks that an incubator approach provides "different starting points [that] may be used to initiate the development of an Aboriginal system." ADR initiatives would be used which "lend [themselves] to a phased development within Aboriginal communities, [and] gives time to assimilate new developments and plan the next logical step" (*Ibid.*). The RCAP sees a two-track approach to reform involving reform of the non-Aboriginal system and the establishment of Aboriginal justice systems as part of the "new relationship" between non-Aboriginal and Aboriginal justice (1996:78-79).

Non-Aboriginal commentators also discuss the rationale of justice partnership. Warry (1998:199) points to the fact that many Aboriginal peoples have become assimilated to the Western justice system and, "because the potential for violence is part of their life, they expect a strong

police and judiciary to control offenders who would threaten the fabric of community life." Other researchers believe a lack of will and resources to deal independently with serious offenses and chronic or psychopathic offenders at the community level makes justice partnership attractive to some Aboriginal communities (Ross, 1996:228-229; LaPrairie, 1996b:110). Judge Stuart, since his ground-breaking judgement in *R. v. Moses* (1992), believes that partnership is essential within sentencing circles because it fosters a co-operative approach to justice not seen in the past (1997). Overall, the "interdependency in problem solving approach to conflict resolution" is the reason that partnership has the support of some Aboriginals and non-Aboriginals (Stevens, 1994:52).

This interdependent and co-operative partnership takes many forms and degrees. One example of these new partnerships is the Tsuu T'ina court in Calgary. Leonard (Tony) Mandamin, an Ojibwe from Ontario, is to be sworn in as judge of the new court, formed to balance traditional Aboriginal healing with contemporary justice (Harrington, 1999). Developed jointly with the federal and Alberta governments, it is to include trained peacemakers who will rely on traditional circles, sweat lodges and spirit healing (*Ibid.*).

Characteristic of new co-operative justice models, peacemakers are to address not only the crime but also the root of the problem that may have translated into criminal or other anti-social behavior (*Ibid.*). The new court model includes a redesigned circular courtroom with the accused facing the community and the judge's bench only slightly elevated; the full range of jurisdictional authority associated with a provincial court, including youth and adult crimes, child and family issues, civil law, as well as First Nation by-laws; prosecutors required to use discretion in determining which cases go to peacemakers and which are prosecuted through the court; interpreters provided for those who speak in their Aboriginal language; and Aboriginal Elders are choosing ceremonies with which to open court proceedings (*Ibid.*).

This approach, however, is potentially problematic for obvious reasons. Many of the issues raised above in the discussion of *R. v. Gladue* (1999) apply. Blending traditional healing with contemporary justice goals of deterrence and protection of the public could be difficult even with noted Aboriginal law scholar Tony Mandamin as the main judge. Prosecutorial discretion in choosing which cases go to peacemakers may pose problems if the prosecutors do not have sufficient understanding and training in Aboriginal ideas and practices of justice. The use of interpreters is also potentially problematic. Courtroom research has shown how interpreters have become a "new variable in the ecology of the courtroom" (Berk-Selig-

son, 1990:96). The new court must be aware of how interpreters can affect the interaction between judge, lawyer, witnesses and the accused (Proulx, 1997:50-51). Interpreters can control the flow of information and affect outcomes through inexact translations and through the choices they make as to what is important enough to translate and what is not, leading to different versions of events (Berk-Seligson, 1990). Nonetheless, it will be interesting to see how well this blend of justice philosophies and practices actually functions after it has been given time to work out the above problems.

The Tsuu T'ina court is an interesting new justice partnership. However, diversion approaches are the most common form of partnership. In diversion approaches the offender is diverted from the ordinary court system into culturally sensitive formats which offer varying degrees of offender accountability and reintegration, offender/victim reconciliation, community involvement in sentencing and post-disposition supervision (Clairmont, 1994). Diversion programs tend to deal with less serious crimes such as theft, breaking and entering, etc. Aboriginal Legal Services of Toronto's Community Council Project, Attawapiskat's Community Court and Sandy Lake's Elders' panel fall into this category. To varying degrees the formal system is involved in choosing who will be diverted while these communities use varying degrees of restorative justice and traditional methods to heal the offender, victims and community. Sentencing circles are another form of diversion, but here judges from the mainstream system have a significant degree of control. The judge sentences the offender after listening to a circle of community members discuss the offense, the offender's past and possibilities for the future, hearing the victim confront the offender and hearing the community's sentencing and supervisory recommendations. However, the judge must still adhere to mainstream sentencing legislation over and above the community's will in order to avoid possible Crown appeals. Mediation is another form of partnership. Huber (1993) outlines how the understandings of the Medicine Wheel are being used by mediators in conflict resolution in Vancouver, British Columbia. Hollow Water, Manitoba also uses diversion in a 13-step sexual assault healing program. This program rejects incarceration and only minimally uses the police and court system to assist them in the formalities of charging and sentencing (Sivell-Feri, 1997; Ross, 1996, 1992). Family group conferences are another diversion format. They are an extension of the court system where offenders are diverted to a group of esteemed peers and role models who use reintegrative shaming to make offenders recognize that what they have done is unacceptable while demonstrating the value to the community of the offenders (Warry, 1998:192; LaPrairie, 1995b). Overall, these diversion

