DOING THE "RIGHT" THING: ABORIGINAL WOMEN, VIOLENCE AND JUSTICE

by

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ABSTRACT

This thesis focuses on Aboriginal women as survivors of intimate violence, and as participants in debates about justice and rights in the academic, political and legal spheres. While several federal and provincial reports have documented the adverse impact of the dominant criminal justice system on Aboriginal peoples, most of the reports fail to consider the impact of the dominant system, and of reform initiatives on Aboriginal women, who engage with such systems primarily as survivors of violence. Although feminist legal scholars and activists have focused on survivors of violence in critiquing the dominant justice system, such discourses have also tended to ignore the needs and concerns of Aboriginal women in recommending reforms to the dominant system, as well as in theorizing the causes and sites of intimate violence.

Using feminist methods, I explore how the writings of Aboriginal women have begun to fill these gaps. In focusing on gender and racial oppression, Aboriginal women have complicated theories on and reforms around intimate violence, and have demanded that they be included in the shaping of public institutions in both the Canadian legal system, and in the context of Aboriginal self-government. While Aboriginal women largely support the creation of Aboriginal justice systems, some have expressed concerns about the willingness of Aboriginal and non-Aboriginal leaders to include women in the process of creating, implementing and operating such systems. The Canadian Charter of Rights and Freedoms, as well as Aboriginal rights under the Constitution Act, 1982 have been advocated as means of achieving Aboriginal women's participation in this context.
This gives rise to a number of fundamental questions which I examine in my thesis. What is the historical basis for the participation of Aboriginal women in the political process, and for survivors of violence in both the dominant and Aboriginal justice systems? What is the significance of the absence of Aboriginal women from dominant discourses on justice and intimate violence? Might a broader level of participation for survivors of violence, both Aboriginal and non-Aboriginal, ameliorate the problematic aspects of the dominant justice system? Does the Canadian Charter of Rights and Freedoms provide a vehicle for survivors of violence who seek a greater level of protection and participation in the dominant justice system? Can the Charter, or Aboriginal rights under the Canadian constitution, assist Aboriginal women in establishing a right of participation in the processes leading to the creation of Aboriginal justice systems, and their participation in such systems once they have been created? What are the limitations of rights discourse in this context?

My analysis suggests that the Supreme Court of Canada’s conservative approach to rights, as well as more fundamental limitations in rights discourse, make constitutional litigation within the dominant system a sometimes necessary, but not ideal strategy for Aboriginal women in defining their involvement in the political and justice arenas. On the other hand, there is potential for rights discourse to bear more fruit once Aboriginal decision making fora are in place, in keeping with holistic approaches to interpretation, and the traditional roles of Aboriginal women and survivors of violence in justice and in the community.
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Parts of this thesis have been, or are in the process of being published. See "Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women", in Susan B. Boyd, ed., Challenging the Public/Private Divide: Feminism, Law and Public Policy (Toronto: University of Toronto Press, 1997) and "Aboriginal Women, Justice and the Charter: Bridging the Divide?", forthcoming in the University of British Columbia Law Review. Thanks to Susan Boyd and the other contributors to the Public/Private book, as well as anonymous reviewers of both pieces, all of whom provided helpful comments.

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This thesis is dedicated to my parents, Jerry and Judy Koshan, who instilled in me a hunger for knowledge, as well as a deep commitment to social justice and "doing the right thing".
CHAPTER 1

INTRODUCTION

The release of the Royal Commission on Aboriginal People ("RCAP")'s report on justice in February, 1996\(^1\), and of its final report in November\(^2\) marks the pinnacle of a decade of federal and provincial reports documenting the adverse impact of the dominant criminal justice system on Aboriginal persons.\(^3\) With only a couple of exceptions, these reports deal almost exclusively with the treatment of persons accused of crimes. Moreover, many of the reports recommend the creation of Aboriginal justice systems or reform initiatives without any meaningful consideration of the impact of such reforms on the

\(^{1}\)Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide. A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services, 1996) [hereinafter Bridging the Cultural Divide].


Aboriginal women who would engage with such systems primarily as survivors of violent crime. 4

The relative silence of the Aboriginal justice reports on survivors of violence occurs in the face of several studies detailing an alarming rate of violence against Aboriginal women. The Ontario Native Women’s Association found that 80% of women responding to its 1989 survey had personally experienced family violence. 5 A 1990 British Columbia study reported that 86% of respondents surveyed had experienced or witnessed family violence. 6 In a 1991 survey conducted by the Indigenous Women’s Collective for the Aboriginal Justice Inquiry of Manitoba, 53% of respondents reported experiencing physical abuse, and 29% reported experiencing sexual abuse. 7 According to a review of three Canadian Centre for Justice Statistics studies, 60.6% of violent acts against Aboriginal women are committed by family members, especially spouses. Aboriginal women are particularly likely to be beaten

4 There is also evidence which documents the mistreatment of Aboriginal women who stand accused and are convicted of criminal offenses. Connections have been made between the victimization of Aboriginal women and subsequent offending by those women. See F. Sugar and L. Fox, "Nistum Peyako Seht’wawin Iskwewak: Breaking Chains" (1989-90) 3 C.J.W.L. 465; The Hon. Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Minister of Supply and Services, 1996).


to death, and physical injury is the primary cause of death for Aboriginal women.

The dominant justice system has not made significant progress in curtailing violence against Aboriginal women. While many Aboriginal women support the creation of Aboriginal justice systems as a preferred way of dealing with violence, and as a matter of political and constitutional rights, they have also raised concerns about the willingness of Aboriginal and non-Aboriginal leaders to include them in the processes of defining self-government, including justice matters. This thesis will consider the participation of Aboriginal women in constructing justice systems which respond to their needs generally, and as survivors of intimate violence.

In Chapter 2, I will undertake an historical review of the treatment of violence against women in both traditional Aboriginal communities, and Euro-Canadian society. This review will concentrate on how disputes involving violence were resolved, and in particular, will canvass the role traditionally played by complainants in dispute resolution. Aboriginal and non-Aboriginal justice processes will be contrasted to underline how the current manifestation of the dominant system impacts upon Aboriginal women who are survivors of violence. An historical review is also significant in respect of claims that Aboriginal women’s participation in justice processes amounts to a right enforceable under the

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S. Moyer, "Race, Gender and Homicide: Comparisons Between Aboriginals and Other Canadians" (1992), 34 Canadian Journal of Criminology 387.

In Chapter 3, I will review Aboriginal justice reports and literature, and feminist literature on violence and justice issues. I will argue that both discourses have tended to exclude the voices of Aboriginal women in documenting and theorizing the causes and sites of violence against women, the impact of violence on survivors, and the impact of the justice system itself. Many Aboriginal women have begun to fill these gaps by explaining their views of violence, and by addressing the need to carefully scrutinize Aboriginal justice systems and reform initiatives in terms of their ability to protect the needs of survivors of violence. I will review these writings in Chapter 4 to uncover the diverse perspectives of Aboriginal women, and to examine the impact of the dominant system on Aboriginal women. Three aspects of the system will underlie this examination -- charging and prosecution, the treatment of evidence, and sentencing in cases involving violence against women. This analysis will reveal that the adverse impact of the dominant system on Aboriginal women is complex and multi-layered. I will argue that one of the main culprits is the construction of the system so as to exclude survivors of violence from playing a meaningful role in justice processes.

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The fifth chapter of my thesis will consider how the traditional roles of Aboriginal women can be (re)created in the criminal justice context. Some Aboriginal women have advocated the application of the Canadian Charter of Rights and Freedoms\(^\text{11}\) as one means of ensuring their participation in the creation, implementation and ongoing operation of community justice systems. A less explored role of the Constitution is its potential to facilitate the participation, and protect the interests of survivors of violence on a case by case basis. I will review recent Supreme Court of Canada jurisprudence to evaluate the utility of the Charter, as well as Aboriginal rights under s.35 of the Constitution at both these levels.

The prospect of self-government over justice issues affords Aboriginal women a unique opportunity to realize some of the reforms that women have been advocating worldwide.\(^\text{12}\) Nevertheless, some Aboriginal women will continue to engage with the dominant justice system for jurisdictional reasons -- for example, in the case of non-Aboriginal

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\(^{11}\)The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), c.11 [hereinafter "the Charter"].

offenders and/or offences committed outside of Aboriginal communities. Moreover, some Aboriginal communities may decide they wish to retain certain aspects of the dominant system as short term or long term solutions to their justice needs. Thus arises the importance of Aboriginal women’s participation in reforming the dominant system to better protect the interests, and secure the participation of survivors of violence in this context. With the exception of those rights which inhere exclusively to Aboriginal women, the analysis undertaken here will also be significant for non-Aboriginal survivors of violence who seek a greater measure of protection and participation within the Euro-Canadian criminal justice system.

A constitutional guarantee of rights is not the ultimate or the only solution, however. In the last chapter of my thesis, I will canvass the debates surrounding the merits and pitfalls of rights discourse, particularly as they relate to Aboriginal peoples, along with the more practical limitations of constitutional litigation. At the same time, I will refrain from expressing an opinion on more normative questions, such as whether the Charter should apply to Aboriginal governments. This, I believe, is a political decision to be made by Aboriginal communities.

13See RCAP, Bridging the Cultural Divide, supra note 1 at 249 - 257; Law Reform Commission of Canada, supra note 3 at 22.

In terms of methodology, a number of sources and methods will be utilized in my thesis. Overall, I am approaching this project cognizant of my political affiliation as a feminist. Carol Smart has said that "it is the work of feminism to deconstruct the naturalistic, gender-blind discourse of law by constantly revealing the context in which it has been constituted and drawing parallels with other areas of social life."\(^{15}\) This method of analysis, which has been called "asking the woman question", also inquires into how other forms of oppression intersect with gender, and have been excluded from dominant discourses.\(^{16}\) I employ this method in Chapter 3 in analyzing how feminist and Aboriginal justice discourses have excluded Aboriginal women from their discussions of gender and cultural oppression, respectively. The "woman question" also figures in my analysis of constitutional jurisprudence in Chapter 5, as does a method termed "feminist practical reasoning". The latter assumes that legal decision making is shaped by social and political considerations rather than being neutral, and seeks to contextualize such decision making processes so that they take account of women’s diverse needs and experiences.\(^{17}\) While I employ more traditional, doctrinal methods in my analysis of case law in Chapter 5, I am also critical of how such methods often exclude a consideration of Aboriginal women’s needs and experiences, and of the forces shaping those needs and experiences. Lastly, I will use historical and comparative methods in Chapter 2, in reviewing and contrasting Aboriginal


\(^{16}\)The term "woman question" has been traced to Simone de Beauvoir, *The Second Sex*. See K. T. Bartlett, "Feminist Legal Methods" (1990), 103 Harvard L.R. 829 at 837. Bartlett’s discussion of this method is at 837 to 849.

\(^{17}\)Bartlett, ibid. at 849-863.
and dominant justice systems for their inclusion of survivors in their processes.

Turning to matters of terminology and focus, I will use the term "Aboriginal" to refer to those persons who are of Indian, Inuit and Metis ancestry, regardless of their legal status. While the term "First Nations" is often used to emphasize historical and political status, it may connote only the inclusion of "status Indians", and does not normally include Inuit or Metis peoples. This terminology is also consistent with the wording of the Canadian Constitution. It must be recognized that Aboriginal peoples are diverse across different nations and communities, and that using any umbrella term to refer to all the first peoples of the place we now call Canada risks "homogenizing" such peoples. Wherever possible, my analysis will refer to the views or practices of specific Aboriginal nations, communities and/or individuals. At the same time, many of the writings of Aboriginal peoples note that there are similarities in traditional justice practices and values, and in the impact of colonization amongst Aboriginal peoples. There may also be political advantages for

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19Section 35(2) Constitution Act 1982, supra note 11.


21See infra Chapters 2 and 3.
Aboriginal peoples in assuming a collective identity around particular issues.\textsuperscript{22}

The terms "race" and "culture" will both be used to describe the basis for the oppression of Aboriginal peoples. According to Mary Ellen Turpel, a legal scholar of Cree and English ancestry, the term "culture" is "more accurate and more expansive", and refers to different ways of living and knowing, while "race" usually connotes differences in colour or heritage.\textsuperscript{23} On the other hand, "culture" may also be used by the dominant society to justify actions that others would call racist.\textsuperscript{24} It must be recognized that both terms are socially constructed rather than necessarily valid descriptions of differences amongst individuals or groups.\textsuperscript{25} Nevertheless, they are useful categories for describing the bases of oppression of Aboriginal peoples, and are terms used in the writings of Aboriginal peoples themselves.

My thesis will focus on male violence against women because of its pervasiveness, and because of the equality issues raised in this context. As well, I will focus on intimate violence, that occurring between current or former partners in intimate relationships. Such

\textsuperscript{22}Braker, supra note 20; Kline, supra note 20 at 455.


\textsuperscript{24}Sherene Razack calls this the double-edged sword of culture talk. See "What is to be Gained by Looking White People in the Eye: Culture, Race, and Gender in Cases of Sexual Violence" (1994), 19(4) Signs 894 at 896.

\textsuperscript{25}F. Anthias and N. Yuval-Davis, Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle (London: Routledge, 1992).
violence raises unique issues as to how Aboriginal notions of family, gender and the state have been largely left out of mainstream analyses, and as to appropriate responses by the justice system. At the same time, it must be acknowledged that many Aboriginal men are survivors of violence, often at the hands of the Canadian state. Moreover, violence between lesbians, or two-spirited women, may also occur, but there is little evidence of the incidence of such violence. As will be explored in the Chapter 4, violence in Aboriginal communities must be conceptualized as involving complex interactions between forces of colonialism, racism, gender inequality and other bases of oppression. While "gender" is not a sufficient, nor always valid basis for analyzing issues around violence, and intimate violence has complex roots, particularly in Aboriginal communities, I believe it is important not to obscure the reality that women are the predominant survivors of intimate violence. My focus on gender-based violence is not meant to imply that "Aboriginal women" experience violence in a universal way, nor that their needs and solutions are uniform. Unfortunately, there is very little written by or about Aboriginal survivors of violence who also experience disadvantage on account of their disability, age, sexual identity, economic status, or other aspects of their identity and location.

See Canadian Panel on Violence Against Women, supra note 9 at 163.


Much of my analysis will also be relevant for survivors of violence more generally, be they men or women, adults or children.

See Canadian Panel on Violence Against Women, supra note 9 at 160-163.
I will use variations of the terms "violence against women" and "intimate violence" to emphasize the gendered nature of heterosexual violence. Terms such as "domestic violence", "family violence" and "spousal assault" ignore the fact that it is usually the female spouse who is at the receiving end of violence. Moreover, I will avoid using the terms "battered woman", which pathologizes the woman instead of the violence or the perpetrator, and "victim", which suggests helplessness, and may create arguments over who is the "real" victim. Instead, I will use the terms "survivor of violence" and "complainant" in order to emphasize the agency of women who have been subjected to violence, and who have chosen to engage with the criminal justice system.

It must be emphasized that "justice" is itself not an Aboriginal word or concept. According to Patricia Monture-OKanee, a Mohawk scholar, there is no word for "justice" in many First Nation languages, and this conception of social relations was imported by

30 See Canadian Panel on Violence Against Women, ibid. at 6-7.


European settlers.\textsuperscript{34} Unfortunately, there is no concise alternative to describe the processes and outcome of dispute resolution in cases which the mainstream system identifies as "criminal".\textsuperscript{35} Indeed, many Aboriginal peoples traditionally have not recognized the same dichotomy between matters we would separate into civil and criminal, believing that all disputes affect both the individuals involved and the wider community.\textsuperscript{36} Moreover, there may be problems associated with a discrete examination of criminal justice issues, given that Aboriginal peoples often take a holistic approach to a given situation.\textsuperscript{37} Recognizing all of these shortcomings, I will continue to use "justice" as a conceptual tool here.

In describing the system of criminal law which is currently in force in Canada, I will use the terms "mainstream", "dominant", and "Euro-Canadian". These terms recognize that there are other, less "formal" systems of justice currently in operation in many communities, both Aboriginal and non-Aboriginal. While Canada’s current criminal justice system has its

\textsuperscript{34}See P.A. Monture-OKanee, "The Roles and Responsibilities of First Nations Women: Reclaiming Justice" (1992), 56 Sask. L.R. 237 at 261 - 262 [hereinafter "Reclaiming Justice"].

\textsuperscript{35}I should add that I am using "justice" in a fairly narrow sense, relating to the system(s) in which criminal matters are dealt with. There is also scope within Western liberal thought for wider concepts of "justice", which include consideration of the distribution of material goods amongst citizens by the state. See N. Lacey, "Theories of Justice and the Welfare State" (1992), 1 Social and Legal Studies 323.

\textsuperscript{36}See infra Chapter 2, Part 2.

\textsuperscript{37}M. E. Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In", in RCAP, National Roundtable, supra note 3, 161 at 166-7 [hereinafter "Don't Fence Me In"].
roots in the English common law, this law has been applied over time by European settlers to Canada.

Lastly, I will situate myself, and explain my interest in and concern about these issues. I am writing from the perspective of a non-Aboriginal feminist who spent three years working as a criminal prosecutor within the Euro-Canadian justice system in Aboriginal communities in the Northwest Territories. Returning to school to pursue graduate studies has served as an opportunity to reflect on my experiences there, and on the role I played within the dominant justice system. My intent here is to accept the responsibility to ensure, as a person of some privilege and power, that these issues are considered and dealt with by non-Aboriginal peoples, rather than being shelved as so many of the previous reports on violence against women and Aboriginal justice have been. I acknowledge that I cannot and should not speak on behalf of Aboriginal women, nor on behalf of survivors of violence.

My title, "Doing the Right Thing", is in part a call to action for dominant discourses to be


40 While feminists are usually good at locating themselves in terms of race, class and sexual orientation, the feminist literature on male violence against women exhibits a silence as to whether the writers are themselves survivors of violence. If one of feminism's goals is to validate the experiences of women by giving women a voice, it is important to recognize when one is not speaking with a particular voice. For an exception to the usual silence on this point see M.R. Mahoney, supra note 31 at 8.
more inclusive of those whose voices have tended not to be heard in the recent past, including Aboriginal women. At the same time, doing the right thing must mean knowing when to draw the line between sharing expertise and resources, and imposing values and structures.
CHAPTER 2

AN HISTORICAL REVIEW OF VIOLENCE, AND THE
PARTICIPATION OF WOMEN AND SURVIVORS IN JUSTICE

Part 1 - Introduction

This chapter will examine traditional Aboriginal justice processes, and those in English society, with a focus on the participation of survivors. Although there are problems with historical reviews, as will be discussed below, I believe such a review is justified for several reasons. First, traditional justice values and procedures are often relied upon by Aboriginal peoples for support and for inspiration when Aboriginal justice systems are being proposed.41 Second, an examination of traditions underlines the dissonance of the dominant justice system for Aboriginal peoples, including survivors of violence. Third, a review of traditional Aboriginal justice processes is necessary to uncover potential gaps which would need to be filled in by contemporary Aboriginal communities. An identification of "gaps" in traditional justice processes is not meant to imply that such processes were primitive or did not work, or that Aboriginal communities do not have the tools to fill the gaps. The Euro-Canadian legal system is also such that the law responds to gaps as they are seen to arise by the courts or legislatures.42 As will be shown in Part 3 of this chapter, the gaps around the treatment of intimate violence in the Euro-Canadian legal system have not been


42See Turpel, "Don't Fence Me In", supra note 37 at 168.
filled in a particularly effective way. Lastly, traditional mechanisms of justice may be relevant to a determination of whether a particular practice is an "Aboriginal or treaty right" for the purposes of s.35 of the Constitution Act, 1982, which will be considered in Chapter 5 of my thesis.

Any historical analysis can be fraught with difficulties, but these are magnified where the historical record relied upon was constructed in a colonial dynamic. For this reason, I base my discussion of traditional Aboriginal justice in this chapter on the writings of Aboriginal peoples. Still, the ways in which history and tradition have been (re)constructed and used against Aboriginal peoples mandate a cautionary approach. It must be recognized that "traditional" values and procedures were diverse, and have evolved over time. Despite the hegemony of the dominant system, such values and procedures may continue to operate in some Aboriginal communities in an informal way.

It must also be recognized that there was and is no universal concept of "community"

For a discussion of the differences in approaches to history by Aboriginal and non-Aboriginal peoples, see Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 1, Looking Forward, Looking Back at 32 to 36.

Hugh Braker has argued that Aboriginal peoples themselves sometimes "romanticize" the traditional ways of their peoples. See "The Romantic Savage", supra note 20. On the other hand, it has been argued that whether "invented" or not, to deny the legitimacy of Aboriginal traditions is not a proper subject for non-Aboriginal peoples to undertake. See E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Legal Systems" (1992), 34 Can. J. Criminology 479 at 498-500.

amongst Aboriginal peoples. For example, before contact with non-Aboriginal peoples, Dene and Inuit peoples of the Northwest Territories were nomadic, living in small hunting and fishing camps.\(^46\) The people of some other Aboriginal nations lived in communities which were more settled.\(^47\) This notion of diverse forms of community must be understood to underlie my discussion of "community justice" traditions.

It is beyond the scope of this thesis to investigate the extent to which male violence against women was prevalent or accepted in pre-colonial Aboriginal communities.\(^48\) It appears to be relatively uncontroversial that present-day Aboriginal communities would proscribe inter-personal violence under their systems of justice, whether based on traditional or contemporary values.\(^49\) Of more interest here are the methods used to deal with what were perceived to be conflicts in pre-colonial times. As noted by Michael Jackson, "a just result is as much dependent upon the process as the substantive rules".\(^50\)

In Part 3 of this chapter I will undertake a review of the treatment of violence against

\(^{46}\)See J. Ryan, \textit{Traditional Dene Justice Project: Final Report} (Lac La Martre, N.W.T., 1993) at 69 [hereinafter \textit{Dene Justice Project}].

\(^{47}\)For example, the Iroquois lived in settled communities, based on their agricultural way of life. See M. Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986), 24 Osgoode Hall L.J. 605 at 610-11.

\(^{48}\)Some of the differing views on this subject will be canvassed in Chapter 4, Part 2.

\(^{49}\)For discussions of Aboriginal women's opposition to violence see Nahane, supra note 10; Monture-OKanee, "Reclaiming Justice", supra note 34 at 260; Ontario Native Women's Association, supra note 5 at 7 - 9.

\(^{50}\)"Pathways to Justice", supra note 41 at 169.
women by the Euro-Canadian justice system as it has evolved. Such an analysis is critical to an understanding of how the dominant justice system impacts on Aboriginal peoples, and in particular, survivors of violence, and to a determination of the roots of the current system for the purposes of its challenge under the Charter. It will be shown that there were many similarities between justice processes in pre-colonial Aboriginal communities and pre-Norman English society, but those similarities have waned over time, to the detriment of survivors of violence.

Part 2 - Traditional Aboriginal Justice Processes

Descriptions of traditional justice practices are made in several of the reports on Aboriginal justice, as well as in scholarly publications. Most of these works recognize the diversity of such practices amongst Aboriginal nations and communities. Nevertheless, generalizations are often made as to "distinctive indigenous processes of justice". Such accounts of justice mechanisms in traditional communities confirm many of these general observations.

Such accounts emphasize that traditional justice practices were grounded in the

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51RCAP, Bridging the Cultural Divide, supra note 1 at 18. See also Aboriginal Justice Inquiry of Manitoba, supra note 3 at 21, 29; Justice on Trial, supra note 3 at 9.1.

perceived need to restore peace, balance and harmony to the relations between offender and victim, their kin, and the community as a whole. Justice was not dichotomized into public and private, or criminal and civil realms -- all offenses were seen to be violative of both individual and group interests, and were treated holistically.\(^{53}\) According to the Gitksan Wet'suwet'en, "all events in both day-to-day and formal life have social, political, spiritual, economic as well as legal aspects".\(^{54}\)

In many communities, fact and guilt determination were reportedly achieved through a consensual process. An adversarial system is thus said to be inimical to traditional Aboriginal culture and values.\(^{55}\) Offenders seldom denied their involvement in an offence, as values of truth and responsibility were paramount in traditional Aboriginal societies.\(^{56}\) All persons in the community, including the survivor of an offence, were thought to have something useful to say about what had happened in a given case, as well as what should be done about it.\(^{57}\) Some commentators argue that no "victims' rights" movement would be

\(^{53}\)Aboriginal Justice Inquiry of Manitoba, supra note 3 at 22; Justice on Trial, supra note 3 at 9.3 - 9.6; Law Reform Commission of Canada, supra note 3 at 6, 19; Monture-OKanee and Turpel, supra note 41 at 258.

\(^{54}\)See Unlocking Aboriginal Justice, supra note 52 at 15.

\(^{55}\)See Aboriginal Justice Inquiry of Manitoba, supra note 3 at 37; Law Reform Commission of Canada, supra note 3 at 15; Turpel, "Don't Fence Me In", supra note 37 at 174.

\(^{56}\)See RCAP, Bridging the Cultural Divide, supra note 1 at 197; Law Reform Commission of Canada, ibid. at 15.

\(^{57}\)Aboriginal Justice Inquiry of Manitoba, supra note 3 at 36; Justice on Trial, supra note 3 at 9.6.
necessary in an Aboriginal justice system, as survivors of violence would customarily be included in the dispute resolution process. These authors also note that women often held great responsibility for justice matters in traditional communities.\(^{58}\) On the other hand, the survivor's view of the matter may have carried no more weight than that of any other member of the community.\(^{59}\)

One aspect of the restoration of harmony is said to have been achieved by means of compensation from the offender and his kin to the victim and her kin.\(^{60}\) The adequacy of compensation depended on factors such as the seriousness of the offence, the survivor's "rank" in the community, and gender -- crimes against women were often treated more harshly than those against men in this respect.\(^{61}\) For example, the Dene considered adultery and sexual offences against women to be the responsibility of the man, and treated them seriously because of the disruptions they caused in the camps.\(^{62}\) This was not a universal view of responsibility, however. Evidence in a recent Aboriginal rights case established that amongst the Blackfoot and Cree peoples in what is now Alberta, women were punished much more harshly for adultery than men.\(^{63}\)

\(^{58}\)See Monture-OKanee and Turpel, supra note 41 at 258, 265.

\(^{59}\)See, for example, Dene Justice Project, supra note 46 at 199, where it is noted that "every person's wisdom counts".

\(^{60}\)Aboriginal Justice Inquiry of Manitoba, supra note 3 at 26.

\(^{61}\)See ibid.

\(^{62}\)See Dene Justice Project, supra note 46 at 123.

In addition to compensation, sanctions were imposed, depending on the seriousness of the offence and the impact of the sanction on the offender, his family and the community. The effectiveness of sanctions derived from the small size of traditional Aboriginal communities, respect for elders and other community leaders, and the desire of individuals to gain and preserve the esteem of their community.

In the case of minor offences, sanctions often included ridicule, shaming, and avoidance. More serious offenses, including adultery and sexual crimes against women, involved a more formal process. Amongst the Dene, for example, such offenses required a collective expression of "harsh words" to the offender, and a more formal process of reconciliation. For the Gitksan and Wet'suwet'en peoples, shame feasts would be held by the offender's house as an occasion at which to display collective remorse and shame for the offence, and to announce the compensation for the victim and her house. The victim's house would then hold a cleansing feast, at which restitution was accepted, and balance and

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64 Aboriginal Justice Inquiry of Manitoba, supra note 3 at 37.
65 See Nungak, supra note 52 at 87.
66 Aboriginal Justice Inquiry of Manitoba, supra note 3 at 25; Dene Justice Project, supra note 46 at 122.
67 A description of the harm done to individual victims and/or the group, along with a restatement of the rules and of how the person should have behaved were included in the harsh words. See Dene Justice Project, ibid. at 122.
68 Unlocking Aboriginal Justice, supra note 52 at 20. See also Jackson, "Pathways to Justice", supra note 41 at 214.
harmony were seen to have been restored.\textsuperscript{69} Amongst the Inuit, abusive men were reportedly counselled by elders. If they did not listen, or would not obey the rules, they were made to feel ashamed, and ultimately, may have been separated from their wives.\textsuperscript{70}

Where an offender refused to acknowledge responsibility, or to comply with the decision on how to "make things right", more severe sanctions of shunning, and sometimes banishment may have been imposed.\textsuperscript{71} The most serious offences, those which endangered the security of the group, were in some communities thought to justify the immediate death of the offender, or his eventual death by removal from the group.\textsuperscript{72}

There are several similarities between traditional approaches to justice in Aboriginal societies, and early English society. I will now turn to an examination of the latter to make such a comparison, and to show how the evolution of the English justice system came to stray from the Aboriginal approach.

Part 3 - The Evolution of the Euro-Canadian Justice System

Prior to the Norman Conquest in 1066, a system of reconciliatory and compensatory justice existed in Anglo-Saxon England. Victims of crime received a monetary payment from

\textsuperscript{69}Jackson, ibid.

\textsuperscript{70}See Canadian Panel on Violence Against Women, supra note 9 at 105, citing the testimony of Inuit elders.

\textsuperscript{71}See Dene Justice Project, supra note 41 at 123; Nungak, supra note 52 at 87.

\textsuperscript{72}Aboriginal Justice Inquiry of Manitoba, supra note 3 at 25; Nungak, ibid..
the offender based on the extent and nature of the wrong, and the status of the victim.\footnote{F. Pollock and F. Maitland, The History of English Law Before the Time of Edward I, 2nd ed., (1899), Vol. 2 at 460; J. Greenberg, "The Victim in Historical Perspective: Some Aspects of the English Experience" (1984), 40 J. Social Issues 77 at 79-80; L. Henderson, "The Wrongs of Victim's Rights" (1985), 37 Stanford Law Rev. 937 at 939.} As in traditional Aboriginal societies, the injured party was conceived of as including the victim's family and kinship group, and an offender's clan took collective responsibility for the offence.\footnote{C.R. Jeffery, "The Development of Crime in Early English Society" in W.J. Chambliss, ed., Crime and the Legal Process (New York: McGraw Hill, 1969) 12 at 20.} Compensation was designed to provide a measure of restitution, and to avoid blood feuds, although the latter still existed as an enforcement mechanism as late as the twelfth century.\footnote{Greenberg, supra note 73 at 80; Henderson, supra note 73 at 939; Jeffery, ibid.} In the late eleventh and twelfth centuries, it became increasingly common for the king to intervene in matters of justice. The quest for increased power of feudal lords and the king, as well as collecting monies and lands is said to have been instrumental in subordinating private interests to the interests of the public, as represented by the "King's Peace".\footnote{Henderson, ibid.; J.C. Coffee, "Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991), 21 Boston U. Law Rev. 193 at 221; M. Horwitz, "The History of the Public/Private Distinction" (1980), 130 U. Penn. Law Rev. 1423.} A system of presentment juries was created to inquire into the criminal behaviour of notorious suspects, and marked the origins of the state's initiation of the criminal justice process. Some serious offenses such as homicide, robbery, theft and arson came to be seen as non-compensable, and jurisdiction vested in the presentment juries. Punishment for these offenses
included forfeiture of land or goods to the king, mutilation, or death.\textsuperscript{77} It was no longer acceptable to the public that such severe sanctions be imposed at the behest of anyone but the king.\textsuperscript{78} The creation of presentment juries is thus said to have been an important step in the separation of matters into public wrongs or crimes, and private wrongs or torts.\textsuperscript{79}

Despite the increasing public presence in dealing with crime, private prosecutions, or "appeals", which developed after the Norman Conquest, were used extensively during this period as an alternative to presentment juries.\textsuperscript{80} Victims may have been motivated to bring appeals because of a mistrust of presentment juries, and the high cost of civil proceedings in addition to seeking compensation. On the other hand, appeals were also expensive, and were often quashed on technical grounds.\textsuperscript{81} Lastly, there were some matters for which there was no redress, or ineffective redress at best. Crimes of violence were treated much less seriously than crimes against property until the late seventeenth century.\textsuperscript{82}

\textsuperscript{77}Greenberg, supra note 73 at 82-83.

