AUTONOMOUS ABORIGINAL CRIMINAL JUSTICE

and

THE CHARTER OF RIGHTS

by

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ABSTRACT

The imminent recognition of an inherent Aboriginal right to self-government signals the beginning of the reversal of a colonization process which threatened the cultural survival of a people. The *Report of the Aboriginal Justice Inquiry of Manitoba* , hereinafter referred to as the *Inquiry*, advocates an autonomous Aboriginal criminal justice system as a significant component of this cultural revitalization. This Aboriginal criminal justice system would differ markedly from the conventional system in giving priority to collective rights over conflicting individual rights. The *Inquiry* rejects the *Charter* as alien to Aboriginal values and advocates a "tailor-made" Aboriginal charter that would incorporate "only those fundamental freedoms and civil liberties that do not violate the beliefs and paramount collective rights of the Aboriginal peoples."

The conventional justice system's paramount concern for individual rights is premised on the potential of punishment. The *Inquiry's* starkly contrasting paramount emphasis on collective rights is premised on an Aboriginal view of justice which this thesis refers to as the "harmony ethos":

> The underlying philosophy in Aboriginal.societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony . . . Atonement and restoration of harmony were the goals - not punishment.

The tension between individual and collective rights apparent in the proposal of the *Inquiry* is the specific focus of this thesis. The colonization process may justify a separate Aboriginal justice system. However, the harmony ethos premise, while appropriate to the mediation-reconciliation communitarian model of justice advocated by the *Inquiry*, blinds the *Inquiry* to the additional, and crucially different, adjudicative-rights imperatives of the contemporary Aboriginal society.

Actually existing Indianism reveals conflict-generating fault lines in the harmony premise which challenge the *sufficiency* of the *Inquiry's* group-based

justice paradigm and indicate a need and desire for an adjudication justice component and concomitant *Charter* values.

This adjudication hiatus in the *Inquiry* position is a reflection of a similar void in historical Aboriginal justice which challenges the asserted rationale of cultural survival for the paramountcy of collective rights in the contemporary Aboriginal justice system. This historical adjudication hiatus does not preclude a separate Aboriginal justice system, but favours the inclusion of *Charter* values to strengthen an adjudication cultural foundation which is frail relative to its reconciliation-mediation strength.

This thesis is a modest attempt to address the interface between two systems; one mature, but in need of change, the other, fledging and in need of assistance. The *Charter* provides a ready and flexible framework to join the Aboriginal community both to the larger society and to the unlanded Aboriginal diaspora by principled standards of justice. These fundamental indicia of fairness, recognized by all civilized self-governing units, constitute no significant threat to the cultural survival of the Aboriginal mediation justice heritage, while buttressing its inherent adjudication frailty.

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INTRODUCTION

The Aboriginal peoples of Canada advocate self-government to reverse the oppressive effects of centuries of economic, political and cultural subjugation by the dominant descendants of the original colonizers. An Aboriginal criminal justice system is a component of this revitalization process which would address the over-representation of Aboriginals in the conventional system as a result of this colonization process.

At the heart of the Aboriginal drive for recognition of the inherent right to self-government and a special place within Canada is the illusive concept of a "collective right" to distinctive forms of self-governance, including a criminal justice system, as a matter of "cultural survival."

Both self-government and justice initiatives vary in their suggested degree of autonomy from the structures, procedures and values of the dominant society. This thesis focuses on the *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People,*[1] which is the most comprehensive, autonomous and recent of the Aboriginal criminal justice suggestions. The *Inquiry* departs most significantly from the precepts of conventional criminal justice by advocating the displacement of the *Canadian Charter of Rights and Freedoms,*[2] with its emphasis on individual rights, by a "tailor-made"[3] Aboriginal charter which would accord paramountcy to collective rights over conflicting individual rights in the criminal law context.

This thesis is an examination of the relevance of the *Charter* to an otherwise autonomous Aboriginal criminal justice system implemented pursuant to a collective right to self-determination in the interests of cultural

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[1] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg, Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair) [hereinafter *Inquiry*].

[2] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K) 1982, c. 11 [hereinafter *Charter*].

[3] *Inquiry, supra*, note 1 at 335.

survival. To the extent that, presently, there is no comprehensive Aboriginal criminal justice system in place, no public draft of an Aboriginal Charter, possibly no such thing in law as a collective right to anything, and a paucity of information on historical Aboriginal justice mechanisms and their relationship, if any, to Aboriginal cultural survival, this thesis embarks on relatively uncharted waters. When it finally returns to port, the conclusion is that the *Charter* does not threaten the culturally distinct survival of otherwise autonomous Aboriginal criminal justice processes. It is submitted that an effective, contemporary Aboriginal criminal justice system would be a synthesis, or, "principled interaction"[4] or middle way between two differently oriented justice systems that would draw from the respective strength and wisdom of each as identified in this thesis.

This thesis will use conventional historical, political and sociological sources to examine the colonization process, the evolution of the self-government movement as a reaction to that process, the nature of Aboriginal criminality engendered by that process, and traditional Aboriginal justice mechanisms extant before the advent of that process. The evolution of autonomous justice initiatives and the relatively radical position of the *Inquiry* therein, is explored by reference to other inquiries, commissions, conferences and commentary. The meagre jurisprudence on the concept of a collective right is augmented by reference to philosophical and historical sources. Sections 1, 25 and 33 of the *Charter* are analyzed in light of the rationales developed in this thesis for individual rights, collective rights and the paramountcy of the one over the other.

The pace of political developments in this area has quickened even as this thesis is written. Therefore the research for this thesis leans heavily on newspaper reports for the most recent developments. These are also used to attempt to measure, principally the reaction of the Aboriginal, but also that of the larger community, to the emerging realization of the possibility of an Aboriginal criminal justice system which may not be subject to the *Charter*.

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[4] *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suet'en People* (A proposal to the B.C. Ministry of the Attorney General by the Gitksan and Wet'suet'en Education Society, and others, March 1985) ,summary, [unpublished]

CHAPTER 1

THE COLONIZATION PROCESS

INTRODUCTION

It is an accepted fact that Aboriginal people are over-represented in the criminal justice system. The *Report of the Aboriginal Justice Inquiry of Manitoba*[1] refers to this obvious fact as "shocking."[2] Jackson adds, "In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away."[3]

There is general acceptance of the conclusion of the Australian Law Reform Commission that "The primary reasons for this disproportionate representation lie outside the criminal justice system."[4]

The proximate cause of what the *Inquiry* concedes is "a higher rate of crime among Aboriginal people"[5] may be poverty and alcohol, however these well-known correlates of crime are themselves the product of what Jackson refers to as the historical process of "colonization"[6] involving the

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[1] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg, Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair) [hereinafter *Inquiry*]

[2] *Ibid.* , at 85.

[3] Michael Jackson, "Locking Up Natives in Canada" (1989) 23: 2 U.B.C. L. Rev.215 at 218.

[4] The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws, Report No. 3I* (Canberra: Australian Government Publishing Services, 1986) (hereinafter Australian Report) referred to in Jackson *Ibid.* , at 217.

[5] *Inquiry* , *supra.*, note 1 at 88.

[6] Jackson, *supra.*, note 3 at 218.

"dispossession" and "marginalization" of Aboriginal people over time. The gross over-representation of Aboriginals in the justice system is attributable to the cumulative effects of this colonizing experience tainting generations of victims. The "long list"[7] of "indices of disorganization and deprivation,"[8] including alcoholism and crime, is an inevitable and probably universal response to the unilateral imposition of grossly disruptive and disempowering pressures on a resistant, but increasingly irrelevant, minority. Despair, alcoholism, loss of self-respect, abuse, suicide and crime are outward manifestations of a deeper personal and collective damage which, like the miners' canaries, "are telling us that something is very wrong."[9]

The fundamental solution to this problem involves "the reversal of that process"[10] by implementing an Aboriginal right to self-government, which would include a justice component as part of this revitalization.

Both self-government and justice initiatives vary in the suggested degree of autonomy from the structures, procedures and values of the dominant society. This thesis focuses on the response of the *Inquiry*, which, as the most autonomous of the justice suggestions, poses the greatest challenge to conventional assumptions about criminal justice. Mere reform of the existing system is rejected by the *Inquiry* because ". . . past efforts at reforming the justice system such as having more Aboriginal people in the system. . . have not brought about significant improvements.[11] "Simply. . . improving what is inherently a flawed approach to justice is not, in our view the answer."[12] The autonomous answer of the *Inquiry* is summarized as follows:

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[7] *Ibid.*, at 218.

[8] *Ibid.*, at 219.

[9] Terrance Armstrong, "Suicide Points to Collapse of Nation" *The Vancouver Sun* (4 October 1991) A3.

[10] Jackson, *supra.*, note 3 at 218.

[11] *Inquiry*, *supra*, note 1 at 254.

[12] *Ibid.*, at 252.

> Each Aboriginal community in Canada may establish an Aboriginal court system as and when it considers itself ready to do so. This court will have exclusive jurisdiction within its territory over all persons, Aboriginal and non-Aboriginal. The law to be applied in these courts would be the criminal code established by the governing body of each community which may include such provisions of present federal and provincial laws as each community chooses to adopt. The procedure in these courts will be according to Aboriginal common law as amended by the community government. These laws and procedures may be subject to the provisions of an Aboriginal charter of rights enacted by each community which would incorporate only those individual rights of the *Canadian Charter of Rights and Freedoms* [13] which are not inconsistent with paramount Aboriginal collective rights.[14]

It must be stated that this summary represents the extreme potential scope of an Aboriginal justice system which is intended to be staged in at times suitable to the capacity and interest of each community; however, "the important point to keep in mind is that it would be up to the Aboriginal people and their governments to make those decisions."[15]

It must also be stated that the *Inquiry's* position on the optional status of the *Charter* is tempered by an acknowledgement that "a growing number of Aboriginal people have come to accept the attractions of an emphasis on individual rights and liberties."[16] This concern leads to the above-described suggestion of a tailor-made Aboriginal charter which would accommodate such rights, however, subject always to the paramountcy of Aboriginal collective rights.

In apparently anxious anticipation of the *Inquiry* position, Bryan Schwartz expressed concern about rhetorical excess and "against going too far in the direction of separatism and special status" in these terms:

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[13] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K), 1982, c. 11 [hereinafter *Charter*].

[14] *Inquiry ,supra* , note 1 at 318, 319, 734 re territorial jurisdiction; 320, 321, 734 re jurisdiction over the person; 323, 325 326, 642 re subject matter jurisdiction and 333-336 re application of the *Charter.*

[15] *Ibid.* , at 326.

[16] *Ibid.* , at 334.

> It may be tempting for the Inquiry to act as an uncritical advocate of separate structures of justice for aboriginal people. Such a proposal would appear bold, original, and responsive to aboriginal demands for more self-government . . . Almost any public inquiry might consider a strategy of deliberate overstatement. Governments can be seen as so inert and insensitive that a radical proposal may be seen as necessary to make moderate progress.[17]

This chapter examines the colonization process and the self-determination response in order to place the *Inquiry* position in perspective. Part one describes the general process, which is illustrated by representative specific examples in order to better understand the urgent demand to reverse the process: "If we refuse to acknowledge the past, we conceal the nature of suffering, and therefore cannot understand the demands of the present."[18] Part two traces the development of self-government to the brink of constitutional entrenchment to meet the justifiable demands of the present. Part three surveys the evolution of Aboriginal justice initiatives as a relatively recent component of the self-government movement, culminating in the response of the *Inquiry*. The *Inquiry* position will be shown to be "bold" and "radical" in the context of this evolution and, it will be argued, is in part, a reaction to governmental inertia on previously less aggressive and challenging suggestions.

PART 1: THE COLONIZATION PROCESS

INTRODUCTION

At first the white man is seen to furnish the obvious products of progress in metal, fabric, shot and glass. The Aboriginal enthusiastically adapted to his needs the tools, yard goods, guns and even the beads. At first the white man took away only furs, sea otters and various fruits of the sea and land. But it was the white man's nature to seek and exploit riches and eventually to colonize, expand and control. In this process the original inhabitants of the land were

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[17] Bryan Schwartz, "A Separate Aboriginal Justice System?" [1990] Man. L.J.77 at 90.

[18] H. Brody, *Maps and Dreams* (Vancouver, Douglas and Mcintyre, 1988) at xiv.

dispossessed, shifted and marginalized to a progressively smaller, meaner and more irrelevant physical and psychic space.

The initial trade was largely mutually satisfactory, but buried in the holds of the ships and in the hearts and intentions of the ships' masters and their successors were more insidious things. Some, like disease, were unknown and unintended. Some, like alcohol, were delivered with maliciously selfish intent. Others, like Christianity, were offered with mixed motives of salvation and cultural genocide. Some, like education, were imposed, again with mixed motives of civilizing, changing and smothering a culture.

Mere goods, resources, and even land, if unfairly taken away, are in a more enlightened day, potentially compensable, at least in part. But the process of colonization took away much more than was immediately apparent. It stole spirit, self-respect, identity and independence. These precious commodities cannot be given back for they are not ours to give. They are not necessarily lost, but only the original owners can retrieve them.

Chief Justice Dickson has laid the foundation for Aboriginal rights litigation and negotiation by making it clear that the Crown will be held, "to a high standard of honourable dealing with respect to the aboriginal peoples of Canada . . . ."[19] In shaping the future in his last decision on Aboriginal rights, the Chief Justice recalled the past, ". . . over the years the rights of the Indians were often honoured in the breach . . . ."[20] He adopts the words of MacDonald J. in *Pasco* v. *C.N.R.*,[21] "We cannot recount with much pride the treatment accorded to the native people of this country."[22]

The repeated themes of the colonization process confirm this indictment.

SUBJUGATION

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[19] *Reg.* v. *Sparrow* , (1990) 56 C. C. C. (3d) 263 at 288.

[20] *Ibid.* , at 283.

[21] (1985), 69 B.C.L.R. 76 at 79.

[22] *Sparrow, supra.* , note 18 at 283.

Economic

There is a so-called "optimum period" in the early phase of white contact when the original inhabitants, "have sufficient of the white man's material civilization to ease the burden of life, but yet not enough to disrupt their way of life."[23] The natives were, by and large, astute businessmen and in the early days of the sea otter trade in British Columbia, for example, would refuse to trade for inferior goods and simply wait for a better ship to come along.[24] Thus, for many, tools and firearms were adapted by choice and integrated into a more efficient, yet familiar lifestyle.

Yet, even at this early "beneficial" stage, the process of ultimately disintegrating cultural change is beginning. Adams describes the negative impact in the mid 1700s of the reception of the horse and gun into the plains Indian society.[25] The increased hunting efficiency and mobility transformed a localized agricultural and pedestrian hunting economy into a nomadic culture with a single unrenewable resource, the buffalo. Fur trapping introduced competition for the white man's goods and individualized profit-making into societies based on sharing and equality.[26] The fur trade infrastructure demanded skills of all kinds and provided jobs and thus wages to Indians for the first time.[27] Economic dependency on the larger society is begun. This initiates a weakening of the traditional communitarian ethic of sharing and leads to the development of the more competitive wage and welfare environment of the later stages of the colonization process as will be outlined in chapter four.

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[23] E.P. Patterson, *The Canadian Indian: A History Since 1500* , (Don Mills, Collier-Macmillan, 1972) at 94, quoting J. Anderson, "Eastern Cree Indians", *Historical and Scientific Society of Manitoba , Papers*, Series III, No. II (1956) at 31.

[24] Professor Michael Kew, Anthropology Lecture (Vancouver, University of British Columbia, 2 October 1991) [unpublished].

[25] Howard Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon, Fifth House, 1989).at 21-22.

[26] *Ibid.*

[27] See, *ibid.* , c. 3.

The buffalo disappeared more or less coincident with the completion of the railroad and massive settlement of the Northwest[28] with the result that treaty and reserve "negotiation" was often an unequal process, "Once the buffalo were gone, the native people were reduced to complete dependency on whites, and the treaties served to justify the seizure of Indian lands."[29] Whether the treaties should be viewed in this way as unfair, or perhaps more accurately as fair, but unfulfilled, the consequence is the same. In order to make room for our railroad, settlement and agriculture, the native is shunted to a place of our choosing, with hunting access to his former territory subject to our regulations. Economic dependency is virtually assured.

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[28] *Ibid.*, at 60-61.

[29] *Ibid.*, at 61.

Political

In the early days of the fur trade the Hudson's Bay Company controls the market and, in effect, runs a very large company town.[30] It becomes in a very real sense the government with "full power to make laws and enforce them."[31] This political dependency is continued in the later reserve period by the Indian agent and the *Indian Act* which emasculate the positions of chief and local council, which were often alien to Indian culture in any event. Before contact , and for periods thereafter which vary as one moves west and north, the Aboriginal was in every sense self-governing. However the *Indian Act* effectively stifled any such local initiative with its paternalistic pretensions of "protection" and "advancement" revealingly explained by Duncan Scott in 1931 as meaning that, "Protection from vices which were not his own, and instruction in peaceful occupations, foreign to his natural bent, were to be substituted for necessary generosity."[32] Under this centralized administration, effective control in the form of budgets and priorities was outside the community. Reserves developed "white compounds"[33] housing the critical decision makers hired by the dominant society: nurses by Health and Welfare; teachers by Indian Affairs; police by the RCMP.and the Hudson's Bay manager by head office. Local council decisions were subject to ministerial veto. Since reserve lands could not be seized as collateral for a loan, Indians were effectively barred from mortgaging their land, their one resource , to finance new economic ventures.[34] Political and economic dependency are joined.

Irrelevance

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[30] See, *ibid.* , c.3 and c. 5.

[31] *Ibid.* , at 23.

[32] Patterson, *supra* , note 23 at 136.

[33] Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (U.K., Lester and Orpen, 1989) at 6.

[34] *Ibid.* , at 58.

Once the Aboriginal community had been displaced to reserves to serve the needs of the larger society, it thereby ceased to be an economic or political factor to be reckoned with and enters a "period of irrelevance"[35] which runs roughly from the *Indian Act* of 1876 to the Trudeau White Paper [36] in 1969. Assimilation was assumed or fostered: "their number was small and exercised no influence at the ballot box."[37] Underfunded outside bureaucratic control fostered predictable neglect by the Indian department whose "job was simply to administer, and like many a custodian, it was so involved in the routine of its administration that it forgot the purpose of its custodianship."[38]

This period of political and economic irrelevance was approximately mirrored by a legal hiatus from the *St. Catherine Milling* case in 1889[39] to the *Calder* case in 1973,[40] during which period "the Canadian law of native rights went into an almost total eclipse . . . and ceased to exist in the minds of the legal profession."[41]

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[35] Patterson, *supra* , note 23 at 25.

[36] Dept. of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy , 1969.*

[37] Patterson, *supra* , note 23 at 27, quoting Diamond Jeness: "Canada's Indians Yesterday, What of Today " (1954) XX Canadian Journal of Economics and Political Science, at 99.

[38] *Ibid* .

[39] *St. Catherine Milling And Lumber Company* v. *The Queen* (1889) 14 A.C. 46 (J.C.P.C.).

[40] *Calder* v. *Attorney-General of B. C.* [1973] S.C.R.313.

[41] Michael.Jackson, " The Articulation of Native Rights in Canada" (1984)18: 2 U.B.C. L. Rev. 255 at 267.

Cultural

The white man's mission was not only to tame, develop, exploit and settle the land, "but also to bring its original owners to 'civilization'."[42] It is during the period of irrelevance that the economic and political subjugation of a people is continued on a massive modern scale, accompanied by a pervasive and insidious acculturation resulting in the "ossification"[43] of native society. Very little of whatever constitutes "cultural identity" and a sense of personal worth and distinctiveness is left untouched or unaffected. It is this comprehensive threat to "cultural survival" which underlies the argument for "collective rights" which will be addressed in chapter three.