programs move away from what Judge Fafard sees as the "justice processing system" of formal criminal justice, toward social justice healing programs in partnership with Aboriginal peoples (1994:403). Hollow Water (Sivell-Ferri, 1997) and Toronto's Community Council Project have been particularly successful in achieving these aims and at reducing recidivism while building and re-building community identity and capacity (Proulx, 2000).

But incubator initiatives face criticism from Aboriginals and non-Aboriginals. The RCAP (1996:302-303) recognizes the downside to incubator approaches in its dependence "on mainstream criminal justice personnel involved and the objectives of the government of the day." Retirement or transfer of culturally sensitive and innovative personnel and changes in government policy "can wipe out Aboriginal justice gains" and lead to a reversion to the status quo of the conventional criminal justice system (*Ibid.*). Adverse reactions from victims and the community due to extending diversion into more serious matters such as sexual assault have resulted in the closure of the South Vancouver Island diversion program (Clairmont, 1994:19). Many Aboriginal women decry how, with the exception of Hollow Water, projects for diversion and alternative sentencing in Reserve communities make no special accommodation for victims of intimate violence (McGillivray and Comaskey, 1999:116). The ADR healing role of Elders, who themselves may be alcoholic, physical and sexual abusers, concern some commentators (Nahanee, 1993:363). Others question whether requiring Elders to be involved with sentencing weakens their traditional role as disseminators of oral tradition and as role models (Ross, 1994, 1993). Conflict of interest criticisms, where control of justice initiatives is too closely tied to Chiefs and Band Councils, have caused problems in Sandy Lake and Attawapiskat (Clairmont, 1994:20-22). Aboriginal women fear "... the potential for manipulation of the process by an offender with strong political connections" (McGillivray and Comaskey, 1999:116). Additionally, problems with power imbalances in mediation approaches are a major concern in cases involving intimate violence (*Ibid.*). Hillary Astor (1994:150, in McGillivray and Comaskey, 1999:117) argues that "mediation—potentially part of any diversion program and characteristic of circle sentencing—is undesirable in intimate violence because 'it creates an extreme power imbalance between the parties, because the parties do not have the capacity to mediate and because mediation does not provide for the needs of the person who has been the target of violence'." Monture-Angus (1994b) is critical of all ADR initiatives because of the continuation of non-Aboriginal power to define what qualifies as a legitimate alternative, to define what qualifies as a dispute using culturally specific parameters and for their

reliance on unequal power of non-Aboriginals and men in resolution. Roberts and LaPrairie (1996) are highly critical of the empirically unproven claims by sentencing circle advocates of success in crime prevention, reductions in crime, incarceration and recidivist rates, claims of increased equity and reduce disparity in sentencing and claims of increased victim participation. They present evidence that may refute these claims and call for more research to deny or confirm their findings. Finally, "confetti" funding approaches by governments in ADR initiatives, where Aboriginal funding is cut up into many small pieces and dispersed to the winds resulting in a multitude of inadequately funded and poorly developed projects, is also a major criticism in Canada and Australia (Hazlehurst and Hazlehurst, in RCAP, 1996:295). These are but a sample of the problems that must be dealt with if incremental incubator approaches are to remain viable. These problems, though daunting, must be met head-on in order to maintain the confidence of Aboriginal peoples currently supporting incremental approaches and to win the confidence and support of justifiably sceptical Aboriginal peoples.