\textsuperscript{78}See Henderson, supra note 73 at 940.

\textsuperscript{79}See Greenberg, supra note 73 at 83; Henderson, ibid. The Church, which became separated from the state only after the Norman Conquest, may also have influenced this process to some extent with its notions of sinfulness as an element of crime. See ibid. at 84; Jeffery, supra note 74 at 30.

\textsuperscript{80}Greenberg, ibid. at 85-94.

\textsuperscript{81}Greenberg, ibid. at 87 - 88; Henderson, supra note 73 at 941.

The Norman invasion also brought with it notions of male superiority, and changed for the worse Anglo-Saxon society's relatively egalitarian treatment of women.83 Intimate violence against women was virtually ignored as an offense until the late nineteenth century - wives were seen to be lawfully subject to chastisement by their husbands.84 While the "right to beat" was subject to reasonable limits, a high degree of violence was considered acceptable, and a husband's actions were seldom challenged.85 Survivors of intimate male violence could apply for peace bonds to protect them from death or great bodily harm, but these did not permit separation from abusive husbands. Divorce was only available by individual Act of Parliament until judicial divorces became available in 1857.86 Criminal prosecutions were not a real option until the early 19th century, when summary jurisdiction was extended to include common assault and battery.87 As a result, many survivors of


84The origins of the infamous "rule of thumb" are somewhat unclear. According to Doggett, it appears to have had no statutory basis, and may have been a matter of public belief rather than a judicially created and maintained rule. See ibid. at 7-8.

85The legal right to batter was removed, at least in the formal sense, in R. v. Jackson, [1891] 1 Q.B. 671 (C.A.). See Doggett, ibid. at 2-8. This reform was made during a period of particular concern over violent crime, especially in relation to the working class. See A. Clark, "Humanity or Justice? Wifebeating and the Law in the Eighteenth and Nineteenth Centuries" in C. Smart, ed., Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality" (London: Routledge, 1992) 187.

86See Doggett, ibid. at 31; C. Backhouse, Petticoats and Prejudice: Women and the Law in 19th Century Canada (Toronto: Women's Press, 1991) at 170.

87Doggett, ibid. at 30, citing the Offenses Against the Person Act, 1828, s.27. Higher courts were adverse to hearing such matters, and were expensive because of the need to hire a prosecutor. Summary remedies were used particularly often by working class women. See Clark, supra note 85 at 193; G. Behlmer, "Summary Justice and Working Class Marriage in England, 1870 - 1940" (1994), 12(2) Law & History Review 229.
violence relied on the intervention of family, friends and neighbours as an informal means of obtaining counselling and peace.\textsuperscript{88}

By the time appeals were eliminated in the early nineteenth century,\textsuperscript{89} the separation of tort and crime in the English justice system was complete. According to Blackstone's Commentaries on the Laws of England:

The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist of this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity ... treason, murder, and robbery are properly ranked among crimes; since besides the injury done the individual, they strike at the very being of society; which cannot possibly subsist where actions of this sort are suffered to escape with impunity.\textsuperscript{90}

The formal role of the victim in the English criminal justice system, and the belief that victims have a right to be made whole declined correspondingly with the separation of the public and private realms of justice. According to one author, the modern criminal justice system is grounded in an ideology which is guided by several principles, including the notions that victims are merely sources of information; acts of violence are offenses against

\textsuperscript{88}Doggett, ibid.; Backhouse, supra note 86 at 169; Clark, supra note 85 at 187.

\textsuperscript{89}Greenberg, supra note 73 at 96.

\textsuperscript{90}W. Blackstone, Commentaries on the Laws of England, 8th ed. (Oxford: Clarendon Press, 1778), Book IV at 5. This divergence of public and private systems also occurred in continental Europe. See Berman, "The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe" (1978), 45 U. Chicago Law Rev. 553 at 553-4.
the state, not the individual; professionals are better able to control crime and justice than are private citizens; and accused persons are entitled to rights and privileges based on the power of the state, and the potential for abuse and mistakes. All of these principles differ radically from the values underlying traditional Aboriginal justice systems, discussed above. Many of the principles have also come under attack by non-Aboriginal persons. Proponents of "restorative justice" seek to depart from this ideology, and to make more space for the needs and concerns of victims within the dominant justice system.

Aboriginal peoples in the place now called Canada first experienced contact with Europeans in the late fifteenth century. The time and extent of contact varied, of course, depending on geography. It was during the nineteenth century that many Aboriginal peoples began to have more persistent contact with whalers, fur traders and missionaries, and

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92 For a comparison of Euro-Canadian and Aboriginal justice values, see Justice on Trial, supra note 3, Chapter 9.

93 Restorative justice proponents may also be critical of the punitive nature of the dominant justice system, of the separation between public and private systems, and sometimes of more structural inequalities leading to involvement with the justice system. For a discussion of feminism and restorative justice see K. Pate, "This Woman's Perspective on Justice. Restorative? Retributive? How about Redistributive?" (1994), 5(2) J. of Prisoners on Prisons 60. For a comparison between restorative and Aboriginal justice see Jackson, "Pathways to Justice", supra note 41 at 170-196. Some "restorative" reforms to the dominant justice system have been implemented federally (See An Act to amend the Criminal Code (sentencing), S.C. 1995, c.22, s.6), and other such strategies proposed provincially (See for example Strategic Reforms of British Columbia's Justice System (Victoria: Ministry of the Attorney General, 1997)).
experienced the imposition of colonial rules. By the time of confederation in 1867, the administration of justice in Aboriginal communities was governed by the English common law regime. There were numerous differences between the criminal laws of the founding provinces of Canada, and a movement for codification began. The Canadian Criminal Code was introduced in 1892, unifying and expressing the common law in statutory form, which was then to be interpreted by common law judges. It is this system of justice, as it has evolved over the last one hundred years, which continues to apply today.

Several recent developments have sought to effectively increase the role of and remedies available to survivors of crime in the Euro-Canadian system. Criminal injuries compensation legislation allows survivors to obtain a small measure of financial

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95 Ibid. at 288-290.

96 It has been said that Sir John A. MacDonald, the first prime minister of Canada, believed that a unified criminal law would help to unify the country. Others argue that the motive behind codification was simply an attempt to achieve uniformity. For a discussion see Parker, supra note 38 at 252.

97 Ibid. at 263. It has been noted that this does not amount to a true codification, one which would be accessible to the ordinary person, state its essential principles and purposes, and a framework for decision making. See Law Reform Commission of Canada, Towards a Codification of Canadian Criminal Law (Ottawa: The Commission, 1976).

98 There have also been reforms to the substantive law, some of which were long in coming. For example, until 1983 a man could not be convicted of raping his wife. See S.C. 1980-81-82, c.125, ss.6, 19.
compensation from the state for injuries sustained as a result of a criminal offence.99 Remedial provisions of the Criminal Code also enable judges to exact restitution from criminal defendants as part of their disposition.100 Publication bans protect the identity of survivors of sexual offenses in many cases,101 although are not made as a matter of course in cases of intimate violence. Courtrooms may be closed where the court is of the opinion that it is in the interests of public morals, the maintenance of order, or the proper administration of justice to do so, and witnesses under the age of eighteen years may testify behind a screen, or on closed circuit television where this is necessary to obtain a full and candid account of the alleged offences.102 Victim impact statements allow survivors to participate in the sentencing process under some circumstances.103 Lastly, victims of crime

99 See, for example, Criminal Injury Compensation Act, R.S.B.C. 1979, c.83, as amended.

100 See Criminal Code of Canada, R.S.C. 1985, c.C-46, as amended [hereinafter Criminal Code]. Subsequent to 1996 amendments to the Code, s. 738 now provides for restitution orders to compensate survivors for pecuniary damages in cases involving bodily harm. Where spouse abuse was the offence, survivors may also be compensated for expenses related to moving, temporary housing, food, child care and transportation.

101 See s.486(3) and (4) Criminal Code. The court shall make such an order on the application of the complainant or Crown. See also R. v. Adams, [1995] 4 S.C.R. 186. Restrictions on the requirements and admissibility of evidence may also protect the interests of complainants in sexual assault proceedings to some extent. Warnings to the jury about the dangers of convicting in the absence of corroboration are no longer required in relation to sexual offences, the rule of recent complaint has been abrogated, and the admissibility of evidence of the complainant's sexual history and reputation is restricted. See Criminal Code s.274, 275, 276 and 277.

102 Criminal Code s.486(1), (2.1) and (2.2).

103 Criminal Code s.722 provides that a sentencing court shall consider any statement made by a victim as to the harm done to, and loss suffered by her, provided the statement is in writing in the form prescribed by the province in question. The court also has the discretion to consider any other evidence relating to the victim.
legislation has been enacted in some jurisdictions, providing for a victim's rights to fair
treatment, to receive information relating to the process, to the provision of services, and
to legal representation.\textsuperscript{104}

These reforms represent a piecemeal approach to the treatment of survivors by the
criminal justice system, however, rather than any fundamental change in their role in the
system. Many are discretionary, and invite a perpetuation of negative stereotypes through
judicial interpretation. Judges are not necessarily biased against survivors, but may be
influenced by, and reproduce dominant ideologies relating to sexuality, racialization and the
family.\textsuperscript{105} For example, relief may only be provided to "deserving victims" in some cases.
In a notorious Saskatchewan case, a woman was denied criminal injuries compensation
because she was found to be contributing to her injuries by staying with her abusive
spouse.\textsuperscript{106} Criminal injuries legislation has also been criticized on the basis that it is subject
to very short limitation periods, carries a "welfare stigma", and usually offers no possibility

\textsuperscript{104}See, for example, Victims of Crime Act, S.B.C. 1995, c. 47. Other jurisdictions have
specific legislation relating to "domestic violence". See, for example, the Victims of
Domestic Violence Act, S.S. 1994, c. V-6.02, which provides for emergency intervention
orders as well as victim's assistance orders.

\textsuperscript{105}See J. Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto:
University of Toronto Press, 1997) at 103-105; Kline, "The Colour of Law", supra note 20;
Theory of Ideology" (1993), 51 U. of T. Faculty of Law Review 118; W.A. Wiegors,
at 256-61. See also P.E. Pasquali, No Rhyme or Reason: The Sentencing of Sexual Assault
(Ottawa: Canadian Research Institute on the Advancement of Women, 1995) at 42-50.

\textsuperscript{106}See A.L. v. Crimes Compensation Board (31 July 1990), Award. No. 2511/90 and
of aggravated or punitive damages.\textsuperscript{107} Moreover, eligibility for criminal injuries compensation normally requires some level of engagement with the criminal justice system,\textsuperscript{108} which, as will be shown in Chapter 4, many women are reluctant to undertake. The pursuit of remedies may mean that survivors will endure multiple levels of proceedings, and of potential re-victimization. The use of victim impact statements, for example, may entail the cross-examination of complainants on their losses. And while the prosecution and defence are entitled to make submissions regarding sentence, survivors have no such opportunity.\textsuperscript{109}

Other reforms may actually diminish the role of survivors in criminal proceedings. For example, police and Crown policy directives, which require aggressive prosecution of "spousal assault" cases, leave little room for complainants who decide they do not wish to engage with the criminal justice system.\textsuperscript{110} Until recently, survivors had no or limited standing to challenge laws or procedures which impacted upon them.\textsuperscript{111} Where the interests

\textsuperscript{107}See N. West, "Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis" (1992), 50 U. of T. Faculty of Law Rev. at 113 - 114; W.A. Wiegers, ibid at 279.

\textsuperscript{108}See Wiegers, ibid.

\textsuperscript{109}\textbf{Criminal Code} s. 723(4) provides that a sentencing court may, on its own motion, compel any witness to attend and give evidence which would assist the court in the sentencing process. For a critique of victim impact statements see T. McCarthy, "Victim Impact Statements -- A Problematic Remedy" (1994), 3 Australian Feminist L.J. 175 at 182.

\textsuperscript{110}See infra Chapter 4, Part 3 for a discussion of how such policies impact upon Aboriginal women.

\textsuperscript{111}See infra Chapter 5, Part 2 for a discussion of the \textit{Charter} in this context.
of the Crown and complainant do not coincide, a survivor of violence may be left without any means of seeking redress, or may have to rely on intervenors to assert her interests.

Private prosecutions, as well as actions in tort, are often unsatisfactory alternatives. In the case of private prosecutions, the complainant lacks ultimate control over the proceedings. The Crown may intervene and quash private prosecutions, leaving the complainant with no recourse. Courts can review this exercise of discretion only where there is "flagrant impropriety" on the part of the Crown. Moreover, such proceedings can be prohibitively expensive, as can civil actions. This makes civil remedies beyond

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112See, for example, A. (L.L.) v. B. (A.), [1995] O.J. No. 13 (C.A.), in which the Crown opposed any standing on behalf of the complainant in the context of an appeal from an order for disclosure in a sexual assault case. On appeal to the Supreme Court of Canada, the complainant was granted standing. See infra note 475.

113Intervenor status will not always be sought or granted, however. Even where intervenors do participate in a case, their interests and arguments will not always jive with those of the survivor. For example, see Wiegers, supra note 105, who describes the relationship between the survivor and an intervenor in the A.L. case.

114See Criminal Code, ss. 2, 785.

115For a review of the availability and use of tort remedies in cases of intimate violence, see Wiegers, supra note 105 at 261-278.

116See s. 579 of the Criminal Code.


118See Henderson, supra note 73 at 941-942; West, supra note 107 at 116.
the reach of most poor women, many of whom are women of colour and Aboriginal
women. Similarly, the lack of means of many defendants minimizes the utility of civil
remedies, particularly in cases of intimate violence where the offender and survivor
continue to live together. Despite these shortcomings, however, civil actions are increasingly
being undertaken, especially in the context of sexual assault.

Overall, these reforms have not transformed the dominant justice system into a more
respectful or inclusive place for survivors of violence, or for Aboriginal peoples. The
dominant justice system has been critiqued, and further reforms proposed by both Aboriginal
writers, and by feminists. These writings will be reviewed in the next chapter for their
analyses of violence against Aboriginal women, and of the justice system more generally.

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119 See Wiegers, supra note 105 at 267.

120 See West, supra note 107 at 115. On the other hand, civil judgments for assault and
battery now survive bankruptcy proceedings. See An Act to amend the Bankruptcy and

121 See B. Feldthusen, "Discriminatory Damage Quantification in Civil Actions for Sexual
Battery" (1994), 44 U. of T. L. J. 133. According to Wiegers, there have been relatively
few tort actions in the context of intimate violence, and those which have proceeded show
a continuing reluctance on the part of judges to take full account of women's harm in this
context. See supra note 105 at 266-268.

122 Critiques have also been mounted by proponents of restorative justice. See supra note
93. A review of such critiques is beyond the scope of this thesis, however.
PART I - Introduction

In this chapter, I will review two bodies of literature for their inclusion of the perspectives of Aboriginal women on violence and justice. The reports and literature on Aboriginal justice issues, and feminist literature and reports on violence and justice will be considered in terms of their analyses of violence against women, their critiques of the dominant criminal justice system, and their recommendations for law reform, including the use of the Charter. It will be shown that for the most part, Aboriginal justice writing has focused on people accused of crimes, with culture as the dominant factor of analysis. Feminist writing, on the other hand, has often dealt with survivors of crime, and has focused on gender as the underlying factor in theorizing violence, and in approaching law reform. While this may seem obvious, my point is to examine how these foci have tended to exclude a consideration of what happens when culture and gender intersect. As a result, the voices of Aboriginal women, and their needs and concerns have been largely absent from these discourses. In the next chapter, I will examine how the writings of Aboriginal women have identified and begun to fill these gaps.

It is important to note that these three bodies of literature are not completely discrete, and overlap from time to time. As will be shown, Aboriginal women have participated in some of the reports on Aboriginal justice, and in more recent reports on violence against women, as well as reports on gender equality and justice. While some Aboriginal women
have expressed an ambivalence about the utility of feminism in their struggles, largely because of their perceived exclusion from the feminist mandate, others consider themselves to be feminists. Still, it will be shown that the exclusions of Aboriginal women have been significant in breadth, as well as in import. Aboriginal and feminist discourses have been prominent in movements for progressive reform of the criminal justice system. While such perspectives have been termed "outsider", Aboriginal women are further outside still.

PART 2 - A Review of Aboriginal Justice Reports and Literature

Since 1967, the federal, provincial and territorial governments of Canada have sponsored over thirty studies relating to Aboriginal justice. A review of the major federal and provincial reports on Aboriginal justice issues released in the 1990s will show that few such reports have adequately included the perspectives of Aboriginal women either

123 For some of these women, feminism is said to be only one tool in their fight against multiple forms of oppression. See Monture-OKanee, "Reclaiming Justice", supra note 34 at 251 - 256; Johnson and Stevenson in "Peekiskwetan", supra note 18 at 159, 171; Turpel, "Don't Fence Me In", supra note 37 at 161.

124 See for example Nahane, supra note 10.

125 The sheer volume of the Aboriginal justice and feminist literature on criminal justice issues attests to this prominence. Moreover, feminist, and to a lesser extent Aboriginal reform initiatives have been implemented in several communities/jurisdictions, as will be seen in this and the following chapter.


127 For a review of these reports, see C. Blackburn, supra note 3 at 15. The major reports of this decade include those in Alberta (1991), Manitoba (1991), Saskatchewan (1992), and nationally, the Law Reform Commission of Canada (1991) and RCAP (1996).
generally, or as survivors of violence. These reports have focused on Aboriginal persons who were accused of crimes, usually men, and of their mistreatment by the dominant justice system. Moreover, most reports have recommended reform initiatives which concentrate on the needs of Aboriginal offenders rather than survivors of crime.

Prior to the Royal Commission on Aboriginal Peoples ("RCAP"), the Law Reform Commission of Canada undertook the first national study on Aboriginal justice issues. While it commissioned research papers from two Aboriginal women scholars for its 1991 report on Aboriginal Peoples and Criminal Justice,\textsuperscript{128} their perspectives on women and justice did not make it into the Commission's final report. Indeed, the extent of the Commission's treatment of Aboriginal women is one line in its conclusion which speaks of the need to study how the criminal justice system has failed Aboriginal women victims.\textsuperscript{129} This lack of analysis occurred despite the Commission's broad mandate. In June, 1990, the Minister of Justice asked the Commission to examine the extent to which the Criminal Code and related statutes "ensure that Aboriginal persons ... have equal access to justice and are treated equitably and with respect".\textsuperscript{130} In my view, the Commission itself failed to treat Aboriginal women, particularly survivors of violence, equitably and with respect.

\textsuperscript{128}See Monture-OKanee and Turpel, supra note 41. In Part II of their paper, the authors include a series of opinion papers by constitutional scholars, one of which specifically considers Aboriginal women. See Greschner, supra note 39.

\textsuperscript{129}Law Reform Commission of Canada, supra note 3 at 92.

\textsuperscript{130}Ibid at 1.
With the exception of Manitoba, provincial reports on Aboriginal justice have also failed to include the perspectives of Aboriginal women. In Alberta, the Task Force on the Criminal Justice System and Its Impact on Indian and Metis People of Alberta was established to identify problems and propose solutions towards ensuring that Indian and Metis people "receive fair, just and equitable treatment at all stages of the criminal justice process". According to the Task Force, it did contact "most Indian and Metis" women's organizations in Alberta to request submissions, but received only one. The impact of this one submission on the Task Force's 1991 report, Justice on Trial, appears to have been minimal. The report's section on women focused on Aboriginal women as offenders, and found that "Indian and Metis women are subject to the same biases and discrimination which are suffered by Indian and Metis men". This statement is made despite numerous studies showing that gender does make a significant difference in the treatment of offenders, one of which the Task Force itself says it relied on. Moreover, while "family violence" was raised as an issue in the report, it was presented in a gender neutral fashion, despite statistics


132 Ibid at p. 8-51. The submission was from the Dene Tha' Women's Society of Assumption. The Task Force notes that it also heard from the Metis Association of Alberta and the Elizabeth Fry Society of Calgary, and met with Aboriginal women at a one day meeting in Edmonton.

133 Ibid at 8-53.

134 See Correctional Services of Canada, Creating Choices: The Report of the Task Force on Federally Sentenced Women (Ottawa: Minister of Supply and Services, 1990). See also Commission of Inquiry into Certain Events at the Prison for Women in Kingston, supra note 4. At the same time, the Task Force did adopt several recommendations from Creating Choices relating to the special needs of Aboriginal women prisoners. See ibid. at 8-54 to 55.
showing that Aboriginal women and children are overwhelmingly the (non)survivors of such violence. 135 Without mentioning the concerns of Aboriginal women, the Task Force recommended that "when police find it necessary to arrest an aboriginal for an incident involving family violence, the criminal justice system employ culturally sensitive diversion programs to attempt to resolve the conflict". 136

In June, 1991, the Saskatchewan and federal governments established two parallel committees to review the criminal justice system in relation to Indian and Metis people and communities in that province. The resulting reports, released in 1992, were informed by the representations of the Aboriginal Women's Council of Saskatchewan in identifying "family violence" as an overarching concern. 137 Still, the reports treat "family violence" in a similar fashion to Alberta, recasting such violence as a gender neutral phenomenon. Moreover, the reports do not examine the impact of the dominant criminal justice system on Aboriginal women, nor make mention of the needs or perspectives of Aboriginal women in the broader context of law reform. The same is true of a regional report in British Columbia, which in its inquiry into the treatment of "native people" by the police and justice system simply identified the need for processes which would protect children and "victims of family violence". 138

135 Justice on Trial, supra note 3 at 8-52 to 54.

136 Recommendation 8.37, ibid. at 8-55.

137 See Report of the Saskatchewan Indian Justice Review Committee, supra note 3 at 66-68.

The Public Inquiry into the Administration of Justice and Aboriginal People was established in Manitoba in 1988 to inquire into all aspects of the justice system, including policing, courts and correctional services, as they relate to Aboriginal peoples in that province. While the two Commissioners were male, one of whom was Aboriginal, the inquiry commissioned research papers from Aboriginal women in an attempt to include their perspectives, and conducted surveys to document the level of violence against Aboriginal women. The report of the Inquiry includes a section analyzing the causes of such violence and its treatment in Aboriginal communities.

The Aboriginal Justice Inquiry of Manitoba came to the conclusion that Aboriginal women are the victims of both racism and sexism, and are subject to "unconscionable levels of domestic violence" which the dominant justice system has done little to address. According to the Inquiry, this must be a priority for any changes within the justice system. Perhaps most significantly, the Inquiry gave voice to a complaint that had long been made by some Aboriginal women, but which had not received formal or public recognition until the Report - that many Aboriginal leaders ignore altogether, or favour the man, in intimate violence situations in their communities. The Inquiry argued that there must

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140 See Courchene, supra note 7.

141 Aboriginal Justice Inquiry of Manitoba, supra note 3 at 475.
be recognition of how men’s silence and failure to act in such cases contributes to the oppression of Aboriginal women.\textsuperscript{142} In its conclusion of this section, the Inquiry reported that there was substantial support amongst women for the creation of separate Aboriginal justice systems which would break the cycle of abuse and restore Aboriginal healing methods. Aboriginal women were said to be key players in the implementation of such systems.\textsuperscript{143}

In many respects, the breadth and sensitivity of the Aboriginal Justice Inquiry of Manitoba set a benchmark for the work of the Royal Commission on Aboriginal Peoples both generally,\textsuperscript{144} and, I would argue, in relation to Aboriginal women. RCAP itself included three women commissioners - Viola Robinson, a Metis woman from Saskatchewan, Mary Sillet, an Inuit woman, and former Supreme Court of Canada justice Bertha Wilson, noted for her attentiveness to women’s issues.\textsuperscript{145} The Commission made a real effort to include Aboriginal women and their perspectives as fundamental to all aspects of its work, including research, commissioned papers and submissions, roundtables, and public hearings.\textsuperscript{146} Both RCAP’s report on justice, \textit{Bridging the Cultural Divide}, and its final report include sections

\textsuperscript{142}Ibid. at 485.
\textsuperscript{143}Ibid. at 506.
\textsuperscript{144}See Turpel, "Don’t Fence Me In", supra note 37 at 164.
\textsuperscript{145}For a review of the work of Madame Justice Wilson, see Symposium, "The Democratic Intellect" (1992), 15 Dalhousie Law Journal 23 to 260.
\textsuperscript{146}For a listing of this work see \textit{Report of the Royal Commission on Aboriginal Peoples}, supra note 3, Vol. 5, \textit{Renewal: A Twenty Year Commitment}, Appendices C and D at 296-324.
relating to the concerns of Aboriginal women.

In *Bridging the Cultural Divide*, released a few months prior to its final report, RCAP set out its recommendations for reform in the criminal justice area. Like the Aboriginal Justice Inquiry of Manitoba, RCAP included in its report a separate section dealing with the needs and concerns of Aboriginal women, focusing on survivors of violence.\(^{147}\) According to RCAP, these concerns are not afterthoughts. Rather, "assuring the safety of women and children is central to any Aboriginal justice system".\(^{148}\) Again, following the lead of the Aboriginal Justice Inquiry of Manitoba, RCAP notes that "Aboriginal society is not free of the sexism and violence that permeate the rest of Canadian society".\(^{149}\) While acknowledging that the root causes of such violence are somewhat different in Aboriginal society, RCAP states that "this does not change the nature or the extent of the problem".\(^{150}\)

This discussion of violence is expanded upon in RCAP’s final report. In Volume 3 of the report, *Gathering Strength*, RCAP addresses issues relating to the family, including violence. "Family violence" is defined as a serious abuse of power within a family, trust or dependency relationship, including physical and sexual violence against women and children,

\(^{147}\)See "Ensuring the Safety of Women and Children in Aboriginal Justice Systems", in *Bridging the Cultural Divide*, supra note 1 at 269-75.

\(^{148}\)Ibid. at 269.

\(^{149}\)Ibid. at 274.

\(^{150}\)Ibid.
economic and psychological violence.\textsuperscript{151} This definition is similar to those which appear in feminist writings on violence,\textsuperscript{152} although RCAP does not explicitly cite any influence of feminist work in this respect. Unlike most feminist work, however, RCAP notes that Aboriginal men are often victims of violence as well as being the predominant perpetrators. What makes Aboriginal violence distinct, according to RCAP, is that it "can be traced to interventions of the state deliberately introduced to disrupt and displace Aboriginal families".\textsuperscript{153} RCAP identifies both racism and sexism as resulting in the stereotyping and devaluing of Aboriginal women by Canadian society, as well as Aboriginal communities, which are said to have internalized the oppression.\textsuperscript{154} RCAP acknowledges that solutions to violence must be broad and many faceted, and must include the representation of Aboriginal women in decision making for both interim and long term solutions.\textsuperscript{155}

RCAP also includes a section in Volume 4 of its final report on "Aboriginal Women's Perspectives". In this section, it is noted that Aboriginal women's traditional, highly respected roles in many Aboriginal societies have been "devalued" since the time of

\textsuperscript{151}See Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 3 at 54.

\textsuperscript{152}See infra Part 3.


\textsuperscript{154}Ibid. at 63.

\textsuperscript{155}Ibid. at 77, 82.
Women's roles of course varied amongst different nations and communities, but the fact that their roles were equally important to those of men is said to be a recurring comment in both historical literature, and the writings of Aboriginal peoples. RCAP notes the diversity amongst Aboriginal women, but states that there are commonalities in terms of their priorities for change, including action against violence, and the accountability of Aboriginal governments. The perspectives of Aboriginal women living in urban areas are included in a separate section, which notes that these women are even more "invisible", and are victimized by racism, sexism, segregation and abuse.

Thus there has been some movement forward in the reports of the Aboriginal Justice Inquiry of Manitoba and RCAP in including the perspectives of Aboriginal women, and in addressing violence against women. Both gender and cultural oppression are beginning to be accounted for as relevant factors in explaining women's current position in Aboriginal communities. Still, I would argue that both reports contain serious gaps in their coverage of Aboriginal women and justice. Neither report contains a detailed examination of the impact of the dominant criminal justice system on survivors of violence. Again, the focus of both the Aboriginal Justice Inquiry of Manitoba and RCAP is the impact of the dominant system on those accused and convicted of crimes, usually men. Given the breadth of RCAP's

156 See Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 4, Perspectives and Realities, at 8.

157 Ibid. at 18-19.

158 Ibid. at 21.

159 Ibid. at 570.
mandate and resources, one would have hoped that this gap would be filled. The omission is all the more significant, as RCAP recognizes that the dominant criminal justice system will continue to apply to Aboriginal peoples in some circumstances.\textsuperscript{160}

Moreover, in RCAP's discussion of reforms to the dominant justice system, and Aboriginal justice initiatives, women's needs as survivors of violence are often left out of the picture. For example, in its discussion of how rules of evidence might be approached under Aboriginal justice systems, RCAP makes no mention of the need to shield survivors of violence from rules and processes which permit myths and biases to creep in.\textsuperscript{161} While this may not have been a concern in Aboriginal dispute resolution prior to colonization, it may be now, given the reports that some Aboriginal leaders have internalized aspects of gender oppression, and that elements of the dominant justice system may have become entrenched.\textsuperscript{162}

In spite of their claims otherwise, both the RCAP and Manitoba reports often treat gender as an add-on consideration.\textsuperscript{163} The title of RCAP's report, "Bridging the Cultural

\textsuperscript{160}See Bridging the Cultural Divide, supra note 1 at 78.

\textsuperscript{161}Ibid. at 204-5.

\textsuperscript{162}Ibid. at 63, 198.

\textsuperscript{163}One of the major lessons to be gleaned from feminist work in the last few years is that multiple forms of oppression must be considered as intersecting in complex ways. See, for example, A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990), 42 Stanford L. Rev. 581; N. Iyer, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 C.J.W.L. 25.
"Divide" itself suggests the primacy of culture as the guiding factor in the Commission's analysis of Aboriginal justice issues. The Aboriginal Justice Inquiry of Manitoba, in its list of fundamental principles for reform of the criminal justice system, did not include the need to protect the interests of women, and to consider gender oppression in addition to racism. Despite many improvements in the treatment of issues around Aboriginal women and violence, the analysis often does not flow through the reports.

Turning to law reform, it is perhaps not surprising that most of the reports are no better at including the needs of Aboriginal women in their suggestions for concrete reform. The literature and reports on Aboriginal justice are heavily swayed towards the abolition of the dominant criminal justice system vis-a-vis Aboriginal peoples, and the creation of new Aboriginal justice systems. This approach is justified on a number of grounds.