A dehumanizing, "grinding paternalism" made reserves resemble prisons where the Indian agent controlled passes to the outside world, opened personal mail and, "managed the reserve people's personal business as official business."[44]

One of the most effective and shameful instruments of cultural oppression was the residential school, "There is little doubt that the federal government regarded the Indian residential schools as the key weapon in a long-term plan to destroy all vestiges of Indian culture."[45] This policy extended through five generations of Indian families to the 1960's and the personal and cultural devastation cannot be underestimated.[46]

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[42] Bradford Morse and David Nahwegahbow, *The Interaction Between Environmental Law Enforcement and Aboriginal and Treaty Rights in Canada*, (paper prepared for the Law Reform Commission of Canada,1985) at 144 [unpublished].

[43] Adams, *supra* , note 25 at 35.

[44] *Ibid.* , at 41.

[45] York, *supra*, note 33 at 32.

[46] See, Rudy Platiel, " 'Impact of Colonization' Felt for Generations, Erasmus Says,"*The Globe and Mail* (5 June 1992) at A6.

The children were indoctrinated with white culture while their own was actively repressed: native foods were denigrated and thrown out;[47] the speaking of Native languages was punished and, "it is estimated that 50 of Canada's 53 native languages are in danger of extinction."[48] Indian braided hair was cut off;[49] Indian rituals were denigrated[50] and Indian names were anglicized.[51]

Doris Sperling[52] adds revealing personal observations to this experience. She points out that birthdays passed unobserved and letters from home were discouraged, "We would learn of the death of a pet on our return home." Children were brought up in unnatural, sexually segregated communities where dating patterns were non-existent and "schools were apprentice courses in abuse." Recent studies confirm her anecdotal observations and suggest that, "as many as eighty per cent of the Indians had been sexually abused at church- run schools."[53] She adds that children were brought up by outsiders without parental models and parents were left behind in unnaturally childless communities.

The products of the residential school and their offspring were often destined for instability, "When I had been stripped of all pride, self-respect, and self-confidence, I was told to make something of myself."[54] Psychologists have coined the term "residential school syndrome" to describe the symptoms of a

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[47] York, *supra*, note 33 at 34.

[48] *Ibid.*, at 36.

[49] *ibid.*, at 40

[50] *Ibid.*, at 42

[51] Adams, *supra*, note 24 at 39.

[52] Doris Sperling, Criminology Address, (Burnaby, Simon Fraser University, 21 October 1991) [unpublished].

[53] York, *supra*, note 33 at 30.

[54] *Ibid.*, at 40.

lost culture, "something they were born with, a part of their soul, was wiped out by the missionaries and the teachers."[55]

Modern Acceleration of the Process

The dispossession of frontier days accelerates during the period of irrelevance in response to the insatiable demands of the industrialized society: ". . . especially after the Second World War, native communities have been assaulted by northern industrial development."[56] The term "assault" is not inappropriate as much of this intrusion into the Aboriginal way of life has taken place without the degree of consultation or compensation that Chief Justice Dickson includes as part of the justification analysis established in *Sparrow.* [57]

The industrialized society needs aluminum, copper, gold, oil, logs, pulp and a host of other primary products, which are often located on or accessed through traditional Aboriginal land and reserves. Major industrial projects generate roads, pipelines, air strips, seismic lines, trailer camps,settlement , hunters and tourists that are insinuated into the Aboriginal lifestyle. Such progress is powered by hydro, which often results in flooding of Aboriginal hunting territories and a shattering of the Aboriginal resources and economy. These impacts are interconnected and cumulative and suffocate a promised[58] and promising[59] lifestyle. Some typical examples follow to make the point that

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[55] *Ibid.* , at 37.

[56] *Ibid.* , at 119.

[57] *Reg.* v *Sparrow*, *supra* , note 22 at 296.

[58]The appellant's factum in *Delgamuukw* develops the argument that the oral negotiations surrounding treaty making often amounted to a promise not to interfere with the hunting and fishing lifestyle. For example, Treaty Commissioner Morris in 1876 referring to Treaty No. 3: "Understand me, I do not want to interfere with your hunting and fishing . . . What I offer does not take away your living, you will have it then as you have now, and what I offer now is put on top of it." Appellants' Factum, *Delgamuukw* v. *A. G. of B. C. et al. (1987)* , para. 265, reproduced in Michael Jackson, *Native Peoples and the Law.* (Vancouver, University of British Columbia , 1992) at 172.

[59] In *Maps and Dreams* , *supra* , note 18, Brody documents in detail the actual economic value of what might otherwise appear to be an anachronistic hunting and trapping lifestyle. In addition ,he portrays how for many, the trapline life embodies "Indianess"and independence.

the result, too often, is wrenching dislocation, seething discontent and social dysfunction. It is this common experience which reduces the attractiveness of the "voluntary exit" defence of collective rights, referred to in chapter five, which maintains that optional exit from the group minimizes concern about the internal procedures of the group.

In 1952, a Carrier reserve disappeared under water in order to provide power to Kitimat, British Columbia, to smelt aluminum, causing the loss of fishing stations, trapping cabins and hunting trails. It was said that, "the bones of their ancestors floated away."[60] In 1962, a dozen Sekani villages were submerged as a result of the W.A C. Bennett Dam[61] without meaningful government compensation or aid. In 1963, massive flooding of the Moose Lake and Chemawawin reserves in Manitoba virtually destroyed a traditional native economy[62] and the the people were relocated to, "one of the most uninhabitable and depressing places one could imagine,"[63] living in houses "jammed together on a small patch of land."[64]

In the 1970's, in Northern Saskatchewan, uranium mining, with attendant roads and development, effectively terminated the traditional hunting and fishing economy of the Chipewyan Indians which, because of their isolation, had remained undisturbed for centuries.[65]

In Northern Quebec, a Cree band has been shunted repeatedly from 1951 to the 1970s to make room for copper, gold mining and logging.[66]

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[60] York, *supra* , note 33 at 120.

[61] *Ibid.* , at 120.

[62] *Ibid.* , at 108-109.

[63] *Ibid.* , at 112.

[64] *Ibid.* , at 108.

[65] *Ibid.* , at 115-117.

[66] *Ibid.* , at 121.

In the 1980s, the oil companies "roared"[67] into the Lubicon land in Alberta and the welfare roll went from ten per cent to ninety per cent [68] as the result of the destruction of a hitherto self-sufficient, and perhaps more importantly, self-identifying, hunting and trapping lifestyle.

EFFECTS: CRIME AND SELF-DETERMINATION

The themes revealed by the above broadly drawn incidents will not apply equally to all Aboriginal groups. The Canadian Aboriginal society is itself a multicultural one encompassing a wide diversity of groups distinguished from each other historically, linguistically, geographically and politically. Such individual incidents on closer analysis may well bear an interpretation which is more favourable to the honour of the Crown. However, the overall perception of the cumulative impact of such events unites the Aboriginal community in the common experience of a process of economic, political and cultural subjugation which results in both an individual and a collective trauma.

The individual impact is felt in the chaos of massive social dysfunction: "The Indian Act, with its restrictions on Native autonomy, and the reserve system, with its patchwork of tiny reserves on infertile land, have locked Indians into a cycle of unemployment, overcrowding, poor health, and dependence on welfare."[69] This surfaces in fairly obvious ways as ennui, despair, alcohol , violence and crime.[70] An observer of Indian society on a Manitoulin Island reserve in the 19th century used language which reverberates with implications for to-day:

> we have taken the work out of their hands, and all motive to work, while we have created wants which they cannot supply. We have clothed them in blankets - we have not taught them to weave blankets, we have substituted guns for the bow and arrows - but

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[67] *Ibid.*, at 127.

[68] *Ibid.*

[69] *Ibid.*, at 79.

[70] Erasmus refers to a "correlation between . . . the loss of culture. . . and prisons," Platiel, *supra.*, note 46.

> they cannot make guns; for the natural progress of arts and civilization springing from within, and from their own intelligence and resources, we have substituted a sort of civilization from without, foreign to their habits, manners, and organization: we are making paupers of them.[71]

This is also a collective trauma because such seemingly inexorable events impact in each case on a relatively small, tightly knit group, which senses a loss of control with a concomitant loss of group or cultural identity. The loss of the ability of the group to control, or even influence, important day to day decisions, is accompanied by a loss of group identity as alien persons and institutions supplant the traditional. The Canadian Bar Association refers to this loss of control as a product of "democratic totalitarianism" involving exclusion on a collective basis, "where a minority group can be consistently excluded from participation in issues affecting its existence."[72] It is this collective experience which contributes to a "community-constituting understanding" about the objective of regaining control, which chapter three refers to as a pre-condition for the finding of a "collective right" so to do.

The colonization process generates a legitimate, yet, it is submitted, almost desperate need for control and self-government. At the same time, it produces a veritable breeding ground for crime which would challenge any justice system, conventional or Aboriginal. It is these pressing themes which converge in the *Inquiry* call for autonomous justice. The reality of these two themes might better "penetrate a twentieth century consciousness "[73] by particular reference to the experience of two peoples, separated widely in time and space, but united by the common thread of the colonization experience. The Mi'kmac illustrate to some degree the criminogenic effect, and the Kluskus the self-determination impetus, generated by the colonization process. They also illustrate the potential of the revitalization movement to correct the irrelevance of the past.

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[71] Patterson, *supra* , note 23 at 87.

[72] *Rebuilding A Canadian Consensus: An Analysis of the Federal Government's Proposals For A Renewed Canada* ,(Ottawa , December, 1991) at 71.

[73] Brody, *supra* , note 18 at xiii.

Crime: The Mi'kmac Example

At the time of Cartier's visit, almost five centuries ago, the Mi'kmac lived an independent existence throughout all of Nova Scotia and the coastal area of New Brunswick.[74] The colonization process, including disease [75] and genocide,[76] accelerated by the Loyalist influx of settlers and increasing pressure on traditional lands, was such that by the end of the eighteenth century, government reports indicate that they had become "economically dependent"[77] and, ". . . almost the whole Mi'kmac population are now vagrants, who wander from place to place and door to door seeking alms."[78]

The first reserve was created in Nova Scotia in 1786 and by the 1830s most of the Mi'kmac were "forced to 'settle down or starve'. . . to surrender himself to dependency upon the white man and to accept land on a reservation."[79] In 1882 the ancestors of Donald Marshall Jr.[80] were shunted to the newly created Kings Road Reserve located on 2 acres along the Sydney River near what is now downtown Sydney.[81] The reserve was small but at least supported their fishing based culture. In 1888, two-thirds of an acre was expropriated for a railway. By 1915, 122 Mi'kmacs were living on the remaining one-third acre.

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[74] Patterson , *supra* , note 23 at 59.

[75] *Ibid.* , at 57-61.

[76] York , *supra* , note 33 at 56.

[77] Patterson , *supra*, note 23 at 64.

[78] York, *supra* , note 33 at 56.

[79] Patterson, *supra* , note 23 at 65.

[80] *Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 1: Findings and Recommendations* (Province of Nova Scotia, December, 1989) (Commissioners: Chief Justice A. Hickman; Associate Chief Justice L. Poitras and The Honourable Mr.G Evans) (Hereinafter Marshall Report) at 161.

[81] See, York, *supra* , note 33, c. 3, "Inside the Reserves."

In 1915, partially to satisfy the white need for prime urban real estate, but after the formality of an Exchequer Court of Canada hearing, they were relocated to the Membertou reserve, a 66 acre site described as "a worthless plot of swamp, rocks and woodlands"[82] which had no access to water. The Mi'kmac objection was explicit: "The feeling of being close to the water . . . a vital element in the Mi'kmac culture . . . was taken away from the people. It's like being chained."[83] Since they could not vote, they were irrelevant and politically powerless to oppose the dislocation.

In 1944, after a federal inquiry into "the Indian problem", a centralizing policy was effected to "simplify"[84] white bureaucratic administration of reserves. This policy was abandoned in 1949, but not before as many as 50 per cent of all Mi'kmacs in Nova Scotia were uprooted, "their homes, farm buildings, and schools burned to the ground."[85] They were crammed into one of two reserves, Eskasoni and Shubenacadie, which are described as remote from major markets and too small and unproductive for the populations. Some former reserves totally disappeared and Membertou stagnated.

In spite of being reduced to a fraction of its former territory, the King's Road reserve was a functioning community. A Sydney magistrate testified at the 1915 hearing that, "only seven Mi'kmacs had appeared before him in the previous ten years,"[86] and the presiding justice found them to be "reasonably well behaved."[87] The *Marshall Report* studied Eskasoni, Shubenacadie and Membertou and, after referring to Jackson's characterization of the process of colonization as "at the root of horrendous figures relating to Native people in the criminal justice system,"[88] confirmed that the rates of unemployment, suicide,

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[82] *Ibid.*, at 64.

[83] *Ibid.*

[84] *Ibid.*, at 65.

[85] *Ibid.*, at 66.

[86] *Ibid.*, at 62.

[87] *Ibid.*, at 63.

[88] Marshall Report, *supra*, note 80 at 162.

assault, impaired driving and incarceration are all "significantly higher than in the non-Indian population."[89]

Such a result should not have come as a surprize. At the time of the plan to relocate his band to Eskasoni, the Membertou chief, "predicted quite accurately, that centralization would lead to an increase in drunkenness and lawlessness."[90] By 1953, three-quarters of the Eskasoni band are described as dependent on welfare, drinking heavier and, "changing their attitudes toward helping each other."[91] A 1980 study found the death rate from cirrhosis of the liver at Shubenacadie to be fourteen times the national average and a spokesman for the Union of Nova Scotia Indians described the social conditions as "just a breeding ground for alcohol and drugs."[92]

The process continues to this day, but the Aboriginal, as a result of the revitalization process, is no longer considered irrelevant. A Sydney company has proposed a quarry on Kelly's Mountain not far from Membertou. The Mi'kmac consider this to be a significant spiritual place. Their concerns have resulted in the establishment of an assessment review panel to which a Mi'kmac has been appointed.[93]

Self-Determination: The Kluskus Example

Brody refers to "an appalling and vicious colonialism"[94] and documents how the Beaver of Northeast British Columbia adapted to successive waves of industrial frontiers by retreating within their own territory, "progressively

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[89] *Ibid.*, at 163.

[90] York, *supra*, note 33 at 66.

[91] *Ibid.*, at 67.

[92] *Ibid.*, at 68.

[93] "Natives Quarrel with Quarry Proposal" *The Vancouver Sun* (8 January 1992) A8.

[94] Brody, *supra*, note 18 at xiv.

restricted to the edges, and even to pockets at the edges "[95] as "the old north" became "the new west."[96] He establishes that there is a minimum physical and psychological Aboriginal cultural survival unit such that retreat and accommodation, "can continue only so long as there are places, domains and selves that are large and secure, and into which they can still retreat . . . every Indian knows that countless accommodations have been made; most of them feel that there is no space and no time to withdraw further."[97]

Kew details a telling contemporary illustration of a people who could retreat no further and felt they had to resort to collective civil disobedience to preserve their identity and assert control over their lives.[98]

The Kluskus are a Southern Carrier people who had traditionally lived and prospered on the Frazer river in central British Columbia. The discovery of gold in this area in 1858 brought the usual boom town mentality, disease and alcohol. White prospectors inundated the area. Farming along the Frazer followed to feed the ever expanding settlements. Game resources were disrupted and massively exploited. Placer mining silted the salmon spawning grounds and damming the Quesnel river, to provide water for the placer mines, obstructed the run.

By the turn of the century, the Kluskus had adapted to this intrusion by moving from the prime Frazer river land to the refuge of the high plateau thought to be less attractive to whites. Here, they adapted to their new circumstances by developing a highly satisfactory and self-sufficient lifestyle, combining hunting , fishing and horse herding supplemented by wage labour.

This functioning independence was effectively ended by the concurrence in the 1950's and 1960's of outside influences in the form of drastically declining fur prices, the expansion of the forestry industry to supply the post-war

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[95] *Ibid.* , at 96.

[96] *Ibid.* , at 116-117.

[97] *Ibid.* , at 98.

[98] Kew , *supra* , note 24 (Lectures and slides; 8, 13 and 15 November 1991)[unpublished].

building boom and the growth of social services in the form of family allowances, unemployment and welfare

Once again, the Kluskus compliantly moved even further west to their present site, but, in the early 1970's, progress again reached their very doorstop. A timber license was granted unilaterally and without consultation over land immediately adjacent to their village, which they felt would threaten their water supply. A new town-site to service the timber expansion was planned for very nearby.

However, by this time, the revitalization wave had reached even the Kluskus, who were now politically informed through their association with the recently formed Union of British Columbia Indian Chiefs.[99] The band council learned to write protest letters and had started to organize a land claim, all to no avail, when, without advance notice, the bulldozers arrived to start a logging access road. It is insensitive acts such as these that moved Brody to warn that:

> To shove, be it gently or forcibly, a person who stands in the middle of a field is one thing, but to shove someone who stands at the edge of a cliff is quite another.[100]

The Kluskus men, women and children placed their bodies in front of the bulldozers. Thus did ordinary people find themselves manning a barricade in a modest act of civil disobedience that joined them in purpose and motive with Ghandi, King, Tolstoy and Thoreau.[101]

PART 2: EVOLUTION OF SELF-GOVERNMENT

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[99] See, Paul Tennant , *Aboriginal Peoples and Politics : The Indian Land Question in British Columbia, 1849-1989*, (Vancouver, University of British Columbia Press,1990), c. 12, "The Formation of the New Organizations, 1969-71".

[100] Brody , *supra*, note 18 at 246.

[101] Arthur Ripstein, "Breaking the Rules for a Reason" *The Globe and Mail* (11 September 1990) at A17.

Issues such as treaties, land title, hunting and fishing rights and the preservation of Aboriginal culture had "long been features of a catalogue of Indian concerns"[102] but, during the period of irrelevance, did not impact on the non-Indian public. However, in the second half of the twentieth century, self-government, the reversal of the process,[103] gradually emerged as a solution to the disempowering impact of the colonization process.[104] It intensified into a demand in the 1970s, in response to the apparently assimilationist rejection of special status by the White Paper, which aroused "massive Indian opposition":[105] "No single action by any government since Confederation has aroused such a violent reaction from Indian people - never have Indians felt so bitter and frustrated as they do today."[106] This demand was facilitated by the 1970s constitutional wrangling[107] and by the Supreme Court of Canada's recognition in *Calder* of at least the existence of Aboriginal title at common law.[108] This water-shed judgement effectively ended the period of irrelevance by prompting what Justice Dickson, in the equally seminal judgement in *Sparrow*, understatedly referred to as, "a reassessment of the position being

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[102] Patterson , *supra*. note 23 at 41; and see: Tennant, *supra* , note 99, c. 5, where these demands, and the demand for self-government generally, are documented from the late 1880's in British Columbia.

[103] Jackson, *supra* , note 10.

[104] C.E.S. Franks, ed. , *Aboriginal Peoples and Constitutional Reform: Background Paper 12*, (Institute of Intergovernmental Relations, Kingston, 1987) at 20; and see: Douglas Sanders, "The Renewal of Indian Special Status" in Bayefsky and Eberts, eds, *Equality Rights and The Canadian Charter of Rights and Freedoms* , 529.

[105] Sanders, *Ibid.* , at 539.

[106] Patterson, *supra* , note 23 at 178.

[107] R. Gibbins and J. Ponting , "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in, Alan Cairns and Cynthia Williams, Research Coordinators, *The Politics of Gender , Ethnicity and Language In Canada* (University of Toronto Press, Toronto,1984) 171 at 173.

[108] *Reg.* v *Calder*, *supra*, note 40.

taken by the government."[109] A "critically important role"[110] was played by the Penner Report of 1983 which advocated self-government and control as "essential. . . to ensure their cultural survival."[111] It became "the catch-phrase of the 80's"[112] as a major concern of the First Minister's conferences of 1983, 1984, 1985 and 1987, which were constitutionally mandated to identify and define "existing aboriginal and treaty rights" that had been affirmed by the *Constitution Act, 1982*.[113] In 1991, British Columbia Chief Justice Justice McEachern was apparently reluctant to endorse the concept of self-government in the case of *Delgamuukw* , where his diagnosis was that, "it is obvious they must make their way off the reserves."[114] This obiter was at least ill-timed, however, for on April 9, 1992, in an "historic breakthrough," the federal and provincial governments unanimously announced that they would agree to recognize the inherent right to self-government.[115] After a long and tortuous path, it appears[116] that this issue has come to at least conceptual fruition. In recognition of its importance as "*the* issue upon which the resolution of other issues depends,"[117] minds must now turn to the details of, and principled limits to, this right, which is the focus of this thesis.