Conclusion

This paper has discussed how self-determination and self-government are directions in Aboriginal justice. I have sketched how colonialism provided, and provides, the conditions leading to over-representation. In so doing I outlined the divide between culture conflict and structural explanations for over-representation and as solutions to empower change. Subsequently I discussed the historical, political and legal arguments that Aboriginal peoples use to legitimate Aboriginal self-determination over justice for non-Aboriginals in both national and international forums. Undermining philosophies and practices providing a bridge to the goal of justice self-determination through alternative measures and ADR were surveyed. The strengths and weaknesses of new justice partnerships were discussed in this regard. Many Aboriginal peoples prefer these incremental incubator approaches to justice despite the problems inherent in them. Conversely, many other Aboriginal peoples think that this new justice does not go far enough or consider it to be a newer, subtler form of co-optation. These Aboriginal peoples, therefore, want self-determining separate systems. They seek the decolonization of Aboriginal and non-Aboriginal minds and the recognition of pre-existing and historical inherent Aboriginal rights.

It is clear that Aboriginal peoples must choose which path is most desirable. As a non-Aboriginal person I would not even attempt to impose any direction upon Aboriginal peoples. I do not wish to be part of the problem. But I do think that separate justice systems are the desirable and

inevitable goal despite Aboriginal and non-Aboriginal fears of multiple systems, funding concerns, jurisdictional disagreements, political and economic factionalism, gender and cultural discrimination and inequality concerns. But I also think the incubator approaches must be continued if only to help build community capacity in preparation for Aboriginal self-determination and self-government in justice. More importantly, despite continued fears of paternalism, non-Aboriginal control and Aboriginal charges of more of the same, incubator approaches provide a base to ease the fear of non-Aboriginal legal professionals, legislators and publics about pluralistic approaches to justice. If this fear is not overcome Canada will continue to pay lip service to Aboriginal justice rights and continue on its legal centralist path. In this regard incubator approaches may be far more valuable in the long-term decolonization of non-Aboriginal minds than they are for short-term social justice for Aboriginal peoples. ADR approaches, then, are the imperfect and incomplete tools used to bridge an immense cultural divide. Until this bridge is completed self-determination, self-government and separate justice systems will not be reached on the further shore.

Notes

1. I am not suggesting that *all* Aboriginal crime and social disorder is the result of colonialism. Individual agency clearly plays a role in decisions about the commission of, and participation in, criminal acts. By and large, however, the social disorganization wrought by colonialism is central to crime and over-representation according to many of the Aboriginal scholars quoted within this paper. My in-progress research with the Native Community Council Diversion Project in Toronto supports this view.
2. The justice implications of the limited form of self-determination in the Nisga'a Treaty are beyond the scope of this paper.
3. A sustained discussion of how Indigenous rights are evolving in international law is beyond the scope of this paper. Venne (1998) provides a detailed account of how Aboriginal peoples are utilizing international law and legal forums as tools to legitimate and publicize their case for self-determination in justice.
4. Legal centralism is an ideology wherein state law is the only legitimate law within the territory which comprises the state. It is uniform for all persons and all other forms of law and/or normative orderings whether Indigenous, ethnic, religious, economic or institutional in nature are hierarchically subordinate to it. This understanding of law is a major ideological barrier that must be broken down before self-determining Aboriginal legal systems can thrive.

5. Discussions of tribal courts in the U.S.A. are beyond the scope of this paper.
6. For a detailed discussion of six models of diversion and alternative sentencing measures see Green (1998).
7. "Intimate violence refers to any and all forms of maltreatment committed in relationships of intimacy, trust and dependence" (McGillivray and Comaskey, 1999:xiv).

References

Aboriginal Justice Strategy Evaluation Document

- 1998 Mid-term evaluation. Ottawa: Department of Justice Evaluation Division Policy Integration and Coordination Section.

Adams, Howard

- 1995 *A Tortured People: The Politics of Colonization*. Penticton: Theytus Books, Ltd.

Akers, Ronald L.

- 1999 *Criminological Theories: Introduction and Evaluation*. Second Edition. Chicago: Fitzroy Dearborn Publishers.

Alfred, Taiaiake

- 1999 *Peace, Power, Righteousness: An Indigenous Manifesto*. Don Mills: Oxford University Press.

Anderssen, Erin

- 1998 How the Sawridge millions tore apart a native community. *The Globe and Mail*, Toronto, 31st October, A1, A8.