First, it is argued that there is an inherent right to self-government which includes the sovereign right to establish separate justice systems in Aboriginal communities. This right is said to be entrenched in s.35 of the Constitution Act, 1982. A second

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164 Aboriginal Justice Inquiry of Manitoba, supra note 3 at 255.

165 For a review of the range of alternatives, see Justice on Trial, supra note 3 at 11-2 to 11-5.


167 RCAP, ibid. at 77; Monture-OKanee and Turpel, ibid. at 254; Macklem, ibid. at 282.
justification for Aboriginal justice systems is the "colonization argument" - the idea that the social conditions caused by colonization, including poverty, alcoholism, lack of social cohesion, and loss of traditional values have resulted in a high rate of crime, and must be re-structured through self-government.\textsuperscript{168} A third argument is that the dominant justice system results in "cultural dissonance" for Aboriginal peoples, and has itself contributed to the process of marginalization such that it must be replaced.\textsuperscript{169} As noted, this argument usually focuses on dissonance from the perspective of those accused and convicted of crimes, although there is plenty of evidence with respect to dissonance for survivors of crime as well. The foreign nature of the concept of "punishment" to Aboriginal peoples has been identified by a number of writers, who note that healing and restoration of the community is the Aboriginal way.\textsuperscript{170} A related point is that the over-representation of Aboriginal peoples at all levels of the mainstream system justifies separate systems, although this is often seen as a symptom of a larger problem rather than the problem itself.\textsuperscript{171} Most writers agree that incremental changes to the dominant justice system would be insufficient to solve


\textsuperscript{169}Coughlan, ibid. at 263 - 264; RCAP, ibid. at 40-42; Law Reform Commission of Canada, supra note 3 at 14 - 16; Justice on Trial, supra note 3 at 9-1.

\textsuperscript{170}Monture-OKanee and Turpel, supra note 41 at 248; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 22- 26; Justice on Trial, ibid. at 9-6.

\textsuperscript{171}Coughlan, supra note 166 at 260 - 261; Monture-OKanee and Turpel, ibid. at 260; Aboriginal Justice Inquiry of Manitoba, ibid. at 255; Jackson, "Locking Up Natives in Canada", supra note 168 at 215 - 218.
these structural problems.\textsuperscript{172} The mistrust and unwillingness of Aboriginal peoples to engage with the system is cited in support of this argument, but again, usually from the perspective of the person accused.\textsuperscript{173}

At the same time, the reports and literature on Aboriginal justice also raise concerns and notes of caution. Some of these concerns deal generally with the implementation of Aboriginal justice systems. For example, it has been noted that many Aboriginal communities have small populations, and limited resources and expertise, which may make it difficult to implement separate justice systems in such communities.\textsuperscript{174} At the other end of the spectrum, geographic dispersion and cultural diversity in urban communities may make Aboriginal justice systems difficult to implement there.\textsuperscript{175} A second concern relates to the application of traditional norms in contemporary settings. According to some writers, many of the values and practices referred to as "Aboriginal" in the literature have been displaced by colonization. The challenge becomes how to resurrect such knowledge, and adapt it to meet the requirements of modern times.\textsuperscript{176} As noted in the previous chapter,

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  \item RCAP, Bridging the Cultural Divide, supra note 1; Jackson, ibid. at 225; Monture-Okanee and Turpel, ibid. at 267-268; Aboriginal Justice Inquiry of Manitoba, ibid. at 252.
  \item See Aboriginal Justice Inquiry of Manitoba, ibid. at 253; Justice on Trial, supra note 3 at 9-1, 9-6.
  \item Jackson, "Locking Up Natives in Canada", supra note 168 at 250.
  \item See Bridging the Cultural Divide, supra note 1 at 281. At the same time, RCAP notes that there are often networks of social and cultural agencies in urban Aboriginal communities.
  \item See Dickson-Gilmore, supra note 44 at 499 to 500; Coyle, supra note 47.
\end{itemize}
however, others argue that such a static conception of Aboriginal communities is inappropriate.\textsuperscript{177} The Aboriginal Justice Inquiry of Manitoba and RCAP reports have added the concern that Aboriginal women must participate in any justice initiatives in order that those initiatives respond to their needs and concerns. To this end, RCAP recommended that Aboriginal women’s groups within each nation review and approve criminal justice initiatives in their constituent communities.\textsuperscript{178}

Another issue raised is the potential conflict between traditional norms and contemporary values. Many writers have noted that in traditional communities, collective rights were dominant, while the Euro-Canadian justice system is based on individual rights.\textsuperscript{179} There is some debate within the Aboriginal justice literature as to the validity of this claim, as will be discussed in Chapter 6. Such discussions often give rise to a consideration of whether the Canadian Charter of Rights and Freedoms should apply to Aboriginal justice systems. Again, the focus has tended to be on the rights of persons accused and convicted of crimes. Several of the reports recommend that Aboriginal nations draft their own charter or charters as a means of balancing individual and collective

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\textsuperscript{177}See Kline, "The Colour of Law", supra note 20; Borrows, "The Trickster", supra note 45.

\textsuperscript{178}See Bridging the Cultural Divide, supra note 1 at 274-5.

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rights. Most recently, RCAP has taken the position that the Charter will apply, as a matter of constitutional interpretation, to Aboriginal governments. While RCAP recognizes that "the importance of constitutional recognition of the rights of women cannot be overstated", it does not give detailed consideration to how the Charter, or the Aboriginal rights entrenched in s.35 of the Constitution, might avail Aboriginal women in the criminal justice context. None of the reports or literature on Aboriginal justice provide any assistance in analyzing recent constitutional jurisprudence to examine the utility of rights discourse in a concrete way. I will attempt to fill this gap in Chapter 5.

At the same time as separate Aboriginal justice systems are advocated, it is recognized that not all communities will favour this approach, and may wish to retain aspects of the dominant criminal justice system, at least for some matters. Moreover, it is acknowledged that the development and implementation of Aboriginal justice systems will

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180 See Bridging the Cultural Divide, supra note 1 at 266 - 267; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 335; First Nations Circle on the Constitution, To the Source: Commissioners Report (Ottawa: Assembly of First Nations, 1992), as cited in L. McNamara, Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada with Reference to the Prairie Region (Winnipeg: Legal Research Institute of the University of Manitoba, 1993) at 419.

181 See Bridging the Cultural Divide, ibid. at 257-268. See infra Chapter 5, Part 1 for further discussion of this point.

182 Ibid. at 262.

take time, creating a need for incremental reforms in the short term.\footnote{Law Reform Commission of Canada, ibid.} Lastly, jurisdictional issues suggest that some Aboriginal people will continue to be involved with the mainstream justice system, particularly outside of Aboriginal communities.\footnote{Bridging the Cultural Divide, supra note 1 at 249-257; Law Reform Commission of Canada, ibid.} The question of how to make the Euro-Canadian system more sensitive to the needs of Aboriginal peoples, including women, thus arises.

Several types of incremental reform to the dominant justice system have been proposed, most of which deal with the treatment of Aboriginal persons accused and convicted of crimes rather than with issues of concern to Aboriginal women generally, or as survivors of violence. First, it has been recommended that the current players in the justice system receive cross-cultural training to sensitize them to the needs of the people appearing before them. It is suggested that such training be mandatory and ongoing for police, lawyers, judges, probation officers and correctional officials whose duties bring them into contact with Aboriginal peoples.\footnote{Law Reform Commission of Canada, supra note 3 at 30; Justice on Trial, supra note 3 at 2-9, 3-6, 5-11; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 661. The Law Reform Commission of Canada also recommended that information about Aboriginal cultures be incorporated into law school programs. See ibid. at 31.} None of the reports or literature recommend that such training be integrated with or complemented by gender sensitivity training for better understanding of the needs and concerns of Aboriginal women. Greater recruitment of Aboriginal police, lawyers, judges, justices of the peace, probation officers and correctional officials is also
called for.\textsuperscript{187} The need to ensure that this representation includes Aboriginal women is not articulated.

A second category of law reform proposes measures which would increase the accessibility of the mainstream justice system to Aboriginal peoples. These include the use of Aboriginal languages in court proceedings,\textsuperscript{188} the provision of simultaneous translation services for members of the public attending court hearings,\textsuperscript{189} the use of courtrooms which are physically sensitive to Aboriginal cultures and traditions,\textsuperscript{190} court scheduling to accommodate hunting and trapping seasons,\textsuperscript{191} holding court sittings in or near the Aboriginal community in which the offence was committed, or if not possible, the provision of transportation to the court sittings for accused persons and witnesses,\textsuperscript{192} the phasing out


\textsuperscript{188}See Law Reform Commission of Canada, ibid. at 32 - 33; Justice on Trial, ibid. at 4-18. The \textit{Official Languages Act}, R.S.N.W.T. 1988, c. O-1, was amended in 1990 to provide for court proceedings in the Aboriginal languages of the Northwest Territories. See \textit{An Act to Amend the Official Languages Act}, S.N.W.T. 1990, c.7.

\textsuperscript{189}Law Reform Commission of Canada, ibid. at 33 - 34; Justice on Trial, ibid.

\textsuperscript{190}Law Reform Commission of Canada, ibid. at 56; Justice on Trial, ibid. at 4-46; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 654.

\textsuperscript{191}Law Reform Commission of Canada, ibid. at 57 - 58.

\textsuperscript{192}Law Reform Commission of Canada, ibid. at 58 - 59; Justice on Trial, supra note 3 at 4-26; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 654.
or significant modification of "fly-in" courts,\footnote{Law Reform Commission of Canada, ibid. at 59 - 60; Aboriginal Justice Inquiry of Manitoba, ibid. at 655. These courts have been criticized on a number of grounds, including delay and their air of colonialism. See Aboriginal Justice Inquiry of Manitoba, ibid. at 253; K. Peterson, The Justice House: Report of the Special Advisor on Gender Equality (Yellowknife: Minister of Justice, 1992) at 58, 68.} and enhanced eligibility for legal aid, as well as the provision of public legal education.\footnote{Law Reform Commission of Canada, ibid. at 53 - 54; Aboriginal Justice Inquiry of Manitoba, ibid. at 655; Justice on Trial, supra note 3 at 3-21, 8-5.}

Few recommendations are made which speak to particular needs that Aboriginal women may have when they must participate as complainant-witnesses in proceedings, and those reports which do address this issue are wanting. For example, in its brief discussion of complainants, the Alberta Task Force found that Aboriginal women are often "reluctant" and "ineffective" witnesses, who are "overly deferential to authority". This finding, in addition to being patronizing and based on stereotype, ignores the possibility that many Aboriginal women may choose not to engage with the dominant justice system for a host of reasons.\footnote{See infra Chapter 4, Part 3A.} Apart from their "special needs" in terms of child care and transportation, the Task Force concluded that Aboriginal women complainant-witnesses experience the same problems as Aboriginal men.\footnote{Justice on Trial, supra note 3 at 8-53-4.} Again, this conclusion ignores evidence as to the impact of the dominant justice system on women, much of which has been brought to light by feminist activists and scholars, and Aboriginal women.
A third type of recommendation deals with bail reforms, sentencing and corrections. Recommended reforms in this context include the use of alternatives to bail\textsuperscript{197} and imprisonment,\textsuperscript{198} the use of alternative dispute resolution, such as diversion, victim-offender reconciliation, elders' sentencing panels and mediation,\textsuperscript{199} a consideration of factors which should mitigate sentence in the case of Aboriginal offenders,\textsuperscript{200} the enhancement of pre-sentence reports to set out the special circumstances of Aboriginal offenders,\textsuperscript{201} adequate provision of treatment facilities for Aboriginal offenders,\textsuperscript{202} and various measures to make corrections more sensitive to the needs of Aboriginal offenders.\textsuperscript{203} Again, these recommendations focus on the needs and concerns of accused persons, and ignore those of women who are survivors of violence. Little attention is paid, for example, to the use of victim impact statements or other measures which would increase

\textsuperscript{197}Law Reform Commission of Canada, supra note 3 at 61 - 66; Justice on Trial, ibid. at 4-45, 4-46.

\textsuperscript{198}Such alternatives include conditional discharges, suspended sentences, community service orders, compensation, restitution, and fine option programs. See Law Reform Commission of Canada, ibid. at 67 - 68, 70 - 75; Justice on Trial, ibid. at 4-40, 5-11; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 647.

\textsuperscript{199}Law Reform Commission of Canada, ibid. at 67 - 70; Justice on Trial, ibid. at 4-40; Aboriginal Justice Inquiry of Manitoba, ibid. For a discussion of the range of alternatives see Jackson, "Pathways to Justice", supra note 41.

\textsuperscript{200}See Law Reform Commission of Canada, ibid. at 76.

\textsuperscript{201}Law Reform Commission of Canada, ibid. at 77; Justice on Trial, supra note 3 at 4-40.

\textsuperscript{202}Justice on Trial, ibid. at 4-40, 8-7.

\textsuperscript{203}See Law Reform Commission of Canada, supra note 3 at 79 - 84; Justice on Trial, ibid. at 6-10 - 42; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 265, 660 - 651; Jackson, "Locking Up Natives in Canada", supra note 168 at 283 - 298.
the role of survivors at the stage of sentencing.

Thus until recently, Aboriginal justice reports and literature have been reticent in analyzing the causes and sites of violence against Aboriginal women, and have focused on how the justice system can be made more relevant in terms of culture, with little recognition of how gender may affect that concept. While the reports of the Aboriginal Justice Inquiry of Manitoba and RCAP included an analysis of issues relevant to Aboriginal women, it can be said that this analysis does not inform all aspects of their reports. Moreover, gaps remain in documenting the impact of the dominant system and some reform initiatives on Aboriginal women, and in assessing the Constitution as a tool of reform. I will now turn to a review of feminist literature and reports on violence against women and criminal justice issues to evaluate their inclusion of Aboriginal women.

Part 3 - A Review of the Feminist Literature and Reports on Violence and Justice

In contrast to the Aboriginal justice reports and literature, and perhaps expectedly, the feminist literature on criminal justice issues has focused on the causes and sites of violence against women as well as the treatment of violence and survivors of violence by the justice system. As well, feminist scholars have considered the utility of the Charter in protecting the needs of women in the context of the criminal justice system. As will be shown, however, feminists have focused on gender as the dominant basis of oppression, and have only recently begun to consider how other bases of oppression may complicate the analysis at both a theoretical and practical level.
Feminists writing about issues of violence have often used the public/private divide as a theoretical tool. These feminists have criticized the social arrangements and structures which result in the vulnerability of women in the private, domestic sphere, and the devaluation of that sphere. While most do not go so far as to advocate the destruction of any sphere of privacy, they argue that violence is one aspect of the family sphere which should be displaced across the private/public dividing line. Thus it is argued that the otherwise private family sphere should be subject to state intervention in the case of intimate violence against women. Feminist legal scholars have often construed patriarchy as the major cause of violence against women, and the family as a major site of violence and

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204 For a review see R. Gavison, "Feminism and the Public/Private Distinction" (1992), 45 Stanford L. Rev. 1.


Catharine MacKinnon critiques the divide further by querying the existence of any private realm for women. For MacKinnon,

[privacy] is defined by everything that feminism reveals women have never been allowed to be or to have, and by everything that women have been equated with and defined in terms of men's ability to have.

It is thus a notion of male privacy that is said to have shielded from public attention and redress matters such as intimate violence against women. MacKinnon argues that feminist theory views the family "as a unit of male dominance, a locale of male violence ... and hence a primary locus of the oppression of women." MacKinnon's solution is to "overthrow" the private, and make the personal political.


209Ibid. at 101 - 102.


211Ibid. at 119-120. This call to action appears in the work of many feminist scholars writing about violence and the public/private distinction. See for example K. O'Donovan, Sexual Divisions in Law (London: Weidenfeld and Nicolson, 1985) at 17. Carol Pateman argues that while the phrase "the personal is political" illuminates unpalatable aspects of domestic life, such as violence, it does not advance a critique of patriarchal - liberalism which underlies the public/private distinction. See supra note 206 at 285 -300. Another feminist writer goes further than this, noting that the question as to whether the personal is political is "one of those typical white women's questions" which underlines the breadth of the sociopolitical gap between white and racialized women. See N. Nzegwu, "Confronting
At the same time, feminists have argued that the notion of "state non-intervention" in the "private" sphere must be problematized. Given the state's role in the formation and functioning of families, the concept of non-intervention has been called a myth.\textsuperscript{212} To focus on the state's lack of intervention in the private sphere is said to mask more informal mechanisms used by the state, including the law, which reify male authority in this realm.\textsuperscript{213} Moreover, it is noted that any "inaction" on the part of the state in the private sphere has been highly selective. For example, although courts have been reluctant to look behind the curtain in cases of spousal non-support and violence, they have delved into the details of family life in other contexts, such as divorce,\textsuperscript{214} child welfare,\textsuperscript{215} and, more recently, child sexual abuse.\textsuperscript{216}

This work, with its focus on patriarchy as the dominant basis for women's oppression, has often excluded the needs and concerns of women who are also oppressed as

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\textsuperscript{214} Rhode, supra note 205 at 27.
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\textsuperscript{216} Thornton, "The Public/Private Dichotomy", supra note 207 at 449.
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a result of their race, culture, sexual identity, and disability.\textsuperscript{217} Some of the more recent analyses of the causes and sites of violence against women are more nuanced, having been informed by the work of women who face multiple bases of oppression.\textsuperscript{218} These discourses see the sources of violence as more complex than can be described by "patriarchy", and view the family as a site of contradiction.\textsuperscript{219} Feminists are also taking note that the extent of state regulation of the family has often depended on factors such as race,\textsuperscript{220} class,\textsuperscript{221} and sexual orientation,\textsuperscript{222} with those who challenged the normative

\textsuperscript{217}This trend in the work of Catharine MacKinnon was identified and critiqued by M. Kline in "Race, Racism and Feminist Legal Theory", supra note 39 at 134 - 142. For a reply by MacKinnon to her critics, see "From Practice to Theory, or What is a White Woman Anyway?" (1991), 4 Yale J. Law and Feminism 13.


\textsuperscript{219}This reflects a more general trend in feminist literature - it is only recently that issues of race, class, disability and sexual identity are routinely included in feminist analyses. For example, contrast a "classic" work on violence written in the early 1980s, R.E. and R.P. Dobash, \textit{Violence Against Wives} (New York: Free Press, 1979), which included no analysis of these factors, with the Dobashes' later work, \textit{Women, Violence and Social Change} (London: Routledge, 1992), which does include such analysis. See also Schneider, "The Violence of Privacy" and "Particularity and Generality", supra notes 31 and 205.

\textsuperscript{220}See Kline, "Complicating the Ideology of Motherhood", supra note 215.


model of family being more heavily regulated.\textsuperscript{223} As will be shown in the next chapter, the work of Aboriginal women has contributed significantly in this respect.

Reports on violence against women, and on criminal justice issues have undertaken a somewhat similar path. While early work in this area tended to focus on gender inequality as the primary explanation for violence against women,\textsuperscript{224} more recent reports have noted that factors such as race, culture, class, disability and sexual identity may influence a woman’s experience of violence, and the solutions required to overcome violence. Such initiatives have attempted to include diverse communities of women in their work, either as members of the inquiry,\textsuperscript{225} or via consultation.\textsuperscript{226} Two recent reports on violence against women included parallel processes analyzing the issues facing Aboriginal women.\textsuperscript{227} Other researchers have focused on certain groups of women, including Aboriginal women, as


\textsuperscript{224}See L. MacLeod, Battered but not Beaten... Preventing Wife Battering in Canada (Ottawa: Canadian Advisory Council on the Status of Women 1987); Manitoba Association of Women and the Law, Gender Equality in the Courts-Criminal Law (Winnipeg: MAWL, 1991).

\textsuperscript{225}See Canadian Panel on Violence Against Women, supra note 9.


\textsuperscript{227}See Canadian Panel on Violence Against Women, supra note 9, which included an Aboriginal Women’s Circle. A recent study of intimate violence in B.C. included a parallel report of the situation in Aboriginal communities. See Frank, supra note 6.
appropriate subjects of inquiry in the context of violence\textsuperscript{228} and justice system reform\textsuperscript{229}.

The Canadian Panel on Violence Against Women included an Aboriginal Women's Circle as an integral part of its study on violence against women in Canada. According to the Panel, this was the first time the voices of Aboriginal women were heard at the national level on issues of violence.\textsuperscript{230} More generally, the Panel recognized that individual women may experience violence differently, based on factors of race, culture, class, age, sexual identity and disability. Violence is broadly defined by the Panel to include physical, sexual, psychological, financial and spiritual elements.\textsuperscript{231}

A recent Manitoba study on violence against Aboriginal women notes that spiritual abuse is of "particular concern" for Aboriginal women, and includes both external and internal cultural and spiritual devaluation.\textsuperscript{232} This report is also useful for it definition of


\textsuperscript{229}See K. Peterson, supra note 193. Peterson was appointed as Special Advisor on Gender Equality to the N.W.T. Minister of Justice, and held workshops throughout the N.W.T. where women were invited to tell their stories about their experiences with the justice system. While the study did not explicitly focus on Aboriginal women, the reality of demographics in the N.W.T. is such that Aboriginal women were the primary subjects of study.

\textsuperscript{230}Originally, only one Aboriginal woman was appointed to the panel. Complaints led to the formation of the Circle. See Canadian Panel on Violence Against Women, supra note 9 at 143.

\textsuperscript{231}Ibid. at 7.

\textsuperscript{232}See McGillivray and Comaskey, supra note 228 at 20.
intimate violence as "a breach of the relationship of deep trust which exists among family members and between sexual partners".\textsuperscript{233} In seeking to explain the high incidence of violence against Aboriginal women, the Manitoba report focuses on violence as a learned behaviour.\textsuperscript{234} The report also examines Aboriginal women’s experiences of violence, and of the justice system by conducting interviews with Aboriginal women survivors of intimate violence.

Other reports on violence and justice provide a more cursory treatment of violence against Aboriginal women.\textsuperscript{235} The Law Reform Commission of Nova Scotia, in its report on "domestic violence" in that province, notes the racism of the justice system towards Mi’kmaq people, as well as difficulties for Aboriginal women living in urban areas.\textsuperscript{236} The Alberta Law Reform Institute, in its Report for Discussion on "domestic abuse", notes that Aboriginal women are particularly vulnerable to violence, and to sexist and racist stereotyping by the police.\textsuperscript{237} The Law Society of British Columbia, in its 1992 study of gender equality in the justice system, reports that it made every effort to seek out and understand the concerns of disadvantaged women, including Aboriginal women. The Law

\textsuperscript{233}Ibid. at 18.

\textsuperscript{234}Ibid. at 11-12.

\textsuperscript{235}While not explicitly "feminist", these reports are being included in my analysis of the feminist literature because of their treatment of issues relating to violence against women, and the apparent influence of feminist analysis on the reports.

\textsuperscript{236}See Law Reform Commission of Nova Scotia, supra note 226 at 18-19.

\textsuperscript{237}Alberta Law Reform Institute, Domestic Abuse: Toward an Effective Legal Response. Report for Discussion No. 15 (Edmonton: The Institute, 1995) at 10, 38.
Society notes that Aboriginal women are isolated by violence, and by systemic barriers in the justice system.\textsuperscript{238}

However, none of these reports look beyond gender when seeking to explain violence against women, and none contain recommendations which focus on the particular needs of Aboriginal women. Moreover, none of the reports discuss the support of Aboriginal women for self-government and separate justice systems, nor consider how such systems might protect Aboriginal women from violence.\textsuperscript{239} These reports are similar to those on Aboriginal justice, in which there is at best partial treatment of issues relating to Aboriginal women, violence and justice.

Thus while their analyses may not be as complicated as those of Aboriginal women, as will be shown in the next chapter, feminists have become better at viewing violence, family and the state as complex matters where gender intersects with other bases of oppression. Still, it is the more traditional conception of violence which provided the major theoretical framework for feminist law reform efforts in this area, many of which took place in the 1980's. One of the main motivations behind such efforts has been to shift violence

\textsuperscript{238}Law Society of British Columbia, \textit{Gender Equality in the Justice System} (Vancouver: The Society, 1992) at 1-3, 7-3.

\textsuperscript{239}In contrast, these issues are considered by the reports of the Canadian Panel on Violence Against Women, Peterson, and McGillivray and Comaskey, supra.
from the private realm into the public realm.\(^{240}\) While the strategies for accomplishing this goal have varied, feminist legal activists have inevitably directed their attentions to the criminal justice system.

There are several trends in the literature on criminal law reform in the context of intimate violence against women, many of which mirror law reforms recommended by Aboriginal justice reports and literature. Feminist legal activists may advocate increased charging and prosecution of intimate violence, more harsh or appropriate sentences, and the creation of specialized fora for hearing such cases.\(^{241}\) Most advocates of these reforms argue that they must be accompanied by the increased provision of services in order to be effective. Like the Aboriginal justice work on law reform, there is relative silence here on how these reforms may affect Aboriginal women in practice.

Feminist advocates of increased state response to intimate violence successfully lobbied for the introduction of police and Crown policy directives in some jurisdictions in

\(^{240}\) Schneider, "The Violence of Privacy", supra note 205 at 974; Hilton, supra note 206 at 324; E. Comack, Feminist Engagement with the Law: The Legal Recognition of the Battered Women's Syndrome (Ottawa: Canadian Research Institute on the Advancement of Women, 1993) at 5; D.H. Currie, "Battered Women and the State: From the Failure of a Theory to a Theory of Failure" (1990), 2 J. Human Justice 77 at 86, 89.

\(^{241}\) For a review of the strategies sought in this context, see E. Sheehy, Personal Autonomy and the Criminal Law: Emerging Issues for Women (Ottawa: Canadian Advisory Council on the Status of Women 1987).
the early 1980s. Before these policies were adopted, it was often incumbent on survivors of intimate violence to request that charges be laid in a given case, unlike the charging practices in cases of assault between strangers, where no such request was required. The police policy directives changed the status quo by providing that charges should be laid by the investigating officer in cases of "domestic violence" where supported by reasonable and probable grounds to believe an offence had been committed, irrespective of the wishes of the complainant. The companion policy directive to federal Crown prosecutors provided that a decision to terminate a "spousal assault" prosecution should be exceptional, and should be made on behalf of the Crown and not the victim. This policy was amended in 1993 to "improve protection and assistance for victims". Decisions to terminate prosecutions must now take into account, amongst other factors, any reliable evidence tending to suggest


243See Sheehy, supra note 241 at 15-16; Ursel, ibid. at 530.

244See for example Solicitor General of Canada, Recommended Police Directive - Spousal Assault (Ottawa: Solicitor General, 1983). This directive also obliged police to provide protection and assistance to victims by acquainting them with community resources such as emergency shelters, legal aid, counselling facilities and welfare services, and assisting them in contacting these resources.

245See Attorney General of Canada, Recommended Directive to Prosecutors - Spousal Assault (Ottawa: Department of Justice, 1983). Provincial prosecutors are subject to similar policy directives in some jurisdictions. See, for example, Attorney General of British Columbia, Violence Against Women in Relationships Policy (Victoria: Ministry of the Attorney General, 1993, revised in 1996).

246See Department of Justice (Canada), Spousal Assault Prosecutions (Ottawa: Department of Justice, 1993) at V-7-2.
that the victim would be "unduly traumatized" if required to testify. Still, Crown counsel are to make every effort to encourage "reluctant" victims to testify, including putting them on the witness stand, and using adverse witness procedures.247

Such policies were justified on several grounds. First, they were said to be an improvement over previous discretionary practices, in which the police and Crown had full rein to decide whether the criminal justice process would be applied in a given case.248 Evidence of an increased rate in arrests, charges and prosecutions, and a decreased rate of recidivism were cited in support of this argument.249 Second, such policies were praised for their symbolic role in emphasizing the public nature of the crime of wife assault, and the state's disapproval thereof.250 The possibility of changing public attitudes, including those of victim-blaming, were seen as a potential benefit as well.251 Third, these reforms were said to result in better protection for victims in terms of both immediate safety and more

247Ibid. at V-7-7 to V-7-8. At the same time, Crown counsel are directed not to doubly victimize spousal assault victims by prosecuting them for failing to testify, nor by moving to cite the victim for contempt except in compelling circumstances.

248See Sheehy, supra note 241 at 9. The exercise of such discretion may have been based in part on the wishes of the victim, but this was not always the case.

249See Ursel, "Examining Systemic Change", supra note 242 at 539 - 544, dealing specifically with the situation in Manitoba. See also P. Jaffe et al, Wife Assault as a Crime: The Perspectives of Victims and Police Officers on a Charging Policy in London, Ontario from 1980 - 1990 (London, 1991), which found similar trends to those reported by Ursel. Neither study analyzed data on the basis of factors such as race or ethnicity.

250Sheehy, supra note 241 at 14; MacLeod, supra note 224 at 81 - 82; Manitoba Association of Women and the Law, supra note 224 at 3-13.

251McGillivray, supra note 206 at 30, 35.
long term safety via deterrence. Lastly, such reforms were advocated on the basis of their ability to empower victims. The argument here was that victims would be less susceptible to threats or harassment to drop criminal charges when they are not in charge of decisions to charge or prosecute their abusers, and that they would have the support and attention of the police, lawyers and the courts. Until recently, the feminist literature did not include an analysis of how different communities of women might be affected by the policies.

A second trend in feminist approaches to law reform is the support for stiffer sentences for crimes of violence. Such sentences are said to offer the possibility of specific and general deterrence. While many writers do not necessarily agree with the concept of a punitive justice system, they note that while such a system is in place, sentences for crimes of violence should be increased, as they are currently disproportionately low. Other law reform advocates suggest that principles of deterrence and protection will be fulfilled by more appropriate sentences rather than stiffer sentences. The focus suggested is

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252 Sheehy, supra note 241 at 14; MacLeod, supra note 224 at 86; Ursel, "Examining Systemic Change", supra note 242 at 544.

253 Sheehy, ibid. at 14; McGillivray, ibid. at 37.

254 Schneider, "The Violence of Privacy", supra note 205 at 990.

255 For an exception see D. Martin and J. Mosher, "Unkept Promises: Experiences of Immigrant Women and the Neo-Criminalization of Wife Abuse" (1995), 8 C.J.W.L. 3, who study the impact of such policies on immigrant women living in Toronto.

256 Sheehy, supra note 241 at 11; McGillivray, supra note 206 at 41.

257 See Manitoba Association of Women and the Law, supra note 224 at 3-12.
on counselling and treatment rather than incarceration. This work also cites evidence which shows that survivors of violence are most positive about criminal interventions when the response is protective or preventive rather than punitive. With only a couple of recent exceptions, this literature has often ignored how a punitive approach to law reform may adversely affect disadvantaged men.

A third trend in feminist law reform literature is the support for specialized fora to deal with issues of violence against women. For example, the province of Manitoba established a Family Violence Court to hear cases of domestic assault in 1990. Such reforms are said to be justified on the basis that they allow specialized personnel to deal with the issues, resulting in more sensitive and appropriate hearings and dispositions, and in increased confidence of victims and offenders in the process. On the other hand, there has been criticism of family courts dealing with cases of intimate violence on the basis that this perpetuates the notion of such violence as "private". Others support sensitivity

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258 MacLeod, supra note 224 at 88; Ursel, "Examining Systemic Change", supra note 242 at 544.