INERTIA AND FUNDAMENTAL CHANGE

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[109] *Reg.* v. *Sparrow* , *supra* , note 19 at 284; and see: J. Frideres, *Native Peoples in Canada: Contemporary Conflicts* (Scarborough, Prentice-Hall, 1988, 3rd. ed.) at 93 and 341.

[110] Gibbins and Ponting, *supra* , note 107 at 174.

[111] House of Commons *Report of the Special Committee on Indian Self-Government in Canada* (1983) (hereinafter Penner Report) at 35.

[112] Morse and Nahwegahbow, *supra* , note 42 at 2.

[113] The *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 1, sections 37, 37(1) and 35.

[114] *Delgamuukw* v. *A. G. of B. C. et al.* [1991] 3 W.W.R. 97 at 478.(B.C.S.C.).

[115] Susan Delacourt, "Natives Promised Self-government" *The Globe and Mail* (10 April 1992) at A1, quoting Premier Rae.

[116] It is unclear at the time of writing whether the agreement will hold up in the absence of agreement on senate reform.

[117] Gibbins and Ponting, *supra* , note 107 at 174.

The self-government movement is grounded in the evident failure of past conventional responses. Despite a plethora of "new" initiatives - "segregation", "assimilation", "devolution" and numerous committees, task forces and royal commissions, the "litany of tragic indices" continued.[118]

The Penner Report concluded that something very different was required, "[the]. . . description of the severe limitations of today's bureaucratic solutions made the need for fundamental change clear."[119]

This fundamental change involved Aboriginal control to ensure cultural survival, an oft-repeated concept which is important to an understanding of collective rights: "Indian witnesses gave convincing testimony about the importance of Indian control in areas central to the culture of First nations. They asserted that in some cases only Indian control of legislation and policy would ensure the survival and development of Indian communities."[120]

The recommendations of the Penner Report were never legislatively realized, but its themes dominated the First Ministers Conferences where Inuit, Metis, Status and Non-Status Indians respectively referred to: "the need to continue to survive as a distinct peoples in Canada,"[121] "the right to self-government . . . your own institutions . . . the right to culture,"[122] "the right of the First Nations to their own self-identity . . . and to develop their own cultures"[123] and, "Our right to self-identity, the preservation and enhancement of cultures and customs, the protection of . . . the self-governing institutions which give full control over essential aspects of our lives."[124]

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[118] Morse and Nahwegahbow,*supra* , note 42 at 1.

[119] Penner Report, *supra* , note 111 at 27.

[120] *Ibid.* , at 27.

[121] Morse and Nahwegahbow,*supra* , note 42 at 27.

[122] *Ibid.* , at 28.

[123] *Ibid.* , at 29.

[124] *Ibid.* , at 30.

DEMAND FOR CHANGE

During the latter period of this evolution the Aboriginal demand for self-government became insistent as more and more people, native and non-native, felt Brody's "need to be clamorous on behalf of Indians."[125] Aboriginals are acutely aware of their history and determined to effect change. They can, and have used, all pressure tactics known to the modern generation. Because they work, these methods can be anticipated again if the expectations generated by the recent historic breakthrough are not realized. York, in a chapter entitled "The New Militancy, " outlines the ever more familiar tactics, including blockades,[126] demonstrations,[127] boycotts,[128] national[129] and international[130] publicity events and just plain politics.[131] Additionally, "the major national Indian and Metis organizations have articulate leaders, multi-million-dollar budgets, large numbers of employees, teams of high-powered lawyers and constitutional experts, economic analysts, and media advisers."[132]

Adams refers to a "red awakening"[133] and advocates "radical nationalism,"[134] which would involve "a sophisticated level of guerilla warfare, both urban and rural."[135] Brakel refers to the "extreme and xenophobic outlook"

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[125] Brody, *supra* , note 18 at x.

[126] York, *supra* , note 33 at 253; B.C. , Haida block logging roads.

[127] *Ibid.* , at 238; Man. , Peguis re housing shortage.

[128] *Ibid.* , re underfunding of schools.

[129] *Ibid.* , at 251; 1,000 natives on "constitutional express " to Ottawa re entrenchment of rights.

[130] *Ibid.* , at 278; Bishop Tutu visits Osnaburgh.

[131] *Ibid.* , at 273-275; Harper scuttles Meech Lake.

[132] *Ibid.* , at 251.

[133] Adams, *supra* , note 25 at 157.

[134] *Ibid.* , at 169.

[135] *Ibid.* , at 187.

of " 'Red Muslims' shouting 'Red Power'."[136] Mark Maracle, who stood with the Mohawk Warriors at Oka, adopts this theme in espousing the theories of Malcolm X and stating, "The only time they (the white man) take notice is when we stand up and point a gun."[137]

George Erasmus, on the occasion of his re-election as national chief of The Assembly of First Nations in 1988, warned, "We say, Canada, deal with us today because our militant leaders are already born.[138] In 1991, Ovide Mercredi succeeded Mr. Erasmus on an election platform that included civil disobedience "if necessary,"[139] and declared, "I will not allow the white man's agenda to dominate our lives."[140]

It is this context which, it is submitted, underlies the concern of Schwarz that, "Almost any public inquiry might consider a strategy of deliberate overstatement."[141]

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[136] Samuel Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (American Bar Foundation, 1978) at 2.

[137] "Use 'Any Means Necessary' to Control Fate, Indians told" *The Vancouver Sun* (19 November 1991) at A5.

[138] York, *supra* , note 33 at 259.

[139] David Olive, "Confrontation is Still the Bottom Line for Canada's Natives" *The Globe and Mail* (15 June 1991) at D4.

[140] Don Gillmore, "Chief Justice" *Saturday Night* (March 1992) 15 at 16.

[141] Schwartz, *supra*, note 17.

PART 3: EVOLUTION OF AUTONOMOUS JUSTICE

While the problem of Aboriginal over-representation in the criminal justice system is obvious, effective solutions are more illusory: " . . .there is a very extensive literature on the problem of minority over-representation in prison . . .no one has yet succeeded in finding an effective remedy to this problem."[142]

The contemporary solution of autonomous Aboriginal justice is relatively "embryonic and inchoate"[143] and frustrates detailed analysis: "Regrettably, the literature on aboriginal self-government in the Canadian context is sparse. It is rich in eloquent rhetoric and philosophy but largely lacking in rigorous analysis and specific, concrete proposals."[144] An even greater lack of analysis and concrete proposals attends the issue of the relevance, if any, of the *Charter* to autonomous Aboriginal justice. This issue has only seriously arisen as a result of the optional status for the *Charter* envisaged by the *Inquiry* and the proposed paramountcy of collective rights in any, as yet unpublished, Aboriginal charter. To the extent that this thesis concentrates on this aspect of the *Inquiry* position, it embarks on largely uncharted waters.

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[142] Jean-Paul Brodeur, Carol La Prairie and Roger McDonnell,.*Justice for the Cree: Final Report* (Quebec, Cree Regional Authority, 1991) at 45 [hereinafter, Cree Report].

[143] Menno Boldt and J. Anthony Long, "Tribal Traditions and European Western Political Ideologies: The Dilemma of Canada's Native Indians", in Menno Boldt and J. Anthony Long (in association with Leroy Little Bear) ,eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1984) 333 at 334, referring to the concept of "sovereignty."

[144] Gibbins and Ponting, *supra* , note 107 at 174.

THE EDMONTON CONFERENCE

The problem was significantly addressed for the first time in 1975, when high-level decision-makers, 22 at the ministerial level, representing four federal government departments and all provincial and territorial governments, met in Edmonton, with six national native organizations, many provincial native organizations and native inmates.[145] Native expectations were high, as a great deal of preparation and consultation had preceded the detailed and realistic proposals, which resulted in almost 200 recommendations.[146] These were extremely important and far-reaching initiatives which this thesis will nevertheless characterize, with no deprecatory intent, as "relatively mild," or conventional improvements to the system, because they involved, in contrast to the suggestions of the *Inquiry*, little challenge to the system itself. The bulk of these proposals centered instead on the need to train and involve natives in all aspects of the planning and delivery of justice, community involvement, diversion, alternatives to incarceration and cross-cultural training or sensitization of non-native personnel. There is no indication that an alternative justice system even approximating the *Inquiry* position was an Aboriginal priority at this time. A recommendation for a community-run, or "peacemaker" court, with minor offence jurisdiction as a limited adjunct to the existing system, appears to have been the most radical recommendation. Prophetically perhaps, "This recommendation was the only one the ministers refused to accept , even in principle."[147]

INERTIA

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[145] National Conference and the Federal - Provincial Conference on Native Peoples and the Criminal Justice System : *Native peoples and Justice* (Ottawa, Ministry of the Solicitor General, 1975) (hereinafter, Edmonton Conference).

[146] "Optimism Marks Edmonton Conference on Native Peoples and the Law" *Liaison* (March 1975).

[147] Don McCaskill, *Native People and the Justice System* , (Paper presented to the Native Studies Conference, Brandon University, November 5-7, 1981) at 11 [unpublished].

While the Edmonton Conference might be said to mark the beginning of the end of Aboriginal justice irrelevance, the issue does not truly flourish, if published reports are any indication, until relatively very recently. Since 1975, approximately 25 reports have been published in Canada, however, 21 of these have appeared since 1984; 11 in 1988 and 1989 alone.[148] Recommendations of the relatively mild Edmonton Conference variety tend to be repeated, which is candidly acknowledged by the Cawsey Report, published in 1991: "We have made these recommendations again, because in our opinion they have not been implemented fully or appropriately and are still applicable."[149] The Cawsey Report recommendations are firmly rooted to sensitizing, rather than supplanting, the existing system: "The Task Force recognizes that intensive indigenization of the criminal justice system, including flexible approaches to sentencing, can, in fact, go a long way toward meeting the wishes of some Aboriginal people."[150]

The implementation of the Edmonton Conference proposals was "eagerly awaited,"[151] and the failure to do so, as evidenced by their repetition in subsequent reports, was bitterly disappointing.[152]

FUNDAMENTAL CHANGE

it is submitted that this largely warranted frustration with official inaction and inertia, coinciding with the escalating and sometimes strident demands of the larger self-government movement outlined above, have played a part in

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[148] See *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*, March 1991, (hereinafter, Cawsey Report). Volume III of the Cawsey Report, at page 4-3, lists the reports from 1967 to 1990 to which are added those published since and which will be referred to herein.

[149] Cawsey Report, *Ibid.*, Vol. I, *Main Report*, at 1-5.

[150] *Ibid.*, at 1-7.

[151] *Supra*, note 146 at 2.

[152] See Christie Jefferson, *Conquest by Law: A Betrayal of Justice in Canada* (Burnaby, Northern Justice Society, Simon Fraser University, 1988) [unpublished] at 267-271; and see: William T. Badcock, *Update of Native Justice Issues, Phase II Report* (Department of Justice, Ottawa, 1983) at 5.

propelling the *Inquiry* to the outside reaches of the spectrum of Aboriginal justice autonomy. This thesis examines whether it has "overshot the mark."[153]

The *Inquiry* does take a "bold and radical"[154] step in consciously disassociating itself from the conventional solutions of the past. It echoes the call of the Penner Report for "fundamental change"[155] through self-government, by advocating "major changes"[156] as "the only appropriate response."[157] Its response, to repeat, is to create a truly autonomous, self-contained, system of Aboriginal justice, rather than merely to implement the relatively mild version of reforms to "what is inherently a flawed approach to justice,"

> Those have been the solutions preferred by governments in the past, but it would seem that that approach has been unproductive for government and unacceptable to Aboriginal people.[158]

In justifying this fundamental change, it recalls the self-government movement theme of "the continuing litany of tragic indices,"[159]

> The situation involving Aboriginal people and the justice system has deteriorated , rather than improved , in the recent past.[160]

THE *INQUIRY*: RELATIVE ISOLATION

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153 "An Assault on the Law, Not to Say Common Sense" *The Globe and Mail* (19 May 1992) referring to comments of Madame Justice McLachlin in *R.* v. *Seaboyer* [1991] 2 S.C.R. 577 at 583.

154 Schwartz, *supra* , note 17.

155 Penner Report, *supra* , note 119.

156 *Inquiry* , *supra* , note 1 at 265.

157 *Ibid.* , at 336.

158 *Ibid.* , at 252.

159 *Supra* , note 118.

160 *Inquiry* , *supra* , note 1 at 252.

The relatively mild or conventional versions of change meet no informed opposition in principle and will not be discussed in this thesis. The more progressive concepts are also not discussed in detail. Their necessity and desirability seems increasingly obvious and acceptable as outlined by Jackson:

> . . . over the past twenty years in Canada a growing understanding has developed regarding the limitations on the traditional criminal justice process and its reliance on imprisonment to further retributive and deterrent objectives. Furthermore, a consensus is emerging on the need to develop community based sanctions and non-adversary processes which balance the interest of the victim, the offender, and the community. There is also a significant and growing body of opinion that restorative justice principles should play a far more important role in criminal justice policy and practice.[161]

In chapter five, this thesis argues further, that it may be possible to structure an Aboriginal system that "bears the hallmarks of their own system,"[162] as distinct from merely indigenizing the conventional system, wherein *Charter* values, as interpreted in the context of the Aboriginal system, form a principled bridge both to conventional justice, and to that significant portion of the unlanded Aboriginal community, which may be largely unable to avail itself of the benefits of self-government.

However, the *Inquiry* position ". . . that the most appropriate course to follow is not simply to establish a system of Aboriginal courts . . . , but to establish fully functional Aboriginal justice systems,"[163] each potentially with its own very different criminal laws and procedures, potentially beyond the scrutiny of individualist *Charter* values as a matter of local option, places it largely, but not totally, apart. Other reports, government positions and, what is submitted is informed and sensitive opinion within the white community, demonstrate this relative isolation. Chapter four refers to significant similar opposition within the

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[161] Michael Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities* , (Paper prepared for the Law reform Commission of Canada, May 15, 1991) at 54[unpublished].

[162] *Ibid.* , at 91.

[163] *Inquiry* , *supra*, note 1 at 256.

Aboriginal community itself, to autonomy without the *Charter*, particularly in the criminal law context.

CONTRASTING POSITIONS

Federal

Before the recently raised possibility of resort to a section 33 "override" power,[164] the federal government consistently insisted on the application of the *Charter* to Aboriginal justice. The proposal of the 1985 First Minister's Conference mirrored Hawthorne's concept of "citizen-plus"[165] in referring to Aboriginal people as, "enjoying the rights that flow from their status as aboriginal peoples . . . as well as rights flowing from Canadian citizenship."[166] The pre-April 9th[167] federal policy to improve Aboriginal justice reflected the constitutional proposal of a delayed "justiciable" right to self-government subject to the *Charter*.[168] This policy, known as the "Native Agenda," recognized the need for self-government, but included the following guidelines:

> . . . solutions must be found within the Constitution of Canada, present and future, as interpreted by the Supreme Court of Canada. In this sense, it does not envisage an entirely separate system of justice for aboriginal peoples, although community

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[164] Agreement to entrench this power was reported on May 12, 1992, however this was denied the following day by Alberta. See, Susan Delacourt, "Talks Shape Third Order of Government, *The Globe and Mail* (12 May 1992) at A1; and see, Tom Barrett, "Self-Rule for Natives Unresolved," *The Vancouver Sun* (13 May 1992) at A1. The potential use of this power by Aboriginal governments is discussed in chapter 5.

[165] H. Hawthorn, *A Survey of the Contemporary Indians of Canada*, Vol. 1 (1966) at 6.

[166] Boldt ,Long and Little Bear, *supra* , note 143 at 371.

[167] The "historic breakthrough" date, see, *supra*, note 115.

[168] *Shaping Canada's Future Together* , (Ottawa, September 1991) in "A Constitutional Primer " *The Globe and Mail* (11 January 1992) at A6.

> justice systems, for example, as connected to aboriginal self-government, are both possible and desirable.[169]
>
> All Canadians are entitled to the equal protection of the law and the protections guaranteed by the *Charter of Rights and Freedoms* , but this in no way denies the importance of differential treatment of aboriginal individuals and communities as necessary to ensure equality and respect for their unique and diverse spiritual and cultural beliefs, aspirations and circumstances and their special place in Canada as reflected in the Constitution.[170]
>
> . . . aboriginal individuals are entitled to the equal protection of the law and the protections of the *Charter of Rights and Freedoms* , but should be treated in a manner that respects their unique history, circumstances and cultures.[171]
>
> It will also be imperative that communities resolve the potentially difficult fit between the demands of procedural fairness and independence and the traditional, less formal approaches which may inform new arrangements.[172]

Like so many other players in this complex and rapidly evolving issue, except for the possibility of Aboriginal resort to section 33 of the *Charter*,[173] the federal government has yet to articulate the interface between the unitary and pluralistic aspects of justice administration which seem to rest so comfortably together in these political statements.

The Globe and Mail, perhaps predictably, is less hesitant to fill the void: "We resist on principle the idea of two different charters guaranteeing different measures of justice depending on which race a Canadian is born into."[174]

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[169] *Aboriginal People and Justice Administration : A Discussion Paper* (presented to the conference "Achieving Justice", Whitehorse, September 4-7, 1991) at 20.

[170] *Ibid.* , at 22

[171] *Ibid.* , at 26.

[172] *Ibid.* , at 30.

[173] See, *supra*, note 164.

[174] "Aboriginal Canadians and the Justice system" *The Globe and Mail* (3 August 1991) at D6.

The Penner Report

The Penner Report was a "bold"[175] step. In calling for a distinct third order of government, it proved to be nine years ahead of its time and clearly inspires the *Inquiry*. However, it was ". . . most concerned with identifying directions in which reform efforts should move" [176] and refers only minimally to justice issues. It concentrated on "three areas of critical concern,"[177] which were education, child welfare and health. Its recommendations do include the power to legislate with respect to "justice and law enforcement, "[178] however, there is no discussion of what this means, or the relationship of the *Charter* to Aboriginal courts, if they are included in that phrase.

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[175] Sanders, *supra* , note 104 at 559.

[176] Gibbins and Ponting, *supra* , note 107 at 174.

[177] Penner Report, *supra* , note 111 at 27.

[178] *Ibid.* , at 64.

Law Reform Commission of Canada

The Report of the Law Reform Commission, *Aboriginal Peoples and Criminal Justice* ,[179] dated December, 1991, concentrates on conventional "short-term" ameliorative solutions, however, It departs significantly from its own previous emphasis on "the virtues of a uniform, consistent and comprehensive approach to law reform "[180] and supports the creation of Aboriginal justice systems "through a process of negotiation and agreement."[181] It poses the "basic difficulty: " . . . can and must the rights of the person involved disappear in the face of an assertion of the collective rights of the Aboriginal community? A method must be found to reconcile the legitimate rights of the individual with those collective rights."[182] Its uncharacteristically cursory analysis concludes that, "The question of determining to what extent *Charter* rights are negotiable can hardly be avoided."[183] It does not, however, attempt to define the parameters of this negotiated reconciliation. It suggests that both sides to the negotiation might benefit from a Reference to the Supreme Court of Canada for clarification of their respective positions.[184] A Globe and Mail editorial rebukes the commissioners' supporting the concept of self-government, "without ever adequately saying what they mean . . . The Law Reform Commission never engages in such a serious examination. We were mistaken in assuming this to have been their job."[185]

The Royal Commission on Aboriginal Peoples

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[179] Law Reform Commission of Canada, Report no. 34,*Aboriginal Peoples and Criminal Justice* (Ottawa , Information Canada, 1991)

[180] *Ibid.* , at 1.

[181] *Ibid.* , at 22.

[182] *Ibid.* , at 20.

[183] *Ibid.*

[184] *Ibid.*

[185] "Defining the Terms of Native Justice" *The Globe and Mail* (26 December 1991) at A14.