Astor, Hillary

- 1994 Swimming Against the Tide: Keeping Violent Men out of Mediation, pp. 147-173 in Stubbs, Julie and Julia Tolme (Editors): *Women, Male Violence and the Law*. Sydney, Australia: Sydney Institute of Criminology.

Bayda, E.D.

- 1997 The Theory and Practice of Sentencing: Are They on the Same Wavelength? *Justice as Healing* 2(3).

Bazemore, G. and M.S. Umbreit

- 1994 Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Response to Youth Crime. Unpublished Manuscript.

Bell, Catherine and Michael Asch

- 1997 *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation*, pp. 38-74 in Michael Asch (Editor): *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*. Vancouver, British Columbia: UBC Press.

Berk-Seligson, Susan

- 1990 *The Bilingua, Courtroom: Court Interpreters in the Judicial Process*. Chicago, Illinois: University of Chicago Press.

Bhattacharyya, Jnanabrata

- 1995 *Solidarity and Agency: Rethinking Community Development.* In *Human Organization* 54 (1): 60-69.

Boldt, Menno

- 1993 *Surviving as Indians: The Challenge of Self-government*. Toronto, Ontario: University of Toronto Press.

Braithwaite, J.

- 1989 *Crime, Shame and Reintegration*. New York: Cambridge University Press.

Carey, M.

- 1996 *Restorative Justice in Community Corrections. Corrections Today* 58(August): 152-155.

Claimont, Donald

- 1994 *Alternative Justice Issues for Aboriginal Justice*. Nova Scotia: Atlantic Institute of Criminology.

Crnkovich, Mary

- 1996 *A Sentencing Circle. Journal of Legal Pluralism and Unofficial Law* 36(Special Issue): 159-181.

Dafoe, J.

- 1991 *Manitoba's Inquiry into Aboriginal Justice Merits Vastly More Wariness. The Globe and Mail*, Toronto, 7 September, D2.

Delgamuuku v. A.G.

- 1991 *Reasons for Judgement of the Honorable Chief Justice McEachern. Canadian Native Law Reporter* 5.

Depew, Robert C.

- 1994 *Aboriginal Policing: A Research Perspective*. A report prepared for the Royal Commission on Aboriginal Peoples, November 1994, Ottawa, Ontario: Solicitor General of Canada.

Depew, Robert C.

- 1996 Popular Justice and Aboriginal Communities: Some Preliminary Considerations. *Journal of Legal Pluralism and Unofficial Law* 36(Special Issue):21-67.

Dickson-Gilmore, Jane

- 1997 The Incentive for Separate Justice Systems, pp. 47-57 in Andrea P. Morrison (Editor): *Justice for Natives: Searching for Common Ground*. Montreal and Kingston: McGill-Queen's University Press.
- 1992 Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems. *Canadian Journal of Criminology* 34(3-4): 479-502.

Donlevy, Bonnie

- 1994 Sentencing Circles and the Search for Aboriginal Justice. Ottawa, Ontario: Solicitor General of Canada.

Dosman, Edgar J.

- 1972 *Indians: The Urban Dilemma*. Toronto, Ontario: McClelland and Stewart Limited.

Dumont, James

- 1993 Justice and Aboriginal people, pp. 42-85, in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Issues, Royal Commission on Aboriginal Peoples*, Ottawa, Ontario: Minister of Supply and Services Canada.

Fafard, C.

- 1994 On Being a Northern Judge, pp. 403-405, in Richard Gross, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

Finkler, Harald

- 1992 Community Participation in Socio-legal Control: The Northern Context. *Canadian Journal of Criminology* 34(3-4):503-512.

Giokas, John

- 1993 Accommodating the Concerns of Aboriginal Peoples Within the Existing Justice System, pp. 184-231, in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Issues, Royal Commission on Aboriginal Peoples*. Ottawa, Ontario: Minister of Supply and Services Canada.

Green, Ross Gordon

- 1998 Justice in Aboriginal Communities: Sentencing Alternatives. Saskatoon, Saskatchewan: Purich Publishing.
- 1995 Aboriginal Sentencing and Mediation Initiatives: The Sentencing Circle and Community Participation Models in Six Aboriginal Communities. Manitoba: Unpublished Master of Law Thesis, University of Manitoba, Faculty of Law.

Griffiths, Curt Taylor and Charlene Belleau

- 1995 Popular Justice and Community Regeneration, pp. 165-186, in Kayleen Hazlehurst (Editor): *Addressing Aboriginal Crime and Victimization in Canada: Revitalizing Communities, Cultures and Traditions*. London: Praeger.