259 MacLeod, ibid. at 85. See also L. Clark, supra note 205 at 427.

260 See infra note 281 and text.

261 Ursel, "Examining Systemic Change", supra note 242 at 539. A Family Violence Court Pilot Project was recommended by the Law Society of B.C. in its report on Gender Equality in the Justice System. See supra note 238 at 755.

262 Ursel, ibid. at 539 - 544.

263 See Hilton, supra note 206 at 328; G. Fraser, "Taking Spousal Assault Seriously: A Philosophical View of Legal Contradiction" (1985), 5 Windsor Yearbook of Access to Justice 368.
training around issues of violence for police, prosecutors, judges, and other criminal justice personnel.\textsuperscript{264} Feminists have also called for increased representation of women as judges\textsuperscript{265} and legal professionals.\textsuperscript{266} While it is noted that gender does make a difference in this respect, this work has not often noted the need for training or increased representation on other bases such as race, culture, class, disability or sexual identity.\textsuperscript{267}

A fourth trend, and one that occurred simultaneously with the others, is the push for increased services to complement reforms in the criminal justice arena.\textsuperscript{268} Services which would improve accessibility to this arena, such as advocacy services for survivors, have been recommended.\textsuperscript{269} Additionally, services outside the criminal realm, such as shelters, counselling and treatment for both survivors and offenders, as well as more widespread

\textsuperscript{264}Macleod, supra note 224 at 82 - 84; Sheehy, supra note 241 at 10.

\textsuperscript{265}See K.E. Mahoney and S.L. Martin, eds., \textit{Equality and Judicial Neutrality} (Calgary: Carswell, 1987); Manitoba Association of Women and the Law, supra note 224 at xiii; Wilson, J., "Do Women Judges Really Make a Difference" (1990), Fourth Annual Barbara Betcherman Lecture.

\textsuperscript{266}See Canadian Bar Association Task Force on Gender Equality in the Legal Profession, \textit{Touchstones for Change: Equality, Diversity and Accountability} (Ottawa: CBA, 1993). One member of the Task Force, Sharon McIvor, is an Aboriginal woman from the Lower Nicola Valley.

\textsuperscript{267}For an exception see, I. Grant and L. Smith, in "Gender Representation in the Canadian Judiciary" in \textit{Appointing Judges: Philosophy, Politics and Practice} (Toronto: Ontario Law Reform Commission, 1991) 57 at 58. The CBA report, ibid., also stresses the importance of the legal profession acknowledging the need for diversity amongst lawyers.

\textsuperscript{268}Ursel, "Examining Systemic Change", supra note 242 at 530; Walker, supra note 242 at 54 - 55.

\textsuperscript{269}Macleod, supra note 224 at 91; McGillivray, supra note 206 at 43; Walker, ibid. at 181.
services in housing, education, and health have been sought. These types of services are thought to be essential to a coordinated response to the issues around violence against women. Until recently, however, the need for these services to respond to the particular needs of diverse groups of women, including Aboriginal women, has not been addressed.

Underlying many of these law reform strategies is the idea that it is a lack of alternatives which causes survivors of violence to turn to the state for protection. Indeed, it has been argued that where the state's interests converge with those of women as they do in the case of intimate male violence, "it is a reasonable, indeed, preferred strategy ... to use the full force of the state, its money, its legal apparatus, [and] its political legitimacy to provide more support and more options" for women. It was this type of argument which persuaded me that working as a prosecutor might be "doing the right thing", at least on a case by case basis.

As noted by Dawn Currie, not all feminists working in the area of violence against women have delved into the criminal justice arena without some self-reflection and

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270 See Walker, ibid. at 54-55.

271 For exceptions see Canadian Panel on Violence Against Women, supra note 9; Peterson, supra note 193.


273 Ursel, Private Lives, Public Policy, supra note 206 at 301.
Many feminists working in this area have acknowledged the difficulties that arise when the terrain of the state becomes home. Like Aboriginal justice advocates, one major critique of the incremental strategies discussed above is that they do not result in any of the sort of structural changes which are required in order to eradicate violence against women. It is argued that such reforms can legitimate existing structures, and deflect attention away from more basic social and economic problems. While criminal justice reforms can lay the foundations for more fundamental social change, it is said they must be accompanied by more systemic remedies, including economic support for women, education, child care, housing, and other social services, as well as measures designed to achieve attitudinal change. Although these types of services have often been advocated along with criminal justice reforms, they have rarely been implemented to the same extent.

This gives rise to a related claim - that the work of law reform activists is often diluted through a process of cooptation by the state. According to some writers, for example, the process of engaging with the state removed any radical potential on the part of the battered women's movement in Canada. One result has been the de-gendering of

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274 See supra note 240 at 85-88.

275 See Currie, ibid. at 88-90; Martin and Mosher, supra note 255 at 37-40; L. Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990), 10 Studies in Law, Politics and Society 143 at 145.

276 Rhode, supra note 205 at 244.

277 See Walker, supra note 242.

278 See Hilton, supra note 206 at 327; Walker, ibid. at 72.
violence in terms of both its cause(s) and incidence.\textsuperscript{279} This may explain the treatment of "family violence" as a gender neutral phenomenon by the Aboriginal justice reports discussed in Part 2.

Some feminists also argue that law reform efforts which focus on the criminal justice system are inherently suspect because the use of punishment and force reinforces the power of the dominant group.\textsuperscript{280} Recently, some feminists writing in this area have discussed how factors such as race and class as well as gender may play out in this context. The argument here is that engagement with the criminal justice system plays into the hands of those who want more control over the "problematic" sectors of the population. Relative over-policing, conviction and incarceration of men of colour, and of the lower class are cited in support of this argument.\textsuperscript{281} A punishment focus has also been criticized on the basis that it is irreconcilable with "feminist" values.\textsuperscript{282}

\begin{footnotesize}
\begin{enumerate}
\item M. Thornton, "Feminism and the Contradictions of Law Reform", supra note 272 at 460. This trend in sexual assault law reform has also been criticized. See J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989), 17 Int. J. Sociol. Law 445 at 454.
\item Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns", supra note 275 at 145; "Feminism, Punishment and the Potential of Empowerment" (1994), 9 Can. J. of Law and Society 75 at 77-78. See also Pate, supra note 93.
\item Snider, ibid. at 157; 84, respectively. See also Martin and Mosher, supra note 255 at 30-31; Sheehy, supra note 241 at 14; R. Morley and A. Mullender, "Hype or Hope? The Importation of Pro-Arrest Policies and Batters' Programmes for North America to Britain as Key Measures for Preventing Violence against Women in the Home" (1992) 6 International Journal of Law and the Family 265.
\item L. Clark, supra note 205 at 428-429.
\end{enumerate}
\end{footnotesize}
A final criticism of criminal law reforms around violence against women is that there is no clear evidence they work. Such arguments cite a lack of unequivocal proof that an intensified criminal justice response results in decreased recidivism.\(^{283}\) In the specific instance of police and prosecution policy directives, it is argued that they are not well enforced, and do not necessarily constrain the improper exercise of discretion as intended.\(^{284}\) Unfortunately, there have been very few studies done in Canada which address the question of effectiveness of criminal reforms on an empirical basis.\(^{285}\) Those which exist have not analyzed data on the basis of factors such as race and class. Some feminists argue, and I would agree, that statistical analysis is inappropriate in any event. A focus on increased arrest, conviction or sentencing rates as measures of success is seen to be

\(^{283}\) Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" supra note 275 at 145; L. Clark, ibid. at 424.

\(^{284}\) See Snider, ibid.; Hilton, supra note 206 at 330-1; M. Ruttenberg, "A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy" (1994), 2 Amer. U. J. Gender and the Law 171 at 191 - 194; E.S. Buzawa and C.G. Buzawa, eds., Domestic Violence: The Changing Criminal Justice Response (Westport, Conn.: Auburn House, 1992), "Introduction" at xiii. An early study in the United States suggested that arrest was a better deterrent than providing informal mediation or a short separation in cases of intimate male violence against women. See L.W. Sherman and R.A. Berk, "The Specific Deterrent Effects of Arrest for Domestic Violence" (1984), 49(2) American Sociological Review 261. The results of this study have been widely criticized, and despite several efforts, have not been replicated. See Martin and Mosher, supra note 255 at 33.

\(^{285}\) Canadian studies on the efficacy of such policies have been conducted by Jaffe and Ursel. See supra note 249. Generally speaking, both studies found the policies resulted in a higher percentage of charges being laid, an increased level of victim satisfaction/cooperation, and a decrease in recidivism. In contrast, a recent study by the B.C. Institute on Family Violence found that despite a prosecution policy, almost 30% of domestic violence charges were withdrawn or stayed by the Crown in 1993. See B.C. Institute on Family Violence, Family Violence in British Columbia: A Brief Overview (Vancouver: BCIFV, 1995). This study reached no conclusion on the more complicated question of whether the policies deter violence.
secondary to how reforms impact on, and are perceived by women who are survivors of violence. The advisability of the policy directives must be questioned because of their removal of control from survivors of violence, a more accurate measure of empowerment, in my view.

Too often, however, such arguments have occurred by way of hindsight, and have rarely resulted in a rejection or even decentring of criminal law as a site of struggle. Charging and prosecution policies remain in force across Canada, and feminist legal activists continue to turn to the criminal arena where issues of violence are concerned. There has been little movement in reforming the criminal arena to provide greater control to survivors of violence, or to address the difficulties caused by the separation of the legal system itself into public and private realms. Feminists’ energies are not exclusively focused on the criminal arena, however. As noted in Chapter 2, feminist legal strategies around violence are increasingly located in the civil justice system. And, of course, not all feminists pursue purely legal strategies in their struggles against violence. Lobbying for services, including shelters, has also occupied much of feminists’ attention in this context.

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286 Snider, "Feminism, Punishment and the Potential of Empowerment" supra note 280 at 89 - 91.

287 This is also the conclusion of Snider, ibid. at 87-91; Morley and Mullender, supra note 281 at 272; Martin and Mosher, supra note 255 at 33-35.

288 For critiques of the public/private divide within the legal system, see Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns", supra note 275 at 163; M. Russell, "A Feminist Analysis of the Criminal Trial Process" (1989-90), 3 C.J.W.L. 552 at 553.
As noted, the law reform critiques have only recently begun to account for the ways in which women other than the white middle class norm may complicate the theoretical backdrop for such reforms, or how they may be adversely affected by the reforms in practice. Moreover, feminist law reform literature has not, for the most part, examined Aboriginal justice initiatives as vehicles for protecting the interests of Aboriginal women. Also absent from the literature is a consideration of Aboriginal justice systems as models for reform of the dominant system. That work which has examined Aboriginal justice issues has tended to be suspicious of such initiatives. While this may be grounded in the need for further research, the concerns expressed by Aboriginal women, or a desire not to tread on matters which are seen to be the proper subject of Aboriginal discourse, it may also be based on inaccurate assumptions about violence against Aboriginal women. One scholar has noted that some feminists may exhibit a "bias of Aboriginal patriarchy", where

289 See for example R. Kohli, "Violence Against Women: Race, Class and Gender Issues" (1991), 11(4) Canadian Woman Studies 13 at 14; Peterson, supra note 193; Martin and Mosher, supra note 255; Snider, supra notes 275, 280.

290 The Canadian Panel on Violence Against Women found that more research was required into the effect of community justice initiatives on Aboriginal women. See supra note 9 at 157.

291 Katherine Peterson, the Special Advisor on Gender Equality, reported that in workshops held across the Northwest Territories, Aboriginal women expressed concerns that their voices regarding community justice were not being heard. See supra note 193 at 74-5. The Manitoba study on violence against Aboriginal women reported that a majority of women interviewed believed that diversion of offenders to Aboriginal justice initiatives was worth a try if appropriate safeguards could be put into place. See McGillivray and Comaskey, supra note 228 at 72-5.

292 See for example M. Kline, "The Colour of Law", supra note 20 at 453, who believes that certain matters, such as a study of the extent to which First Nations have internalized racist ideologies, and how they experience oppressive structures is best left to First Nations people themselves.
Aboriginal men are assumed to be sexist, and Aboriginal women are seen to be unable to develop their own solutions to violence. My own view is that the feminist literature in Canada has exhibited more of a silence around these issues than a direct bias. Just as the concept of state non-intervention in the "private" sphere has been exposed as action in disguise, however, so must these silences be recognized as sounds.

Unlike the Aboriginal justice literature, where the Charter is seen as a potential source of conflict between individual and collective rights, feminist scholars have advocated the utility of the Charter to further progressive reforms of the criminal justice system. Such work, which will be discussed more fully in Chapters 5 and 6 below, considers the Charter as a vehicle for protecting both the interests of the accused, as well as the complainant in criminal matters. There has not, however, been much theoretical work on intersecting inequalities in the context of the Charter's application. Moreover, there has been little analysis of how s.35(4) of the Constitution, which guarantees Aboriginal and treaty rights equally to men and women, may assist Aboriginal women in the context of Aboriginal justice

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293 See Greschner, supra note 39 at 339-40.

294 See S. L. Martin, "Some Constitutional Considerations on Sexual Violence Against Women (1994) 32 Alberta Law Review 535. See also the work of the Women's Legal Education and Action Fund ("LEAF"). Most of this work has been in the context of sexual violence, although it can be applied in the context of intimate violence as well.

295 Iyer, supra note 163, criticizes human rights jurisprudence for its failure to consider women as "whole" beings potentially subject to intersecting forms of oppression. LEAF has attempted, albeit unsuccessfully so far, to introduce this concept into Charter jurisprudence. See the factum of the intervenor coalition in O'Connor, infra note 368, for example.
Thus until recently, the feminist scholarship on violence against women tended to focus on gender oppression, and was relatively silent on how factors such as race, culture, class, sexual identity and ability affected the picture. On a theoretical level, this tendency has resulted in an overly simplistic analysis of the causes and sites of women's oppression by violence. On a practical level, the ways in which feminist reforms to the criminal law may impact upon some women have been largely left out of the analysis, along with any consideration of Aboriginal justice initiatives. Like the Aboriginal justice literature, the analysis has tended to exclude the needs and concerns of Aboriginal women by focusing on only one aspect of their oppression. In Chapter 4, I will explore how Aboriginal women have begun to shatter these silences.

\footnote{For an exception see Greschner, supra note 39.}
CHAPTER 4

ABORIGINAL WOMEN, VIOLENCE AND JUSTICE

PART 1 - Introduction

This chapter will show that in contrast to much of the Aboriginal justice and feminist literature, Aboriginal women focus on both gender and culture as bases of oppression, presenting unique and holistic analyses of violence and law reform. The goal of this chapter is to emphasize that there must be a recognition of how gender, culture and other aspects of identity and location overlap and affect in complex ways how Aboriginal women experience violence and the justice system, and what reforms will address these experiences. Moreover, my review of the perspectives of Aboriginal women underlines the importance of their participation in discourses on violence and justice in the academic, political and legal arenas.

The voices of Aboriginal women are diverse, and are expressed in several written fora, including reports, academic literature, and stories, a comprehensive review of which is beyond this thesis. I will focus here on those writings which explore issues relating to justice and violence. It must be recognized, however, that an examination of the written words of Aboriginal women may still exclude the voices of some Aboriginal women, perhaps those who are most marginalized. While several commissions and studies have attempted to seek out Aboriginal women at public and private hearings, workshops and other
gatherings,\textsuperscript{297} it cannot be assumed that the voices of all women are being heard.

As noted in the previous chapter, others have conducted research into violence against Aboriginal women,\textsuperscript{298} and on women and justice in an Aboriginal setting.\textsuperscript{299} Such work has attempted to be "for and with" Aboriginal women rather than "on or about" them.\textsuperscript{300} While the authors themselves are not Aboriginal women, their work often includes references to the views expressed by Aboriginal women. Although it is possible that these references interpret the voices heard, they often corroborate what Aboriginal women have written about violence and justice, and will be considered here.

The work of some women of colour, and lesbian scholars on violence against women will also be drawn upon in this chapter to corroborate the critique that Aboriginal women’s work poses to the dominant feminist literature reviewed in Chapter 3. While I recognize the need not to overgeneralize how racialization and culturalization may play out in the context of violence against different groups of women, I believe it is useful to look at a broad range of work with a view to identifying the difficulties with some feminist theorizing, and the breadth of its impact.

\textsuperscript{297}See for example RCAP’s study, supra note 2; Peterson, supra note 193; Canadian Panel on Violence Against Women, supra note 9.

\textsuperscript{298}See McGillivray and Comaskey, supra note 228.

\textsuperscript{299}See Peterson, supra note 193.

\textsuperscript{300}See McGillivray and Comaskey, supra note 228 at 30.
PART 2 - Aboriginal Women on Violence, the Family and the State

As noted in Chapter 3, the feminist literature on violence against women has tended to identify patriarchy as the primary cause of women's oppression. The focus has very much been on how gendered power relations are the main contributing factor to violence. When Aboriginal women write about these issues, however, they almost always begin by noting how male violence against women was not prevalent or accepted in their traditional communities. Rather, violence against Aboriginal women is described as resulting in large part from the process and effects of colonization.\footnote{Monture-OKanee, "Reclaiming Justice" supra note 34 at 259-260; Nahane, supra note 10 at 362-363; Ontario Native Women's Association, supra note 5 at 7 - 9; Frank, supra note 6 at 2 - 3. The discriminatory provisions of the Indian Act have been implicated in this process. See Monture-OKanee and Turpel, supra note 41 at 265.} According to Mary Ellen Turpel, the term "domestic violence" itself conjures up images of state violence against Aboriginal people in addition to male violence against women.\footnote{See "Patriarchy and Paternalism", supra note 18 at 183.}

Other sources cast some doubt about the ability to generalize male/female relations and violence in this fashion, however. A recent study on traditional justice amongst the Dene found that although rape was considered to be a serious crime, albeit a rare one, intimate male violence against women may have been accepted to some extent.\footnote{Dene Justice Project, supra note 46 at 106. The report argues that traditional violence can be distinguished from post-contact violence in that the former was tied to the survival of the group, and was designed to teach the person how to do things properly. Current male violence against women is said to lack this connection.} The work of some Aboriginal women maintains that gender relations differed among various Aboriginal
cultures,\textsuperscript{304} and may have included male violence against women.\textsuperscript{305} Moreover, many Aboriginal women note that even if traditional communities were relatively violence free, some Aboriginal men have "internalized" the Western "devaluation of women",\textsuperscript{306} resulting in higher levels of violence. Still, they maintain that it is overly simplistic to put gender oppression at the root of male violence in this context -- racism and cultural and economic oppression must be recognized as contributing to a complex and intersecting set of oppressions.\textsuperscript{307}

The dominant feminist conceptualization of the family as patriarchal and as a key source of women's oppression is also problematic. First, Aboriginal women often note that many pre-colonial communities were egalitarian, with women at the centre of the family and community.\textsuperscript{308} Although there may have been separate spheres for men and women, these were not exclusive, nor were they ordered in a hierarchical fashion. Gender roles were flexible, and women could and often did participate in "public" life, both political and

\begin{itemize}
  \item \textsuperscript{305}See La Rocque, supra note 10 at 75.
  \item \textsuperscript{306}La Rocque, ibid. See also Monture-OKanee, "Reclaiming Justice", supra note 41 at 260; Courchene, supra note 7 at 20.
  \item \textsuperscript{307}The same point has been made by women of colour writing about issues of oppression. See Cox, supra note 218; Harris, supra note 163.
  \item \textsuperscript{308}Turpel, "Patriarchy and Paternalism", supra note 18 at 180; Courchene, supra note 7 at 16 -19; P.A. Monture, "Reflecting on Flint Woman", citing O. Lyons, "Spirituality, Equality and Natural Law" in L. Little Bear et al, eds., Pathways to Self-Determination: Canadian Indians and the Canadian State (Toronto: University of Toronto Press, 1986) at 5.
\end{itemize}
productive.\textsuperscript{309} There was also a recognized and valued place in many traditional communities for gay and lesbian, or "two-spirited" people.\textsuperscript{310}

Moreover, Aboriginal women note that there was no clear demarcation between families and the state in traditional Aboriginal communities. Families were not nuclear or linear entities, and they were at the centre of society in terms of structure and governance.\textsuperscript{311} Cases of violence, for example, were dealt with by families and communities using methods of healing, reconciliation, compensation, and shaming.\textsuperscript{312}

The work of Aboriginal women suggests that dominant feminist notions of family and state continue to be problematic in many contemporary Aboriginal communities.\textsuperscript{313} First, the Canadian state itself is not necessarily accepted as a legitimate entity, as evidenced from the struggle of Aboriginal peoples for self-determination. Although the Indian Act regime of band councils has imposed the structures and ideologies of the Canadian state on many Aboriginal communities, families often continue to be the basic organizational units of such

\textsuperscript{309}Turpel, ibid.; W. Stevenson in "Peekiskwetan", supra note 18 at 166.

\textsuperscript{310}See R. Burns, "Preface", in Roscoe, supra note 304, 1 at 2.

\textsuperscript{311}Monture, "Reflecting on Flint Woman", supra note 308 at 356; Ontario Native Women's Association, supra note 5 at 8.

\textsuperscript{312}Courchene, supra note 7 at 18; Frank, supra note 6 at 8. See supra Chapter 2, Part 2.

\textsuperscript{313}See Turpel, "Patriarchy and Paternalism", supra note 18.
communities, even in urban centres. If the experiences of women of colour and lesbians are any indication, families are important sites of resistance against the dominant culture as well as being sites of violence some of the time.

Not only is it overly simplistic to say that the family is necessarily a site of oppression for women, it is also inaccurate to identify the family as the primary sphere of oppression for Aboriginal women. The legacy of residential schools is only one example of how Aboriginal women have been subjected to violence outside the family sphere. Aboriginal women have noted other ways in which their families may be subjected to coercive state intervention, in the child welfare arena, for example. At the same time, the state has often been all too willing to avoid intervening where housing and other social services are required by Aboriginal peoples.

This is not to say that Aboriginal women allow traditional gender and family relations, or colonization itself, to justify or excuse male violence against women in

314 Ontario Native Women's Association, supra note 7 at 8; Frank, supra note 6 at 8.
315 See Bhavani and Coulson, supra note 218 at 88; Ruttenberg, supra note 284 at 186.
316 See Eaton, supra note 218 at 206-207.
317 Residential schools are often identified as one of the tools of colonization which has had a lasting impact on Aboriginal communities in terms of a cycle of violence. See Nahanee, supra note 10 at 363; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 478; Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 1, Looking Forward, Looking Back at 333-409.
contemporary Aboriginal communities. There may be community or family pressure on Aboriginal women to avoid perpetuating racist stereotypes about Aboriginal men and violence, or to support their families and not expose them to criticism. This pressure, however, does not necessarily render them silent. While these factors may come into play in terms of the unwillingness of Aboriginal women to engage with the dominant justice system, as will be shown in the next section, Aboriginal women are speaking out about violence. The salient point is that the dominant theoretical framework used by feminists, and their strategies for responding to violence should not be assumed to be the same as those of Aboriginal women, or to be equally relevant to them. Nor are solutions conceived of in a singular fashion by Aboriginal women. Factors of poverty, age, disability, geographic location and sexual identity may be relevant to how different Aboriginal women experience violence, and in constructing solutions appropriate to respond to their diverse needs. There tended to be silence on these diverse needs and concerns, however, at the level of

319 For example, see La Rocque, supra note 10 at 76 - 77; Nahane, supra note 10 at 371.

320 La Rocque, ibid. at 88. The same argument has been made in the context of intra-racial violence against women of colour. See K. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991), 43 Stanford Law Review 1241. Crenshaw queries why the "priority tends to be interpreted as obliging women not to scream rather than obliging men not to hit" at 1257.

321 Monture-OKanee, "Reclaiming Justice", supra note 34 at 256; Ontario Native Women's Association, supra note 5 at 6.

322 See Frank, supra note 6 at 17.

323 As noted in Chapter 1, little research has been done on relating to Aboriginal women in these contexts. See Canadian Panel on Violence Against Women, supra note 9 at 160 - 163.
feminist law reform efforts around intimate male violence.\textsuperscript{324}

As noted in the preceding chapter, recent studies on violence against women have perhaps been more sensitive to the need to hear the voices of all women, including Aboriginal women. Moreover, Aboriginal women have recently worked in coalition with feminist legal activists on criminal justice issues.\textsuperscript{325} While analyses of violence against women, and law reform work have become more complicated, however, it is important to note that some aspects of the criminal justice system which continue to be problematic for Aboriginal women were the result of feminist law reform efforts in this sphere. The impact of these reforms, and the dominant system, on Aboriginal women will be discussed more fully in the next section, with a focus on the participation of survivors of violence.

\textsuperscript{324}The perception of some Aboriginal women (see Ontario Native Women's Association, supra note 5 at 6) and other "minority women" (see Kohli, supra note 289) is that the Battered Women's Movement in Canada was not diverse or attuned to their needs. Three historical accounts of the movement are silent on this point. See Walker, supra note 242; Hilton, supra note 206; Ursel, "Examining Systemic Change", supra note 242.

\textsuperscript{325}For example, the Aboriginal Women's Council was part of a coalition which intervened in the O'Connor case, infra note 368.
PART 3 - Aboriginal Women on the Dominant Justice System and Aboriginal Reform Initiatives

As noted in Chapter 2, both pre-colonial Aboriginal justice systems and the early English system involved survivors of violence in the dispute resolution process to some extent. This may have included their participation in the fact finding process, as well as at the stage of determining the appropriate level of sanctions and compensation. Most importantly, the traditional systems were grounded on the notions of reconciliation and compensation, placing the survivor at the centre while still recognizing the impact of the offense on the community, and the responsibility of the community in the dispute resolution process. By the time of colonization, however, the English criminal justice system, which was imported into what became Canada, was firmly entrenched as a "public" system in which the only acknowledged parties were the state and the offender.

Chapter 3 revealed that the dominant justice system has been problematic for Aboriginal peoples, as well as women. The writings of Aboriginal women reveal that the impact of the dominant system on Aboriginal survivors of violence has been profound, based on both traditional values and contemporary realities. Aboriginal women are reported to lack

326 Most of the reform initiatives which will be discussed in this chapter have taken place in small Aboriginal communities. There is at least one justice initiative which is operating in an urban context in Canada. See Aboriginal Legal Services of Toronto, Community Council Report for the Period January-March 1993 (Toronto: A.L.S.T., 1993) at 9, which notes that a Family Violence Working Group is "working towards a comprehensive approach to the issue of wife assault that considers the needs of all parties and ensures the safety of the woman".
confidence in the ability of the dominant justice system to stop violence.\textsuperscript{327} In this section, I will focus on three problematic aspects of the Euro-Canadian justice system to illustrate its adverse impact on Aboriginal women: engaging with the system itself, giving evidence within the system, and participating at the level of sentencing.

A. Intimate Violence Charging and Prosecution Policies

As noted in Chapter 3, police and prosecution policy directives apply in cases of intimate violence in several jurisdictions across Canada.\textsuperscript{328} While Aboriginal women have only infrequently critiqued these policies directly,\textsuperscript{329} their general comments about engaging with the dominant justice system are apposite here. Aboriginal women may be discouraged from reporting cases of violence, or from wanting to proceed with charges or prosecution for a host of reasons. Many Aboriginal women articulate a fear of pressure and potential ostracism from family members and their community if they speak out about violence.\textsuperscript{330} Alternatively, or at the same time, Aboriginal women may be reluctant to subject their

\textsuperscript{327}Peterson, supra note 193 at 64; Pauktuutit, Setting Standards First: Community Based Justice and Correctional Services in Inuit Communities (Ottawa: Pauktuutit, 1995) at 2 [hereinafter Setting Standards First].

\textsuperscript{328}See discussion supra at pages 63-65.

\textsuperscript{329}See Ontario Native Women’s Association, supra note 5 at 44. See also Peterson, supra note 193 at 47-50; McGillivray and Comaskey, supra note 228 at 86.

\textsuperscript{330}La Rocque, supra note 10 at 77; Ontario Native Women’s Association, supra note 5 at 18; Native Women’s Association of Canada, Voices of Aboriginal Women: Aboriginal Women Speak Out About Violence (Ottawa: Canadian Council on Social Development, 1991) at 4 [hereinafter "Voices of Aboriginal Women"]. See also Peterson, supra note 193 at 61.
partners\textsuperscript{331} to a system which has arguably resulted in the significant over-representation and incarceration of Aboriginal men.\textsuperscript{332} According to Emma La Rocque, a Metis woman from Manitoba, Aboriginal communities may have "shied away" from dealing with issues of violence "partly ... to fend off racism and stereotypes".\textsuperscript{333} Aboriginal women may also be unwilling to subject themselves to the victim-blaming which has been documented in the dominant justice system, and which is exacerbated by racism and cultural stereotyping.\textsuperscript{334} For example, a survey of sexual assault cases found that Aboriginal women tend to be blamed when they were intoxicated at time of their assault.\textsuperscript{335}

Cultural differences in the propriety of speaking about the actions of others may also discourage some Aboriginal women from testifying,\textsuperscript{336} as may language differences.\textsuperscript{337}

\textsuperscript{331}Frank, supra note 6 at 16; Monture-OKane, "Reclaiming Justice", supra note 34 at 263; Ontario Native Women's Association, supra note 5 at 46-47.

\textsuperscript{332}Michael Jackson, in "Locking Up Natives in Canada", supra note 168, cites statistics which show that in both the federal and provincial/territorial prison systems, Aboriginal men and women are incarcerated in numbers disproportionately greater than their representation in the population.

\textsuperscript{333}See supra note 10 at 88.

\textsuperscript{334}See Frank, supra note 6 at 16; Courchene, supra note 7 at 96; \textit{Voices of Aboriginal Women}, supra note 330 at 5. See also McGillivray and Comaskey, supra note 228 at 59.

\textsuperscript{335}M. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991), 23 Ottawa Law Rev. 71 at 87-88.

\textsuperscript{336}This has been termed the ethic of non-interference. See Turpel, "Don't Fence Me In", supra note 37 at 175; R. Ross, \textit{Dancing with a Ghost: Exploring Indian Reality} (Markham: Octopus Books, 1992) at 12 - 14. This ethic, articulated in the work of Iroquois psychiatrist Clare Brant, is said to be particularly strong between family members. On the other hand, the existence of such an ethic has been called into question by at least one writer, on the basis that it "unnecessarily typifies the behaviour of First Nations peoples". See R. Kiyoshk,
Delays in processing cases of violence against women, a particular problem in small and isolated communities, may make complainants reluctant to resurrect matters, or to subject the offender to a second round of "justice" where healing has already begun.\(^{338}\)

Another difficulty lies in the lack of support services for Aboriginal women who experience violence. Again, this problem is most acute in remote and isolated communities, and is of particular concern for Aboriginal women with disabilities.\(^{339}\) According to Katherine Peterson, Special Advisor on Gender Equality to the Northwest Territories Minister of Justice, the lack of appropriate services was the most frequent complaint voiced at workshops held throughout the Northwest Territories.\(^{340}\) Even if Aboriginal women do have information about and access to shelters, counselling or advocacy services, these are rarely culturally specific, or even sensitive.\(^{341}\) The small size of many Aboriginal

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\(^{338}\)See Law Reform Commission of Canada, supra note 3 at 32 - 34; *Justice on Trial*, supra note 3 at 4-18.