The Royal Commission on Aboriginal Peoples, established in August 1991, is composed of seven commissioners, four of whom are Aboriginal. Two of the non-Aboriginal members, former Supreme Court Justice Bertha Wilson and former Saskatchewan premier Allan Blakney, are described as "deeply sympathetic to native perspectives."[186] Even though the commission has a broad mandate, a three year time frame; and, George Erasmus, the co-chair, had indicated that the commission, "would be cautious about stepping into the issue,"[187] the commission has announced a position, in advance of any hearings or evidence, that any inherent right to self-government should be "circumscribed."[188] Again, as with so many statements in this area, it is not entirely clear what is meant by this, but it may imply a self-government position limited by *Charter* values: "You can word it in such a way that it is clear it's an inherent right within the parameters of Canada and deal with the fact that there should be a co-existence and limiting factor of the right."[189]

The Canadian Human Rights Commission

The Canadian Human Rights Commission expresses limited support for an autonomous solution, ". . . but there must evidently be a basic level of consistency with national norms."[190] Recently, Commissioner Yalden in supporting self-government, nevertheless, "hoped once self-government was obtained aboriginal nations would choose to operate in contemporary Canada and adopt the *Charter of Rights* ."[191]

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[186] Jeffrey Simpson, "The Telling Nature of the New Royal Commission on Aboriginal Affairs" *The Globe and Mail* (30 August 1991) at A14.

[187] Rudy Platiel, "Native Panel Ponders Constitutional Role" *The Globe and Mail* (31 October 1991)at A4.

[188] Rudy Platiel and Geoffrey York, "Native Rights Inherent, Panel Says *The Globe and Mail* (14 February 1992) at A5.

[189] *Ibid.*

[190] Canadian Human Rights Commission,"Issues in Human Rights" *Newsletter* , (February., 1989).

[191] Charles Lewis, "Commission Backs Natives' Demands For Self-Government "*The Globe and Mail* (27 March 1992) at A6.

The Australian Law Reform Commission

The 1986 Report of the Australian Law Reform Commission[192] was preceded by almost ten years of hearings and research and ". . . represents the most comprehensive review undertaken in any country of the problems associated with indigenous peoples and an imposed criminal justice system."[193] Its general recommendation was not in favour of a general scheme of autonomous Aboriginal courts for Australia. It did advocate particular supplemental local justice mechanisms of various kinds, but was of the view that an election, or a right of appeal to the regular system, should be in place in order to safeguard individual rights.[194]

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[192] *Supra* , note 4.

[193] Jackson, *supra* , note 3 at 222.

[194] See Jackson, *Ibid.* , at 238-239.

The Marshall Report

The Marshall Report,[195] published in late 1989, expressly took a "modest"[196] approach, seeking a, "balance between the old and new ways"[197] in recommending an experimental section 107 summary conviction court. It expressly rejected an autonomous system:

> We do not propose a separate system of Native law, but rather a different process for administering on a reserve certain aspects of the criminal law. The laws enacted by Parliament and the Legislative Assembly will continue to apply to Natives, and the safeguards for accused persons under the *Charter* would apply in any Native Criminal Court . . . An accommodation can be reached between Native traditions, human rights law and the *Charter*, so that the end result will be relevant to Native people and consistent with the protections provided to all Canadians."[198]

The Cawsey Report

The Cawsey Report[199] released just months before the *Inquiry*, "reiterates the principle that all Canadians are entitled to the protection of the rule of law and to the protections provided by the *Charter of Rights and Freedoms* "[200] and expressed concern that a person subject to any Aboriginal system of justice should be able to opt out of a tribal system.[201] It declined to

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[195] *Supra*, note 80.

[196] *Ibid.* , at 168.

[197] *Ibid.* , at 169.

[198] *Ibid.* , at 168-169.

[199] Cawsey Report, *Supra* , note 148.

[200] *Ibid.*, Vol. 1, at 1-2.

[201] *Ibid.* , at 11-2.

advocate a parallel system on the basis that, "whether an Aboriginal Justice System should exist and its scope and extent, is a matter for negotiation."[202]

Ontario

The Ontario government, arguably, has been quite progressive in Aboriginal issues. It is one of the few governments to fund and continue a native advisory council on justice issues,[203] as recommended by the Edmonton Conference, and all Ontario reserves are expected to have their own native police forces within five years.[204] However, it stops short of an optional *Charter*. At the First Ministers Conference in 1984, it supported native self-government to the extent that it was compatible with the existing system: "there can be reforms within the structure of the Canadian federal system which give Aboriginal people more control over their lives but without fragmenting our country and provinces or our individual communities."[205]

Former Ontario attorney-general Ian Scott, now free of the constraints of public office, while "widely viewed as sympathetic to the native cause,"[206] would appear to insist on the application of the *Charter* as he is reported to consider it, "fundamental that common laws apply to both natives and non-natives alike."[207]

Manitoba

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[202] *Ibid.*, at 11-5.

[203] See Badcock, *supra*, note 152 at 5 (The Ontario Native Council on Justice).

[204] "Ontario Native Police in Five Years Predicted" *The Globe and Mail* (27 February 1992) at A7.

[205] Gibbins and Ponting, *supra*, note 107 at 222.

[206] Jeffrey Simpson, "Broad, Bold and Breath-taking, But What Does It Mean? *The Globe and Mail* (25 March 1992).

[207] *Ibid.*

Apparently, Manitoba will implement many of the Inquiry proposals, but rejects a totally autonomous system, partially, it says, because "the federal government has made it clear that a separate justice system is just not on."[208]

Saskatchewan

Less than 48 hours after Manitoba rejected the idea of a separate Aboriginal justice system, the Saskatchewan government was reported as, "expressing unequivocal support for the concept "[209] by endorsing the Report of the Saskatchewan Indian Justice Review Committee, dated January 30, 1992.[210] In fact, after referring to the Inquiry and to the Cawsey Report, this report is explicit that, "The process undertaken in Saskatchewan cannot be compared to the inquiries and studies just referred to."[211]This is because its mandate was, "to focus on practical changes and initiatives that could be implemented almost immediately, or within a very short period of time."[212] Rather than examining a broad range of justice alternatives, the report chose, ". . . to examine ways to make changes within our present criminal justice system."[213] Accordingly, its proposals are consistent with the Cawsey Report[214] and the Edmonton Conference[215] proposals in emphasizing indigenization, sensitization and an expanded role for native justices of the peace over First

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208 David Roberts, "Separate Native Justice System Rejected for Manitoba" The Globe and Mail (29 January 1992) at A1.

209 David Roberts, "Saskatchewan Moves Toward Native Justice" *The Globe and Mail* (1 February 1992) at A4.

210 *Report of the Saskatchewan Indian Justice Review Committee* (Regina, Saskatchewan Queen's Printer, January 1992) [hereinafter, Saskatchewan Report].

211 *Ibid.*, at 4.

212 *Ibid.*, at 1.

213 *Ibid.*,at 4

214 *Supra*, note 148.

215 *Supra*, note 145.

Nations laws effected pursuant to the Indian Act, with a right of appeal to the Provincial Court.[216]

British Columbia

British Columbia recognizes the mediation and conciliation emphasis in Aboriginal approaches to justice, but its 1990 Report sees, ". . . much scope for this approach within the present justice system."[217] The five goals of its action plan are firmly rooted to the relatively mild and familiar versions of change involving understanding, communication, service delivery, indigenization, diversion and the like, but all, apparently, within the existing system and the Charter.[218]

CONCLUSION

Former Chief Justice Dickson addressed a conference on Aboriginal issues in March of 1992 and is reported to have stated that: "To avoid a chaotic situation any constitutional agreement on self-government must include broad parameters specifying that the *Charter of Rights* , the Criminal Code and certain other federal and provincial laws will continue to apply."[219] It is submitted that this statement of the former Chief Justice highlights the relative remoteness of the *Inquiry* position from much contemporary thinking and, in this sense, may justify Schwartz's anticipatory description of it as a "radical proposal."[220] The important question is whether this proposal, however radical, can adequately

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[216] The Saskatchewan Report, *supra*, note 210 at 45.

[217] *Native Justice Consultations: Progress Report and Action Plan.* (Ministries of Solicitor General, Attorney General and Native Affairs (Vancouver, July , 1990) at 4.

[218] *Ibid.* , at 12-17.

[219] John Bryden, "Mulroney Calls for Definition of Native Self-Government" *The Vancouver Sun* (18 March 1992) at 13 ; and see: Peter O'neil, "Conference Fails To Shed Light on Future of Self-Government" *The Vancouver Sun* (16 March 1992) at A9 where the former Chief Justice is quoted slightly differently, "Chaos would reign in Canada unless there are parameters around an aboriginal right to self-government. For starters the Charter of Rights must apply to all Canadians."

[220] Schwartz, *supra*, note 17.

meet the demands of contemporary Aboriginal crime, an analysis of which, begins in the next chapter.

CHAPTER 2

BASIC CONCEPTS AND ABORIGINAL CRIME

INTRODUCTION

Part two of this chapter examines the nature of Aboriginal crime, spawned, in part, by the colonization process, which autonomous Aboriginal justice must be able to address. In assessing the sufficiency of the position of the *Report of the Aboriginal Justice Inquiry of Manitoba*,[1] this thesis makes repeated use of a number of concepts that are introduced in part one

PART 1: BASIC CONCEPTS

HARMONY ETHOS

Introduction

The *Inquiry* considers the conventional justice system alien to Aboriginal values. The call for a fundamentally different Aboriginal justice system is not simply a reaction to the governmental inertia of the past referred to in chapter one. It is premised on what the *Inquiry* describes as a very different Aboriginal world view and concept of justice. This approach is set out here with a minimum of comment.

Aboriginal Concept of Justice

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[1] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg , Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair [hereinafter, *Inquiry*]

"The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony. . . . Atonement and restoration of harmony were the goals - not punishment,"[2]

> The philosophy in Aboriginal society was for all parties to acknowledge the crime, allow for some process of atonement and install a system of reparation or compensation in order to restore harmony to the community.[3]

Aboriginal World View

The Aboriginal is said by the *Inquiry* to have a fundamentally different "world view,"[4] which is manifested in certain "traits,"[5] "characteristics,"[6] or "cultural imperatives,"[7] which grew out of the need "to maintain harmony and ensure survival of the group."[8] These communitarian values contribute to "major Aboriginal ethics or rules of behaviour [which] form the basis of daily relations within Aboriginal communities,"[9] and which, while perhaps now not necessary to actual survival continue ". . . to be functional to maintain harmony within the community."[10]

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[2] *Inquiry*, *supra*, note 1 at 27.

[3] *Ibid.*, 26.

[4] *Ibid.*, at 35.

[5] *Ibid.*, at 29.

[6] *Ibid.*

[7] *Ibid.*, at 30.

[8] *Ibid.*, at 31.

[9] *Ibid.*, at 33.

[10] *Ibid.*, at 32.

These altruistic traits include the "ethic of non-interference,"[11] which discourages "coercion of any kind;"[12] the "rule of non-competitiveness [which] exists to suppress internal conflict within a group. . . [and] stresses a more cooperative approach,"[13] and, "sharing [which] is another rule of behaviour. . . "[14] natural to a communitarian based society:

> In some instances, it was institutionalized in ceremonies to ensure that no one became too rich or powerful and, conversely, that no one became too poor or too powerless. Such ceremonies included the Potlatch of the West Coast and the Sundance of Manitoba. However, it was, and remains, a daily feature of Aboriginal societies in a less formal fashion [and] . . . serves as a form of conflict suppression by reducing the likelihood of greed, envy, arrogance and pride within the tribe."[15]

Conventional System Alien

Within such a "value system" the processes of the Canadian justice system are found to be profoundly "alien": ". . . adversarialism and confrontation are antagonistic to the high value placed on harmony and the peaceful coexistence of all living beings, both human and non-human, with one another and with nature."[16]

In the conventional system, "Retribution is demanded if the person is considered guilty [and is]. . . an end in itself. . . [which is] a meaningless notion

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[11] *Ibid.*, at 31.

[12] *Ibid.*

[13] *Ibid.*, at 32.

[14] *Ibid.*

[15] *Ibid.*, at 32-33.

[16] *Ibid.*, at 37.

in a value system which requires reconciliation of an offender with the community and restitution for victims."[17]

"Because the purpose of law in Aboriginal society is to restore harmony within the community. . . restitution to the victim or victims is, therefore, a primary consideration."[18] "In the eyes of the community sentencing the offender to incarceration or, worse still, placing him or her on probation, is tantamount to relieving the offender completely of any responsibility for a just restitution of the wrong. It is viewed by Aboriginal people as as a total vindication of the wrongdoer and an abdication of duty by the justice system."[19]

The *Inquiry* notes the relative ". . . ease with which a member of the dominant society can plead not guilty to a charge for which that person, in fact, is responsible. . . [as the] conventional response to an accusation, based on the doctrine that people are not required to incriminate themselves and that it is up to the prosecution to prove guilt."[20] Whereas, "primary Native values"[21] are such that, ". . . to deny a true allegation is seen as dishonest, and such a denial is a repudiation of fundamental and highly valued standards of behaviour."[22]

The *Inquiry* is critical of the adversarial system, which is described as a process, "where only a chosen number are called to testify on subjects carefully chosen by adversarial counsel, where certain topics or information are inadmissible, and where questions can be asked in ways that dictate the answers."[23] It suggests that, ". . . more of the truth can be determined when everyone is free to contribute information. . . [as in the Aboriginal hearing process where] belief in the inherent decency and wisdom of each individual

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[17] *Ibid.*

[18] *Ibid.*, at 36.

[19] *Ibid.*, at 37.

[20] *Ibid.*, at 21-22.

[21] *Ibid.*, at 21

[22] *Ibid.*, at 22

[23] *Ibid.*, at 36.

person implies that any person will have useful opinions. . . [and therefore allows] any interested party to volunteer an opinion or make a comment."[24] The *Inquiry* states that, " 'Truth' is a key concept in the Canadian legal system and, as such, is considered definite and definable,"[25] whereas, the Aboriginal understanding is that, " 'absolute truth' is unknowable. . . [and] relative."[26]

This Aboriginal world view and concept of justice will be referred to in this thesis as the "harmony ethos."[27] This concept refers compendiously to what the *Inquiry* concludes is a fundamentally different "meaning of justice."[28] The *Inquiry* states that, "At the most basic level of understanding, justice is understood differently by Aboriginal people. The dominant society . . .emphasis is on the punishment of the deviant as a means. . . of protecting society."[29] However:

> The purpose of justice in an Aboriginal society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order.[30]

ACTUALLY EXISTING INDIANISM

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[24] *Ibid.*

[25] *Ibid.* ,a t 41.

[26] *Ibid.*

[27] Ken Peak "Criminal Justice, Law, and Policy in Indian Country: A Historical Perspective" (1989) 17 Journal of Criminal Justice 393.

[28] *Inquiry*, *supra*, note 1 at 22

[29] *Ibid.*

[30] *Inquiry* , *supra* , note 1 at 22.

This thesis will analyze the sufficiency of the *Inquiry* position against the "reality" of the contemporary Aboriginal community and its justice needs and demands. In so doing, two concepts are adapted from Salman Rushdie which are intended to refer to the contemporary Aboriginal society and the contemporary Aboriginal person - "actually existing Indianism" and the "secular Indian":

> I reminded myself that I had always argued that it was necessary to develop the nascent concept of the 'secular Muslim', who, like the secular Jew, affirmed his membership of the culture while being separate from the theology.
>
> I also found myself up against the granite, heartless certainties of 'Actually Existing Islam', by which I mean the political and priestly power structure that presently dominates. . . Muslim societies. [31]

ADJUDICATION HIATUS

Introduction

A central problem which this thesis raises about the harmony ethos is not that it is wrong, but that it is an insufficient description of actually existing Indianism. It leads to a failure to adequately consider the adjudication, as distinct from the mediation needs of the Aboriginal community. This thesis argues that this distinction is important in assessing the *Inquiry* position and the relevance of the *Charter* to an otherwise autonomous Aboriginal criminal justice system.

Mediation

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[31] Salman Rushdie, "1,000 Days Trapped in a Metaphor" *The Globe and Mail* (13 December 1991) A19.

A Saskatchewan study[32] examined the role of "peacemakers" and concluded that: ". . . any form of adversarial approach to conflict resolution was, in general, considered alien by the Indian bands. On the other hand, a conciliation and mediation approach, being more familiar, would be the preferred manner of resolving disputes."[33] It defines mediation as involving a consensual context:

> Mediation is defined as an approach to conflict resolution in which an impartial third party intervenes in a dispute, with the consent of the parties, to assist them in reaching a mutually satisfactory settlement. Great value is placed on restoring relationships and reducing tensions and hostilities.[34]

It underlines the need for consent even in areas other than criminal justice such as "interpersonal disputes as might arise among families, neighbours, or landlords and tenants. . . [where] voluntary agreement to participation by both complainant and respondent is, of course, an essential precondition."[35]

It is submitted that this precondition is not just an empty legalism. The success of such an approach hinges on reconcilability. Mediators talk in terms of "compromise"; helping parties "build bridges to each other," "trade-offs and choices to be made," and "consensus."[36] Mediation is seen as accentuating the positive and blending separate interests to further an ongoing relationship of some kind, which could be as different as a child in common or the environment, but some ultimate objective which is "mutually agreeable"[37]

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[32] *Reflecting Indian Concerns and Values In the Justice System* (Joint Study: Government of Canada, Government of Saskatchewan and the Federation of Saskatchewan Indians, 1985) [hereinafter Saskatchewan Study]

[33] *Ibid.* ,at 33.

[34] *Ibid.* , at 29.

[35] *Ibid.* , at 31.

[36] John Sanderson, "Mediation: A Better Way Than Battling" The Vancouver Sun (28 January 1992) at A11.

[37] *Re Residential Tenancies Act , 1979*, [1981]1 S. C. R. 714 at 727.

however disparate the immediate appearances. In the context of criminal justice, it is submitted that the offender must in some important way see his or her self-interest as connected to the ongoing relationship in dispute and to the community interest in social harmony. "Atonement and restoration of harmony" must be predicated on a some sense of responsibility and will to atone and restore.

Adjudication

The adjudication process, on the other hand, "is predicated on the assumption that there are irreconcilable differences between the disputing parties."[38] The context and purpose of adjudication is fundamentally different from mediation. The alleged offender disputes the allegation or implacably resists the suggested resolution of the dispute. There may be no mutuality of interest at all. Individual interest may have wholly displaced communitarian concerns.

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[38] Law Reform Commission of Canada, *Studies on Diversion* (Ottawa, Information Canada, 1975) at 27.

Conclusion

The line between mediation and adjudication will often be blurred. The potential reconcilability of the dispute may have to be sought out and even fostered. However, it is submitted that a defiant assertion of innocence is fundamentally incompatible with the mediation process and demands an adjudication process of some kind. Such an assertion of innocence, if maintained, places the individual in an adversarial context. The individual is now very much at risk of an imposed, rather than a negotiated or mediated mutual settlement. It is this context to which Justice Dickson refers in stating that, ". . . adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole."[39]

The *Inquiry* does not refer to the distinction between adjudication and mediation, perhaps because of its unremitting, seamless reliance on the harmony ethos. The *Inquiry* does not address the question posed by Hoebel in his study of traditional Aboriginal law ways: "And what if guilt was denied?"[40] The failure of the *Inquiry* to consider the adjudication component of justice will be referred to as the "adjudication hiatus."

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[39] *Re Residential Tenancies Act, 1979, supra*, note 37 at 743.

[40] E. Adamson Hoebel , "Law Ways of the Comanche Indians" in Paul Bohannon, ed. , *Law and Warfare* (New York, National History Press, 1967) 184 at 192.

PART 2: CRIME IN THE ABORIGINAL COMMUNITY

INTRODUCTION

The colonization process generated the self-government initiative, but also created a crime problem which autonomous Aboriginal justice must be sufficient to address. This part examines the nature of Aboriginal crime in order to structure a background against which to assess the sufficiency of the *Inquiry* response. This background reality is merely one aspect of actually existing Indianism, which contributes to a conclusion that the very real contemporary differences between the Aboriginal and conventional society, identified by the *Inquiry*, are not such that an Aboriginal justice system can function successfully, without an adversarial, adjudicative, rights-based component.