Hahn, Paul H.

- 1998 Emerging Criminal Justice: Three Pillars for a Proactive Justice System. London: Sage Publications.

Hamilton, Mr. Justice A.C. and Judge Murray Sinclair

- 1991 Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg, Manitoba: Queen's Printer.

Harrington, Carol

- 1999 Native Smudge Ceremony to Inaugurate Aboriginal Court. Calgary, Alberta: Canadian Press.

Hazlehurst, Kayleen

- 1995 Introduction: Unyielding Domains in the Post-colonial Relationship, pp. ix-xxxv in Kayleen Hazlehurst (Editor): *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*. Aldershot, England: Avebury.
- 1995 Introduction: Indigenous Models for Community Reconstruction and Social Recovery, pp. ix-xi in Kayleen Hazlehurst (Editor): *Perceptions of Justice: Issues in Indigenous and Community Empowerment*. Brookfield: Avebury.

Hazlehurst, Kayleen and Cameron Sober Hazlehurst

- 1995 Successful and in Control: Proposing an Aboriginal Community Recovery Strategy to the Queensland Government. In *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa, Ontario: Minister of Supply and Services Canada.

Henderson, James Sa'ke'j Youngblood

- 2000 Personal Communication.

- 1997 Indian Justice and Punishment Clause of Victorian Treaties in Constitution Law of Canada. *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* Spring:1-7.
- 1995 Exploring Justice as Healing. *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* Spring:1-3.
- 1994a Implementing the Treaty Order, pp. 52-62 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's' Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.
- 1994b All is Never Said, pp. 423-431 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's' Quest: Presentations made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

Hendrickson, Marv A

- 1994 Provincial Perspective on Urban Self-government, pp. 391-396 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's' Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

Howard, Cori

- 1999 Racial Background Key Part of Argument at Sentencing Hearing. *The Globe and Mail*, Toronto, 11 January, A3.

Hoyle, Marcia L.

- 1995 A Fitting Remedy: Aboriginal Justice as a Community Healing Strategy, pp. 143-164 in Kayleen Hazelhurst (Editor): *Perceptions of Justice: Issues in Indigenous and Community Empowerment*. Brookfield: Avebury.

Huber, Marg

- 1993 Mediation Around the Medicine Wheel. *Mediation Quarterly* 10(4): 355-365.

Jackson, Margaret

- 1999 Canadian Aboriginal Women and their 'Criminality': The Cycle of Violence in the Context of Difference. *The Australian and New Zealand Journal of Criminology* 32(2): 197-208.
- 1996 Aboriginal Women and Self-government, pp. 180-198 in John H. Hylton (Editor) *Aboriginal Self-government in Canada: Current Issues and Trends*. Saskatoon, Saskatchewan: Purich Publishing.

Jackson, Michael

- 1988 Locking up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release. Vancouver, British Columbia: UBC Press.

Johnstone, J.

- 1998 *R. v. A.G.A.* [1998] A.J. No. 282 (Action No. 9703 1482C5) Alberta Court of Queen's Bench.

LaPrairie, Carol

- 1998 The 'New' Justice: Some Implications for Aboriginal Communities. *Canadian Journal of Criminology* 40:61-79.
- 1996 Self-government and Criminal Justice: Issues and Realities, pp. 108-129 in John H. Hylton (Editor) *Aboriginal Self-government in Canada: Current Trends and Issues*. Saskatoon, Saskatchewan: Purich Publishing.
- 1995a *Altering Course: New Directions in Criminal Justice, Sentencing Circles and Family Group Conferences*. Ottawa: Solicitor General of Canada, 1-36.
- 1995b Community Justice or Just Communities? Aboriginal Communities in Search of Justice In *Canadian Journal of Criminology* 37:521-545.
- 1994 Seen But Not Heard: Native People in the Inner City. Ottawa: Communications Branch, Department of Justice Canada.

LaPrairie, Carol and Eddie Diamond

- 1992 Who Owns the Problem? Crime and Disorder in James Bay. *Canadian Journal of Criminology* 34(3-4): 417-434.

LaRocque, Emma

- 1997 Re-examining Culturally Appropriate Models in Criminal Justice Applications, pp. 73-96 in Michael Asch (Editor): *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*. Vancouver, British Columbia: UBC Press.