\(^{339}\)See Peterson, supra note 193 at 58, 68; Courchene, supra note 7 at 99, 103.

\(^{339}\)See Canadian Panel on Violence Against Women, supra note 9 at 160-161. Women with disabilities are also particularly vulnerable to abuse by their service providers.

\(^{340}\)See supra note 193 at 49. See also La Rocque, supra note 10 at 82; Courchene, supra note 7 at 31-32; Pauktuutit, supra note 10 at 35; McGillivray and Comaskey, supra note 228 at 51.

\(^{341}\)See Frank, supra note 6 at 10 - 15; Courchene, supra note 7 at 28 - 32.
communities also brings into question whether shelters are truly "safe". This lack of services, widespread conditions of poverty, housing shortages, and a paucity of employment opportunities may force Aboriginal women to maintain their financial dependence on abusive partners. The high rates of child apprehension from Aboriginal homes may also cause Aboriginal women to keep violence private. Where Aboriginal women do leave their homes and communities to escape violence, they may also lose access to their family, culture, and language.

Where survivors of violence do complain to the police, it is often to seek immediate protection rather than to become involved in a lengthy criminal process. Because of charging and prosecution policies, however, once a survivor makes a complaint of "spousal assault", the police and Crown are obliged to proceed with the matter regardless of the


343See Pauktuutit, supra note 10 at 35.

344See Frank, supra note 6 at 16; McGillivray and Comaskey, supra note 228 at 77; Monture, "A Vicious Circle", supra note 318. See also Kline, "Complicating the Ideology of Motherhood", supra note 215.

345See Turpel, "Home/Land", supra note 126 at 31-2. This article reviews two Supreme Court of Canada cases which held that provincial matrimonial property regimes do not apply on "Indian" reserves, and assesses the impact of this gap on Aboriginal women.

346McGillivray and Comaskey, supra note 228 at 57.
Women who decide they do not wish to testify risk being arrested, subjected to treatment as hostile witnesses, convicted of perjury, or held in contempt of court. Worse still, the policies may remove women’s control over violence itself by failing to recognize that some women choose not to pursue charges, and to remain with abusive partners as a matter of survival. Intimate violence is at its highest and most lethal rate when a woman tries to leave her partner. According to one source, this has driven underground the problem of intimate violence against women in Aboriginal communities.

347 See supra Chapter 3, Part 3. Evidence that a complainant will be "unduly traumatized" by testifying can be taken into account as a factor, however. See Spousal Assault Prosecutions, supra note 246 at V-7-6 to 7.

348 See, for example, the case of Kitty Nowdluk-Reynolds, an Inuit woman who was sexually assaulted and viciously beaten in Iqaluit, N.W.T. in June, 1990. When Ms. Nowdluk ignored her subpoena to attend court, she was subsequently arrested in Vancouver, where she had gone to reside with her husband. During the course of her arrest, Nowdluk was handcuffed, kept in police cells in various locations across Canada on an eight day odyssey back to Iqaluit, and ultimately taken to court in the same vehicle as her attacker. R.C.M.P. Public Complaints Commission, Annual Report 1992 - 93 (Ottawa: Minister of Supply and Services, 1993) at 79 - 80.

349 See Spousal Assault Prosecutions, supra note 246, at V-7-7 to 8.

350 See Criminal Code s.132.

351 For an example of a case where a "reluctant" witness was found in contempt, see R. v. Moore, [1987] N.W.T.R 47 (T.C.). While the federal prosecution policy, as amended in 1993, now discourages the Crown from seeking to have a witness cited in contempt, it remains open to the presiding judge to do so. See R. v. K.(B.), [1995] 4 S.C.R. 186.

352 See Mahoney, supra note 31.

353 See Billson, supra note 342 at 156 - 158, who argues that since the policies were implemented, women are just as likely to call social services as the police, or not seek assistance at all.
The Report of the Special Advisor on Gender Equality in the Northwest Territories recommended that the prosecution policy directives be amended to require the Crown to abide by the wishes of survivors of intimate violence, and the Ontario Native Women's Association concluded that such policies were not appropriate for Aboriginal communities.\textsuperscript{354} In contrast, the Manitoba study on violence against Aboriginal women recommended, on the basis of twenty-six interviews conducted with survivors, that the prosecution policy be maintained.\textsuperscript{355} The prosecution policy was viewed as one way in which Aboriginal women could escape blame for testifying against their (ex)partners. Although there is clearly a range of views as to the propriety of such policies, even those Aboriginal women who support them have experienced difficulties in their engagement with the dominant justice system.\textsuperscript{356} This clearly speaks to the need for Aboriginal women to participate in determining which approaches will work within their own communities.

The corollary of a complainant's lack of control over the decision to prosecute is that where Aboriginal women do want action taken against violence, they may not be in a position to ensure such action. While the police and prosecution policy directives were motivated by the desire to eliminate state inaction in cases of intimate violence,\textsuperscript{357} they are

\begin{itemize}
  \item \textsuperscript{354}See Peterson, supra note 193 at 50; Ontario Native Women’s Association, supra note 5 at 44.
  \item \textsuperscript{355}See McGillivray and Comaskey, supra note 228 at 86. See also Pauktuutit, supra note 10 at 33, which supports charging policies.
  \item \textsuperscript{356}McGillivray and Comaskey, ibid. at 52-72.
  \item \textsuperscript{357}See Ursel, "Examining Systemic Change", supra note 242 at 531 - 2.
\end{itemize}
not always followed. For example, a recent study in British Columbia found that despite the existence of a prosecution policy in that province, almost 30% of wife assault charges were withdrawn or stayed by the Crown.\footnote{358}{See British Columbia Institute on Family Violence, supra note 285. This result is confirmed by Law Reform Commission of Nova Scotia, supra note 226, and by McGillivray and Comaskey, supra note 228 at 21-24, citing a Manitoba study which found similar results.} In some remote communities with no resident police force, the delays in any police response may put women at risk after making a complaint.\footnote{359}{See Pauktuutit, Progress Report No. 1, supra note 10 at 33.} On the other hand, police and prosecution policies may be followed with a vengeance, resulting in charges against women for trying to defend themselves.\footnote{360}{See McGillivray and Comaskey, supra note 228 at 23. See also Snider, "Feminism, Punishment and the Potential for Empowerment", supra note 280 at 85.}

Accounts of traditional Aboriginal justice processes do not establish whether survivors of violence were ever unwilling to participate in the process, and if so, how such cases were dealt with. It may be that reluctance to participate is a recent phenomenon, resulting from the dissonance of the dominant system for Aboriginal women, and their lack of power within post-colonization communities. Ensuring voluntary participation in individual cases may thus be linked to providing Aboriginal women a means of participation in creating justice systems which respond to their needs.

There may still be cases where a survivor does not wish to participate in the justice process, especially in communities which do not take issues of violence seriously. In these cases, a balance would have to be achieved between the survivor's interest in avoiding the
justice process, and the community’s interests in dealing with offenses as a means of
restoring balance and harmony and protecting the survivor and/or other community members.
Again, ensuring the participation of Aboriginal women at all stages of the process of
establishing and operating Aboriginal justice systems would be most likely to result in a just
means of achieving such a balance.

B. Evidence in Cases of Violence

A second problem area for Aboriginal women in the dominant justice system relates
to the parameters of evidence in cases involving violence. Although the rules in this area
derive largely from cases of sexual assault, the principles are more broad based, and will
apply in many cases of intimate violence as well. While Aboriginal women have not written
extensively about evidentiary issues, they have participated in a challenge to discriminatory
evidentiary practices. Moreover, the general comments of Aboriginal women in relation
to their participation in the dominant justice system can clearly be applied in the context of
this issue.

From the mid-1970s until 1992, complainants in sexual assault trials could only be
questioned to a limited extent as to their past sexual conduct with persons other than the

361The Aboriginal Women’s Council was part of the coalition which intervened in the
case of O’Connor, in which a Bishop at a residential school in Williams Lake, B.C. was
charged with several sexual offences against his former students. See infra note 368.
accused. In the case of R. v. Seaboyer; R. v. Gayme, the Supreme Court of Canada struck down this law on the basis that it offended the Charter rights of accused persons. The Court replaced the law with a scheme according to which complainants could be questioned about past sexual conduct with anyone, including the accused, only where such evidence was relevant to an issue in the case, and its probative value was not substantially outweighed by its prejudicial effects. It also recognized that past sexual conduct was largely irrelevant to issues of consent and credibility, and upheld the prohibition of sexual reputation evidence. This judicial scheme was modified by a legislative response from Parliament in the summer of 1992.

Applications by defence counsel to cross-examine complainants on their sexual histories have thus been limited to some extent, but have been strategically replaced with applications for disclosure of complainants’ personal records. While initially, these applications were made strictly in the context of sexual assault cases, the strategy is making

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364 Ibid. at 409.

its way into numerous other cases, including cases involving intimate violence. Counsel have sought such records in enormous variety, including those relating to counselling, child welfare and adoption, drug and alcohol treatment, residential schools, abortion and birth control clinics, social welfare offices, personal diaries, family correspondence, and records from prison, employment, and immigration. The tactic is to look for any information available to discredit the complainant and her version of events, and perhaps even to undermine the complainant’s willingness to participate, and faith, in the system.

Disclosure applications may discourage reporting of offenses to police, medical service providers and counsellors, and deprive survivors of violence of recourse to justice as well as counselling and medical attention. Moreover, until recently the complainant’s ability to challenge such applications was dependent on whether the trial judge exercised his discretion to grant standing in a particular case. Where no standing was granted, complainants had to rely on the Crown, or intervenors, to assert their interests. As noted above, the interests of the complainant and Crown or intervenor do not always mesh in such cases.


368 Factum of the intervenors Aboriginal Women’s Council, the Canadian Association of Sexual Assault Centres, DisAbled Women’s Network of Canada, and the Women’s Legal Education and Action Fund in R. v. O’Connor, (1995 S.C.C.) at 19 [hereinafter "Coalition Factum"].

These issues were considered by the Supreme Court of Canada in O'Connor, a case where a Roman Catholic Bishop was charged with committing sexual offences against several Aboriginal women while they were students and employees at a residential school in Williams Lake, B.C. at which he was principal.\textsuperscript{370} O'Connor sought disclosure of a wide range of records relating to the complainants, including the residential school records he had a hand in creating. The Supreme Court's decision in O'Connor was received with mixed reviews. The Court did send O'Connor back to trial, allowing the survivors of his violence to have their day in court.\textsuperscript{371} On the other hand, the majority decision is highly problematic in that it created a virtual entitlement to access complainants' and third parties' records.\textsuperscript{372} While Parliament has responded with legislation which limits disclosure to a greater extent,\textsuperscript{373} this legislation only applies to sexual offences. The O'Connor regime will still allow a great number of discriminatory disclosure applications, and decisions to be made in cases of intimate violence.

While these evidentiary trends potentially affect all survivors of violence, they are


\textsuperscript{371}O'Connor was convicted after a trial in B.C. Supreme Court on July 25, 1996. His conviction is currently under appeal.

\textsuperscript{372}See Busby, supra note 367; M. MacCrimmon, "Trial by Ordeal", (1996), 1 Can. Criminal Law Review 31. The case is also problematic for its use of a model of conflicting rights, as will be discussed in Chapter 5.

\textsuperscript{373}See Bill C-46, An Act to amend the Criminal Code (production of records in sexual assault proceedings), Second Session, 35th Parliament (1996). This Bill was introduced in the wake of the Supreme Court's decisions in O'Connor and A.(L.L.) v. B.(A.), after extensive consultations between the federal Justice ministry and women's groups, including members of the O'Connor Coalition. The Bill came into effect on May 12, 1997.
arguably of heightened concern for Aboriginal women. As noted in Chapter 1, Aboriginal women are vulnerable to high levels of violence. Aboriginal women are also susceptible to the gender and racially based stereotypes that often underlie disclosure applications. Lastly, as exemplified by the O'Connor case itself, Aboriginal women are likely to be subject to extensive documentation, given the high levels of state intervention in their lives.

Accounts of Aboriginal justice traditions are silent as to whether such evidentiary challenges arose, and how they were dealt with in pre-colonial times. It may be that informal procedures worked very well within traditional communities, where it was difficult to hide what had happened in a particular case. One author notes that the information considered pertinent to understanding an offense would be "shared openly", with no regard for what the Euro-Canadian system would deem relevant or admissible. Moreover, she notes that there was great emphasis placed on accepting responsibility for wrongdoing in traditional Aboriginal communities, often making fact-finding unnecessary.

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374 See Chapter 1, supra at pages 2-3.

375 See La Rocque, supra note 10 at 74; Coalition factum, supra note 368 at 6-7.

376 See discussion in Chapter 3, Part 3 at pages 58-59, supra. See also Coalition Factum, ibid. at 6-8. This may be particularly so for Aboriginal women with disabilities, and Aboriginal women on social assistance.

377 See Dene Justice Project, supra note 46 at 99.

378 See Turpel, "Don't Fence Me In", supra note 37 at 175-6. Turpel draws a distinction between "pertinence" and "relevance", using the latter as a legal term of art.
This may not be the case today, however. The influence of the dominant adversarial system may limit the number of guilty pleas, and encourage Aboriginal defendants to take advantage of strategic tactics such as disclosure applications. New approaches to evidence may also be required in cases where certain matters are beyond the knowledge of the fact-finders in a given case. For example, expert evidence of the effects and indicators of intimate violence may be useful to communities in attempting to resolve such issues. As in the first example, the participation of Aboriginal women is critical to devising and applying rules of evidence which incorporate traditional values and meet contemporary challenges posed by the dominant system.

C. Sentencing

A third level of the criminal justice system about which Aboriginal women have raised concerns is that of sentencing. Aboriginal women often say that what they want is a healing approach to end the violence against them, not an end to their families. However, the limited role of complainants in the sentencing process means there will be few opportunities for the voices of survivors to be heard in this respect.

Victim impact statements may be available in some jurisdictions, but they have not

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379 See RCAP, Bridging the Cultural Divide, supra note 1 at 197-8.

380 Courchene, supra note 7 at 44 - 48; Ontario Native Women’s Association, supra note 5 at 45; Voices of Aboriginal Women, supra note 330 at 26.

381 One case in particular illustrates the absurdity of leaving the complainant out of the process -- she had to rely on defence counsel to make her views known to the sentencing judge. See Highway, infra note 386 at 247.
proved to be an effective way of giving survivors of violence a meaningful voice in sentencing proceedings. A study of sexual assault sentencing judgements over an 18 month period in the Yukon showed that survivors are usually invisible, despite the use of victim impact statements in that jurisdiction. Moreover, it notes that judges often pay little or no regard to the impact of offences, or of sentences, on secondary victims such as children and other family members, and place little weight on the survivor's assessment of her injuries. This may cause judges to speculate on the impact of an offence on a survivor, a process which ignores the diversity of survivors, and may rely on stereotypes. A second study found that there is little support for survivors with the administrative process involved in making a victim impact statement.

Some courts have held that any desire for family preservation by survivors of violence should not influence sentences in cases of intimate violence. This line of cases notes that "wife assault" is a serious problem in society, and recognizes that the relationship

382 See Pasquali, supra note 105 at 42.

383 Ibid. at 42-50.

384 Pasquali, ibid. at 44-46. A recent Supreme Court of Canada case may limit the extent to which any speculation favourable to survivors may take place, however. In R. v. McDonnell, (S.C.C. No. 24814, 24 April, 1997), the Court held that it cannot be presumed that a survivor of sexual assault has sustained psychological harm.

385 See Pauktuutit, Progress Report No. 1, supra note 10 at 9-18, which studied the use of victim impact statements during a pilot project in the N.W.T.

between the survivor and offender is one of trust. Recent amendments to the Criminal Code codify some of these principles. For example, the abuse of a spouse or child, or of a position of trust in relation to the victim are to be considered aggravating factors for sentencing purposes. On the other hand, all available sanctions other than imprisonment that are reasonable in the circumstances are to be considered, with particular attention to the circumstances of Aboriginal offenders.\textsuperscript{387}

Judicial reluctance to take account of the wishes of the survivor may be motivated by a desire to avoid having the accused or others pressure her to plead for leniency, or conversely, to avoid pleas for an overly punitive sentence. Even where this is not the case, the courts often place vague notions of general deterrence before the wishes of the survivor.\textsuperscript{388} Moreover, while the possibility of an alternative approach to sentencing in cases involving Aboriginal intimate violence is left open,\textsuperscript{389} such an approach has no basis in or regard for the perspective of the survivor.

Some recent sentencing initiatives in Aboriginal communities may be more successful at taking the survivor's perspective into account, at least nominally. Circle sentencing cases in several jurisdictions have acknowledged the need for survivors of violence to have input

\textsuperscript{387}See Criminal Code s.718.2, enacted by An Act to amend the Criminal Code (sentencing), S.C. 1995, c.22, s. 6, which came into force on September 3, 1996.

\textsuperscript{388}In one case, the court acknowledged it is unclear whether stiff custodial sentences will actually serve as a deterrent. See Ollenberger, supra note 386 at 180.

\textsuperscript{389}See Highway, supra note 386 at 253.
into dispositions of criminal cases. The challenge in community-based sentencing initiatives is to ensure that such input is meaningful and truly voluntary. In its report on the first sentencing circle held in Nunavik, Pauktuutit, the Inuit Women’s Association, reported that Inuit women, and in particular, survivors of violence, may be pressured into participating in sentencing circles, and may not be in a position to express their true feelings as to an appropriate disposition in front of the offender and other powerful members of the community.

Moreover, some Aboriginal women perceive as too lenient, and indeed racist, the "culturally sensitive" sentencing of Aboriginal men convicted of crimes of violence. Sentences which allow a violent offender to remain in his community are seen as imposing very serious risks for survivors and potential victims of such crimes, emphasizing rehabilitation at the expense of community safety. This was reportedly one of the strongest

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391 See Progress Report Number 1, supra note 10 at 22-25. It is interesting to contrast Pauktuutit’s observations about the process with those of the judge in the reported decision. See R. v. Naappaluk (1993), 25 C.R. (4th) 220 (Ct. of Que.). See also La Rocque, supra note 10 at 86 - 88.

392 See Nahane, supra note 10 at 361-2; La Rocque, supra note 10 at 83 - 85. See also Canadian Panel on Violence Against Women, supra note 9 at 169; McGillivray and Comaskey, supra note 228 at 68-70; Nightingale, supra note 335; Razack, supra note 24. Pauktuutit developed a court challenge of sentencing practices in the N.W.T., arguing that they "violated Inuit women's constitutional rights under section 15 and 7 of the Charter". See Progress Report No.1, ibid. at 13.
themes to emerge at RCAP's Roundtable on Justice Issues.\textsuperscript{393} Such risks are caused by problems of inadequate supervision of probation, a lack of counselling services and other resources and facilities, and a fear of speaking out as undermining the success of the sentencing circle. It has been suggested that in some cases, the permanent removal of offenders from the community may be justified as the only realistic means of protection.\textsuperscript{394}

Political and judicial support for community sentencing, combined with the apathy or outright tolerance of some Aboriginal community leaders and elders towards male violence against women\textsuperscript{395} may exacerbate these risks. The reality of abuse by elders in some communities is also seen to undermine the enhanced weight given to their words by non-Aboriginal judges.\textsuperscript{396} Sentences and processes which implicitly blame the survivor of violence are another problem. This may happen when violence is seen as being "their" problem and responsibility, for example when recommendations for joint counselling are

\textsuperscript{393}See supra note 3 at 8.

\textsuperscript{394}La Rocque, supra note 10 at 84. See also Pauktuutit, Progress Report No. 1, supra note 10 at 24; Nahane, supra note 10 at 362 for discussions about the need for sentences which protect women.

\textsuperscript{395}See Frank, supra note 6 at 18; La Rocque, ibid. at 76; Pauktuutit, ibid. at 23; Nahane, supra note 10 at 362. See also Peterson, supra note 193 at 18; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 485; Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol.3, Gathering Strength, at 64.

\textsuperscript{396}Nahane, ibid. See also Peterson, supra note 193 at 75. One recent case illustrates the power of elders in the community, and how this may impact adversely on their victims. In R. v. F.(A)., supra note 390, the court denied the accused elder's application for a sentencing circle where the victim had been shunned by the community after disclosing her abuse.
Lastly, sentencing reforms have been introduced by some judges without regard to the traditions and culture of the communities in question, and without sufficient planning or preparation to ensure that there is full and meaningful participation towards concrete goals. According to Pauktuutit, sentencing circles have been used in some Inuit communities despite the fact that they build upon First Nations rather than Inuit culture and traditions. My own experience in the Northwest Territories was that the use of community based sentencing initiatives varied greatly from one region to another, usually because of the predispositions of a particular judge rather than the communities themselves.

The realm of sentencing is perhaps the strongest example of how traditions of victim participation could be called upon to recreate a role for survivors of violence in modern day Aboriginal justice systems. The traditional values of compensation, reconciliation and restoration of harmony are also important here, and may allow for the integration of what the Euro-Canadian system currently packages into criminal and civil components.

One Aboriginal justice initiative which has received much attention for its attempt to implement a holistic healing approach in the context of violence is the Hollow Water

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397See Pauktuutit, Progress Report No.1, supra note 10 at 24-5.

398Ibid. at 23.
Community Holistic Circle Healing Program.\textsuperscript{399} The Hollow Water First Nation comprises the Ojibway communities of Hollow Water, Manigotogan, Aghaming and Seymourville located in eastern Manitoba. These communities found their impetus for creating the Community Holistic Circle Healing Program in 1987 after a number of individuals disclosed that they had been abused at a community workshop.

According to a report of the Hollow Water Nation, an Assessment Team of interdisciplinary professionals is called in when an instance of physical or sexual abuse is disclosed by a survivor or offender.\textsuperscript{400} The Team meets with the R.C.M.P. to discuss the reported abuse, and focuses on the protection, support and healing of the survivor. If the R.C.M.P. decide to lay a criminal charge, the matter proceeds through the court system, where a Resource Group may become involved at various stages, particularly sentencing. The Resource group includes a child protection worker, a community health representative, a substance abuse worker, and members of the R.C.M.P., schools, churches, and the community at large. If the matter does proceed through the courts, the Resource Group assists the court in the sentencing process. While the Group initially took the position that incarceration may be required in "serious" cases to break the cycle of abuse in the community, it modified this position when it became difficult to define which cases met this

\textsuperscript{399}See RCAP, \textit{Bridging the Cultural Divide}, supra note 1 at 274; Aboriginal Justice Inquiry of Manitoba, supra note 3 at 493-4; R. Ross, "Duelling Paradigms?", supra note 14 at 243 - 245.

standard, and due to concerns that calls for incarceration may have been motivated by anger, revenge, shame and guilt rather than a desire for a healthy resolution of the problem. The Resource Group now advocates community based dispositions as the most effective way to hold the offender accountable to the survivor, families, and community.\footnote{See Hollow Water Resource Group, 1993 Position Paper, as cited in R. Ross, supra note 14 at 246.}

In order to be accepted into the program, the offender must consent, and must accept responsibility for his actions.\footnote{Community Holistic Circle Healing: Interim Report, supra note 400 at 3.} Assigned members of the Resource Group meet separately with the offender, survivor and their families. The survivor and offender may also meet, where appropriate. If the Police do not lay a charge, or the Crown decides not to proceed,\footnote{A Protocol has been entered into with the Manitoba Justice Department, identifying the Community Holistic Healing Circle as the "preferred alternative" in dealing with offenders. Ibid. at 20.} the Resource Group continues to meet with all parties to advance the healing process. A special gathering and ceremony is held, at which the offender, survivor, family and Resource Group members speak about the offence, how it has affected them, and how the healing process should proceed. The offender makes a public apology, and signs a Healing Contract which requires him to undergo treatment, perform community service work, and to promise against future abuse. The contract is designed by a wide group of people, and may last for a period of two to five years.\footnote{Aboriginal Justice Inquiry of Manitoba, supra note 3 at 495.} When the contract has been completed successfully, a special "cleansing" ceremony is held to mark the restoration of the
offender to the community and a new beginning for all involved.

While this initiative has received much praise, not least for its inclusion of women in the process, others have raised concerns. As is the case with circle sentencing initiatives, it has been questioned whether victims are truly free to participate, or must bow to community pressure and the lack of meaningful alternatives. The prevalence of violence against women and children, and the internalization of dominant attitudes may test whether healing is a viable option today. Moreover, there may be disagreements between certain factions within the community as to whether a disposition is appropriate in a given case. For example, a complainant may wish to reconcile with her spouse while other women in the community favour tough sanctions. Again, the participation of Aboriginal women in the creation, implementation and operation of justice systems and initiatives should go some way towards ensuring that a process for working out such conflicts is in place.

RCAP's view was that the Hollow Water program "truly addresses the needs of all those affected by sexual abuse." See Bridging the Cultural Divide, supra note 1 at 167, 224. McGillivray and Comaskey call the program "innovative", but do not explore it in any detail. See supra note 228 at 26. See also Aboriginal Justice Inquiry of Manitoba, supra note 3 at 493-4.

La Rocque, supra note 10 at 87.

Of course, such disagreements are not restricted to Aboriginal communities.
PART IV - Conclusion

The work of Aboriginal women demonstrates that in theorizing violence, and solutions to violence, factors of gender, culture and other bases of oppression must be analyzed. This cannot be done in a discrete or simplistic fashion: these factors overlap and are intertwined in complex ways, and may be relevant in terms of how different Aboriginal women experience violence, and in constructing systems or reforms appropriate to respond to their particular needs.

Moreover, the work of Aboriginal women shows that the Euro-Canadian justice system has been ineffective at meeting the needs of Aboriginal women who are survivors of violence. While this may be explained at the structural level by cultural dissonance and the operation of dominant ideologies around violence against Aboriginal women, a common thread is the lack of control and input of survivors of violence within the dominant justice system. This exclusion compounds, and is compounded by the exclusion of Aboriginal women from feminist and Aboriginal justice discourses on violence and justice. Most reform efforts within both the dominant system and Aboriginal communities have not provided satisfactory solutions, and some may make matters worse.

Many Aboriginal women writing about violence and law reform issues support self-government and the implementation of Aboriginal justice systems or initiatives. From

\[\text{\textsuperscript{408}}\text{For example, see Pauktuutit, Setting Standards First, supra note 327 at 8; Monture-OKanee and Turpel, supra note 41 at 258; Nahane, supra note 10 at 359; Courchene, supra note 7 at 99; Ontario Native Women's Association, supra note 5 at 89 - 90; Frank, supra}\]
their analyses, several criteria for the creation of such systems emerge, based on both traditional values and the contemporary needs of Aboriginal women. First, Aboriginal women demand that they play a central role in the process of negotiating the creation, implementation and maintenance of justice systems in their communities.409 In the short term, or in those communities which do not support the creation of separate systems, Aboriginal women must be instrumental in reforming the dominant criminal justice system to meet their needs. Second, Aboriginal women advocate an enhanced role for survivors of violence in Aboriginal justice systems.410 Reforms which concentrate on the needs of offenders at the expense of those of survivors are said to be problematic.411 Third, Aboriginal women call for the creation of new systems that are holistic. A reactive focus on purely criminal justice concerns is said to be ineffective, as well as dissonant with traditional Aboriginal values.412 A holistic approach to preventing and dealing with violence would require the provision of services to Aboriginal offenders and survivors of violence, and their families and communities, including policing, dispute resolution, counselling, traditional teachings and healing practices, housing and shelters, health services, education, and

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409 Monture-OKanee and Turpel, ibid. at 265; Nahane, ibid. at 360; Frank, ibid. at 17. See also Greschner, supra note 39 at 341 - 342.

410 Monture-OKanee and Turpel, ibid. at 258; Nahane, ibid. at 359-66; Courchene, supra note 7 at 90 - 92. See also Peterson, supra note 193 at 70.

411 La Rocque, supra note 10 at 85 - 88.

412 Monture-OKanee and Turpel, supra note 41 at 258.
substance abuse treatment. A focus on community-based healing programs and other services is said to offer the best long-term protection for Aboriginal women and the wider community.

At the same time, Aboriginal women have expressed concerns as to the ability of Aboriginal justice systems to protect the needs of Aboriginal women and children. These concerns normally focus on whether Aboriginal women can meaningfully participate in the creation of justice systems, given their current lack of empowerment within their communities. The Report of the Special Advisor on Gender Equality in the N.W.T. cautions that what is perceived to be "community input" must be ensured to be truly representative of the wishes of all members of the community.

As noted in Chapter 3, RCAP recommended that "all nations rely on the expertise of Aboriginal women and Aboriginal women's organizations to review initiatives in the justice area and ensure that the participation of women in the creation and design of justice

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413 La Rocque, supra note 10 at 79-82; Courchene, supra note 7 at 44-48; Ontario Native Women’s Association, supra note 5 at 90-104; Voices of Aboriginal Women, supra note 330 at 25 - 26.

414 See Courchene, ibid.; Ontario Native Women’s Association, ibid. at 45 - 46.

415 Frank, supra note 6 at 21; Nahanee, supra note 10 at 360-362.

416 Peterson, supra note 193 at 74 - 75. At workshops held throughout the Territories, Aboriginal women are said to have expressed the concern that their voices were not being heard, particularly on issues of violence. See also McGillivray and Comaskey, supra note 228 at 72-75.
systems is both meaningful and significant". Some Aboriginal women have looked to the Constitution as a means of protecting and enforcing their interests in this respect. As will be shown in Chapter 6, debate has been vigorous amongst Aboriginal peoples as to whether the Charter can be a tool for progressive reform, or is itself part of the problem. Still, none of the analysis has looked at jurisprudence under the Charter, or s.35 of the Constitution, to evaluate the utility of rights discourse in facilitating the participation of Aboriginal women in justice matters. I will attempt to fill this gap in the next chapter.

\[417\text{Bridging the Cultural Divide, supra note 1 at 275.}\]
CHAPTER 5

USING RIGHTS TO (RE)CREATE THE PARTICIPATION OF ABORIGINAL WOMEN IN JUSTICE

PART 1 - Introduction

During the constitutional amendment negotiations leading to the formulation of the Charlottetown Accord in 1992, discussions on the scope of Aboriginal self-government included a consideration of whether the Charter would apply to Aboriginal governments. Public attention around this issue intensified when the Native Women’s Association of Canada (hereinafter "NWAC") argued that a pro-Charter Aboriginal voice had been excluded from the negotiations. While NWAC supported constitutional recognition of the inherent right to self-government, its contention was that the Charter must apply to Aboriginal governments in order to protect the interests of Aboriginal women, and more particularly to guarantee their equal participation in shaping and implementing such systems of government. NWAC’s strategy around the Charlottetown Accord culminated in a challenge to the constitutional review process itself. This case, which has important implications for the utility of the Constitution for Aboriginal women, will be discussed in

418 The government of Canada ultimately proposed a justiciable right to Aboriginal self-government subject to the Charter. This was supported by the Beaudoin-Dobbie Report on the "Canada Round", as well as by the Assembly of First Nations. See McNamara, supra note 180 at 4-5, 120, 123.