This analysis of the nature of Aboriginal crime will be general and not wholly applicable to every community. However, just as all communities share to varying degrees the common experiences of dispossession, marginalization and loss of control, which inform the autonomy movement, so too, few can be wholly free of the devastating and often criminal manifestations of the process. The "tragic irony"[41] of the colonization process is that the people most affected by the march of progress have been the least to benefit from it: "They have not received the electricity produced by the dams, the fuel from the oil wells and the pipelines, or the jobs created."[42] Instead, they have lost a productive and self-identifying way of life and are enmeshed in the tragedy of despair, alcohol and their criminal correlates.

The association of alcohol and crime is, of course, a cross-cultural phenomenon, but its particular relevance to Aboriginal criminality was noted by the Law Reform Commission in 1974, "Much, if not most, Native crime is

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[41] Bradford Morse and David Nahwegahbow, *The Interaction Between Environmental Law Enforcement and Aboriginal and Treaty Rights in Canada*, (paper prepared for the Law Reform Commission of Canada,1985) at 317 [unpublished].

[42] *Ibid.*

associated with the use of alcohol."[43] A paper prepared for the 1985 First Ministers Conference reported the incidence of alcoholism among Aboriginal peoples to be 13 times that for non-Aboriginals.[44] The result is that an Aboriginal person is almost twice as likely as a white person to be a victim of crime generally, and runs an almost four times greater risk of being the victim of violent crime.[45]

The purpose of self-government is, of course, to reverse the process and its effects. This it will likely do, but crime and the need for a complete and integrated justice response, it is submitted, will never be eliminated in any community, Aboriginal or non-Aboriginal. Indeed, Gibbins and Ponting argue that the achievement of self-government , while on balance profoundly positive, may itself significantly contribute to instability and conflict. They raise the likelihood of unrealistically high expectations for self-government on the part of the Aboriginal community, which in the case of some particularly disadvantaged groups "may be near millennial."[46] If certain very real problems of actually existing Indianism such as poverty and alcoholism simply prove to be inherently difficult to manage, then reactions of, "anger or conversely, cynicism and apathy . . . can undermine the social vitality of the community."[47] Such sentiments may also suggest fault lines in the harmony ethos which are examined more fully in chapter four.

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[43] Douglas Schmeiser, *The Native Offender and the Law*, (Law Reform Commission of Canada, Ottawa , 1974) at 81.

[44] First Ministers Conference: The Rights of Aboriginal Peoples, *Background Kit.*(Ottawa, April 2-3, 1985) at 4.

[45] *Inquiry* , *supra* , note 1 at 87. The general rate is described as 1.8 times and the violent rate as 3.67 times the national rate.

[46] R. Gibbins and J. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada", in Alan Cairns and Cynthia Williams, Research Coordinators, *The Politics of Gender , Ethnicity and Language In Canada* (University of Toronto Press, Toronto,1984) 171 at 186.

[47] *Ibid.* , at 189.

The disproportionate dimensions of Aboriginal crime[48] are the product of the colonization process. They are not attributable to an inherent disposition to either crime or alcohol, although the myth of genetic intolerance to alcohol apparently warranted scientific refutation as recently as the mid 1970s.[49] Even when the plains Indians were facing starvation in the late 1870's, with the loss of the buffalo and white encroachment, Mounted Police crime statistics showed, "unequivocally that the Indian population had a much lower crime rate than did the white . . . and . . ., with a much larger population than the whites, had fewer total convictions than did the whites for liquor offences alone."[50]

Before white contact, ". . . the northern peoples of North America neither made nor used intoxicants of any kind."[51] This curse was introduced by the fur traders who soon recognized, "an almost ideal trade commodity in alcohol: it is soon consumed and tends to be addictive."[52] Washington Irving is reputed to have commented on the criminalizing effects of contact as follows: "The Indians improved daily and wonderfully by their intercourse with whites. They took to drinking rum, they learned to cheat, to lie, to swear, to gamble, to quarrel, to cut each other's throat, in short to excel in all that marked the superiority of their Christian visitors."[53]

It is submitted that the well-documented relationship between alcohol and crime, in fact, produces two related, but somewhat distinct effects, which will be simplistically characterized for convenience as "minor"and "major"crime.

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[48] The *Inquiry* , *supra*, note 1, at p. 88, concedes there is "a higher rate of crime among Aboriginal people."

[49] Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (U.K., Lester and Orpen, 1989) at 188.

[50] John Jennings, "Policemen and Poachers: Indian Relations On the Ranching Frontier" , in A. W. Rasporich and Henry Klassen ,eds, *Frontier Calgary:Town , City and Region 1875-1914* (Calgary, McClelland and Stewart, 1975) at 91.

[51] H. Brody, *Maps and Dreams* (Vancouver, Douglas and Mcintyre, 1988) at 250.

[52] *Ibid.*

[53] Peak, *supra*, note 27 at 394.

Minor crime

The writer's personal experience of prosecuting for over 20 years suggests there is a type of non-Aboriginal alcoholic offender, who is repeatedly involved in a disproportionately high number of relatively minor nuisance, property, or disorderly offences. While the employed, family-monitored or, otherwise apparently responsible, occasional, such offender, might simply pay a fine; the recidivist , alcoholic offender, without apparent economic or family support, would, with depressing regularity, end up in jail. This "revolving door" process would seem to have had no discernible positive impact on either the offender or the community. However, often it seemed that the court was presented with no viable alternative.

It appears that this type of offender and these types of offences are generated in disproportionate numbers from within the Aboriginal community, if incarceration for non-payment of fines can be taken as an indicator of the relatively minor nature of the presenting offence. Schmeiser reported in 1974 that, "A large number of Native offenders are sent to jail for non-payment of fines."[54] In spite of the possibility of Fine Option Programs[55] and judicial warnings against fining the impecunious, with summary incarceration in default of payment, [56] this pattern apparently continues.[57] Hagan noted the Native person's, "repetitious involvement in minor offences."[58] Coyle's study of Ontario patterns noted that natives, "were over-represented in admissions involving a sentence of less than three months";[59] were, "most frequently incarcerated as a

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[54] Schmeiser, *supra* , note 43 at 81.

[55] Section. 718.1 of the *Criminal Code of Canada* permits such a program.

[56] *R.* v. *Natrall* (1972) 9 C.C.C.(2d) 390 (B.C.C.A.); *R.* v. *Deeb and Wilson* (1986) 28 C.C.C. (3d) 257 (Ont.Prov. Ct.).

[57] *Inquiry*, *supra* , note 1 at 419 - 421.

[58] J. Hagan, "Criminal Justice and Native People : A Study of Incarceration in a Canadian Province", Canadian Review of Sociology and Anthropology, (August, 1974) 220 at 233; referred to in Simon Verdun-Jones and Gregory Muirhead, "Natives in the Canadian Justice System: An Overview", (1979-80) 7 Crime and Justice 3 at 14.

[59] Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?", (1986) 24 Osgoode Hall L. J.605 at 607.

result of liquor-related offences,"[60] and a, "distressingly high"[61] and, "alarming number of these people are imprisoned because they fail to pay a fine."[62]

One may question whether the full procedural panoply of the conventional criminal justice system is required in such proceedings. Moreover, as Verdun-Jones points out in referring to Brody's description of the alcoholic "rounder":[63] "In such circumstances discussions of the rehabilitative or deterrent effects of incarceration is otiose."[64] Nevertheless, such matters constitute a significant and distasteful proportion of Aboriginal contact with the justice system, which is at the root of much of the impetus for fundamental change. Indeed, the National Indian Brotherhood concentrated on this area in its submission to the Edmonton Conference[65] in 1975, which urged that, "Indian courts be set up on the reserves to deal with minor criminal offences."[66] It expressly based its position on the then recent Law Reform Commission of Canada Report [67] showing, "that native offenders are usually involved in less serious crimes than non-Native offenders."[68]

Such matters may be especially amenable to an alternative approach emphasizing restoration to, and, perhaps more importantly, utilizing the particular strengths of, the Aboriginal community. These cultural strengths can be harnessed to a restorative model in Aboriginal hands in ways simply, and

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[60] *Ibid.*, at 607.

[61] *Ibid.*

[62] *Ibid.*, at 608.

[63] H. Brody, *Indians on Skid Row* (Ottawa, Information Canada, 1971) at 57; referred to in Verdun-Jones, *supra*, note 58 at 16.

[64] Verdun-Jones, *supra*, note 58 at 16.

[65] National Conference and the Federal - Provincial Conference on Native Peoples and the Criminal Justice System : *Native peoples and Justice*, (Ottawa, Ministry of the Solicitor General. 1975)(hereinafter, Edmonton Conference)

[66] National Indian Brotherhood, *Indians and the Criminal Justice System* (A brief presented to the Edmonton Conference, February 3-5. 1975) at 1 (under title " Criminal Court System").

[67] Schmeiser, *supra*, note 43.

[68] National Indian Brotherhood, *supra*, note 66 at 2.

regrettably, not generally available to the similarly cursed non-Aboriginal offender. Alkalai Lake,[69] formerly "Alcohol Lake", exemplifies the transformation that can occur when community pressure and support, coupled with native-controlled treatment centers and cultural traditions, such as the sweat lodge, sweetgrass ceremonies, fasting, traditional Indian dancing, the medicine man and all manner of self-identifying and empowering techniques, are concentrated on motivated offenders. Alkalai Lake endured the nightmare of alcoholism and violence and now is a symbol of hope for other communities. The key was full community involvement and commitment, "Culture is treatment; all healing is spiritual, the community is a treatment center; we are all counsellors." [70] Of course, not all crime is minor, and not all minor offenders share a commitment to the harmony ethos. Additionally, and importantly, some may wish to assert innocence for whatever reason.

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[69] See York, *supra*, note 49, chapter 7, "Alkalai Lake: Resisting Alcohol".

[70] *Ibid.*, at 183.

Major Crime

Aboriginal abuse of alcohol and resultant criminality is widespread, but it is also distinguished by a spree, or binge pattern of drinking. White alcoholics, of course, also often drink until the cash runs out, however, Aboriginal spree drinking assumes communal or cultural proportions, "penetrating the entire fabric of the community."[71] According to Brody's analysis in *Indians on Skid Row* , Aboriginal drinking cannot be explained adequately by conventional white perceptions of alcoholism: "Once heavy drinking is established as normal within a community or even within a whole culture, and that drinking is associated with great pleasure, happiness and communality, the question 'why drink?' is in danger of becoming a complete mystification. A more realistic approach to the problem might come with a reverse question: 'why not drink?' "[72]

The effects of this kind of spree drinking within the close and often emotionally charged familial confines of the reserve may be overwhelming, and are the proximate cause of much relatively serious Aboriginal criminality: "they change in every aspect of their behaviour. . . the changes are far more drastic than those in white drinkers, [and]. . . the chaos of uninhibited spree drinking, is both dismaying and terrifying."[73] Berger reported that, "when a traditional community becomes a drinking community, the whole atmosphere can change. Drunks can be seen staggering around the village and people begin to lock their doors."[74]

In her penetrating and disturbing book, *A Poison Stronger than Love* , Anastasia Shkilnyk documents the truly awful reality of alcohol, the poison of

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[71].York, *supra* , note 49 at 196.

[72] Brody , *supra* ,note 63 at 73.

[73] *Ibid.* , at 110.

[74] Northern Frontier, Northern Homeland-The Report of the MacKenzie Valley Pipeline Inquiry, Vol.1 (Ottawa, 1977)(Mr Justice Tom Berger, Commissioner) at 155.

the title, in Grassy Narrows, and its relationship to the incidence of crime within that community of about five hundred.[75] Grassy narrows is, of course, a uniquely devastated community, having to cope with the additional burden of mercury poisoning, however Shkilnyk notes that spree drinking distinguishes Indian drinking patterns from the white society, "not only in the Kenora area reserves, but in Indian communities across the country."[76] York cites studies estimating disproportionately high abuse of alcohol among New Brunswick, Saskatchewan and Manitoba Aboriginals, and states that, "In other regions the pattern is similar."[77]

Shkilnyk describes the spree as, "a continuous process; people drink until they become unconscious."[78] She states that, "A prolonged binge is like a tornado that tears across the landscape of the community, leaving devastation in its wake. During the binge, infants become dehydrated, children go hungry, women are swollen from beatings, young girls are raped."[79]

Common sense would anticipate serious incidents from such volatile conditions and this is confirmed by Shkilnyk's closer observation of the scene. During one five day binge following a payday in 1979, Shkilnyk diarized: a 4 year old wandering alone at midnight; an 18 month old abandoned in an empty house; a nine month old with obvious bruising locked in a room; an 8 month old found abandoned in the bush; an infant barely saved from falling off a dock and a 12 year old beaten and gang raped.[80] She concludes that violence by adults and breaking and entering by the young are associated with, "these black periods of heavy drinking,"[81] and that incest is common: ". . . the drinking party

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[75] A. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Objibwa Community* , (Yale University, 1985).

[76] *Ibid.* , at 20.

[77] York, *supra*, note 49 at 192.

[78] Shkilnyk, *supra* , note 75 at 21.

[79] *Ibid.*

[80] *Ibid.* , at 41-42.

[81] *Ibid.* , at 30.

during the binge is almost always composed of family members belonging to the same bloodline. During such a binge, the taboos against incest or sexual relations between close relatives are dissolved."[82] She reports that female suicide is noticeably higher, ". . . the connection between gang rape and attempted suicide by young women is no secret in the community "[83] York cites similar incidents at Alkali Lake before the successful sobriety movement: "Many of the women were beaten up and it was common to see them with black eyes or puffed up faces following the weekend. Some were even hospitalized. Girls were raped and even gang-rape was usual."[84] The Canadian Committee on Violence Against Women is currently investigating the comprehensive problem, but confirms a particular concern for violence against women in the Aboriginal community as suggested by the above anecdotal descriptions.[85]

Gasoline and Other Substance Abuse

Extensive gasoline and other substance abuse aggravates a difficult situation, especially among the young. The terrifying effects of this most dangerous of addictions is specifically and graphically documented by York for the Cree reserve of Shamattawa in Manitoba, but he notes that its significant contribution to crime generally, and extreme violence in particular, is a serious problem, "at scores of native communities across the country."[86] A 1986 study concluded that 70 per cent of all Indian children in northern Manitoba sniffed gasoline and 1400 of these are described as in,"serious trouble," requiring

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[82] *Ibid.*, at 46.

[83] *Ibid.*

[84] York, *supra*, note 49 at 178.

[85] "Violence Against Women", *The Vancouver Sun* (23 March 1992) at A9. Its information material suggests that eighty per cent of native women on reserves in Ontario have been abused or assaulted.

[86] York, *supra*, note 49 at 9.

treatment.[87] Police in northern Ontario estimate that gasoline sniffing is linked to 60 to 70 per cent of crime by juveniles. [88]

The very steep road to recovery is highlighted by the effects of alcohol and gasoline on the very young next generation. Shkilnyck found that: of 22 children in grade two in 1979, "ten were sniffing heavily and showing signs of mental deterioration;" "over half the children in grade three were sniffing;" six of 20 children in grade four were, "in an advanced state of intellectual and emotional derangement due to mixing gas with alcohol," and, an increasing number of infants will show signs of fetal alcohol syndrome at birth.[89]

Commercial Crime

The contemporary Aboriginal community is not free of modern or white collar crime and this type of crime may even increase with self-government and the associated opportunities for graft to which politicians and administrators of all stripes seem prone. Howard Adams, a prominent and aggressive[90] leader in the native rights movement, bitterly refers to community development funds, "being ripped off by the native administrators before they get to the community,"[91] and, "unaccountable [multi-million dollar grants] . . . opened up to manipulation and corruption,"[92] by what he dismisses as, "opportunists, drifters, hucksters . . . freeloaders, in other words."[93]

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[87] *Ibid.* , at 10.

[88] *Ibid.* , at 11.

[89] Shkilnyk, *supra* , note 75 at 45 and 47.

[90] See chapter one: notes 133-135.

[91] Howard Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon, Fifth House, 1989).at 179.

[92] *Ibid.* , at 160.

[93] *Ibid.* , at 161.

Trafficking

The Aboriginal community is not free of the drug trafficking problem. The Warrior Society, asserting its exclusive right to protect the reserve, is reported as forcibly evicting a Kahnawake Aboriginal woman who had been repeatedly warned by the Society to desist from selling drugs on the reserve.[94]

Gambling

Gambling is attractive to Aboriginal and, increasingly, provincial governments, as a source of revenue. Casinos on the reserves are seen as, "an imperfect and partial solution to a large and complicated economic problem - the revival of the Indian communities across Canada."[95]

Bingo is big business already and members of bands near Parry Sound and Brantford are reported as facing charges amidst internal controversy as to the appropriateness of the activity and the applicability of Canadian law.[96]

In the United States, gambling started innocently enough with bingo, but is said to have escalated to an annual billion dollar business,[97] which, even if seen as positive affirmative action, cannot be expected to totally avoid an element of criminal penetration and associated degradation invariably associated with big money operations. The gunfire, arson and violence at the St. Regis-Akwesasne reserve involves "casino wars" dividing Mohawk against Mohawk.[98] Recently, the 300 members of the Alderville reserve near Coburg Ontario voted against a 200 million dollar Las Vegas style casino, splitting the

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[94] A. Fleras, *Race and Minority Relations* (Waterloo, University of Waterloo, 1991) at 192.

[95] Terrence Corcoran, "Indian Casinos: One Way to Renewal", *The Globe and Mail* (21 May 1992) at B2.

[96] *Ibid.*, at 193.

[97] William Safire, "Legal Gambling a Greater Threat Than Any Racial Slur" *The Vancouver Sun*, (8 January 1992) at A13.

[98] Fleras, *supra*, note 94 at 206; and see: A. Picard, "A One Way View From the Barricades", *The Globe and Mail* (3 August 1991) at C14.

community between those who lamented a lost economic opportunity and those who feared, "whorehouses, dope racketeers and God knows what else."[99]

A 1991 RCMP report describes cigarette smuggling as an annual 500 million dollar business, "linked to the sensitive native issue," and to organized crime, gambling and weapons, which is principally associated with the Akwesasne reserve, but, "has increased to the point that it is truly national in scope."[100]

CONCLUSION

This part emphasizes the nature of Aboriginal crime because the *Inquiry*, it is submitted, tends to minimize the seriousness of it. The *Inquiry* describes thirty five per cent of reserve crime as falling into a group of four relatively minor offences - common assault, break and enter, theft under and public mischief,[101] and states that, ". . . although there were more violent offences than non-Aboriginal people committed, the majority of crimes committed were petty offences."[102]

It may be that the Aboriginal community generates a higher proportion of "petty offences." However, it is submitted that the above description of Aboriginal crime does not reveal a crime problem within the Aboriginal community that is so different in nature from that of the larger society to suggest that adjudication processes will not be required of an autonomous Aboriginal justice system. It is submitted that an unknowable portion of "major" crime as well as a portion of "minor" crime is less amenable to pure restorative justice.

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[99] Paul Waldie, "Reserve Turns Down Plan for Las Vegas-Style Casino", *The Globe and Mail* (11 November 1991) at A5.

[100] Alan Freeman, "Cigarette Smuggling 'Escalating' "*The Globe and Mail* , (19 November 1991) at A1.

[101] *Inquiry, supra*, note 1 at 87.

[102] *Ibid.* , at 88.

This portion will generate "the potential for true penal consequences,"[103] a potential which chapter three argues tends to reduce the utility of mediation and reconciliation and increase the need for an adjudication process. This justifies concerns about the adjudication hiatus apparent in the *Inquiry* response.

The colonization process has hobbled three crucial sources of the socialization process whereby control over ones behaviour is learned and refined: the family, the school and the workplace.[104] Such crippled societies can be expected to generate a disproportionate number of offenders, as confirmed by the observation of the Australian Law Reform Commission noted in chapter one, "The primary reasons for this disproportionate representation lie outside the criminal justice system."[105] It would be a "grave delusion"[106] to exaggerate the extent to which any justice system can contribute to the reversal of these criminogenic processes, and it is not suggested that the expectations of the *Inquiry* for an Aboriginal justice system are anything more than appropriately "modest "[107] in this regard. However, It may be equally delusional, and, ultimately contrary to the best interests of the Aboriginal community, either to minimize the seriousness of Aboriginal criminality, or to exaggerate the capacity of the harmony based paradigm of justice envisaged by the *Inquiry*, to respond thereto.