Law Reform Commission of Canada

- 1991 Aboriginal Peoples and Criminal Justice. Report No. 34. Ottawa, Ontario: Law Reform Commission of Canada.

Lee, Gloria

- 1969 Defining Traditional Healing *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* 1(4).

Little Bear, Leroy

- 1997 An independent Native Judiciary, pp. 285-291 in Andrea P. Morrison (Editor): *Justice for Natives: Searching for Common Ground*. Montreal and Kingston: McGill-Queen's University Press.

Mandamin, Leonard (Tony)

- 1993 Aboriginal Justice Systems: Relationships, pp. 275-308 in *Aboriginal Peoples and the Justice System: Report on the Round Table on Aboriginal Justice Issues*. Royal Commission on Aboriginal Peoples. Ottawa, Ontario: Minister of Supply and Services Canada.

McGillivray, Anne and Brenda Comaskey

- 1999 Black Eyes All the Time: Intimate Violence, Aboriginal Women and the Justice System. Toronto, Ontario: University of Toronto Press.

McNamara, Luke

- 1995 Aboriginal Justice Reform in Canada: Alternatives to State Control, pp. 1-26 in Kayleen Hazlehurst (Editor): *Perceptions of Justice: Issues in Indigenous and Community Empowerment*. Brookfield, USA: Avebury.

Mickelburge, Rod

- 2000 BC Liberals Challenge Aboriginal Self-government. *The Globe and Mail*, Toronto, 16 May, A2.

Mitchell, Robert

- 1996 *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Royal Commission on Aboriginal Peoples. Ottawa, Ontario: Minister of Supply and Services Canada.
- 1994 Blazing the Trail, pp. 303-314 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

Monture, Patricia and M. E. Turpel

- 1992 Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice. *UBC Law Review* 26:239-277.
- 1994a Thinking about Aboriginal Justice: Myths and Revolution, pp. 222-231 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

- 1994b Alternative Dispute Resolution: A Bridge to Aboriginal Experience?, pp.131-140 in Catherine Morris and Andrew Pirie (Editors): *Qualifications for Dispute Resolution: Perspectives and Debates*. Victoria, British Columbia: University of Victoria Institute for Dispute Resolution.
- 1995 Justice as Healing: Thinking about Change. *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice*.
- Monture-Angus, Patricia
- 1999 Journeying Forward: Dreaming First Nations Independence. Halifax, Nova Scotia: Fernwood Publishing.
- Nahanee, Teresa
- 1993 Dancing with a Gorilla: Aboriginal Women, Justice and the Charter, pp. 359-382 in *Aboriginal Peoples and the Justice System: Report on the Round Table on Aboriginal Justice Issues*. Royal Commission on Aboriginal Peoples, Ottawa, Ontario: Minister of Supply and Services Canada.
- Omatsu, Maryka
- The Fiction of Judicial Impartiality. *Canadian Journal of Women and the Law* 9(1):1-16.
- Paul, Rejean
- 1997 L'administration de la justice dan la province de Québec, pp. 39-40 in Andrea P. Morrison (Editor): *Justice for Natives: Searching for Common Ground*. Montreal and Kingston: McGill-Queen's University Press.
- Peters, Evelyn J.
- 1995 Aboriginal Self-government in Urban Areas: Proceedings of a Workshop, May 25 and 26, 1994. Kingston, Ontario: Institute of Intergovernmental Affairs, Queen's University.
- Ponting, Rick J. and Jerilynn Kiely
- 1997 Disempowerment: Justice, Racism and Public Opinion, in Rick J. Ponting (Editor): *First Nations in Canada: Perspectives on Opportunity, Empowerment and Self-determination*. Toronto, Ontario: McGraw-Hill Ryerson Ltd.
- Proulx, Craig
- 2000 Ph.D. Anthropology Thesis, McMaster University.
- 1997 Interrogating Justice: A Cultural Critique. London, Ontario: Unpublished M.A. Thesis, University of Western Ontario.

Quigley, Tim

- 1994 Some Issues in Sentencing of Aboriginal Offenders, pp. 269-300 in Richard Gosse, James Youngblood Henderson and Roger Carter (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

R. v. Gladue [1999] 1 S.C.R. 688R v. A.G.A. [1998] A.J. No. 282 (Action No. 9703 1482c5), Alberta Court of Queen's Bench.