419 For an analysis of the role played by the media in constructing the public face of NWAC’s position, see Bakan, supra note 105, Chapter 8, "Rights as Political Discourse: The Charter Meets the Charlottetown Accord" at 117-133.


Part 2 of this chapter. While NWAC’s claim was ultimately rejected, as was the Charlottetown Accord itself,\(^{422}\) NWAC was successful in planting the Charter issue squarely in the minds of politicians and the Canadian public.

In addition to the political and normative question of whether the Charter should apply to Aboriginal governments, legal discourse has focused on whether the Charter would apply as a matter of constitutional interpretation. Constitutional scholars have noted that the application of the Charter to a given Aboriginal justice system would depend in part on the legal basis for such a system. For example, if a justice system was created by way of federal, provincial or territorial legislation, the Charter would likely apply by virtue of s. 32 of the Constitution Act, 1992, which binds governments to the provisions of the Charter.\(^ {423}\)

Alternatively, if the creation, implementation and operation of Aboriginal justice systems is viewed as an aspect of the inherent right to self-government, there are differing views on whether the Charter would apply. Most recently, RCAP has taken the position that the inherent Aboriginal right to self-government, including governance over justice issues, must be read as being subject to the provisions of the Charter.\(^ {424}\) This is based on an

\(^{422}\)The Accord, a package of constitutional amendments agreed to at Charlottetown on August 28, 1992, was defeated in a national referendum on October 26, 1992.


\(^{424}\)See RCAP, Bridging the Cultural Divide, ibid. at 262-264. See also Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 2, Restructuring the Relationship, at 226-234; RCAP, Partners in Confederation (Ottawa: Minister of Supply and
interpretation of sections 25, 32 and 35 of the Constitution Act, 1982. At the same time, RCAP notes that Aboriginal governments could rely on section 33 of the Constitution Act, 1982, the notwithstanding clause, to exempt justice systems from Charter scrutiny. Moreover, s.25 of the Charter, which provides that the rights and freedoms guaranteed therein shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms pertaining to Aboriginal peoples, is said to offer some protection from what may be dissonant Charter values. It has also been noted that section 28, which guarantees all of the Charter rights equally to men and women, and section 35(4), which guarantees Aboriginal and treaty rights equally to men and women, would offer some protection of Aboriginal women’s equality rights. 425

An alternative interpretation is that the right to establish Aboriginal systems of justice, if entrenched as an Aboriginal or treaty right under section 35 of the Constitution, would not be subject to the Charter. This view is based on the facts that section 32 of the Constitution makes no mention of Aboriginal governments, and that section 35 falls outside the Charter in Part II of the Constitution Act, 1982. 426

I will not concern myself here with the interpretive issue of whether the Charter will

425See Greschner, supra note 39 at 350-353.

426See K. McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms: A Legal Perspective", as cited in RCAP, Bridging the Cultural Divide, supra note 1 at 263.
apply to Aboriginal governments. Rather, I will focus on the utility the Constitution would
serve if it did apply in the context of creating and operating Aboriginal justice systems. Even
in this context, the Charter may continue to be interpreted by judges from the dominant
system. The question of forum will likely depend on the stage at which the Charter
application occurs. Any challenges to the actions of the federal, provincial and territorial
governments, or to the actions of Aboriginal governments in the process of establishing
justice systems or initiatives would likely take place in a Euro-Canadian forum. Once
Aboriginal justice systems were in place, Charter claims relating to issues in a given case
would probably be made to the "trial court". RCAP recommended the creation of a pan-
Canadian appeal body, but noted that it might still be useful for appeals on Charter issues
to be considered by courts from the Euro-Canadian system. As well, the dominant
justice system may continue to operate to varying extents in some Aboriginal communities
for jurisdictional reasons, or as a matter of community choice. Thus an evaluation of the
utility of constitutional rights must also consider who will be making the decisions.

As noted in Chapter 3, the focus of RCAP and others writing on Aboriginal justice
issues has largely been on the Charter’s application to individuals accused of committing
offences. In this context, RCAP recommended the creation of Aboriginal charters as a means
of balancing individual rights and the collective rights of Aboriginal communities. This

427 See Bridging the Cultural Divide, supra note 1 at 278-80.
428 See supra at pages 5-6.
429 See Bridging the Cultural Divide, supra note 1 at 266 - 267. These charters would
supplement rather than displace the provisions of the Canadian Charter.
approach has also received support from the Aboriginal Justice Inquiry of Manitoba,\textsuperscript{430} and the Assembly of First Nations.\textsuperscript{431} NWAC did not object to this approach, but expressed concerns that having such a document accepted by each self-governing entity would create gaps in the protection of Aboriginal women. NWAC,\textsuperscript{432} as well as other Aboriginal women,\textsuperscript{433} have recommended that the Canadian Charter of Rights and Freedoms continue to apply in order to fill these potential gaps. This view is not universally held, however. During the time of the constitutional review process, there were many Aboriginal women active within the Assembly of First Nations, which took the view that the Charter must be opposed as a symbol and tool of colonialism.\textsuperscript{434} While RCAP did pay some heed to the importance of constitutional recognition of the rights of Aboriginal women,\textsuperscript{435} its reports do not address in any concrete way whether the Charter might serve some utility for women, and in particular, survivors of violence.

\textsuperscript{430}See supra note 3 at 335.

\textsuperscript{431}See First Nations Circle on the Constitution, To the Source: Commissioners Report (Ottawa: Assembly of First Nations, 1992), as cited in McNamara, supra note 180 at 152.


\textsuperscript{433}See for example Nahane, supra note 10 at 367-369.

\textsuperscript{434}See Bakan, supra note 105 at 128-9. See also J. Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993), 4 Constitutional Forum 110 at 114. See Chapter 6 for a further discussion of this debate. The Assembly of First Nations, and other Aboriginal organizations, ultimately supported a version of the Accord which made self-government subject to the Charter, with the availability of the s.33 override. See McNamara, supra note 180 at 127.

\textsuperscript{435}See Bridging the Cultural Divide, supra note 1 at 262; Report of the Royal Commission on Aboriginal Peoples, supra note 2, Vol. 2, Restructuring the Relationship at 233.
As noted, the traditional roles of Aboriginal women as valuable participants in justice processes have largely been displaced by colonization. In Chapter 4, three problematic aspects of this lack of control were highlighted in the context of cases of intimate violence against women. In Part 2 of this chapter, I will analyze recent Supreme Court of Canada jurisprudence to evaluate the utility of the Charter in (re)creating\textsuperscript{436} the participation of Aboriginal women in justice processes, with particular reference to these three problem areas. As well, I will review the Court's (non)analysis of the intersecting oppressions identified in the work of Aboriginal women, as discussed in Chapter 4.

Section 35(4) of the Constitution Act, 1982, which provides that Aboriginal and treaty rights are guaranteed equally to men and women, may also be a means by which Aboriginal women can (re)create their roles in justice processes. Little has been written, and there have been no cases, dealing with how this section could be used, either in the context of Aboriginal justice systems, or the dominant justice system. I will attempt to fill that gap in Part 3 of this chapter by reviewing recent Supreme Court of Canada and lower court jurisprudence under section 35.

PART 2 - The Canadian Charter of Rights and Freedoms

As noted, NWAC challenged the 1992 constitutional reform process on the basis that a pro-Charter Aboriginal voice had been excluded from the negotiations. NWAC

\textsuperscript{436}My use of this term is meant to acknowledge that traditional roles may truly be re-created, or they may be created on the basis of traditional values in response to contemporary challenges.
claimed that the federal government violated its rights under sections 2(b), 15, 28 and 35 of the Charter and Constitution by funding and providing seats at the bargaining table to four other Aboriginal organizations - the Assembly of First Nations, the Native Council of Canada, the Metis National Council and the Inuit Tapirisat of Canada. NWAC sought an order prohibiting the federal government from making any further payments to these organizations until it was provided equal funding and an equal right of participation.

NWAC's claims for equal funding and an equal right of participation in the constitutional review process were denied at Federal Court trial level.437 The Federal Court of Appeal reversed this decision, finding that "the Canadian government has accorded the advocates of male-dominated aboriginal self-governments a preferred position in the exercise of an expressive activity", contrary to Aboriginal women's equal right to freedom of expression.438 Still, NWAC's remedy was restricted to a declaration that its rights had been violated. A prohibition was denied on the basis that there was no evidence that equal funding would provide NWAC with an equal voice at the bargaining table, as well as the fact that the constitutional review process had by that time advanced beyond the negotiation stage.439 Thus it has been argued that even at its most successful, NWAC's rights claim had no remedial effects.440 After the Federal Court of Appeal decision, NWAC applied for an


439See ibid at 219-20.

440See Green, supra note 434.
injunction to stop the referendum on the Charlottetown Accord. While NWAC's injunction was denied, the "No" vote triumphed in the referendum. Because all aspects of the accord were voted on as a package, and the voices in opposition to the accord were many and varied, it is difficult to evaluate the role that NWAC's arguments, and rights discourse more generally, played in its defeat.

NWAC's case finally reached the Supreme Court of Canada after the constitutional review process was well over. There, a unanimous Court held that there was insufficient evidence to support NWAC's contention that its right to freedom of expression had been denied on a discriminatory basis. More specifically, the Court found no support for NWAC's claim that the four funded groups were less representative of Aboriginal women, nor that they advocated a "male dominated" form of self government. A majority of the Court stated that sections 15 and 28 of the Charter would avail groups such as NWAC only where their participation was "necessary" to provide an equal voice for the rights of women.

Leaving aside for a moment the wider implications of this decision, the test laid out is too restrictive. Section 15 of the Charter requires an analysis of whether the law in question has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics, and whether the denial results in "discrimination" -- ie.

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441 See Green, ibid. at 116.


443 Ibid. at 651. As will be discussed in Part 3 of this chapter, the Court also found that s.35 of the constitution did not avail NWAC.
whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others, or of withholding or limiting access to opportunities, benefits and advantages available to others. While it is unlikely that any law would on its face exclude Aboriginal women from the process of creating and implementing justice systems, any act of government, whether Aboriginal or non-Aboriginal, which had this effect should come under section 15 scrutiny. This is implicitly recognized in the minority decision of Madame Justice L'Heureux Dube, who believed the majority was improperly limiting the Court's earlier decision in Haig. According to that case, while the government is under no obligation to guarantee expression by a particular means, where it does choose to provide one it cannot do so in a discriminatory fashion. Still, L'Heureux Dube, J. agreed with the majority that NWAC did not lead sufficient evidence to prove it was the victim of discrimination.

It has been suggested that the majority's ruling in NWAC may have been more reflective of the Court's discomfort with "positive rights" rather than a rejection of the


446 See NWAC, supra note 442 at 666-668. The importance of marshalling sufficient evidence to support a finding of discrimination has also been noted in other cases. See Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519; Symes v. Minister of National Revenue (1993), 161 N.R. 243 (S.C.C.).
particular merits of the case. Commentators have noted that the Court is much more inclined to find a rights violation when the state has acted in a particular way, as opposed to when it has failed to act. This may make any failure of Aboriginal governments to include women in the process of creating and implementing Aboriginal justice systems difficult to challenge. Moreover, the Supreme Court's tendency to give deference to so-called political acts of government raises questions as to the utility of the Charter in this respect. Whether the Court would provide a similar level of deference to the acts of Aboriginal governments remains to be seen.

The NWAC case is also disappointing for its failure to consider how gender and cultural inequalities intersect. While the Supreme Court's reticence may be based on its finding of insufficient evidence, the Federal Court of Appeal was not similarly troubled. That court found there was "ample evidence" that Aboriginal women "individually, and ... as a class, remain doubly disadvantaged in Canadian society by reason of both race and sex and disadvantaged in at least some aboriginal societies by reason of sex."

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448 See Trakman, ibid.; D. Pothier, supra note 444; Bakan, supra note 105 at 49-51.

449 See, for example, Egan v. The Queen, [1995] 2 S.C.R. 513.

450 Joel Bakan has noted how the Court's tendency to find certain matters "political" is quite selective with respect to the already established orders of government. See supra note 105 at 38-9.

451 See supra note 438 at 199.
It has been said that if Aboriginal women do participate equally in self-government negotiations, the Charter will have little or no work to do after equality respecting Aboriginal governments are in place.\footnote{See M. A. Murphy, "After All, Violence is Not A Traditional Value: First Nations, Self-Government, Gender Equality and the Charter", in Jackson and Banks, supra note 444, 39 at 61, citing the discussion at a symposium workshop entitled "A Focus on Aboriginal Women and the Charter".} Others, such as NWAC, are perhaps less optimistic, and have argued that the Charter should continue to apply. Given RCAP's position that the Charter will apply to Aboriginal governments, and the likely continued application of the dominant justice system in some circumstances, it is important to look at a second level at which the Charter might provide some utility - protecting the interests of survivors of violence on a case by case basis.

Recent Supreme Court of Canada jurisprudence reveals a fledgling discourse in the importance of protecting the interests and rights of survivors of violence.\footnote{The Supreme Court has also considered the interests of survivors of violence in the context of self-defence. See \textit{Lavallee v. R.}, [1990] 1 S.C.R. 852. See also D. Martinson, M. MacCrimmon, I. Grant, C. Boyle, "A Forum on \textit{Lavallee v. R.}: Women and Self Defence" (1991), 25 U.B.C. Law Review 23.} One aspect of this discourse focuses on section 7 of the Charter, which provides that the rights to life, liberty and security of the person can only be deprived in accordance with the principles of fundamental justice. This line of cases established that section 7 protects the interests of society as well as those of accused persons.\footnote{See \textit{Lyons v. The Queen} (1987), 44 D.L.R. (4th) 193 at 214 (S.C.C.); \textit{R. v. Beare} (1988), 55 D.L.R. (4th) 481 at 493 (S.C.C.); \textit{Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)} (1990), 54 C.C.C. (3d) 417 at 501 (S.C.C.); \textit{Seaboyer}, supra note 363 at 385; \textit{Cunningham v. The Queen} (1993), 80 C.C.C. (3d) 492 }
that section 7 should be viewed as concerned with the interests of complainants to security of the person, and equality.\textsuperscript{455} Moreover, the criminal justice system was said to have an interest in protecting against the unnecessary invasion of a witness's privacy. Despite these pronouncements, however, complainants' interests were seen as secondary to the rights of the accused. In the end result, the Court struck down the rape shield legislation for which women had fought long and hard in the political arena.\textsuperscript{456}

The Supreme Court first spoke in terms of the "rights" of complainants in a sexual assault case concerned with the relevance of medical records evidence. In \textit{R. v. Osolin}, a majority of the Court held that sections 15 and 28 of the Charter, as well as the privacy interests of complainants should be taken into account in determining the reasonable limits of cross-examination on such evidence.\textsuperscript{457} The Court stated that a sexual assault complainant's "right" not to be "unduly harassed and pilloried to the extent of becoming a victim of an insensitive justice system" was to be balanced against that of the accused to a fair trial.\textsuperscript{458} Again, however, a majority of the Court resolved this balance in favour of the

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\item at 499 (S.C.C.); \textit{Rodriguez}, supra note 446 at 593.
\item \textit{Seaboyer}, ibid. at 385.
\item \textit{Ibid.} at 387. For a critical discussion of this struggle see \textit{Fudge}, supra note 279.
\item [1993] 4 S.C.R. 595; (1993), 86 C.C.C. (3d) 481 at 521, 524 (S.C.C.) [hereinafter cited to C.C.C.]. The medical records in this case had already been produced by order of the trial judge as potentially relevant to the reliability of the complainant as a witness, so there was no issue of disclosure. \textit{Ibid.} at 490.
\item \textit{Ibid.}
\end{footnotelist}
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accused. Madame Justice L'Heureux Dube, in dissent, focused on the complainant's "fundamental" entitlement to privacy and control over personal information as aspects of s. 8 of the Charter. She concluded that the interests of sexual assault complainants, and of the wider society militate against the disclosure of and cross-examination on medical records in such cases.

A similar issue was considered by the Supreme Court in the O'Connor case. As noted in Chapter 4, O'Connor, a Roman Catholic bishop, was charged with several sexual offences, and sought disclosure of a wide range of records relating to the complainants, Aboriginal women who were his former students and employees at a residential school in Williams Lake, B.C. After the charges were stayed by the B.C. Supreme Court, the Court of Appeal formulated a procedure for dealing with disclosure which attempted to balance the rights of the accused to a fair trial with the complainants' privacy interests.

At the same time, the Court of Appeal denied the complainants in the case standing to argue that their interests merited protection, finding that they had no "special status" in this respect. According to the Court, the distinction between criminal and civil proceedings

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459 The majority held that the complainant could be cross-examined on the medical records as potentially relevant evidence of a motive to fabricate and the accused's belief in consent. Ibid. at 524.

460 Ibid. at 488-509.

461 Supra note 370.

rendered the complainants mere witnesses for the Crown with no right of standing, despite
the fact that the complainants were ordered by the trial court to authorize the release of
records to the Crown without having received any notice of the original application. The
complainants’ initiation of civil proceedings against Bishop O’Connor was seen as evidence
of "personal interest", robbing them of the required "detachment" to take part in the criminal
proceedings.463

Fortunately, a coalition of women’s groups, including the Aboriginal Women’s
Council, was permitted to intervene in the case at both the Court of Appeal and Supreme
Court levels. In its facta, the Coalition argued that disclosure practices and jurisprudence in
relation to complainants’ personal records "reflect, exploit and reinforce discriminatory
stereotypes about women, children and their sexuality" in such a way that an accused
person’s fair trial rights have "eclipsed" the section 7 and 15 rights of complainants.464

This argument is significant not only for its claim that complainants possess rights,
but for its construction of those rights as coexisting rather than in conflict with the right to
a fair trial.465 The Native Women’s Association of Canada has also argued that a model


464Coalition Factum, supra note 368 at 3. See also factum of the Coalition at the B.C.
Court of Appeal (1994) at 5-8.

465Ibid. at 3 - 4. See also J. McInnes and C. Boyle, "Judging Sexual Assault Law
of conflicting rights is improper in the context of the Charter. According to a model of coexisting rights, women's inequality, as well as violations of their security and privacy interests, should be considered significant in terms of what constitutes a fair trial, rather than opposed to it.

This model of rights finds some support in the Supreme Court of Canada decision in Dagenais v. C.B.C., a case dealing with the right of a third party to challenge a publication ban imposed in a criminal trial. In this case, the Court stated that a hierarchical approach to rights is to be avoided. Rather, where the protected rights of two parties conflict, the Charter requires that a balance be struck which "fully respects the importance of both sets of rights". At the same time, the Court acknowledged that rights should not be construed as necessarily involving a "clash between two titans". For example, the right to freedom of expression was said to be motivated in part to ensure the fairness of the trial process.

Unfortunately, Dagenais's promise of a richer, less hierarchical analysis of rights has not been kept. In O'Connor, a majority of the Supreme Court of Canada widened the parameters for the disclosure of complainant's personal records by using a model which

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468 Ibid. at 877.

469 See ibid. at 881 - 884.
pitted a complainant’s privacy rights against an accused person’s right to full answer and
defence. While the Court explicitly adopted a balancing approach in holding that certain
factors must be considered in determining whether the evidentiary value of the records in
question outweighs the negative effects of their production,470 it expressly failed to include
other factors, such as women’s equality and the effect of production on the reporting of
sexual offences. These factors were found to be relevant by the dissenting justices, who
stated that "privacy and equality must not be sacrificed willy-nilly on the altar of trial
fairness".471 Moreover, the dissenting justices accepted the Coalition’s argument that the
eradication of discriminatory disclosure practices will enhance the fairness of sexual assault
trials.472

The majority’s failure to consider the case from the perspective of women’s equality
also resulted in it missing an opportunity to introduce the notion of intersecting inequalities
into the Supreme Court’s jurisprudence. The Coalition had argued that multiply
disadvantaged women, including Aboriginal women, women with disabilities, and women
living in poverty, were all "particularly susceptible" to discriminatory disclosure practices,

470 The factors found to be important in deciding whether to order production of the
documents include: the extent to which the records are necessary for the accused to make
full answer and defence, their probative value, the reasonable expectation of privacy
associated with the records, whether production would be premised upon discriminatory
beliefs or biases, and the potential prejudice to the complainant’s dignity, privacy or security

471 See judgement of L’Heureux Dube, J. at 492. The Court’s decision on the disclosure
issue was 5:4. The four judges dissenting on this point were in the majority regarding the
disposition of the case, however.

472 See ibid. at 491.
given the disproportionate number of records made in relation to these women. Although this argument had resonance for the dissenting justices, the majority neglected to address it in their reasons for judgement.

The same day as O'Connor, the Supreme Court's decision in the companion case of A. (L.L.) v. B. (A.) was released. One of the issues in this case was whether complainants and third party record holders have standing in criminal trials to make submissions in relation to disclosure applications. The Court expanded on another, significant aspect of the Dagenais case, in which it was held that trial judges have the discretion to grant standing to third parties in criminal proceedings for the purposes of speaking to interlocutory orders which impinge upon their Charter rights. The Court also outlined the procedures to be followed by third parties in appealing interlocutory orders which unjustifiably limit their Charter rights. For provincial court orders, applications for certiorari are to be made to the superior court, and for supreme court orders, appeals are to be made directly to the Supreme Court of Canada.

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473 See Coalition factum, supra note 368 at 5-8.

474 See judgement of L'Heureux Dube, J., supra note 370 at 487-488. Her judgement focused on the impact of disclosure practices on women with disabilities.


476 See Dagenais, supra note 467 at 869.

In A.(L.L.) v. B.(A.), the Court held that the complainant and third party record holders have standing to speak to, and to appeal disclosure applications, reversing the Court of Appeal decision in O'Connor on this point. According to the Court, the principles of natural justice require that courts provide an opportunity to be heard to those who will be affected by the courts’ decisions. This holding is an important step, at least in theory, in providing survivors of violence with remedial avenues for challenging aspects of criminal trials which violate their Charter rights. The Court did not, however, go so far as to call standing a "right", nor did it establish a survivor’s right to participate in justice processes more broadly. The decisions in Dagenais and A.(L.L.) v. B.(A.) may be restricted to granting standing to complainants to speak to interlocutory matters where it is seen that their privacy or other interests are directly affected. The dominant construction of complainants as "third parties" remains, and may be difficult to overcome in this context.

A third decision in a case involving disclosure issues was handed down by the Supreme Court of Canada in February, 1997. In R. v. Carosella, the same five member majority as in O'Connor stayed criminal proceedings against the accused because a sexual assault centre at which the complainant had sought counselling and information destroyed their interview notes. While there are many unsettling aspects to this case, the most troublesome in terms of rights theory is the majority’s virtual extension of the Crown’s


479 See [1997] S.C.J. No. 12. This decision was reached even though the records had not been subpoenaed prior to their destruction.
disclosure obligations to third parties, and the elevation of disclosure to a constitutional right, the breach of which is assumed to be prejudicial to the accused.\textsuperscript{480} Even if the Court had engaged in a balancing of this right with those of the complainant, sexual assault centre, or the wider society, the construction of the disclosure obligation in such a fashion essentially predetermines the question.\textsuperscript{481} There was a complete lack of acknowledgement of any rights beyond those of the accused, however. On the other hand, the majority was fairly quick to speculate as to the relevance of the missing evidence, and to make assumptions about complainants' credibility.\textsuperscript{482}

The notion of rights for survivors of violence has other limits. In the case of \textit{R. v. X.}, the Ontario High Court of Justice rejected a bid by a complainant in a rape trial to quash her subpoena on the basis that her rights under section 7 of the \textit{Charter} were violated.\textsuperscript{483} Although the complainant was suffering considerable emotional distress as a result of her involvement in the matter before the court, it held that there was no violation of section 7. The court found that any violation of section 7 would have been upheld under section 1 in

\textsuperscript{480}Ibid. at paras. 25-37. In contrast, the dissenting judges viewed the case as one involving issues of missing evidence rather than disclosure obligations. They held that the accused must demonstrate a real likelihood of prejudice in order to establish a breach of his right to full answer and defence. Ibid. at para. 107.

\textsuperscript{481}As noted by McInnes and Boyle, supra note 465 at 355, where legislation, and I would add, the actions of governments and third parties, has already been found to violate an accused person’s rights, any balancing with the complainant’s rights in the context of s.1 is unlikely to result in the legislation or action being upheld.

\textsuperscript{482}See ibid. at paras. 44-47.

\textsuperscript{483}(1983), 43 O.R. (2d) 685 (H.C.J. per Linden, J.).
any event, as:

[it] is a sensible, necessary rule of our society to require the giving of testimony, if needed, even where the emotional tranquillity of the individual must suffer as a result, and even if it puts them at some risk of retaliation.484

Although this case was decided in the early days of the Charter, it does not appear to have been overruled. Moreover, its principles are supported by several recent Supreme Court of Canada cases which provide that persons accused or under investigation are compellable witnesses in some proceedings.485 While there are some cases providing for a broad construction of section 7 to include the freedom of personal choices and freedom from state imposed stress,486 these would be unlikely to protect a complainant where her rights were balanced against those of society.

The courts have not yet addressed the issue of whether survivors of violence have standing to speak to sentencing related matters. Decisions of lower courts on the importance of including survivors in sentencing initiatives in Aboriginal communities do not ground their analyses in any Charter right to participate.487 On the other hand, a recent decision of the

484Ibid. at 689.
485See Thomson Newspapers, supra note 454; and B.C. Securities Commission v. Branch, [1995] 2 S.C.R. 3, involving compellability under combines and securities legislation; and Primeau and Jobin, supra note 477, where it was held that accused persons are compellable witnesses at the preliminary inquiries and trials, respectively, of their co-accused.
487See Chapter 4, Part 3C.
Supreme Court of Canada on sentencing in cases of sexual assault held that harm to the survivor cannot be presumed.\(^{488}\) This may result in more survivors participating in the sentencing process, even where they do not wish to undergo the likely re-victimization of being questioned about the extent of their harm.

As compared to the rights discourse of the Supreme Court of Canada, federal and provincial legislation have been less equivocal in providing that survivors of violence have interests to be protected in criminal matters. In several recent amendments to the Criminal Code, Parliament has begun a trend of including preambles which set out the guiding principles of the legislation in question. An example of one such preamble provides that Parliament:

recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms;

and that it

desires to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the Canadian Charter of Rights and Freedoms for all Canadians, including those who are or may be victims of violence.\(^{489}\)

\(^{488}\)See McDonnell v. The Queen, supra note 384.

\(^{489}\)An Act to amend the Criminal Code (self-induced intoxication), 1st Session, 35th Parliament (1994-95). See also An Act to amend the Criminal Code (sexual assault), supra note 365.
Most recently, Bill C-46, An Act to amend the Criminal Code (production of records in sexual assault proceedings), provided in its preamble that:

the rights guaranteed by the Canadian Charter of Rights and Freedoms are guaranteed equally to all and, in the event of a conflict, those rights are to be accommodated and reconciled to the greatest extent possible.

These pronouncements were not taken out of thin air. Women's groups were active in lobbying the government for these legislative changes, and the references to the Charter therein.

At the provincial/territorial level, several jurisdictions have enacted laws protecting the rights of victims of crime. In British Columbia, the Victims of Crime Act provides that a victim must be treated with courtesy and respect and without discrimination (s.2), and has access to information regarding the justice system, victim services, and the status of the criminal investigation, proceedings and decisions, including the decision whether to lay charges. The victim still has no say in these decisions, only the right to be informed as to what they are. The government must promote the goals of developing and promoting equal access to victim services, including "culturally sensitive" services for Aboriginal

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490 Supra note 373.

491 See, for example, Women's Legal Education and Action Fund, Submissions to Standing Committee on Justice and Legal Affairs Review of Bill C-46 (Toronto: LEAF, 1997); National Association of Women and the Law, Submissions to the Standing Committee on Bill C-46, An Act to amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings (Ottawa: NAWL, 1997).

492 S.B.C. 1995, c.47.

493 See sections 5, 6, and 7.
persons (s.8(g)). While this legislation does not challenge the dominant model of criminal justice in which the matter is seen as involving a dispute between the state and the accused, it does provide more space for survivors of crime, and contributes to the notion of rights for survivors.

It can thus be said that the Charter has had a positive impact for women, particularly survivors of violence, in the legislative arena, and perhaps on the legislative process itself. A more open, and widely consultative process, at least within the federal Justice department, leads one to ask whether NWAC would be excluded from the process today as it was in 1992. Still, the NWAC case, and cases on standing leave some doubt as to whether a right to participate in the political process within Canadian or Aboriginal governments would be found to exist. While the notion of standing will be significant in providing an opportunity for survivors of violence to participate in criminal justice processes in some circumstances, it is unclear how far this notion will extend. Within the dominant system, even a broadly construed right of participation may not ensure equality for survivors of violence, given the Supreme Court’s adherence to a model of conflicting rights, and its failure to consider how bases of disadvantage such as gender and culture intersect.

494 This can by no means be taken for granted, however. For example, in March, 1997 the B.C. Native Women’s Society commenced an action in federal court, alleging that the Indian Act’s failure to provide for the distribution of matrimonial property on reserves discriminates against Aboriginal women. According to a news report, the case was brought after all other avenues of resolving the issue, including lobbying, had failed. See A. Huang, "Fighting for fairness", Kinesis (April, 1997), at 3.
As noted, section 35(4) of the Constitution Act, 1982 is another source of rights for Aboriginal women, providing that Aboriginal and treaty rights are guaranteed equally to men and women. Given that this section incorporates notions of both gender and culture, it seems worthwhile to consider its utility as a vehicle for protecting and enforcing the rights of Aboriginal women in the justice context. I will now turn to an examination of the Court's decisions under section 35 to evaluate whether this section holds more promise for Aboriginal women than the Charter.

PART 3 - Aboriginal Rights: Section 35 of the Constitution Act, 1982

Section 35 falls outside the Charter in Part II of the Constitution Act, 1982, "Rights of the Aboriginal Peoples of Canada". This section provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Of particular significance for Aboriginal women is section 35(4), which was added to the Constitution after lobbying on the part of Aboriginal women. Section 35(4) provides that "notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons".

While there have been no cases decided by the Supreme Court of Canada under section 35 in the specific context of Aboriginal justice issues, the scope of section 35 in this

context could arise in different ways. For example, an accused could ask for a sentencing circle to decide his fate in a particular case. In support of his application, he could argue that he had an Aboriginal right to participate in a circle, protected under section 35. Alternatively, a survivor could ask for the opportunity to participate in the sentencing process beyond that currently provided for in the Criminal Code, based on an Aboriginal right to do so under section 35. The Supreme Court's pronouncements on section 35 in other areas have implications for its interpretation in this context. As well, lower court judgements have addressed the application of section 35 in contexts analogous to justice. A recent case at the federal court level has finally given judicial consideration to the import of s. 35(4) of the Constitution, and will be discussed later in this part. Again, I will focus on the right of a survivor to participate, or not to participate in Aboriginal and dominant justice processes.