The nature of Aboriginal crime alone does not appear to justify a totally different approach to justice. Chapter three examines the theoretical rationales for both individual and group rights and the suggested conceptual justification for a communitarian based system which would place group rights before individual rights.

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[103] *R. v. Genereux* [1992] S. C. J. No. 10 at 20

[104] Jean-Paul Brodeur, Carol La Prairie and Roger McDonnell,.*Justice for the Cree: Final Report* (Quebec, Cree Regional Authority, 1991) at 44.[hereinafter Cree Report]

[105] The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws, Report No. 3I* (Canberra: Australian Government Publishing Services, 1986), referred to in, Michael Jackson, "Locking Up Natives in Canada" (1989) 23: 2 U.B.C. L. Rev.215 at 217.

[106] The Cree Report, *supra*, note 104 at 44.

[107] *Ibid.* , at 43.

CHAPTER 3

COLLECTIVE AND INDIVIDUAL RIGHTS: SECTION 25

INTRODUCTION

> The *Charter* puts the rights of the individual ahead of the group. . . in our culture, the rights of the group must come ahead of the individual.[1]

> The doctrine of political and social individualism in the west emerged from and as a counter to the doctrine of the pre-eminence of the group (whether Church, guild, rank, or other). In Rousseau's words: 'Man is born free, and everywhere he is in chains'. The chains to which Rousseau refers are those of the group, the social unit which superimposes itself on the individual.[2]

Section 35 of the *Constitution Act* [3] "recognized and affirmed," but did not define, a special status for the Aboriginal peoples of Canada. Constitutionally mandated conferences[4] failed to reach agreement on the nature of this special status, partly because of an inability to resolve the different emphasis on individual and collective rights represented by the above positions.[5] The current "Quebec-native balancing act" is described as two peoples, ". . . competing for what seems to be a limited supply of group rights in the national-unity debate."[6]

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[1] D. Shoalts, "Natives Value Justice Differently" *Globe and Mail* (9 September 1991) at A1, quoting Pearl Keenan, elder, Teslin Tlinglit band.

[2] Francis Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes", 27 Pol. Stud. 423.

[3] The *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.) , 1982, c. 1.

[4] *Ibid.* , s. 37.

[5] Will Kymlicka, *Liberalism , Community and Culture* (Oxford, Clarendon Press, 1991) 138.

[6] Susan Delacourt, "A Tale of Two Nations" *The Globe and Mail* (26 May 1992) at A1.

The concept of "collective rights" has been referred to as a "novelty,"[7] and as such, it is both confusing and controversial. It is not clear whether communities have or should have rights, or if so, the nature of such rights. It is beyond the scope of this thesis to resolve the philosophical and legal debate about these apparently unusual and perhaps awkward communitarian values. Nevertheless, the idea of a collective interest, whether properly termed a "collective right " or not, is very much at the heart of the Aboriginal drive for inherent self-government and a special place within Canada as described in chapter one. It is reasonable to assume that a conceptual justification for a separate Aboriginal justice system, as a component of self-government, must draw on whatever the rationale is said to be for a "collective right. "

This chapter delineates conceptual and practical elements of this debate which will be used in subsequent chapters to examine several issues which this thesis has set out to address in the context of actually existing Indianism. To what extent does the Aboriginal desire for a separate justice system conform to the theoretical parameters of a collective right? What is the relationship between such a collective right and the rights of the larger external community of which the Aboriginal community is a part? What is the internal relationship between such a collective right and the rights of the individual members of that collective? What is the position of an individual who considers himself or herself a member of both the external and the internal community? What role, if any, might the *Charter*[8] play with respect to either the external or the internal relationship?

TERMINOLOGY CONFUSION

The confusion engendered by the term "collective rights" stems largely from an intuitive sense that ,however real the value of a seemingly nebulous group, that value can have no foundation other than the interest of the tangible,

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[7] Michael Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Can. J. Law & Jurs. 293.

[8] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.) , 1982, c. 11 [hereinafter *Charter*].

individual member of the group. The individual is the justification for the good however "collective" the good may appear to be. Thus, goods which conventionally can be participated in only with others, such as a cultural activity, or goods which depend on membership in a group, such as Aboriginal entitlement to band funds, may be referred to as "collective" goods, but they are good only "to the extent that they contribute to the well-being of individual human beings."[9] Indeed the "collective" right to a minority language education may be said to hinge on the pragmatic economic rationale of sufficient numbers of individual members of the collective to warrant the expense.[10] The holder of the right is an individual who is limited to asserting the right from within an appropriately sized group.

Hartney suggests[11] that it is in this sense that Justice Tarnopolsky refers to "group collective rights" to minority education in *Reference re an Act to Amend the Education Act* [12] and Justice Wilson refers to "a group right" to open on Sunday in *Edwards Books and Art Limited* v. *the Queen* .[13]

It is reasonable to confine these usages of the term "collective rights" to a notion of individual rights reserved to members of certain groups. Such a usage, while potentially confusing, is not legally problematic. However, the use of the term with respect to Aboriginal rights seems intended to refer to a value which is not reducible to a set of individual interests and, significantly, which may transcend the individual interest. Sanders would refer to the above examples as "group rights. . . the sum of the rights of the individual members of the group," to distinguish them from, "collective rights . . . that transcend the ending of discrimination against their members."[14]

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[9] Hartney, *supra* , .note 7 at 298.

[10] See generally Michael Bastarache, "Education Rights of Provincial Official Language Minorities" in, Gerald-A Beaudoin and Ed Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2nd. ed. , (Toronto , Carswell, 1989) 687 at 696 - 702.

[11] Hartney, *supra* note 7 at 311-312.

[12] (1986) 53 O.R. (2nd) 513.

[13] [1986] 2 S. C. R. 713 at 808-809.

[14] Douglas Sanders, "Collective Rights" (1991) 13 Human Rights Quarterly 368.

SKEPTICISM ABOUT GROUP RIGHTS

This latter sense of a collective right does raise problems. It posits a right inhering in the collective entity itself, which is distinct from, and therefore potentially in conflict with, the individual rights of the member. This runs counter to the conventional, intuitive belief in the paramountcy of the individual, and would be, to that extent, a novelty. Justice McIntyre quotes with approval another commentator's instinctive aversion to this sense of a collective right as follows:

> This notion that an association is no more than the sum of its individual members seems essential in a society in which it is 'the individual who is the ultimate concern of the social order'. In such a society it would hardly seem possible that an abstract entity such as an association should enjoy rights apart from and indeed greater than its individual members.[15]

Chief Justice Lamer seems to express a similar skepticism in a recent interview: ". . . a person is a very important thing. Everything else is subordinate. Even collectivities."[16]

There can be no question that the *Charter* was based fundamentally on a respect for individual rights, which its principal political architect, Pierre Trudeau, thought to be universal, constant and based on "natural law":

> In ancient times, and for centuries thereafter, these rights were known as 'natural rights'; rights to which all men were entitled because they are endowed with a moral and rational nature. The denial of such rights was regarded as an affront to 'natural' law - those elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason. . . Cicero said of natural law that it was 'unchanging and everlasting', that it was 'one eternal and unchangeable law. . . valid for all nations and for all times'.[17]

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[15] *Reference re Public Service Employees Relations Act (Alta)* [1987] 1 S. C. R. 313 at 398.

[16] "How the Charter Changes Justice," *The Globe and Mail* (17 April 1992) at A17.

[17] Honourable Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa, 1968) 9.

Ely notes, however, that "natural law" can be invoked, "to support anything you want."[18] Its allure is not lost on advocates of Aboriginal collective rights whose assertion of Aboriginal title and the right to self-government is based, "on a covenant with the Creator from time immemorial"[19]:

> The most precious aboriginal right of the first Nations is the right to self-government . . . a collective human right. . . . The Creator gave each people the right to govern its own affairs, as well as land on which to live and with which to sustain their lives. These Creator-given rights cannot be taken away by other human beings.[20]

While Aboriginal peoples in Canada are now accorded individual rights due any human being,[21] their natural entitlement thereto has been the subject of dispute. During the years 1550 and 1551, the legal and moral justification for the Spanish subjugation of the Aboriginals of the new world was debated by Juan Sepulveda and Bartolome de Casas before a council summoned by Emperor Charles V of Spain.[22] The core of this debate was whether Aboriginals possessed, "the moral and rational nature," and the very, "capacity to reason" referred to by Trudeau,[23] considered essential to the natural basis of rights. Las Casas, a former conquistador with Columbus, turned Franciscan priest, argued on the basis of the earlier writings of Francisco De Vitoria that

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[18] John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980) at 50.

[19] Menno Boldt and J. Anthony Long (in association with Leroy Little Bear),eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1984) Introduction.

[20] *Ibid* . at 24.

[21] Douglas Sanders, "The Renewal of Indian Special Status" in, Bayefsky and Eberts , (eds) *Equality Rights and The Canadian Charter of Rights and Freedoms* , 529 . At page 552, Sanders states that, " Invidious discrimination no longer exists in federal or provincial statutes."

[22] Appellants' Factum, *Delgamuukw* v. *A. G. of B. C. et al. (1987)* , paras 808 to 819.(hereinafter Factum), reproduced in Michael Jackson, *Native Peoples and the Law*, (Vancouver, University of British Columbia, 1992).Trial judgement reported: [1991] 3 W.W.R. 97.

[23] Trudeau, *supra* , note 17.

these original inhabitants were, "free and rational persons,"[24] "truly men,"[25] and "not ignorant, inhuman or bestial"[26] Probably Sepulveda will be remembered as, "one of the world's first great racists"[27] for countering with an argument based on the inherent inferiority of a people, ". . . in such a state of barbarism that force was required to liberate them from this condition."[28]

A considerable vestige of this skepticism about Aboriginal individual rights is directed in modern times to the issue of Aboriginal collective rights. British Columbia Chief Justice Davey attracted censure from the highest judicial level for referring anachronistically to the Nishga capacity to govern: "[they] were undoubtedly at the time of settlement, a very primitive people with few of the institutions of civilized society."[29] The "White Paper" of the Trudeau government referred derisively to the implausibility of such a collective concept, "These are so general and undefined that it is not realistic to think of them as specific claims capable of a remedy."[30]

This skepticism is repeated by some philosophical writers, one of whom observes, for example, that, "all individuals whomsoever . . . have rights [but] not all groups. . . have rights [and are] not naturally endowed with rights."[31]

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[24] Factum, *supra* , note 22 , para. 809.

[25] *Ibid.* ,para. 815.

[26] *Ibid.* , para. 818.

[27] Howard Adams *Prison of Grass: Canada from a Native Point of View* (Saskatoon, Fifth House, 1989) at 12.

[28] Factum, *supra* , note 22, para. 817.

[29] *Reg.* v *Calder* 13 D. L. R.(3d) 64 at 66 (B. C. C. A.) referred to in the Factum, *supra* , note 22, para. 820. Hall J. criticizes this comment in *Reg.* v *Calder* [1973] 34 D. L. R. (3d) 145 at 170 (S. C. C.): "In so saying this in 1970, he [Davey C.J.] was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before."

[30] Dept. of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy , 1969.*

[31] Jan Narvesson, "Collective Rights?", (1991) 4 Can. J. Law & Jurs.329 at 330.

The seemingly pre-eminent status of individual rights is suggested by the Supreme Court of Canada's assertion that the function of the *Charter*, ". . . is to provide for the unremitting protection of individual rights and liberties,"[32] and that, ". . . emphasis on individual conscience and individual judgement . . . lies at the heart of our democratic tradition."[33]

RECOGNITION OF GROUP VALUES

Despite, or perhaps because of, this traditional resistance to collective rights, the Canada clause in the recent federal proposals appears deliberately attuned to communitarian values in constitutionally acknowledging:

> . . . the importance of tolerance for individuals, groups and communities and respect for the rights of citizens and constituent communities as set forth in the *Canadian Charter of Rights and Freedoms* .[34] (emphasis added)

This more inclusive approach is not without judicial support. Chief Justice Dickson, in a seminal case on *Charter* interpretation, expressed the view that respect for both the individual and the group are underlying values which generate the rights and freedoms of the *Charter*:

> A second contextual element of interpretation of s.1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms

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[32] *Hunter v. Southam Inc.* [1984] 2 S. C. R. 145 at 155.

[33] *R. v. Big M. Drug Mart Ltd.* [1985] 1 S. C. R. 295 at 346.

[34] "Shaping Canada's Future Together" *The Globe and Mail* (25 September 1991) at A6.

> guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[35] (emphasis added)

Turpel minimizes Justice Dickson's comments as representative of a "paradigm of rhetorical arguments"[36] which permit insensitivity to cultural difference. Magnet cites Quebec Chief Justice Deschênes' rejection of Bill 101 as indicative of the judiciary's continuing resistance to the theory and practice of collective rights:

> Quebec's argument puts forward a totalitarian view of society to which the Court does not subscribe. Human beings are to us, of paramount importance and nothing should be allowed to diminish the respect due to them. Other societies place the collectivity above the individual. They use the Kolkhoze steamroller and see merit only in the collective result even if individuals must be destroyed in the process.[37] (emphasis added)

Justice Deschêne's suggestion that "nothing" can interfere with individual rights echoes Dworkin's famous claim to the effect that individual rights trump collective interests.[38] However, section 25 of the *Charter* would seem to suggest that this may not always be so:

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. . . .

Does this section refer to the "novel" sense of "collective rights"? Probably so. The Supreme Court of Canada's first exploration of the scope of

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[35] *Reg.* v *Oakes* (1986) 24 C. C. C. (3d) 321 (S. C. C.) at 346.

[36] Mary Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 C. H. R. Y. B. 1 at 26.

[37] Joseph Manget, " Collective Rights , Cultural Autonomy and the Canadian State", (1986) 32 McGill L. J. 171 at 181.

[38] R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) at 188; referred to by Hartney, *supra* note 7 at 303: "Individual rights are political trumps held by individuals."

Aboriginal rights entrenched in section 35 of the *Constitution Act, 1982*,[39] refers to such rights as, "rights held by a collective and are in keeping with the culture and existence of that group."[40] Justice McIntrye, in characterizing the right to strike as an individual right in an earlier case, makes passing reference to Aboriginal rights in section 25 as something distinct from individual rights:

> While some provisions in the Constitution involve groups, such as s. 93 of the *Constitution Act, 1867* protecting denominational schools, and s. 25 of the *Charter* referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members.[41]

POSSIBILITY OF TYRANNY OF THE GROUP

Does section 25 imply that Aboriginal self-government, or its justice component, could steamroller individual rights in the name of collective security? This possibility was referred to by Whyte as one of a catalogue of legal problems concerning Aboriginal self-government:

> It is felt that by virtue of the operation of Section 25 found in the *Charter of Rights and Freedoms* , it is possible that the basic human rights and freedoms articulated in the *Charter of Rights* will not be available to citizens under aboriginal self-government.[42]

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[39] *Supra* , note 3.

[40] *Reg.* v. *Sparrow* (1990) 56 C. C. C. (3d) 263 at 290.(referring to the right to fish).

[41] *Reference re Public Service Employees Relations Act (Alta .), supra* , note 15 at 397.

[42] John Whyte, "The Aboriginal Self-Government Amendment: Analysis of Some legal Obstacles" in, David Hawkes and Evelyn Peters, *Aboriginal Peoples - and Constitutional Reform: Workshop Report - Issues in Entrenching Aboriginal Self- Government* (Institute of Intergovernmental Relations, Kingstons, 1987) 77 at 81.

On another occasion, Whyte refers to this individual - collective potential conflict as, "deeply troublesome" and, ". . . a problem that represents the single biggest conceptual block to Indian political autonomy."[43]

Others are more blunt:

> The communitarian impulse to jettison justice must be tempered in order to retain some notion of rights, collective or otherwise.[44]

Contemporary Example of the Possibility

The reality of such a disturbing clash between individual and collective rights is dramatically illustrated by the 1991 case of *David Thomas v.Daniel Norris et. al.*[45] The plaintiff's wife, wishing to improve the marital relationship, arranged, without her husband's permission or knowledge, for the defendants to initiate her husband into the Coast Salish Big House tradition known as the Coast Salish Spirit Dance. The defendant did not consent to participate in the ceremony, nor is such consent required according to the tradition, so long as a member of the family of the initiate, quite commonly the wife, does so. The plaintiff was "grabbed" or taken from his home and confined in the Long House for four days, where he was subjected to the ritual four times each morning and four times each afternoon: "He was lifted up horizontally by eight men, who then took turns digging their fingers into his stomach area and biting him on his sides,"[46] " . . . hard enough to hurt and hard enough to make him scream."[47] Mr. Justice Hood found that the plaintiff was assaulted and imprisoned, "all forcibly

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[43] John Whyte, "Indian Self-Government: A Legal Analysis" in, Leroy Little Bear, Menno Boldt and J. Anthony Long, *Pathways to Self-Determination: Canadian Indians and the Canadian State*, (Toronto, University of Toronto Press, 1984) 101 at 103.

[44] Darlene Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. of Law and Jurs.19 at 21.

[45] (16 September 1991), Victoria 88/412 (B. C. S. C.)

[46] *Ibid.* , at 6.

[47] *Ibid.* , at 7.

and without his consent or acquiescence,"[48] and that, "when he arrived at the hospital he was dehydrated, his peptic ulcer was activated, he was suffering from multiple contusions and he was frightened that 'he would be dragged back there '."[49]

The Spirit Dance, which is an ancient and sacred tradition intended to benefit the initiate and his family, is further described as follows:

> The initiation process is commenced by the initiate being 'grabbed' by his or her initiators, and taken to a Long House and there detained for a number of days, presumably the time it takes to complete the initiation. It is completed when the initiate has his or her vision experience, which is evidenced by the initiate dancing and singing his or her song. While in the Long House, the initiate undergoes a process which includes being lifted horizontally to shoulder or head height, by eight or so initiators who, among other things, blow on the body of the initiate to help the initiate 'bring out' or sing his or her song. This ritual is repeated daily, four times each morning and four times each afternoon. The initiation is done under the guidance of elders who are in charge of the process, which takes a number of days. During the process the initiate participates in rituals including a ceremonial bath, dressing in clean clothes, fasting and sleeping in a blanket tent set up in the House. The initiate is always accompanied by an attendant who is called his or her 'baby-sitter'.[50]

It was the stated intention of the defendants to "baby" the plaintiff and to, ". . . not do anything that might hurt him."[51] However, at least one of the defendants was aware that such initiations are not always benign and, in fact, resulted in a death in 1988.[52] An inquest into that death revealed that seven deaths had occurred on Vancouver island as a result of this rite since 1972.[53]

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[48] *Ibid.*, at 27.

[49] *Ibid.*, at 28.

[50] *Ibid.*, at 34.

[51] *Ibid.*, at13 and 15.

[52] *Ibid.*, at 13.

[53] "Dancing Around the Law of the Land" *The Globe and Mail* (11 February 1992) A16.

The respective positions in the case are somewhat confusing. Counsel for the plaintiff argued,[54] on the basis of the *Dolphin Delivery* case,[55] that section 25 of the *Charter* had no application in the absence of any state involvement. The defence[56] and the Court[57] agreed. The Court decided there was insufficient proof of the existence of Spirit Dancing as an Aboriginal right,[58] and even if it did so exist at one time, the non-consensual part did not survive the introduction of English law in the mid-1800s.[59] However, the Court was prepared to assume for the sake of argument that Spirit Dancing was an Aboriginal right which survived the introduction of English law and existed in 1982.[60] Thus the issue was framed in terms of section 35 and the justificatory standard for extinguishment established by *Reg.* v *Sparrow*.[61] The Court stated that, "the only question remaining is whether the upholding of the individual's common law rights, over the constitutionally protected collective rights of the Band, can be justified."[62] Or, as the defence put the issue:

> Are the individual rights of aboriginal persons subject to the collective rights of the aboriginal nation to which he belongs?[63]

The Court had no difficulty concluding that the protection of individual rights is a valid common law objective, and the collective right, to the extent that force is an integral part, is extinguished for what the court refers to as "obvious

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54 *Thomas*, *Ibid.*, note 45 at 29.