R. v. Manyfingers [1995] A.J. No. 1025.

R. v. Moses [1992] 3 Canadian Native Law Reporter, 116.

R. v. A.G.A. [1998] A.J. No. 282.

R. v. Willocks [1994] 1 Canadian Native Law Reporter, 167.

Roberts, J. and Carol LaPrairie

- 1996 Sentencing Circles: Some Unanswered Questions. *Criminal Law Quarterly* 39:69-83.

Ross, Rupert

- 1996 Return to the Teachings: Exploring Aboriginal Justice. Toronto: Penguin Books.
- 1994 Managing the Merger: Justice as Healing in Aboriginal Communities. Unpublished manuscript.
- 1993 *Dueling Paradigms: Western Criminal Justice versus Aboriginal Community Healing*. Ottawa: Aboriginal Justice Directorate, Department of Justice.
- 1992 *Dancing With a Ghost: Exploring Indian Reality*. Markham, Ontario: Reed Books.
- 1989 Leaving our White Eyes Behind. *Canadian Native Law Reporter* 3.

Royal Commission on Aboriginal Peoples

- 1996 Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada. Ottawa: Minister of Supply and Services Canada.
- 1993 Aboriginal Peoples and the Justice System: Report on the Round Table on Aboriginal Justice Issues. Ottawa: Minister of Supply and Services Canada.

Rudin, Jonathan

- 1999 *R. v. Gladue*: A Step Forward in the Sentencing of Aboriginal Offenders. *Aboriginal Justice Bulletin* 3(1).

Rudin, Jonathan and Dan Russell

- 1993 Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past. Toronto, Ontario: Ontario Native Council on Justice.

Scott, Joan W.

- 1992 Experience, in Judith Butler and Joan W. Scott (Editors): *Feminists Theorize the Political*. New York: Routledge.

Sivell-Ferri, Christine

- 1997 The Four Circles of Hollow Water. Ottawa, Ontario: Supply and Services Canada.

Smandych, Smandych, Russell, Robyn Lincoln and Paul Wilson

- 1995 Towards a Cross-cultural Theory of Aboriginal Criminality, in Kayleen Hazlehurst (Editor) *Perceptions of Justice: Issues in Indigenous and Community Empowerment*. Brookfield, USA: Avebury.

Stevens, Sam

- 1997 Native People Within the Justice System, pp. 28-40 in Andrea P. Morrison (Editor): *Justice for Natives: Searching for Common Ground*. Montreal and Kingston: McGill-Queen's University Press.
- 1994 Report on the Effectiveness of Circle Sentencing. Ottawa, Ontario: Solicitor General.

Stuart, B.

- 1997 Building Community Justice Partnerships: Community Peacemaking Circles. Ottawa, Ontario: Minister of Public Works and Government Services Canada.
- 1995 Circle Sentencing. *The Ottawa Citizen*, by S. Davis-Barron, June 16, 5.
- 1995a Circles into Squares: Can Community Processes be Partnered with the Formal Justice System? Whitehorse, Yukon Territory: Unpublished manuscript.
- 1994 Community Sentencing Circles: Forging New Partnerships and Empowering Communities. Whitehorse, Yukon Territory: unpublished manuscript.
- 1992 R. v. Moses Canadian Native Law Reporter 3.

Turpel, Mary-Ellen

- 1994 Reflections on thinking concretely about criminal justice reform., pp. 206-221 in Justice, Richard Gosse *et al.* (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing, 206-221.

- 1993a On the question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In, pp. 161-182 in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues*. Ottawa, Ontario: Minister of Supply and Services Canada.
- 1993b The Charlottetown Discord and Aboriginal peoples' struggle for fundamental political change pp. 117-151 in Kenneth McRoberts and Patrick Monahan (Editors): *In The Charlottetown Accord, the Referendum and the Future of Canada*.
- 1989-1990 Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences. *Canadian Human Rights Yearbook* 6:3-45.

Venne, Sharon Helen

- 1998 Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights. Penticton, British Columbia: Theytus Books Ltd.

Warry, Wayne

- 1998 Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-government. Toronto, Ontario: University of Toronto Press.

Webber, Jeremy

- 1993 Individuality, equality and difference: Justifications for a parallel system of justice, pp. 133-160 in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues*. Ottawa, Ontario: Minister of Supply and Services Canada.

Worme, Don

- 1994 First Nations Perspective on Self-government, pp. 77-82 in Richard Gosse *et al.* (Editors): *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon, Saskatchewan: Purich Publishing.