The first Supreme Court of Canada decision dealing with section 35 was R. v. Sparrow, a case involving Aboriginal fishing rights.\(^{496}\) Dickson, C.J.C. and La Forest, J., speaking for a unanimous Court, held that the word "existing" protects under section 35(1) Aboriginal rights which were in existence when the Constitution Act, 1982 came into effect. According to the Court, extinguished rights are not revived by the Act. Moreover, the Court found that the phrase "existing aboriginal rights" must be interpreted flexibly so as to avoid a notion of frozen rights, and permit the evolution of rights over time.\(^{497}\) According to the


\(^{497}\)Ibid. at 421 - 423.
Court, section 35 should be interpreted in a purposive manner, leading to a "generous, liberal interpretation". A further guiding principle for the interpretation of section 35 is that "the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples". The relationship between the government and Aboriginal peoples was said to be "trust-like" rather than adversarial.\textsuperscript{498} Where it is alleged that legislation has the effect of interfering with an existing Aboriginal right, the inquiry will begin with a reference to the characteristics of the right at stake, with "sensitivit[y] to the Aboriginal perspective" on the meaning of the right being "crucial".\textsuperscript{499}

In \textit{Sparrow}, the Court did not spend much time coming to the conclusion that the accused, a member of the Musqueam nation, was exercising an existing Aboriginal right to fish salmon when he was charged with violating federal fisheries regulations by using a drift net longer than that permitted by his band's food fishing licence. The Court noted in passing that for the Musqueam, the salmon fishery has always been "an integral part of their distinctive culture".\textsuperscript{500} These words would later be taken up by this and other courts as a test for the existence of Aboriginal rights. The Court did not, however, wade into the waters of whether the Aboriginal right in question could be exercised by the rights holders according to their own discretion, as argued by the accused and intervenors. For the purposes of the appeal, the Court found it was sufficient to characterize the scope of the right

\textsuperscript{498}Ibid. at 433-434.

\textsuperscript{499}Ibid. at 437.

\textsuperscript{500}Ibid. at 427.
at issue as including the right to fish for food consumed for social and ceremonial activities. The more contentious issue was whether that right had been extinguished by years of regulation under the Fisheries Act.

In looking at the issue of extinguishment, the Court noted how regulation of the fishing industry had become more stringent over time, coinciding with the development of the non-Aboriginal commercial and sports fishing industries. Contrary to the government’s position, however, the Court held that extensive regulation does not amount to extinguishment. In the Court’s opinion, the appropriate test for extinguishment is one of clarity of intention, that is, "the sovereign’s intention must be clear and plain if it is to extinguish an Aboriginal right." That kind of clear and plain intention was found to be lacking in the Fisheries Act and regulations.

Having found the existence of an unextinguished right, the next step for the Court was to develop a test for determining whether an Aboriginal right has been infringed by legislation or government action. The Court held that to determine whether there has been a prima facie interference with the right, it is necessary to look at 1. whether the limitation is reasonable; 2. whether the limitation imposes undue hardship; and 3. whether the limitation denies to rights holders their preferred means of exercising the right. At this stage, the onus is on the individual or group challenging the legislation to prove a prima facie

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501 Ibid. at 429.

502 Ibid. at 427. The burden of proof is on the Crown at this stage.
Where a prima facie interference is proved, the next step is to determine whether the legislation can be justified. While acknowledging that s. 35 falls outside the Charter and section 1, the Supreme Court found it appropriate to read in a test for justifying the interference with Aboriginal rights as contemplated by the words "recognized and affirmed". According to the Court, these words incorporate the fiduciary relationship, and hence imply "some restraint on the exercise of sovereign power." The Court’s test for justification closely mirrors that it has developed under s. 1 of the Charter. First, a valid legislative objective must be established. The Court noted that "objectives purporting to prevent the exercise of section 35(1) rights that would cause harm to the general populace or to Aboriginal peoples themselves" would be valid here, as well as other objectives found to be "compelling and substantial". The Court rejected a "public interest" objective as too vague and broad to justify a limitation on Aboriginal rights.

The second branch of the justification test was said to require a review of whether the legislation can be justified in light of the Crown’s responsibility to and trust relationship with Aboriginal peoples. The questions to be asked in this review, depending on the circumstances of the case, include whether there has been as little infringement as possible.

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503 Ibid. at 437.
504 Ibid. at 435.
505 Ibid. at 438.
to effect the desired result, and whether the Aboriginal group in question has been consulted regarding the measures being implemented. According to the Court, justification amounts to a heavy burden on the part of the Crown.\textsuperscript{506} In the circumstances of the \textit{Sparrow} case, the Court found there was insufficient evidence to proceed with the section 35 analysis, and sent the matter back to trial.

Not surprisingly, \textit{Sparrow} has been the subject of much academic comment. One of the major criticisms of the decision is that it takes as a given the Crown’s sovereignty over Aboriginal peoples in Canada.\textsuperscript{507} Implicit in this notion of sovereignty is the unquestioned ability of the Crown to unilaterally extinguish the rights of Aboriginal peoples.\textsuperscript{508} Of course, if the Court had challenged the sovereignty of the Crown, it would also have undermined its own authority, including its authority to decide the \textit{Sparrow} case itself.\textsuperscript{509} Additionally, the justification test has been criticized on the basis that a fiduciary duty cannot be reconciled with the infringements of Aboriginal rights.\textsuperscript{510} In hindsight, however,

\textsuperscript{506}Ibid. at 439-443.


\textsuperscript{508}Doyle-Bedwell, ibid.


Sparrow stands as a high water mark in the jurisprudence on Aboriginal rights. Subsequent decisions of lower courts, and of the Supreme Court have narrowed the principles of Sparrow considerably.

One of the most notorious cases dealing with Aboriginal rights post-Sparrow is the British Columbia case of Delgamuukw v. British Columbia. This case involves a claim by the hereditary chiefs of the Gitksan and Wet’suwet’en nations, on behalf of their peoples, to ownership of and jurisdiction over a large area of central British Columbia. After a lengthy trial in the British Columbia Supreme Court, Chief Justice McEachern found that any Aboriginal right of jurisdiction or self-government was extinguished by the exercise of Crown sovereignty over the lands before confederation. He nonetheless granted a declaration that the claimants were entitled to use vacant Crown lands for Aboriginal purposes, subject to the laws of the province.\(^{511}\)

On appeal, and after the government abandoned its argument of a "blanket extinguishment" of Aboriginal title, a unanimous five member panel of the British Columbia Court of Appeal declared that the plaintiffs have unextinguished, non-exclusive rights in respect of land protected under section 35, including the rights of occupation and use of

much of the claimed land. The parties had agreed to negotiate the precise content of those rights, and the boundaries of the territory wherein they could be exercised. This left the Court to determine whether the Aboriginal rights extended to jurisdiction, or self-government over the lands in question.

A three member majority of the Court did not decide whether Aboriginal rights under section 35, as defined in Sparrow, contemplate an Aboriginal right of self-government. The majority found that any such right had been extinguished by the Crown, either by the exercise of British sovereignty over the colony of British Columbia prior to 1871, or by British Columbia’s entry into Confederation in 1871. Accordingly, the majority found there was no existing Aboriginal right to make and enforce laws governing the Gitksan and Wet’suwet’en’s land, resources or peoples, and no existing right to control or manage their resources. In the Court’s view, these were matters "ripe for negotiation and reconciliation" between the parties. Importantly, the majority held that the "clear and plain" test for legislative extinguishment of Aboriginal rights "may be declared expressly or manifested by unavoidable implication". In other words, the only possible interpretation of the legislation must be that Aboriginal rights were intended to be extinguished. Section 91(24)

512(93), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.) [hereinafter cited to D.L.R.]; leave to appeal to S.C.C. granted. The appeal was heard by the Supreme Court in the summer of 1997. Their decision was reserved.


514Ibid. at 520.

515Ibid. at 523 per Macfarlane and Taggart, J.J.A., and at 595 per Wallace, J.A.
of the Constitution Act, 1867, which conferred "exclusive" power on the federal Crown to legislate in relation to "Indians" and lands reserved to Indians, was found to meet this test, at least in relation to self-government over land and resources.516

The dissenting justices were of the view that the Aboriginal right to self-government was not extinguished. Lambert, J.A. and Hutcheon, J.A., in separate judgements, expressed the view that the Gitksan and Wet'suwet'en peoples have the right to "self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity".517 However, they agreed with the majority that in principle, extinguishment of Aboriginal rights may be possible by necessary implication.518

The majority decision in Delgamuukw has been criticized as departing from the broad principles in Sparrow, and for confusing the actual extinguishment of Aboriginal rights with governments' capacity to extinguish such rights.519 Moreover, it runs contrary to the views of the Royal Commission on Aboriginal Peoples that an Aboriginal right of self-government

516Ibid. at 535 per Macfarlane, J.A. In obiter, Macfarlane suggested that perhaps s.91(24) extinguished Aboriginal jurisdiction even more broadly.

517Ibid. at 741 per Lambert, J.A., and at 764 per Hutcheon, J.A..

518Ibid. at 667-8 per Lambert J.A., and at 753 per Hutcheon, J.A.

519See, for example, B. Ryder, "Aboriginal Rights and Delgamuukw v. The Queen" (1994) 5 Constitutional Forum 43 at 44-5.
has not been extinguished, merely heavily regulated.\textsuperscript{520} The Supreme Court of Canada heard the appeal in the \textit{Delgamuukw} case during the summer of 1997, reserving its decision. The Court's judgments in a number of other cases released in 1996 do not bode well for a majority of the Court finding in favour of a broad, unextinguished Aboriginal right of self-government.

Before turning to these cases, it is useful to review a second decision of the British Columbia Court of Appeal which interprets the majority's decision in \textit{Delgamuukw}. In the case of \textit{Casimel v. Insurance Corporation of British Columbia}, the Court held that Aboriginal rights of "social self-regulation" had not been subject to blanket extinguishment by British Columbia's entry into Confederation. Such rights were said to include those arising from marriage, adoption and inheritance. According to the Court, each case involving such rights must be looked at on the basis of its particular circumstances to determine the scope and content of the specific right in the Aboriginal society, and the relationship between the right and the general laws of the province.\textsuperscript{521} In the case at bar, the Court found that an Aboriginal right to customary adoption existed among the Stellaquo band of the Carrier people, and had not been extinguished by provincial adoption legislation, or by the \textit{Indian Act}.\textsuperscript{522} This case leaves open the possibility that the regulation of matters relating to justice could be viewed as a form of social self-regulation, and hence as an Aboriginal right.

\textsuperscript{520}See \textit{Partners in Confederation}, supra note 424 at 35.


\textsuperscript{522}Ibid. at 32.
protected under section 35.

In 1996, the Supreme Court of Canada released a number of decisions dealing with Aboriginal rights. Three of these cases related to fishing rights in British Columbia, and are often referred to as the Van der Peet trilogy.\(^{523}\) In R. v. Van der Peet, the first decision, the Court considered a factual context similar to that in Sparrow, namely whether fisheries regulations under which the accused was charged when she sold ten salmon were contrary to section 35(1) of the Constitution Act, 1982. The Court split seven to two in its decision, with the majority finding that there was no existing Aboriginal right to exchange fish for money or goods.\(^{524}\) In reaching its decision, the Court made several pronouncements regarding the scope of Aboriginal rights which are significant, and which go beyond the Court's judgment in Sparrow.

First, Lamer, C.J., writing for the majority, made several broad interpretive comments about section 35 rights. He repeated the statement from Sparrow that such rights are to be given a generous and liberal interpretation, and noted that any ambiguity must be resolved in favour of Aboriginal peoples.\(^{525}\) Moreover, the Court articulated its view of


\(^{524}\)[1996] 4 C.N.L.R. 177 at 210-214. The majority decision was written by Lamer, C.J., with L'Heureux Dube, J. and McLachlin, J. writing separate dissenting judgments.

\(^{525}\)Ibid. at 192.
the purposes behind section 35. These were said to be first, a recognition that Aboriginal peoples were "already here" at the time of European settlement, and second, the reconciliation of pre-existing Aboriginal societies with the sovereignty of the Crown.\textsuperscript{526}

Lamer, C.J. noted that while they are equal in importance, and significance to Charter rights, Aboriginal rights are different. In the view of the Chief Justice, Aboriginal rights are "held by Aboriginal peoples because they are Aboriginal". He set the Court’s task as defining the scope of section 35 "in a way which captures both the Aboriginal and the rights in Aboriginal rights".\textsuperscript{527}

The majority's test for whether an activity amounts to an Aboriginal right is taken from the passage in Sparrow mentioned above. According to the Court, Aboriginal rights are those activities which are elements of a tradition, custom or practice which is "integral to the distinctive culture" of the group claiming the right.\textsuperscript{528} In identifying the exact nature of the activity which is claimed to be a right, the first step under section 35 analysis, the factors to be considered were found to include: the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right. The second step is to determine whether that activity was "integral to a distinctive culture", which was said to require proof that the practice, tradition

\textsuperscript{526}Ibid. at 193. This view was said to be supported by jurisprudence and scholarly work from Canada, the United States, and Australia.

\textsuperscript{527}Ibid. at 190.

\textsuperscript{528}Ibid. at 201.
or custom was a central and significant part of the distinctive culture - that it was one of the things that "truly made the society what it was".\footnote{Ibid. at 203-204.}

For the majority, the relevant time period to determine whether the activity was integral to the Aboriginal community was said to be prior to contact with non-Aboriginal peoples. While the Court recognized that it may be "next to impossible" to marshall evidence from pre-contact times, it allowed that claimants may use evidence of practices post-contact which demonstrate their pre-contact origins.\footnote{Ibid. at 205.} Also significant in this respect is the majority’s point that the Court must look at the evidence from the perspective of the Aboriginal people claiming the right in question. That perspective, however, is to be framed in terms "cognizable to the Canadian legal and constitutional structure".\footnote{Ibid. at 202.} The majority took no position on whether the disappearance of a practice precludes its existence as an Aboriginal right, but noted that the continuity of a practice is important to identifying it as a right deserving protection under section 35. The interruption of a practice which is later resumed is said not to preclude the establishment of a right protected under s. 35.\footnote{Ibid. at 206-7.}

In the circumstances of the Van der Peet case, the Court construed the right claimed as the exchange of fish for money or other goods, and found that the evidence did not
support the claim that this was an integral, significant or defining feature of the Sto:lo nation.\textsuperscript{533} It was therefore not necessary for the majority of the Court to consider the issue of extinguishment.

Some of the most incisive criticism of the majority judgment in \textit{Van der Peet} came from the dissenting justices. Madame Justice L’Heureux Dube stated that she favoured a more "abstract" and general approach to rights as compared to the particular approach of the majority. Moreover, she criticized Lamer, C.J.’s construction of Aboriginal rights as "overly majoritarian", and contrary to the imperatives in \textit{Sparrow} that courts take account of fiduciary duty and the perspective of the Aboriginal claimants. For L’Heureux Dube, J., the purpose of the Aboriginal rights in section 35 arises from the historical use and occupation of lands by Aboriginal peoples. Activities should be seen as manifestations of culture rather than rights in and of themselves.\textsuperscript{534} Moreover, she disagreed with the majority’s arbitrary choice of contact as the relevant time period, arguing that such a cut off point overemphasizes the impact of European influence on Aboriginal communities, imposes a heavy and unfair evidentiary burden, and makes inappropriate and unprovable assumptions about Aboriginal culture and societies.\textsuperscript{535} The approach to Aboriginal rights recommended by L’Heureux Dube, J. is said to be "evolutionary" rather than frozen, and "dynamic" - s. 35 would protect those practices which are sufficiently significant and fundamental to the

\textsuperscript{533}\textit{Ibid.} at 216.

\textsuperscript{534}\textit{Ibid.} at 230-233.

\textsuperscript{535}\textit{Ibid.} at 234-5.
culture and social organization of the Aboriginal group in question, and which have been so for a substantial continuous period of time. Applying this test, she found the Sto:lo possess an Aboriginal right to sell and trade fish for livelihood, support and sustenance. Madame Justice L’Heureux Dube would have remitted the case back to trial for further evidence on the issues of extinguishment, infringement and justification. In obiter, however, she noted that she disagrees with the comments regarding extinguishment in Delgamuukw, finding that legislation necessarily inconsistent with the continued enjoyment of Aboriginal rights is not sufficient to meet the "clear and plain" test.

Similarly, McLachlin, J. found the majority’s statement of the purposes of section 35 to be too narrow, and its approach to section 35 too particular, effectively freezing Aboriginal communities in their ancient modes, and denying them the right to adapt to a changing society. For her, "Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the Aboriginal people in question". Moreover, she found that there must be continuity of the activity over time, a link between the historical practice and the right asserted. On the other hand, a failure to exercise the right does not necessarily amount to abandonment, provided a link can be

536Ibid. at 237 to 238. According to L’Heureux Dube, J., a period of twenty to fifty years is a useful reference point on the question of what amounts to a substantial period of time. It could also be argued that this time period is arbitrary, however.

537Ibid. at 254.

538Ibid. at 226.

539Ibid. at 261.
demonstrated between the modern and historical practices. McLachlin favours what she called an "empirical approach", looking to history to see what types of practices have been identified as Aboriginal rights in the past.\textsuperscript{540} Following this approach, McLachlin, J. found there was an existing Aboriginal right to sell fish for commercial purposes which, based on the test from \textit{Sparrow}, had not been extinguished. These findings made Madame Justice McLachlin the only judge in \textit{Van der Peet} to consider the issue of justification. Modifying the majority's test for justification from \textit{Gladstone}, infra, McLachlin, J. found that the limitation on the Aboriginal right could not be justified.\textsuperscript{541}

The \textit{Van der Peet} case has also been criticized by commentators. For example, John Borrows notes that the majority decision relies too heavily on what was, "inviting stories about the past", an ignorance of the present, and "the potential to reinforce stereotypes" about Aboriginal peoples. Borrows is also critical of the choice of contact as the relevant time period for determining the existence of Aboriginal rights, noting that such a standard is invented, with no basis in Aboriginal or non-Aboriginal law.\textsuperscript{542} Another difficulty with the judgments, both majority and dissenting, is the requirement of continuity of Aboriginal practices, customs or traditions. While leaving some room for practices which are interrupted

\textsuperscript{540}Ibid. at 265 - 266. While this approach may be more determinate than that used by the majority and L'Heureux Dube, J., it has its own problems, not least of which is its potential perpetuate a Euro-Canadian construction of Aboriginal rights.

\textsuperscript{541}Ibid. at 284. In reaching this conclusion, McLachlin, J. becomes the only judge from the Supreme Court to find in favour of the Aboriginal claimants through all stages of the tests from \textit{Sparrow}.

\textsuperscript{542}See Borrows, "The Trickster", supra note 45 at 28-29.
or not exercised, this conception of rights does not account for those practices which may have been buried under the colonial regime, but which could be resurrected on the basis of continuing Aboriginal values. As I will argue below, the requirement of continuity may be a difficult burden to overcome in the justice context.

Turning to the Court's decision in Gladstone, the majority there found sufficient evidence to prove an existing, unextinguished right to sell herring spawn on kelp commercially amongst the Heiltsuk band, and to prove the prima facie infringement of that right by federal fishery regulations. The majority applied the Sparrow test for extinguishment, but noted in passing that "the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of Aboriginal rights". The main issue in the case thus became one of justification - whether the infringement of the Aboriginal right could be justified on the basis of the test laid out in Sparrow.

In deciding the justification issue, the Court explicitly departed from the test in Sparrow, finding it was necessary to do so because the commercial fishing context did not

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543[1996] 4 C.N.L.R. 65 (S.C.C.). Lamer, C.J. again wrote for the majority, with five others concurring in his judgement. La Forest, J. reached the same result as the majority, but found that any right to sell herring spawn on a commercial scale had been extinguished. McLachlin, J. concurred with the majority in finding an existing, unextinguished Aboriginal right, but found there was insufficient evidence to decide the issue of infringement. Similarly, L'Heureux Dube, J. concurred with the majority's finding of an existing, unextinguished Aboriginal right, but found there was insufficient evidence to decide the issue of justification.

544Ibid. at 80.
impart the same sort of internal limits as the food fishery context in that case.\textsuperscript{545} While the Court adhered to the first part of the justification test - whether there is a legislative objective which is compelling and substantial - the majority interpreted this test in such a way that it was significantly broadened. Compelling and substantial objectives were said to be those which are directed at the recognition of prior occupation, or the reconciliation of Aboriginal occupation with Crown sovereignty. This test was said to contemplate limits which are of "sufficient importance to the broader community as a whole".\textsuperscript{546} As noted by McNeil, this looks very much like the "public interest" justification rejected by the Court in \textit{Sparrow}, and amounts to an abdication of the Court's responsibility to uphold the constitutional rights of Aboriginal peoples.\textsuperscript{547} As for the second part of the justification test, whether the Crown can prove that the measures taken are consistent with its fiduciary duty to Aboriginal peoples, the Court imported a reasonableness standard from section 1 of the \textit{Charter}, again, a test that was rejected in \textit{Sparrow}.\textsuperscript{548} As noted above, McLachlin, J. criticized this reasoning in \textit{Van der Peet}, on the basis that it is contrary to the authorities and the intention of the framers of the \textit{Constitution}, is indeterminate, and in the final analysis, unnecessary.\textsuperscript{549} Ultimately, the majority found there was insufficient evidence to decide the justification issue fully, and ordered a new trial in \textit{Gladstone}.

\textsuperscript{545}Ibid. at 89 - 90.

\textsuperscript{546}Ibid. at 97.


\textsuperscript{548}See \textit{Gladstone}, supra at 92-93; McNeil, ibid. at 38.

\textsuperscript{549}\textit{Van der Peet}, supra note 523 at 283.
A fourth Supreme Court decision on the scope of section 35 is also worthy of note. In *R. v. Pamajewon*, the Court considered the claim of members of the Shawanga and Eagle Lake First Nations in Ontario that the *Criminal Code* sections prohibiting gambling-related activities violated their rights under section 35. The claimants argued that their right to regulate gambling activities flowed from a more general right of self-government. A majority of the Court held that whether or not section 35 includes the right of self-government, the test from *Van der Peet* governs. Applying this test, it held that while the Ojibwa people traditionally gambled, there was no proof that participation in and regulation of high stakes gambling was an integral part of their distinctive culture. Because of this finding, there was no need for the majority to consider whether the *Criminal Code* had extinguished any right to gamble. In a separate, concurring judgment, L'Heureux Dube, J. characterized the right at issue somewhere between the claimants' argument of self-government, and the majority’s construction of "regulation of high stakes gambling". Still, she found that there was no right to gamble more broadly, as the evidence did not establish that this was sufficiently connected to the claimants' self identity or preservation to deserve section 35(1) protection. As noted by Borrows, this case reinforces the notion of "frozen rights", as the Court is unwilling to consider that the nature of gambling has evolved since the time of

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550 [1996] 4 C.N.L.R. 164 at 171; [1996] 2 S.C.R. 821 [hereinafter cited to C.N.L.R.]. Again, Lamer, C.J. wrote the majority opinion, supported by the same judges as in *Van der Peet* with the addition of McLachlin, J.

551 Ibid. at 172.

552 Ibid. at 174-5.
contact.\textsuperscript{553} In Pamajewon, even the dissenting justices from Van der Peet seem to fall into this approach. Moreover, the case perpetuates the highly particularized approach to rights taken in Van der Peet, and diminishes hope for the Court finding a broad Aboriginal right of self-government in Delgamuukw.

While some of the cases discussed above arose in the context of criminal proceedings, none speak directly to the issue of whether section 35 would protect Aboriginal justice initiatives, or the right of survivors to participate more fully in Aboriginal or the dominant justice systems. The only reported case considering Aboriginal rights in a justice context relied on s.25 of the Charter rather than section 35. In R. v. Redhead, the Manitoba Court of Queen’s Bench denied an accused person’s claim that he had a right to be tried by a jury of his peers in his own community. According to the court, s.25 confers no new rights on Aboriginal peoples, and there was no evidence to prove that the rights claimed existed prior to the Charter.\textsuperscript{554} While the judge’s reasoning seems to import some aspects of section 35 analysis, it is of no assistance in thinking about how section 35 might avail survivors of violence in the context of justice systems or processes.

Most of the academic commentary on section 35 in the justice context pre-dates the Supreme Court’s 1996 Aboriginal rights decisions. Noel Lyon, in a paper prepared for the

\textsuperscript{553}See "The Trickster", supra note 45 at 29-30.

\textsuperscript{554}[1996] 3 C.N.L.R. 217 at 231 (Man. Q.B.) The court also denied the argument that the accused’s s.15 rights were violated by having to travel outside his home community for a jury trial.
Law Reform Commission of Canada's report on Aboriginal justice, argued that section 35, and the Sparrow decision, would protect the right to "restore traditional practices for maintaining harmony and dealing with destructive conduct". According to Lyon, "the government's duty is to protect a way of life, not just certain activities". Given the Court's decision in Van der Peet, however, this broad conception of rights is unlikely to hold sway. Similarly, the Royal Commission on Aboriginal Peoples, in Bridging the Cultural Divide, concluded that Aboriginal peoples "have the right to establish criminal justice systems that reflect and respect [their] cultural distinctiveness", as part of the inherent right to self-government recognized and affirmed in section 35. According to RCAP, "the right to establish a system of justice inheres in each ... nation, [and] ... is concurrent with federal jurisdiction over criminal law and procedure". Where a conflict arises, RCAP argued that Aboriginal law should take priority "except where the need for federal action [is] compelling and substantial", and the action is "consistent with the Crown's ... trust responsibilities to Aboriginal peoples", echoing the test for justification from Sparrow. Lastly, RCAP concluded that while Aboriginal governments could in principle take "self-starting initiatives" in the area of criminal law, negotiations would be preferable because of issues of comity, and to avoid litigation. Again, these conclusions were drawn before the Court's decisions in the Van der Peet trilogy and Pamajewon, cases which raise difficulties in relation to the issues of rights definition, continuity, extinguishment and justification.

555 Supra note 509 at 310.

556 Ibid. at 311.

557 See Bridging the Cultural Divide, supra note 1 at 310-311.
Pending any negotiations on Aboriginal jurisdiction over criminal matters, section 35 could arise in different ways in the justice context. A survivor could ask for the opportunity to participate in justice processes beyond the level of involvement currently allowed by the Criminal Code. For example, she might seek to participate in the fact-finding process, or to make arguments about how fact-finding should take place. She might also seek to participate in the sentencing process, by telling her own story about the impact of the offence, or by making suggestions for what she considered an appropriate sentence. All of these roles could be based on an Aboriginal right under section 35. The court would then have to decide, on the basis of the Supreme Court's section 35 jurisprudence, whether the activity in question was an existing Aboriginal right and whether it had been extinguished by the Crown. In other cases, for example where a provision of the Criminal Code was in conflict with a particular Aboriginal justice practice, the issues of infringement and justification might also arise.

A survivor would have to lead evidence which proved that before the time of European contact, justice processes, and participation in such processes, were an "integral part of the distinctive culture" of her nation or community. The historical accounts of traditional Aboriginal justice practices discussed in Chapter 2 suggest there may be basis for arguing that the participation of survivors in justice processes meets this test in some communities, particularly at the stage of sentencing. Difficulties might arise in relation to other aspects of the Van der Peet test, however. First, the particularity of the majority's approach to rights suggests that the claim may be assessed on the basis of the particular type
of participation sought by the claimant, rather than on a more general right to participate. This characterization may make it difficult to meet the evidentiary burden established by the Court. A broader construction of section 35, one that recognized a right of self-government over matters including justice, would be much preferred, and was left open by the British Columbia Court of Appeal’s decision in Casimel. While feminists have often advocated the need for particularity and context in asserting their claims, it is also recognized that a certain level of abstraction may be necessary to achieve justice in certain circumstances.558

Second, the majority’s requirement that there be a continuity of the practice in question could prove insurmountable. While the judgements in Van der Peet allow, to varying extents, the possibility that Aboriginal practices can be interrupted for a period of time, the decision still requires a level of continuity which may be difficult to prove. Evidence of survivors’ participation in justice processes since the time of contact, no matter how informal or infrequent, would be critical here. Given the Supreme Court’s "frozen rights" approach, however, this may not be enough to prove a right to participate in modern day justice processes. The continuity aspect of the test underlines the impact of the word "existing" in section 35 of the Constitution Act, 1982. This wording, and the way it has been narrowly interpreted by the courts, essentially precludes the re-creation of practices which were integral to the Aboriginal community in question, but which have been eroded by the forces of colonialism, even where the values underlying such practices have survived.

558See Bartlett, supra note 16 at 857.
Similarly, the notion of extinguishment may pose difficulties in the context of Aboriginal justice initiatives. Although the Criminal Code does not expressly extinguish the rights of survivors to participate in justice processes, the cases discussed above suggest that a finding of extinguishment by necessary implication is possible. The reasoning of the majority in Delgamuukw also suggests that the federal power over criminal law entrenched in s.91(27) of the Constitution Act, 1867 may be viewed as exclusive rather than co-existing with Aboriginal jurisdiction over justice matters. While RCAP's conclusion was to the opposite effect, it remains to be seen whether the judiciary will be persuaded by their reasoning.

Lastly, the Supreme Court's views on justification also raise hurdles which may be difficult to overcome in the justice context. In Sparrow, the Court noted that the compelling and substantial test could be met by legislative objectives which sought to prevent "harm to the general populace or to Aboriginal peoples themselves". This test was broadened in Gladstone to make valid legislative objectives which were in the public interest. Such standards may allow the infringements of the Aboriginal rights of accused persons in some cases, for example where they sought to utilize Aboriginal justice initiatives which did not adequately account for the needs of survivors of violence. While such an outcome may be rationalized on the basis that it protects Aboriginal women, the more fundamental problem of the Crown justifying a breach of its fiduciary duty remains. An infringement of any Aboriginal right not to participate in justice processes, for example, one which would excuse
a survivor from telling her story, is also likely to be justifiable on the basis of this test.\textsuperscript{559}

Thus the approach to section 35 taken by the Supreme Court does not bode well for a broad finding that survivors' participation in justice processes is an existing, unextinguished Aboriginal right. As noted by the Court in\textit{ Sparrow}, litigation of the scope of Aboriginal rights "may not be the most appropriate setting in which to determine the existence of an Aboriginal right".\textsuperscript{560} This is especially true given the courts' tendency to take an overly particular approach to Aboriginal rights, an approach which is determining the content and scope of such rights in a piecemeal fashion, and given the concepts of extinguishment and justification. As I concluded in the realm of \textit{Chart\#er} rights, struggles in the political arena may be more fruitful for Aboriginal women seeking to enforce a right to participate in justice processes in their communities. This again gives rise to the question of whether Aboriginal women have the right to participate in negotiations which determine the scope of their rights. Does section 35 itself confer such a right of participation?

The case of NWAC v. \textit{Canada} is instructive on this issue. As noted above, the Supreme Court of Canada denied that NWAC's \textit{Chart\#er} rights had been violated by the failure of the federal government to include the organization in its negotiations on the scope of self-government. The Court also decided that section 35 would not avail NWAC. In the

\textsuperscript{559}As discussed in Chapter 4, however, historical accounts are silent as to whether a right of non-participation has roots in Aboriginal societies.