55 *Peterson and Alexander* v. *Dolphin Delivery Ltd.* [1987] 1 W.W.R. 577 (S. C. C.).

56 *Thomas*, *supra.*, note 45 at 42.

57 *Ibid.*, at 29.

58 *Ibid.*, at 36 and 39.

59 *Ibid.*, at 39.

60 *Ibid.*, at 41.

61 *Supra.*, note 40.

62 *Thomas, supra*, note 45 at 46.

63 *Ibid.*

reasons."[64] It restricts the collective right to, ". . . the residue of the right remaining after the civil rights of the persons who may be injured by its exercise are recognized."[65] It is submitted that this comes very close to saying simply that individual rights automatically trump conflicting collective rights.

SECTION 25: FOCUS OF THE ISSUE

Unfortunately then, this case provides no guidance on the dynamics of the individual-collective clash contemplated by section 25. However, it is submitted that Aboriginal rights cannot have much meaning or uniqueness if they are routinely restricted or extinguished to conform to the values of the dominant society. Indeed, as Morton observes, such rights often will be asserted for the very reason that they are non-conforming practices:

> . . . such non-Europeon, and thus non-liberal, traditions and values would inevitably, and in some cases purposely, be included in the internal policies of self-governing Indian bands. Indeed, a central purpose of the native claim to self-government, free from 'outside ' interference, is precisely to protect and to promote aspects of traditional native culture that are perceived to be threatened by the norms and practices of Canadian society.[66]

The *Thomas* case was a private civil matter. However, it is assumed for the purposes of this thesis that a similar assertion of collective paramountcy in an Aboriginal criminal justice system, pursant to the inherent right to self-government , would trigger section 25. Many aspects of the communitarianism-liberalism clash, inherent in the Aboriginal justice issue, will converge around section 25, which has yet to receive any significant judicial application.[67] The

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[64] *Ibid.* , at 49.

[65] *Ibid.* , at 50.

[66] F. L. Morton "Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois" in, *Minorities and the Canadian State* , Neil Nevitte and Alan Kornberg, eds, (Oakville, Mosaic Press, 1985) at 75.

[67] *Attorney - General for Ontario* v. *Bear Island Foundation et al.* (1984) 15 D.L.R. (4th) 321 (H.C.J.) affirmed 58 D.L.R. (4th) 117, *R.* v. *Steinhauer* (1985) 15 C.R.R. 175 (Q. B.) and *R.* v. *Nicholas* [1989] 2 C.N.L.R. 131 (Q. B.) simply affirm that the section acts merely as a shield and does not create additional rights.

balance of this chapter is divided into two parts which focus firstly on the rationales for collective and individual rights and secondly on the interface between the two as contemplated by section 25.

To be more specific, part one examines basic theoretical parameters of individualism and communitarianism in the context of the contrasting conventional and Aboriginal views of criminal justice identified by the *Report of the Aboriginal Justice Inquiry of Manitoba* [68] , as set out in chapter two. Certain theoretical problems associated with communitarianism, their possible relevance to the Aboriginal justice system envisaged by the *Inquiry* and the potential significance of *Charter* values to such problems are identified. The fuller significance of these theoretical matters is addressed in chapter four in the context of actually existing Indianism

Part two assumes the inevitable clash between collective and individual rights teasingly raised in *Thomas* ,[69] and examines how section 25 might be used to resolve this issue in a principled way, in light of the apparent rationales for these respective rights. A rationale is fashioned for the finding of a legally enforceable collective right, which is rather greater in scope than merely the "residue" untouched by conflicting individual rights. Chapter five will argue that this rationalization for collective paramountcy is not restricted to a section 25 analysis, but is relevant to any exercise of a local option with respect to the *Charter*, either as a result of the *Inquiry* recommendation, or implementation of a section 33 override power.

PART 1: RIGHTS

INDIVIDUAL RIGHTS

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[68] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg , Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair [hereinafter, *Inquiry*]

[69] *Supra* , note 45.

It is inevitable that governments, native or otherwise, will pass criminal laws. The liberal justification for such laws is generally based on a respect for individual liberty.[70] Everyone is entitled to pursue one's own definition of the good to the extent that one does not infringe on the equal right of one's neighbour to do the same. The role of the state in a liberal democracy is to ensure that the individual's choice of the good is free from interference from others or from the state. It is not the role of the state or collective to impose its conception of the good. The individual is seen as an end rather than a means to a collective good. Dworkin explains, what a liberal would consider, the misuse of the individual as a means to a collective good as follows:

> A majority decides to make criminal some act . . . not because the act deprives others of opportunities they want, but because the majority disapproves of . . . [the act] . . . The political decision, in other words, reflects not just some accommodation of the *personal* preferences of everyone, in such a way as to make the opportunities of all as nearly equal as may be, but the domination of one set of *external* preferences, that is, preferences people have about what others shall do or have.[71]

Individual rights are seen as a shield against, and thus in opposition to, such a collective definition of the good. Fundamental individual rights or freedoms are seen as encompassing areas presumptively likely to attract strong communitarian or external preferences, and any intrusion into these otherwise sacrosanct private spheres must be demonstrably justified.[72]

A similar concern for the individual informs the justification for "due process" rights, or what the conventional system would call "the principles of fundamental justice."[73] While such rights may not absolutely shield the individual accused from state action, they do ensure that, "criminal procedure. . . [is]. . . structured to achieve a margin of safety in decisions, so that the process

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[70] See generally, Ronald Dworkin, *A Matter of Principle* (Cambridge, Harvard University Press,1985) c.8: "Liberalism".

[71] *Ibid*, at 196

[72] *Ibid.* , at 197.

[73] The *Charter*, *supra*, note 8, section 7.

is biased strongly against the conviction of the innocent."[74] Dworkin points out that such procedural rights, "intervene in the process even at the cost of inaccuracy," but, in effect, to the benefit of fairness and protection of the individual accused against the state.[75] Chapter five of this thesis emphasizes that this protection of accused persons redounds to the benefit of all members of the state.

The Canadian criminal justice system is firmly grounded in the soil of liberalism. The most relevant rights in the context of the issue of an alternative criminal justice system are the "legal rights" set out in sections 8 to 14 of the *Charter*, referred to in section 7 as "the principles of fundamental justice." The conventional system considers these rights, "the most important of all those enumerated in the Charter,"[76] and they have been given a broad and respectful interpretation since, "the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which 'has the most severe consequences upon an individual'."[77] The Supreme Court of Canada has recently confirmed this concern for the individual accused in holding that an alternative military justice system will be subject to the legal rights provisions of the *Charter*, ". . . if the imposition of true penal consequences is involved."[78] Where such a risk to the individual is involved, sections 8 to 14 of the *Charter* function as, "specific instances of the basic tenets of fairness upon which our legal system is based, and which are now entrenched as a constitutional minimum standard by section 7."[79] Chief Justice Lamer refers to his previous judgement in *Reference re B. C. Motor Vehicle Act*,[80] which more expressly founds such tenets of fairness four-square on a

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[74] Dworkin, *supra*, note 70 at 197.

[75] *Ibid.*, at 198.

[76] *Re Cadeddu and the Queen* (1982) 40 O. R. (2d) 128 at 139.

[77] *Reference re B. C. Motor Vehicle Act* (1985) 24 D. L. R. (4th) 536 (S. C. C.) at 548 quoting *Re Cadeddu*, *ibid.*

[78] *R. v. Genereux* [1992] S. C. J. No. 10 at 20.

[79] *Ibid.*, at 44.

[80] *Supra*, note 77.

foundation of conventional liberal concern for the individual: ". . . they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law."[81] These sentiments echo the words of Pierre Trudeau that legal rights, ". . . go to the very root of the concept of the individual so prized in Canada."[82]

This concern for the individual accused is premised on the potential of "true penal consequences,"[83] or punishment, in which case, "The State's interest in punishment must always be weighed against the rights and freedoms of the individual."[84] It is these rights which are threatened by the exclusion of the *Charter* from an Aboriginal criminal justice system, or by the principle of the paramountcy of collective rights in that system.

Aboriginal Justice: Mediation v. Adjudication

However, as outlined in chapter two, the harmony ethos of the *Inquiry* posits a fundamentally different foundation and purpose for an Aboriginal justice system which emphasizes that, "Atonement and restoration of harmony were the goals - not punishment."[85]

Therefore, the examination of actually existing Indianism in chapter four will include an assessment of the extent to which punishment and true penal consequences, and thus an increased concern for the individual offender, may be indicated. The analysis of the nature of Aboriginal crime in chapter two, has

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[81] *Ibid.*, at 557.

[82] *Supra*, note 17 at 19.

[83] *Genereux supra*, note 78.

[84] Don Stuart, "Four Springboards from the Supreme Court of Canada: *Hunter*, *Therens*, *Motor Vehicle Reference* and *Oakes* - Asserting Basic Values of our Criminal Justice System" 12 Queen's L. J. 131 at 132.

[85] *Inquiry*, *supra*, note 68 at 27.

suggested that the basic nature of Aboriginal crime itself is not so different from the conventional picture as to preclude consideration of resort to punitive justice.

These different rationales also suggest that concern for the individual, and hence the protection of *Charter* values, may be heightened in the adjudication context where the sense of responsibility and will to atone essential to mediation can neither be assumed nor fostered, and is, in fact, denied and resisted. Therefore, chapter five will consider the extent to which the liberal emphasis on individual rights premised on an adjudication-punishment context may bear modification in a mediation-reconciliation context. The Court in *Genereux* suggests that, ". . . the contextual approach is a tenet of constitutional interpretation which is of paramount importance,"[86] such that, ". . . a particular right or freedom may have a different value depending on the context."[87] *Charter* rights which might otherwise seem alien to the Aboriginal value system, may seem less so in any criminal justice situation where the harmony ethos is actually operational.

COMMUNITARIANISM

Patrick Monahan argues that an interpretation of the *Charter* which seeks to make sense of the document as a whole must take into account, "that the *Charter* is not simply a reflection of liberal individualist values."[88] Section 25 (and ss. 27 and 29) can be seen as, ". . . designed to preserve or enhance communitarian values."[89] The official language and minority language guarantees in sections 16 to 23, in linking the exercise of the right to the

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[86] *Supra* , note 78 at 52.

[87] *Ibid.* , at 53.

[88] Patrick Monahan " The Use and Abuse of American Constitutional Theory in Charter Analysis" in, L. Smith , R. Elliot and R. Grant, eds, *Canadian Charter of Rights and Freedoms,* (Vancouver, University of British Columbia, 1992) (hereinafter Smith , Elliot and Grant) at 2-78.

[89] *Ibid.* at 78.

presence of a sufficient community, show, "a symbiotic relationship between individual autonomy and community values."[90]

While this suggested endorsement of communitarian values by the *Charter* pales in comparison to the emphasis on individualist values outlined above, Monahan's relatively unambitious purpose is simply, "to identify the types of arguments and considerations that ought to count in interpreting the *Charter* which might assist the court in 'balancing' rights against larger considerations of social utility."[91] He argues that a purposive approach to the interpretation of the *Charter* also ought to take into account the communitarian values which underlie it.

The communitarian challenge to individualism questions, "the claim for the priority of the right over the good,"[92] and is, "dismayed by the exaltation of the individual that grounds contemporary liberal theory."[93] The communitarian takes the view that individuated interests, as urgent as they may be, do not exhaust what is important in life: "Liberty is important, but so is a sense of common enterprise . . . while individual well-being matters, so may the well-being of groups of people, especially when it seems distinct from the well-being of their members taken severally."[94]

Communitarians reject the liberal idea of a state neutral to the good in favour of a classical, Aristotelian state, that actively promotes the good or "civic virtue," the essence of which is defined as, "the willingness of citizens to subordinate their private interests to the general good."[95]

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[90] *Ibid.* at 77.

[91] *Ibid.* at 87.

[92] Michael Sandel,*Liberalism and its Critics* , in Smith, Elliot and Grant ,*supra* , note 88 at 1 - 24.

[93] Donna Greschner, *Feminist Concerns With the New Communitarians: We Don't Need Another Hero* , in Smith , Elliot and Grant, *supra* , note 88 at 1 -26.

[94] Leslie Green, "Two Views of Collective Rights" (1991) 4 Can. J. Law & Jurs. 315 at 317.

[95] Greschner,*supra* , note 93 at 1 - 26.

Aboriginal Person: Different World View

The harmony ethos is, of course, an expression of this communitarian "world view,"[96] which is holistic in nature, ". . . placing a high value on harmony and the peaceful coexistence of all living things, both human and non-human , with one another and with nature."[97] In the Aboriginal value system, "the idea that guilt and innocence can be decided on the basis of argument is incompatible with a firmly rooted belief in honesty and integrity that does not permit lying."[98] In traditional cultures the individual saw himself: ". . . as part of a whole that was much larger than himself. His life acquired meaning with reference to this whole and in its service."[99] This was strikingly reflected in traditional forms of Aboriginal justice where the offender's clan might be expected to offer up a life in satisfaction of a wrong and, "Loyalty to the family was such a powerful force, that the person chosen to give up his life for his clan's honour went to his doom willingly and with grace."[100]

Therefore, the efficacy of an Aboriginal justice system and the need for *Charter* protection will rest in part on the extent to which the *Inquiry's* emphasis on this Aboriginal communitarian world view conforms to contemporary reality. The examination of actually existing Indianism in chapter four will assess the extent to which the modern, perhaps secular, Indian is motivated to sublimate self to the interest of the community.

The Tyranny Problem

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96 *Inquiry*, *supra*, note 68 at 35.

97 *Ibid.* , at 37, and see, chapter two herein.

98 *Ibid.*

99 Joseph Pestieau, "Minority Rights: Caught Between Individual Rights and Peoples' Rights" (1991) 4 Can. J. Law & Jurs. 361 at 369.

100 Christie Jefferson, *Conquest by Law: A Betrayal of Justice in Canada* (Burnaby, Northern Justice Society, Simon Fraser University, 1988) [unpublished] at 147.

A major concern liberals express about collective rights is the "Kolkhoze Steamroller,"[101] or the fear that, ". . . any attempt to govern by a vision of the good is likely to lead to a slippery slope of totalitarian temptations."[102] Dworkin observes that people who share a "sound conception of virtue,"[103] rather than seeking to exclude external preferences in governing, expect such preferences to be legislated. Due process concerns for the individual which permit the guilty to go free, tend to be replaced by an emphasis on accuracy and efficiency in the process in the belief that, ". . . the censure of vice is indispensable to the honour of virtue."[104]

While there is often something of a rhetorical flourish to this concern, it cannot be denied that history is replete with examples of "collective rights" becoming "collective wrongs."[105]

Therefore, an assessment of the efficacy of an Aboriginal justice system and the need for *Charter* protection will need to be sensitive to the dynamics of contemporary Aboriginal society and the extent to which this danger of abuse in the name of collective rights is real.

Balkanization

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[101] Manget, *supra* , note 37.

[102] Michael Sandel, *supra* , note 92, at 1 - 25.

[103] Dworkin, *supra* , note 70 at 198.

[104] *Ibid.* , at 200.

[105] Morton, *supra* , note 66 at 80 sets out representative examples.

Another concern expressed about collective rights is the tendency to "balkanize"[106] the liberal state thus making it at least difficult to carry out any political agenda,[107] if not actually to threaten the political stability of the state.[108]

The theoretical possibility of 633[109] separate and distinct justice systems within Canada is also a part of actually existing Indianism and raises a legitimate concern about uniformity.

John A MacDonald saw uniformity as a reason for reserving the criminal law power to the federal government:

> The criminal law too - the determination of what is a crime and what is not and how crime should be punished - is left to the central government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces - that what is a crime in one part of British America, should be a crime in every part - that there should be the same protection of life and property in one as in another.[110]

Pierre Trudeau considered uniformity of standards within a federal state to be one rationale for a bill of rights: "Only by a single constitutional enactment will the fundamental rights of all Canadians be guaranteed equal protection."[111]

The Canadian Human Rights Commission in recognizing the need for Aboriginal justice autonomy, nevertheless saw a need for, "a basic level of consistency with national norms."[112]

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[106] Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism (1991) 4 Can. J. of Law & Jurs. 217 at 227.

[107] *Ibid.*

[108] *Ibid.* , at 246.

[109] *The Globe and Mail* (11 January 1992) A6.There are 633 bands registered under the Indian Act encompassing over 2300 reserves.The Assembly of First Nations is comprised of the chiefs of these bands. This factor is analyzed more fully under "localness" in chapter five.

[110] Martin Friedland, *A Century of Criminal Justice* (Toronto, Carswell, 1984) 48.

[111] Trudeau, *supra* , note 17 at 14.

[112] Canadian Human Rights Commission,"Issues in Human Rights" *Newsletter* (February., 1989), and see: note 190, chapter one.

The Canadian Bar Association, in 1989, strongly endorsed Aboriginal self-determination, ". . . without impairing the fundamental rights guaranteed to all Canadians."[113] This theme is continued in its most recent report in response to the Federal Government's proposals: ". . . the resolution of these issues must take place within the context of an affirmation of the shared values which create the framework for accommodating Canada's diversity. Since adoption of the Canadian *Charter of Rights and Freedoms* , Canadians have come more and more to regard the constitution as belonging to them as citizens and enshrining their common values."[114]

If the *Inquiry* is correct that a collective right to a justice system, "resides within each and every properly constituted Aboriginal community,"[115] and that each such community is, "entitled to enact their own criminal laws and to have those laws enforced by their own justice systems,"[116] then, even though John A would not have approved, a degree of inconvenience and administrative awkwardness is simply a justifiable necessity.

However, the *Charter* could play a significant role in accommodating this need for justice pluralism with a natural desire, if not need, for some degree of uniformity. The *Genereux* case illustrates the possibility of minimum, but uniform standards unifying practically and symbolically at least two very different systems.[117] This possibility is examined more closely in chapter five.

COMMUNITY-CONSTITUTING UNDERSTANDING

The Aboriginal approach to justice which emphasizes the individual's obligations and allegiance to the community as distinct from his rights against

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[113] Annual Meeting, Resolution A-03-89.

[114] *Rebuilding A Canadian Consensus: An Analysis of the Federal Government's Proposals for a Renewed Canada* (Ottawa , December, 1991) at 3.

[115] *Inquiry* , *supra* , note 68 at 316.

[116] *Ibid.* , at 323.

[117] *Genereux*, *supra*, note 78.

the community, is based on a traditional world view which may bear modification in the contemporary context: "The belief in the harmonious and consensual nature of communities often ignores the reality of conflict and dissension so that local justice may serve to exacerbate rather than reduce conflict."[118] The possibility of fault lines in the harmony premise relates to the concept of a "community-constituting understanding,"[119] which advocates of collective rights assert is a, "necessary condition for the attribution of collective rights."[120] This subjective shared understanding arises naturally as a social fact rather than being created artificially as a legal fiction. It will arise most commonly as a response to a shared objective factor such as oppression which provides the focus of the shared understanding and may explain the various values that arise from it.[121] This group"internal cohesiveness"[122] reaches the point where each member can be said to, "see herself as part of an *us* rather than a separate *me*. "[123] At some profound level such allegiance to the group can be seen as part of the member's self- identification.

The Aboriginal Community

The requirement of a "community-constituting understanding"[124] again indicates the relevance of an examination of actually existing Indianism to assess the extent to which the views of the secular Indian may be said to accord with the notion of the paramountcy of the collective interest in the specific context of criminal justice. A commitment to the goal of self-government may not necessarily translate into a commensurate collective sharing with respect to

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[118] Jean-Paul Brodeur, Carol La Prairie and Roger McDonnell, *Justice for the Cree: Final Report* (Quebec, Cree Regional Authority, 1991) at 5 [hereinafter, Cree Report].

[119] McDonald, *Supra* , note 106 at 231.

[120] *Ibid.*

[121] *Ibid.* , at 219.

[122] Sanders, *supra* , note 14 at 369.

[123] McDonald , *supra* , note 106 at 219.