\textsuperscript{560}\textit{Sparrow}, supra note 496 at 424. See also \textit{Delgamuukw}, supra note 512 at 643 (per Lambert, J.A.).
Court’s view, the right being claimed was the right to participate in constitutional discussions, which was found not to derive from any existing Aboriginal right.\textsuperscript{561} This construction of the right at issue is one which even the broad test from \textit{Sparrow} would be unlikely to protect. While the NWAC case preceded \textit{Van der Peet}, it foreshadowed the extent to which the Court would particularize the Aboriginal right being claimed, and the corresponding difficulty in proving that such a right existed prior to contact.

A better characterization of NWAC’s claim would have been the right to participate in the political process more broadly. According to Sharon McIvor, "women’s rights to participate politically, socially, culturally and militarily form part of the historical custom and tradition recognized and affirmed within the existing right to self-government in section 35(1)".\textsuperscript{562} Her view is that such rights, while regulated by the \textit{Indian Act}, were not extinguished, or if so, were restored with the passage of Bill C-31.\textsuperscript{563} This Bill, passed in 1985 after section 15 of the \textit{Charter} came into effect, amended the \textit{Indian Act}’s discriminatory treatment of "Indian" women who married non-"Indian" men. Such women no longer lost their "Indian" status, and were reinstated as "Indians" under the Act.\textsuperscript{564} This

\textsuperscript{561}See NWAC, supra note 421 at 665. The Court thus found it unnecessary to consider the scope of s.35(4).


\textsuperscript{563}Ibid. at 82.

\textsuperscript{564}Bill C-31, \textit{An Act to amend the Indian Act}, R.S.C. 1985, c.32 (1st. Supp). The Bill did not completely cure the discriminatory treatment of Aboriginal women under the \textit{Indian Act}, however. There remains a second generation cut-off provision in the Act, which prevents some grandchildren of reinstated women from obtaining "Indian" status. This aspect
did not end the struggle for "Bill C-31 Indians", however, as many became involved with disputes with their bands over their right to reside on reserve.

A recent decision of the Federal Court considered such a dispute, and the impact of section 35 on the positions of the parties. In Sawridge Band v. Canada, the plaintiffs contended that the Bill C-31 amendments violated their bands' Aboriginal rights to determine their own membership, which was said to be protected under section 35. The plaintiffs led evidence to the effect that members of the Sawridge, Ermineskin and Sarcee bands had traditionally practised a marital custom according to which a woman would follow her husband after marriage. In other words, it was alleged that where a woman married a member of another community or nation, or a non-Aboriginal man, she would follow her husband to his community, and lose her status amongst her own people. This custom was said to be codified in the Indian Act prior to its amendment by Bill C-31. The Crown argued that any right to determine membership had been extinguished by federal legislation, and by Treaties 6, 7 and 8.

Muldoon, J., of the Federal Court, Trial Division denied the plaintiffs' claim, finding section 35(4) of the Constitution Act, 1982 to be determinative. According to Muldoon, J.,

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of the legislation is being challenged by Sharon McIvor in a case before the B.C. Supreme Court. See McIvor v. The Registrar, Indian and Northern Affairs, Canada (B.C.S.C., Vancouver Registry No. A 941142).

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"if ever there was or could be a clear extinguishment of any alleged Aboriginal or treaty right to discriminate within the collectivity of Indians and more particularly against Indian women, subsection 35(4) of the Constitution Act is that; and it works that extinguishment very specifically, absolutely, and imperatively". 566 This finding made it unnecessary to consider the relationship between section 15 of the Charter, which would have supported Bill C-31, and section 25, which provides that Charter rights must not be construed so as to abrogate from any Aboriginal, treaty or other rights. 567 Muldoon, J. went on to find that in any event, there was no custom of determining membership in the manner described by the plaintiffs, or at all. In so doing, he made a number of negative comments about the evidence and claims of the plaintiffs, 568 comments which likely led to his judgment being overturned by the Federal Court of Appeal on the basis of a "reasonable apprehension of bias". 569 While his support of section 35(4) is persuasive and encouraging, these other parts of Muldoon, J.'s judgment diminish the significance, and the weight of his decision about

566Ibid. at 141. The Court also found that any such rights were extinguished by federal legislation, and were not codified in the Indian Act, nor in the relevant treaties.

567Ibid. at 142.

568For example, Muldoon, J. opined that "In no time at all historical stories, if ever accurate, soon became mortally skewed propaganda, without objective verity". Moreover, he characterized the statement of claim as "fictitious revisionism". See ibid. at 195, 221.

569See Sawridge Indian Band v. Canada, [1997] F.C.J. No. 761 (C.A.). The Court gave its ruling in an oral judgement released on June 3, 1997, with reasons to follow. A new trial was ordered by the Court of Appeal. Leave to appeal to the Supreme Court of Canada has been filed in the case.
the rights of Aboriginal women.\textsuperscript{570}

In many ways, the Sawridge case underscores the difficulties and compromises inherent in litigating claims of Aboriginal rights. Bill C-31 has reportedly been a source of great tension and conflict between some Indian women and their communities, not least because of the federal government’s failure to accompany the Bill by an increased level of resources to Indian bands to allow them to accommodate their reinstated members.\textsuperscript{571} More fundamentally, there is also resentment over Bill C-31 as part of the continuing control by the federal government over "Indians". It is ironic that the plaintiffs in Sawridge were reduced to using the Indian Act, long identified as the major tool of colonization in Canada, as proof of their Aboriginal right to control their own membership.

In conclusion, the Supreme Court has chosen to define Aboriginal rights with a level of particularity which presents significant challenges for Aboriginal women asserting the right to participate in justice processes, and in the larger political context. As I will discuss further in Chapter 6, rights litigation may at times be a necessary tool for responding to

\textsuperscript{570}This conclusion is also reached by T. Isaac, "Self-Government, Indian Women and Their Rights of Reinstatement under the Indian Act: A Comment on Sawridge Band v. Canada, [1995] 4 C.N.L.R. 1 at 6.

\textsuperscript{571}See T. Nahanee, "Aboriginal Women and Self-Government", in M.A. Jackson and N.K.S. Banks, eds., supra note 444, 27 at 31-32. This tension has existed for some time, as the National Indian Brotherhood (the precursor to the Assembly of First Nations) and others resisted Aboriginal women’s earlier challenges to the Indian Act under the Canadian Bill of Rights. See T. Isaac and M.S. Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man. L.J. 453 at 459-461.
particular conflicts, but in light of the Supreme Court's treatment of rights under both the Charter and Part II of the Constitution Act, 1982, it does not appear to be the best way to define the scope of rights held by Aboriginal women.
CHAPTER 6

CONCLUSION: EVALUATING RIGHTS DISCOURSE

A comparison between the histories of Aboriginal and early English justice systems has shown that survivors of crime played significant roles in justice processes, and that those processes attempted to make things right again. The post-Norman English system strayed from this approach, however, and by the time of colonization of Canada, there was little space left for survivors of violence in dominant justice processes. While Aboriginal justice reports, and feminist literature have tended to ignore the impact of the dominant system on Aboriginal women, the writings of Aboriginal women reveal the consequences of excluding survivors from the dominant system, and the concern that this exclusion may be perpetuated in Aboriginal justice systems. Aboriginal women demand that they play key roles in the creation, implementation and operation of Aboriginal justice systems, and in more short term initiatives to reform the dominant system. As well, they advocate an increased level of participation for Aboriginal survivors of violence in both the dominant and Aboriginal justice systems.

As shown in Chapter 5, recent Supreme Court of Canada jurisprudence, and federal and provincial legislative enactments have begun a trend towards recognizing the rights of survivors of violence. This is a matter of some significance, given the modern Euro-Canadian justice system’s usual treatment of survivors as third parties. If the notion of standing is broadly interpreted, there will be new opportunities for survivors of violence to appear before the courts to make arguments about their rights, and about doing the right
thing. At this stage, however, the notion of "third party" standing does not translate into a full right for survivors of violence to participate in criminal justice processes. In the context of the dominant justice system, participation in rights discourse may not be enough, in any case. Despite the promise of the Dagenais case, a model of conflicting rights appears to be entrenched in the courts. When seen to be in conflict with the interests of survivors of violence, the balance seems perpetually tipped in favour of the accused. Moreover, judges continue to rely on myths and stereotypes, and have not incorporated notions of intersecting inequalities into their analyses of Aboriginal women and intimate violence.

It can be said that the most significant progress for women in asserting their rights as survivors of violence has been through the political process. At the same time, governments' responsiveness to women's concerns is still selective. For example, Aboriginal women have had no luck in persuading the federal government to amend the Indian Act to allow for the distribution of matrimonial property on reserves, making constitutional litigation a last, but necessary resort. Judicial deference to the political branch of government, and an unwillingness to recognize "positive rights", mean that courts are also unlikely to find in favour of a right of Aboriginal women to participate in shaping the parameters of self-government in the political arena.

Nor do the rights entrenched in section 35 of the Constitution Act, 1982 provide much hope for Aboriginal women in the justice, or political contexts. The courts have taken

572 See supra note 494.
a conservative, overly particular approach to such rights, constraining them in time and breadth. Moreover, the judicially created principles of extinguishment, continuity and justification present obstacles to a justiciable right to participate in justice processes, or in the political process. In particular, the equality guarantee in section 35(4) has not yet been used to its full potential by the courts.\textsuperscript{573}

Beyond their restrictive interpretation, another significant limitation of constitutional rights is that they apply only to the actions of governments.\textsuperscript{574} Aboriginal women seeking protection against violence may use the Charter to hold governments, and government actors to account in some circumstances.\textsuperscript{575} These will be fairly limited, however, and will not likely be found to include governmental obligations to distribute resources in such a way that violence against women is minimized.\textsuperscript{576} Moreover, the constitutional rights of Aboriginal women do not provide any remedies against their actual abusers.

\textsuperscript{573}This is similar to judicial reticence to use s.28 of the Charter except as an afterthought to s.15 equality rights.


\textsuperscript{575}See for example the case of \textit{Arlena C. Jones v. The City of Vancouver et al} (B.C.S.C., No. 963099 Vancouver Registry), in which an Aboriginal woman is suing the City of Vancouver, and a police officer, for negligence and a breach of her rights under sections 7 and 15 of the Charter. It is alleged that Ms. Jones was brutally assaulted by her ex-partner two times in two days. Despite Ms. Jones’ pleas for protection, the police failed to arrest and charge the man after the first assault. See also \textit{Jane Doe v. Metropolitan Toronto Commissioners of Police} (1989), 58 D.L.R. (4th) 396 (H.C.J.), affirmed (1990), 74 O.R. (2d) 225 (Div. Ct.), leave to appeal denied (1991), 1 O.R. (3d) 416 (C.A.).

\textsuperscript{576}For a discussion see Martin, supra note 294 at 537.
Another, more practical limitation is the level of resources required to enforce the provisions of the constitution in a litigation context. Rights may be more illusory than real where the costs of representation in court proceedings is considered. This limitation may be of particular significance for Aboriginal women, given their widespread conditions of poverty and lack of legal resources. Legal aid and many native courtworker programs have traditionally been available to accused persons, not complainants. Access to justice would be most restricted where a rights claim was brought in a Euro-Canadian forum, given the likely travel and other expenses. Moreover, the courts can be notoriously slow at processing cases. The NWAC case provides only one example of an issue becoming moot before being finally adjudicated.

A more fundamental limitation to the constitution is the potential dissonance of rights discourse with Aboriginal values. It has been argued that the Charter is based on Western liberal traditions which focus on individual rights at the expense of collective rights, providing no space to recognize the "cultural differences" of Aboriginal peoples. This was the view underlying the opposition of the Assembly of First Nations, and others, to the Charter's application to Aboriginal governments. It has been reported that many Aboriginal women supported this position, and consider the Charter to be a symbol and tool of colonial

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577 In British Columbia, legal aid is currently available for complainants in disclosure applications where they meet the financial eligibility requirements, and have "substantial privacy interests" at stake. It is arguable that s.3 of the Victims of Crime Act, supra note 104, requires that such coverage be provided.

578 Turpel, "Interpretive Monopolies", supra note 23. See also RCAP, Bridging the Cultural Divide, supra note 1 at 258 - 261.
rule.\textsuperscript{579} On the other hand, some Aboriginal women have argued that individual rights are also important in Aboriginal societies, and that the individual/collective rights dichotomy is a false or exaggerated one.\textsuperscript{580} Non-Aboriginal scholars have noted that the \textit{Charter} protects collective as well as individual rights, in section 25, for example.\textsuperscript{581}

One constitutional scholar argues that the very nature of rights, whether construed as inhering to individuals or groups, is such that they will always pit some in conflict with others in society.\textsuperscript{582} The Supreme Court of Canada's construction of survivors' rights, discussed in Chapter 5, certainly seems to bear this argument out. Feminists have noted how constructing social problems in terms of "rights" may lead to an oversimplification of what are often complex power relationships,\textsuperscript{583} and often, an individualization of the problems.\textsuperscript{584} Moreover, experience has shown that rights can easily be appropriated by less than progressive actors, and have been used in the courts to destroy some of the gains made in

\textsuperscript{579}See supra note 434 and text.

\textsuperscript{580}See McIvor, supra note 562 at 78-80. See also Nahanee, supra note 10 at 369-70, "Aboriginal Women and Self-Government", in Jackson and Banks, supra note 444, 27 at 30.

\textsuperscript{581}For a review of some of this work see Turpel, "Interpretive Monopolies", supra note 23 at 17-21. Turpel argues that nevertheless, the dominant paradigm is of individual rights.

\textsuperscript{582}See Bakan, supra note 105 at 47-8.

\textsuperscript{583}Smart, supra note 15 at 144. See also Fudge, supra note 279 at 458-459.

\textsuperscript{584}L. Gotell, \textit{The Canadian Women's Movement, Equality Rights and the Charter} (Ottawa: Canadian Research Institute for the Advancement of Women, 1990) at 41-42.
the political arena by women.\textsuperscript{585} As noted by Gotell, decisions in the judicial arena are "non-negotiable", and decision makers "isolated from direct political pressure" by women.\textsuperscript{586}

The adversarial litigation process undertaken by rights claimants may itself be problematic as a means of resolving conflicts within Aboriginal communities. According to John Borrows, the debate over whether the Charter should apply to Aboriginal governments threatened to "disintegrate the fragile gains that have been made towards self-determination in the last decade".\textsuperscript{587} Moreover, although courts are increasingly willing to hear evidence which contextualizes rights claims, litigants are still constrained by rules of evidence and procedure. Recall that in the Van der Peet case, a majority of the Supreme Court of Canada held that Aboriginal perspectives must be framed in terms "cognizable to the courts".\textsuperscript{588}

Despite these shortcomings, Aboriginal peoples have engaged with rights discourse,


\textsuperscript{586}See supra note 584 at 39.

\textsuperscript{587}See "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994), 43 U.N.B. Law Journal 19 at 20. See also Turpel, "Interpretive Monopolies", supra note 23 at 21, who argues that collective rights litigation may be particularly adversarial, given the extent of the "differences" at issue.

\textsuperscript{588}See supra note 523 at 202.
often because of a lack or exhaustion of viable alternatives.\textsuperscript{589} NWAC has written widely of the history and importance of rights struggles for Aboriginal women, and notes that Aboriginal women were among the first to benefit from the equality provisions of the \textit{Charter}, citing the Bill C-31 amendments to the \textit{Indian Act}.\textsuperscript{590} While the treatment of reinstated "Indians" by some bands, and the NWAC case itself call into question the remedial effects of the \textit{Charter}, debates over the propriety of rights discourse will likely never squash the occurrence of such claims.\textsuperscript{591}

Aboriginal peoples have also engaged in rights discourse at the international level. For example, the \textit{Draft Declaration on the Rights of Indigenous Peoples} recognizes the right to self-determination, including the right "to promote, develop and maintain ... their distinctive juridical customs, traditions, procedures and practices in accordance with internationally recognized human rights standards".\textsuperscript{592} These rights are expressly guaranteed equally to male and female indigenous individuals.\textsuperscript{593} If these provisions

\textsuperscript{589}This is acknowledged by Turpel in "Interpretive Monopolies", supra note 23 at 28.

\textsuperscript{590}See \textit{Native Women and the Charter}, supra note 466 at 1 - 2; \textit{Statement on the Canada Package}, supra note 420 at 1. See also Krosenbrink-Gelissen, supra note 495.

\textsuperscript{591}The debate over the utility of rights discourse in the Aboriginal context brings to mind that between feminists and people of colour, and critical legal scholars in the United States. For a discussion of the latter debate see P. Goldfarb, "From the Worlds of "Others": Minority and Feminist Responses to Critical Legal Studies" (1992), 26 New England Law Rev. 683.


\textsuperscript{593}Ibid., article 43.
become recognized as international law, they will provide Aboriginal women with an alternative to the Canadian constitution as a means of enforcing their rights. Aboriginal women have in the past turned to international fora when their rights claims were denied at a domestic level. It could be said, in keeping with an evolving notion of Aboriginal cultures, that rights discourse has itself become an aspect of some Aboriginal cultures.

More transformative models of rights may also ameliorate concerns about the dissonance of the Charter with Aboriginal values. As noted in Chapter 5, NWAC and others have advocated the possibilities of rights discourse which views rights as coexisting and relational rather than conflicting. While the Supreme Court of Canada, and lower courts in the dominant system seem stuck in a model of conflicting rights, decision makers in the Aboriginal justice context could be encouraged to adopt more holistic models of rights. In the justice context, such models would acknowledge and seek to accommodate the rights of all parties, including survivors of violence, in doing the right thing. Moreover, holistic models of rights would view claimants as whole beings, rather than pigeonholing them into discrete grounds of discrimination. Oppression and disadvantage based on gender, culture and other aspects of identity might finally be understood and challenged if Aboriginal women


595See Borrows, "Contemporary Traditional Equality", supra note 587 at 21, 31-32. Turpel argues that better models of rights are not sufficient to eradicate the fundamental "cultural hegemony" of the Charter. See "Interpretive Monopolies", supra note 23 at 25.

596See NWAC, supra note 466; Coalition factum, supra note 368. See also J. Nedelsky, "Reconceiving Rights as Relational" (1993), 1 Review of Constitutional Studies 1.
are afforded the opportunity to participate in the construction of rights in this context.

Alternatively, Aboriginal women might argue that decision makers consider departing from the notion of rights altogether, in favour of a paradigm of social relations which focuses on needs and responsibilities. 597 This would make possible the understanding that in cases of intimate violence, there are complex and intersecting interests, needs and responsibilities on the part of the offender, the survivor, their family(s), and their community(s). In turn, such conceptions of rights and responsibilities might assist decision makers within the Euro-Canadian justice system in developing approaches to violence which are more inclusive of the needs and interests of all of those concerned in a particular case. In this respect, Aboriginal peoples may have much to teach non-Aboriginal peoples about rights and justice.

Where Aboriginal women have a choice as to where they might most strategically participate in rights discourse, Aboriginal decision making fora would be the most likely places to find holistic, culturally synchronous interpretations of their rights. 598 But I do not mean to suggest that Aboriginal women should give up the battle in the context of the dominant justice system. There is still space for arguments which will persuade courts that doing the right thing means rejecting a model of conflicting rights, avoiding dominant

597 According to Turpel, responsibilities are the more accurate paradigm for Aboriginal social relations. See "Interpretive Monopolies", supra note 23 at 29-30.

598 See supra at page 114 for a discussion of fora.
ideologies about Aboriginal women and intimate violence, and acknowledging the impact of intersecting inequalities on a theoretical and practical level. Feminist organizations with legal expertise and financial resources should do the right thing, and share this struggle with Aboriginal women.
BIBLIOGRAPHY

I. Articles/Books

Adelberg, Ellen, "When the Victim Goes to Jail: The Law on Contempt of Court" (1984), 9(3) Status of Women News 8

Anonymous, "A Beaten Woman", in Mary Crnkovich, ed., "Gossip": A Spoken History of Women in the North (Ottawa: Canadian Arctic Resource Committee, 1990) 163

Anthias, Floya and Yuval-Davis, N., Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle (London and New York: Routledge, 1992)


Auger, D.J. et al, "Crime and Control in Three Nishnawbe-Aski Nation Communities: An Exploratory Investigation" (1992), 34 Canadian Journal of Criminology 317


Bakan, Joel, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997)

Bartlett, Katherine T., "Feminist Legal Methods" (1990), 103 Harvard Law Review 829


Bhavani, Kum-Kum and Coulson, Margaret, "Transforming Socialist Feminism: The Challenge of Racism" (1986), 23 Feminist Review 81

Billson, Janet M., "Violence Toward Women and Children." In M. Crnkovich, ed., "Gossip": A Spoken History of Women in the North (Ottawa: Canadian Arctic Resource Committee, 1990) 151


Borrows, John, "The Trickster: Integral to a Distinctive Culture" (1997), 8 Constitutional Forum 27


Burns, Randy, "Preface", in Roscoe, W., ed. Living the Spirit: A Gay American Indian Anthology (New York: St. Martin's Press, 1988) 1


Carswell, Margaret, "Social Controls Among the Native Peoples of the N.W.T. in the Pre-Contact Period" (1984), 22 Alberta Law Review 303

Chunn, Dorothy E., From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940 (Toronto: University of Toronto Press, 1992)


Clark, Lorenne, "Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service and Criminal Justice Concerns" (1989-90), 3 Canadian Journal of Women and the Law 420

Comack, Elizabeth, Feminist Engagement with the Law: The Legal Recognition of the Battered Women's Syndrome (Ottawa: Canadian Research Institute for the Advancement of Women, 1993)

Courchene, Eileen Joyce, Aboriginal Women's Perspective of the Justice System in Manitoba (Manitoba: Aboriginal Justice Inquiry, 1990)


Coyle, Michael, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986), 24 Osgoode Hall Law Journal 605

Cox, Cherise, "Anything Less is not Feminism" (1990), 1 Law and Critique 237


Crnkovich, Mary, ed., "Gossip": A Spoken History of Women in the North (Ottawa: Canadian Arctic Resource Committee, 1990)

Currie, Dawn H., "Battered Women and the State: From the Failure of a Theory to a Theory of Failure" (1990), 2 Journal of Human Justice 77


Dickson-Gilmore, E.J., "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Legal Systems" (1992), 34 Canadian Journal of Criminology 479


Eaton, Mary, "Abuse by Any Other Name: Feminism, Difference and Intralesbian Violence", in Martha Fineman and Roxanne Mykitiuk, eds., The Public Nature of Private Violence (New York: Routledge, 1994) 195

Faulkner, Ellen, "Lesbian Abuse: The Social and Legal Realities" (1991), 16 Queen's Law Journal 261


Fraser, Gwen, "Taking Spousal Assault Seriously: A Philosophical View of Legal Contradiction" (1985), 5 Windsor Yearbook of Access to Justice 368


Gavison, Ruth, "Feminism and the Public/Private Distinction" (1992), 45 Stanford Law Review 1

Gitksan-Wet'suwet'en Education Society et al, Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People (Hazelton, B.C., 1989)

Goldfarb, Phyllis, "From the Worlds of "Others": Minority and Feminist Responses to Critical Legal Studies" (1992), 26 New England Law Rev. 683


Green, Joyce, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993), 4 Constitutional Forum 110


Greschner, Donna, "Aboriginal Women, the Constitution and Criminal Justice" (1992), Special Edition University of British Columbia Law Review 338

Griffiths, C.T. and Yerbury, J.C., "Native Indian Victims in Canada: Issues in Policy and Program Delivery" (1991), 1 International Review of Victimology 335
Harris, Angela P, "Race and Essentialism in Feminist Legal Theory" (1990), 42 Stanford Law Review 581


Horwitz, Morton J., "The History of the Public/Private Distinction" (1980), 130 University of Pennsylvania Law Review 1423


Jackson, Michael, "Locking Up Natives in Canada" (1989), 23 University of British Columbia Law Review 205

Jackson, Michael, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities (1992), Special Edition, University of British Columbia Law Review 147


Kelly, D.P., "Victim's Perception of Criminal Justice" (1984), 11 Pepperdine Law Review 15

Kline, Marlee, "Race, Racism and Feminist Legal Theory" (1989), 12 Harvard Women's Law Journal 115


Kobly, Peggy, "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion" (1992), 30 Alberta Law Review 988

Kohli, Rita, "Violence Against Women: Race, Class and Gender Issues"(1991), 11(4) Canadian Woman Studies 13


La Prairie, Carol, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992), 34 Canadian Journal of Criminology 281

La Rocque, Emma, "Violence in Aboriginal Communities", in Royal Commission on Aboriginal Peoples, The Path to Healing: Report of the National Roundtable on Aboriginal Health and Social Issues (Ottawa: Minister of Supply and Services Canada, 1994)


MacLeod, Linda, Battered But Not Beaten... Preventing Wife Battering in Canada (Ottawa: Canadian Advisory Council on the Status of Women, 1987)

Mahoney, Martha, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991), 90 Michigan Law Review 1

Martin, Dianne L. and Janet E. Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995), 8 Canadian Journal of Women and the Law 44


McInnes, John, and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995), 29 University of British Columbia Law Review 341


McNamara, Luke, Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada with Reference to the Prairie Region (Winnipeg: Legal Research Institute of the University of Manitoba, 1993)

McNeil, Kent, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen’s Law Journal 95


Minow, Martha, "Surviving Victim Talk" (1993), 40 U.C.L.A. Law Review 1411


Monture, Patricia A., "Reflecting on Flint Woman", in Richard F. Devlin, ed., Canadian Perspectives on Legal Theory (Toronto: Emond Montgomery, 1991) 351


Morley, R. and Mullender, A., "Hype or Hope? The Importation of Pro-Arrest Policies and Batterers' Programmes for North America to Britain as Key Measures for Preventing Violence Against Women in the Home" (1992), 6 International Journal of Law and Family 265

Moyer, Sharon, "Race, Gender and Homicide: Comparisons Between Aboriginals and Other Canadians" (1992), 34 Canadian Journal of Criminology 387


Native Women's Association of Canada, Statement on the Canada Package (Ottawa: NWAC, 1992)

Native Women's Association of Canada, Voices of Aboriginal Women: Speak Out About Violence (Ottawa: NWAC, 1991)

Nedelsky, Jennifer, "Reconceiving Rights as Relational" (1993), 1 Review of Constitutional Studies 1

Nightingale, Margot, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991), 23 Ottawa Law Review 71


Nzegwu, Nkiru, "Confronting Racism: Towards the Formation of a Female-Identified Alliance" (1994), 7 Canadian Journal of Women and the Law 15


Pasquali, Paula E., No Rhyme or Reason: The Sentencing of Sexual Assault (Ottawa: Canadian Research Institute on the Advancement of Women, 1995)


Pateman, Carol "Feminist Critiques of the Public / Private Dichotomy", in S. Benn and G.F. Gaus, eds., Public and Private in Social Life (London: Croon Helm, 1983) 281

Pauktuutit, Setting Standards First. Community-Based Justice and Correctional Services in Inuit Communities (Ottawa: Pauktuutit, 1995)


Razack, Sherene, "What is to be Gained by Looking White People in the Eye? Culture, Race and Gender in Cases of Sexual Violence" (1994), 19(4) Signs 894


Ross, Rupert, Dancing with a Ghost: Exploring Indian Reality (Markham: Octopus Books, 1992)


Ryder, Bruce, "Aboriginal Rights and Delgamuukw v. The Queen" (1994) 5 Constitutional Forum 43

Schneider, Elizabeth, "The Violence of Privacy" (1991), 23 Connecticut Law Review 973

Schneider, Elizabeth, "Particularity and Generality" (1992), 67 New York University Law Review 520


Smart, Carol, Feminism and the Power of Law (London: Routledge, 1989)


Snider, Laureen, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990), 10 Studies in Law, Politics and Society 143

Snider, Laureen, "Feminism, Punishment and the Potential for Empowerment" (1994), 9 Canadian Journal of Law and Society 75


Sugar, Fran and Lana Fox, "Nistum Peyako Seht’wawinlskwewak: Breaking Chains" (1989-90) 3 Canadian Journal of Women and the Law 465


Thornton, Margaret, "Feminism and the Contradictions of Law Reform" (1991), 19 International Journal of the Sociology of Law 453

Thornton, Margaret, "The Public/Private Dichotomy: Gendered and Discriminatory" (1991), 18 Journal of Law & Society 448

Turpel, Mary Ellen, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90), 6 Canadian Human Rights Yearbook 3

Turpel, Mary Ellen, "Home/Land" (1991), 10 Canadian Journal of Family Law 17

Turpel, Mary Ellen, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don’t Fence Me In", in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System. Report of the National Roundtable on Aboriginal Justice Issues (Ottawa: Minister of Supply and Services, 1992) 161


Ursel, E. Jane, "Examining Systemic Change in the Criminal Justice System: The Example of Wife Abuse Policies in Manitoba" (1990), 19 Manitoba Law Journal 529

Ursel, E. Jane, Private Lives, Public Policy. 100 Years of State Intervention in the Family (Toronto: Women’s Press, 1992)


West, Nora, "Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis" (1992), 50 University of Toronto Faculty of Law Review 96


II. Cases


Cunningham v. The Queen (1993), 80 C.C.C. (3d) 492 (S.C.C.)


Egan v. The Queen, [1995] 2 S.C.R. 513


McDonnell v. The Queen, S.C.C. No. 24814, 24 April, 1997


R. v. Tivii, (unreported, 19 October 1993, Ct. of Quebec)


Thomson Newspapers v. Canada (1990), 54 C.C.C. (3d) 417 (S.C.C)

III. Legislation

An Act to amend the Criminal Code (production of records in sexual assault proceedings), Second Session, 35th Parliament (1996)

An Act to Amend the Criminal Code (sexual assault), S.C. 1992, c.38

An Act to amend the Criminal Code (self-induced intoxication), First Session, 35th Parliament (1994-5)

An Act to amend the Criminal Code (sentencing), S.C. 1995, c.22

An Act to amend the Indian Act, R.S.C. 1985, c.32 (1st. Supp)


Criminal Injury Compensation Act, R.S.B.C. 1979, c.83

Victims of Crime Act, S.B.C. 1995, c. 47

IV. Reports

Alberta Law Reform Institute, Domestic Abuse: Toward an Effective Legal Response. Report for Discussion No. 15 (Edmonton: The Institute, 1995)

Arbour, The Hon. Louise, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Minister of Supply and Services, 1996)


V. Other

Attorney General of Canada, *Recommended Directive to Prosecutors - Spousal Assault* (Ottawa: Department of Justice, 1983), replaced by Department of Justice Canada, *Spousal Assault Prosecutions* (Ottawa: Department of Justice, 1993)


Factum of the Aboriginal Women's Council, Canadian Association of Sexual Assault Centres, DisAbled Women’s Network Canada, and Women’s Legal Education and Action Fund in *R. v. O’Connor* (1994), B.C.C.A.

Factum of the Aboriginal Women's Council, Canadian Association of Sexual Assault Centres, DisAbled Women's Network Canada, and Women's Legal Education and Action Fund in *R. v. O'Connor* (1995), Supreme Court of Canada

Huang, Agnes, "Fighting for fairness", *Kinesis* (April, 1997) 3


Women's Legal Education and Action Fund, *Submissions to Standing Committee on Justice and Legal Affairs Review of Bill C-46* (Toronto: LEAF, 1997)