[124] *Ibid* , at 231.

autonomous justice as a means to that goal. The individual Aboriginal may simultaneously identify with both the traditional and the dominant society. Such an examination will be sensitive to the possibility that the advocates of a collective right to autonomous justice may "claim to see a homogeneous nation where homogeneity exists only in their minds."[125] If a significant portion of the contemporary community in fact asserts a concern for liberal values in this particular context, there may be "to all intents and purposes a second community."[126] The need for *Charter* protection of the individual Aboriginal within a self-governing community may relate in part to the degree to which the modern Aboriginal community truly contains a homogeneity of views: "The 'politics of culture' presupposes a homogeneous community, while the *Charter* is designed to protect the equal treatment of individuals in a heterogeneous society."[127]

If the reality is homogeneous consensus, the concern for tyranny may be diminished. However, if examination reveals a significant diversity of value allegiances then, "a prince, a city, or a state "[128] may be tempted to use the kolkhose steamroller to pave over the fault lines in the community understanding to impose its particular view of the good. If so, the relevance of the *Charter* may be enhanced.

Diaspora

An aspect of actually existing Indianism which may be relevant to the assessment of a community-constituting understanding is the fact of what this thesis will refer to compendiously as the "diaspora."[129] A significant portion,

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[125] *Ibid.* , at 367.

[126] *Ibid.* , at 231.

[127] Morton, *supra* , note 66 at 81.

[128] Pestieau, *supra* , note 99 at 366.

[129] R. Gibbins and J. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in, Alan Cairns and Cynthia Williams, research coordinators, *The Politics of Gender , Ethnicity and Language in Canada* (University of Toronto Press, Toronto,1984) 175.

arguably a majority,[130] of the Aboriginal community, lives off-reserve, maintaining a lifestyle largely indistinguishable from what might be considered conventional. This sub-group, even if it wished to subscribe to the benefits of the communitarian justice ethic, may not be able to do so fully, as it lacks the territorial land base arguably essential to self-government:

> No form of self-government has been put forward without a land base, which could be designated as such in any conventional sense of that term . . . Self-government, in all its various forms, must have as a starting point some land base on which to govern.[131]

This factor will also be related to the issue of uniformity discussed above. The *Charter* may serve to connect the Aboriginal system not just to the larger White society, but to its unlanded brethren.

RATIONALE FOR COLLECTIVE RIGHT: CULTURAL SURVIVAL

If a community-constituting understanding about some form of Aboriginal justice is found to exist, after considering any fault lines in actually existing Indianism, it remains to consider the rationale for elevating this value to the status of a right which is intended to be legally enforceable against the contrary right of an individual. Johnston observes that, "collective rights cannot be asserted in a vacuum."[132] Pentney stresses that the particular content of a group right will derive from, ". . . the nature, history and social context of the collectivity."[133] Just as not all individual interests generate rights, so too, there must be something special about a group interest in justice to transform that value into a legal right. A related matter involves examining why this right should vest in the collectivity as distinct from the individual member.

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[130] *Ibid.*, at 175.

[131] David C. Hawke, *Aboriginal Self-Government* (Queen's University, 1986) at 25.

[132] *Supra*, note 44 at 28.

[133] William Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (LL.M. Thesis, University of Ottawa, 1987) at 56.

This part of the analysis must be sensitive to the rhetorical power of the rights discourse in order to avoid moving in a rather too, ". . . cursory way from the claim that communities are good things to the claim that communities have rights."[134]

It is apparent that "rights ground duties"[135] and therefore should be found to exist only where there is a sufficient rationale to raise a corresponding duty. It is submitted that it would not be unreasonable to insist that this rationale be substantial indeed, if ascribed to a "nebulous"[136] collective with inherent potential to interfere with real human beings through the imposition of "real penal consequences."[137]

Such a sufficient, and perhaps the only defensible, rationale may be the cultural survival or identity or integrity of the group. The Constitution does seem to encompass the recognition of some notion of collective rights[138] and, as Pentney observes, such rights would appear to be, "meaningless unless the collectivity itself is allowed to survive."[139] This would accord with the view that a major difference between an individual and a collective right is that an individual asserts a, "right to be treated like any other human being [whereas, a collective asserts a right] . . .to be treated differently."[140] Pestieau expresses such a sentiment with respect to Aboriginal rights:

> A minority wants to exist as such. It will not settle for demanding for its members the same advantages as those enjoyed by the majority . . . . The indigenous peoples of Canada . . . are not just claiming for their members the same advantages as those enjoyed

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[134] Hartney, *supra* , note 7 at 294.

[135] Green, *supra* , note 94 at 318.

[136] Pentney, *supra* , note 133 at 46.

[137] *Genereux* , *supra* , note 78.

[138] See, "Recognition of Group Values", *supra.*

[139] Pentney , *supra* , note 133 at 53.

[140] Hartney, *supra* , note 7 at 311.

> by the majority of Canadian society. They do not want to be assimilated.[141]

Some collective interests seem to relate quite readily to this notion of cultural survival. Language, for example, may encompass an, "entire pattern of culture."[142] What, however, is the relationship between cultural survival and justice? Quebec seems able to assert a distinct society status without requiring a distinctive criminal justice system. On the other hand, the military, arguably, could not survive without a separate system of justice.[143] Therefore, as is discussed in more detail in part two, it will be relevant to examine the historical roots of Aboriginal justice to ascertain the extent to which it is associated with Aboriginal cultural distinctiveness.

The cultural survival factor is asserted as a justification for a separate Aboriginal justice system. The *Inquiry* adopts Ovide Mercredi's assimilation fears as, ". . . the unarticulated premise underlying the concerns of other Aboriginal presenters "[144] on Aboriginal justice:

> Unless we affirm our rights and rebuild our social and political institutions now, we are fearful that within decades, assimilation will be complete and our civilization will disappear.[145]

The colonization process described in chapter one confirms the grim reality of this assimilationist fear. Diamond Jeness, the federal government anthropologist, wrote that, "doubtless all the tribes will disappear,"[146] and in 1947, he seemingly set out to realize this prediction by presenting a plan, "to

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[141] *Supra* , note 99 at 364.

[142] Nathan Brett, "Language Laws and Collective Rights" (1991) 4 Can. Law & Jurs.347 at 359.

[143] *Genereux* , *supra*, note 78. See note 161, *infra.*

[144] *Inquiry* , *supra* , note 68 at 256.

[145] *Ibid.*

[146] Diamond Jeness, *The Indians of Canada*, 7th ed.(University of Toronto Press, 1947) 264.

abolish, gradually, but rapidly, the separate political and social status of the Indians."[147]

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[147]Sanders, *supra* , note 21 at 535.

Precedent for Cultural Survival Rationale

It is difficult at this early stage in the development of a collective rights jurisprudence to be definitive, however, a cultural survival rationale for collective rights is consistent with somewhat analogous judgements of the Supreme Court of Canada.

In *Ford* v *Quebec*,[148] the Court held that the objective of ensuring the survival of the "Quebecois Francophone collectivity,"[149] or "visage linguistique,"[150] or the "means by which a people may express its cultural identity,"[151] would have justified an appropriately tailored law overriding the individual right to expression.[152] The Court ruled admissible certain material relating to the vulnerability or survival of the French language in Quebec and Canada.[153]

In *Caldwell* v. *Stuart*,[154] a Catholic denominational school dismissed an employee for marrying a divorced man, contrary to the teachings of the Church. This case was decided before the *Charter*, however the Court, in justifying the Catholic Church's power, which may arguably be seen as a collective right, to ensure Catholic standards in a denominational school, emphasized that, ". . .

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[148] [1988] 2 S. C. R. 712.

[149] Sanders, *supra* , note 14 at 378.

[150] *Ford*, *supra* , note 148 at 780.

[151] *Ibid.* , at 749.

[152] The law requiring French only commercial signs was struck down as a mere predominance of French on commercial signs could have achieved the objective with less intrusion on individual rights.

[153] *Ford* ,*Supra* , note 148 at 777.The concern for the protection of the French language could perhaps more appropriately be viewed as a concern for the " linguistic security " of the collectivity or at least the members of the collectivity, in order to counter the argument that the goal of protecting an endangered linguistic species cannot generate a case for rights. See Brett, *supra* , note 142 at 351.

[154] [1984] 2 S. C. R. 603.

the special nature and objectives of the school [make] observance of the Church's rules . . . reasonably necessary to assure the achievement of the objects of the school."[155] Manget, commenting on this case, observes that, "It is difficult to see how a denominational school, the raison d'être of which is inculcating a set of religious tenets through example, can survive promotion of free thinking in key staff members."[156] Roger Tassé observes that the effect is to protect, "the essential Catholic nature" of the school with the result that the Catholic Board might have the right to fire women who marry civilly, but could not refuse to hire women.[157]

In *Genereux*,[158] Chief Justice Lamer justifies a separate military justice system in cultural survival terms, ". . . the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces. . . "[159] He asserts that a parallel system is, "deeply entrenched in our history and supported by . . . compelling principles,"[160] and adopts the comment of Cattenach J. in a previous case that, "Without a code of service discipline the armed forces could not discharge the function for which they were created."[161]

The cultural survival rationale is detectable elsewhere. A draft United Nations Declaration on the Rights of Indigenous Peoples refers, in part, to their, "collective right to exist . . . as distinct peoples."[162] Macklem refers to Aboriginal rights as, "affirming a sphere of autonomy for native people over those matters

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[155] *Ibid.* at 625.

[156] Joseph Manget, " Multiculturalism and Collective Rights : Approaches to Section 27" in, Beaudoin and Ratushny, *supra* , note 10, 739 at 773.

[157] Roger Tassé, "Application of the *Canadian Charter of Rights and Freedoms* (Sections 30-33 and 52)" in, Beadoin and Ratushny, *supra*, note 10, at 114, note 148.

[158] *Supra* , note 78.

[159] *Ibid.* , at 32.

[160] *Ibid.*

[161] *Ibid.* , at 31.

[162] Rudy Platiel, "Native Rights Debated at UN" *The Globe and Mail* (20 February 1992) A4.

that are central to their individual and collective self-definition."[163] The agreement reported to be emerging from the ongoing constitutional negotiations states, " . . . that self-government will be described as a system to guard and develop native languages, cultures, identities and traditions."[164]

The Group as Holder of the Right

If an autonomous Aboriginal justice system is found to relate in some significant way to the continuing cultural distinctiveness of the Aboriginal group, then it probably makes sense that the protection of such "paradigmatically collective assets"[165] should somehow be vested in the group itself, for several reasons.

Certain unique aspects of the Aboriginal situation may make their assertion of collective rights, as distinct from mere collective interests, particularly compelling. They have a genuine communitarian tradition on which to build, which is most obvious in their relationship to land:

> The hunting territories and the fishing places belonged to the entire band, and were as much the right of every member as the surrounding atmosphere.[166]

Immigrant groups, arguably, cannot assert an enforceable right to separate institutions of cultural survival, as they presumably expect to have to rely on the policy and good will of their chosen country.[167] Aboriginal groups, however, as the prior occupiers of the land, may be able to justify a strident

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[163] Patrick Macklem, " First Nations Self-Government and the Borders of the Canadian Legal Imagination " [1991] 36 McGill L. J. 383 at 451.

[164] Susan Delacourt and Richard MacKie, "Compromise Makes Day at Unity Talks," *The Globe and Mail* (28 May 1992) at A1.

[165] McDonald, *supra*, note 106 at 235.

[166] Jeness, *supra* , note 146 at 124.

[167] Will Kymlicka , "Liberalism and the Politicization of Ethnicity" (1991) 4 Can. J. Law & Jurs 239.

demand as set out in chapter one, that the uninvited dominant society respect their right to institutions of cultural survival.

Most significantly, individual rights may be simply insufficient to realize the purpose of the cultural survival of such a severely damaged society:

> For such societies, there is a kind of Humpty Dumpty effect; once such a community is shattered it cannot be put together again. To pretend that individual rights without the addition of powerful collective rights and powers would preserve the social goods in question would I think be disingenuous.[168]

One of the criteria for a collective right advanced by Joseph Raz is that, "the interests of no single member of that group in the public good is sufficient to justify holding another person to be subject to the duty."[169] On this view, protecting the culture of a group is not reducible to merely protecting the individuals who comprise it. The culture could survive while the individuals do not, and the the individuals could survive while the culture does not.[170] Sanders makes a similar point with respect to the creation of a separate Province of Quebec: "To simply recognize the right of individual Francophones to speak French or follow the cultural norms of their traditions would have defeated the collectivity. French would have lost out in the linguistic marketplace of North America."[171]

Therefore it seems reasonable to conclude that, if a collective Aboriginal right is otherwise warranted, it is not simply redundant to the rights of the individual members of the group, but is necessarily vested in the group entity to serve the distinctly different function of group survival.

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[168] McDonald *supra* , note 106 at 230.

[169] J. Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986) 208, referred to by Brett, *supra* , note 142 at 353.

[170] Brett, *supra* , note 142 at 355.

[171] Sanders , *supra* , note 14 at 382.

The next part considers this rationale in the context of section 25 and addresses the interface between collective and individual rights contemplated by that section.

PART 2: SECTION 25

SECTION 25: CULTURAL SURVIVAL AND THE INDIAN ACT

It is submitted that the legislative and political background to section 25 is consistent with a cultural survival rationale for a collective right. Section 25 was the legislative response to Aboriginal fears that their special status under the *Indian Act* was open to a section 15 equality challenge.[172] Contrary to the expectations of Jeness,[173] and no doubt others, the Aboriginal community persisted in the face of repeated threats to their cultural survival. Sanders notes that, "The most significant development in post-war Canadian aboriginal policy is the acceptance of the idea that Indian communities should have continuing special status within Canadian federalism."[174] The "historic breakthrough"[175] of agreeing to entrench the inherent right to self-government builds on this acceptance. However, the basic fact was that the *Indian Act* treated Indians, qua Indians, differently from other people,[176] and was vulnerable under section 15 of the *Charter.* Previous threats to this special status as a distinctive cultural community had aroused considerable opposition. In 1969 Pierre Trudeau, "took a strong Social Darwinian approach"[177] in rejecting a special status for Indians

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[172] See generally Sanders, *supra* , note 21 where this point is thoroughly canvassed.

[173] *Supra*, note 146.

[174] Sanders, *supra*, note 21 at 529.

[175] Susan Delacourt, "Natives Promised Self-government" *The Globe and Mail* (10 April 1992) at A1, quoting Premier Rae.

[176] *Isaac* v. *Davey*, [1973] 3 O. R. 677 at 690.

[177] Sanders, *supra* , note 21 at 538.

in the previously noted and infamous "White Paper,"[178] which proposed the repeal of both the Indian Act and s. 91(24) of the *Constitution Act, 1867*. It was repealed after "massive Indian opposition."[179]

In 1974, the *Lavell* [180] case mounted an attack on the *Indian Act* membership system, which clearly discriminated on the basis of sex, since an Indian woman lost her status if she married a non-status man, whereas, an Indian man conferred status on a non-status woman by marrying her. Aboriginals, as in the case of the White Paper, reacted "strongly"[181] to this case sensing, "that all parts of the *Indian Act* were now vulnerable to judicial attack."[182] The apparent legitimacy of the position of Aboriginal women coupled with the perceived general threat to the special status of the *Indian Act* resulted, ". . . in an atmosphere of controversy that has characterized very few arguments before the Supreme Court of Canada."[183]

The Court was apparently loath to "simply junk" [184] the *Act* and effectively avoided the merits of the issue by invoking, "the dictates of the Constitution in support of the *Indian Act*, giving it a superiority over the *Canadian Bill of Rights*."[185]

Therefore, Sanders concludes that, "After the experience with the 1969 White Paper and the controversies over the Lavell litigation the federal government recognized that a Constitutional bill of rights must explicitly signal whether Indian special status was to continue or not [and therefore] a protective

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[178] *Supra* , note 30..

[179] Sanders, *supra* , note 21 at 539.

[180] *A. G. Can. v. Lavell* [1974] S. C. R. 1349.

[181] Sanders, *supra* , note 21 at 540.

[182] *Ibid.*

[183] *Ibid.* 545.

[184] *Ibid.* 546.

[185] *Ibid.* 545.

section along the lines of section 25, should be inserted in the *Charter.*"[186] (emphasis added)

Others agree. Morton links section 25 to the resolution of, "the problem of reconciling the *Indian Act* with the non-discrimination principle of section 15."[187] Pentney adds, "In particular, s. 25 is intended to protect the rights of aboriginal peoples from being obliterated by the equality rights guarantee contained in s. 15 of the *Charter.*"[188]

Section 29 is similar to section 25 and, according to Justice Wilson, serves a similar function for denominational schools legislation, "It was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational . . . schools, even if it sits uncomfortably with the concept of equality . . . is nevertheless not impaired by the *Charter.*"[189]

THE INTERFACE: A PRINCIPLED BALANCE

However, as Pentney observes, section 25 is not on its face limited to section 15 and, ". . . any *Charter* right may need to be reconciled with the particular rights guaranteed to the aboriginal peoples of Canada."[190]

Pentney and Manget are two of the very few commentators to confront the issue avoided in *Thomas* [191] and attempt to give life to section 25 by articulating the interface between the collective right of a community in conflict with the individual right of a member. Each refers to the lack of available precedent to guide the attempt.[192],

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[186] *Ibid.* 553.

[187] Morton, *supra* , note 66 at 75.

[188] Pentney, *supra* , note 133 at 109.

[189] *Reference Re Bill 30 , An Act to Amend the Education Act* [1987] 1 S. C. R. 1148 at 1197.

[190] Pentney, *supra* , note 133 at 109.

[191] *Supra* , note 45.

[192] See *supra* , note 67 re cases under section 25.

Magnet states:

> At the same time as the Canadian constitutional system recognizes a special need of Canadian minorities for group autonomy, commitment to a *Charter*-based system requires that groups exercising general governmental functions respect fundamental norms of due process, personal liberty and equality. Thus the systems of individual and group rights in the *Charter* come squarely into conflict. There is no readily apparent doctrine to regulate this considerable difficulty.[193]

Pentney states:

> How can the individual rights of aboriginal persons be dealt with when they involve claims contrary to the position of the collectivity?[194] . . . there is exceedingly little available scholarship on which to rely.[195]

Each refers to the "interpretive guides"[196] section of the *Charter* and concludes that a collective right may indeed trump an individual right, "if the collective right is vital to the continuance of the group,"[197] in the case of Aboriginal collective rights,or, if, "it is necessary to preserve the essential features of the group's identity,"[198] in the case of multicultural group rights.

The analysis, then, would center on the survival of the cultural essence of the group. Appropriate respect for individual rights would require a commensurately weighty justification for dilution by a conflicting group right. On the other hand, minimum respect for a group right would mandate that it prevail over any individual right that threatens the group's very existence or reason for existence.

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[193] Manget, *supra* , note 156 at 774

[194] Pentney, *supra* , note 133 at 51.

[195] *Ibid.* at 59.

[196] *Ibid.* at 39.

[197] *Ibid.* at 53.

[198] Magnet, *supra* , note 156 at 774.

The cultural survival rationale for the paramountcy of collective over individual rights, advocated by this thesis, seeks a principled accommodation with individual *Charter* values, rather than the somewhat open and unsubtle *Inquiry* approach, which envisages the potential wholesale exclusion of such values by any conflicting collective right as a matter of local option.[199] In the words of Manget, the more principled approach would, ". . . blunt, but not negate, the *Charter's* force."[200] it would refine and confine exclusion of the *Charter* for the limited, but essential purpose of cultural survival. At the same time, one hopes it might lead to the possibly very healthy exercise of defining with precision just what is essential to cultural survival. Chapter five examines the extent to which Aboriginal justice is essential to Aboriginal cultural survival.

Pentney formulates the collective - individual interface as follows:

> . . . a particular collectivity must respect the maximum individual rights consonant with the preservation and functioning of the group.[201] . . . If however the collective right is 'ancillary' to the vital interests of the group and the individual right is strongly protected . . . then the collective should give way.[202]

Acceptance of the concept of a group right necessarily raises the perhaps unsettling possibility that such a right could prevail over traditionally sacrosanct individual rights.[203] Nevertheless, if the rationale for the creation or recognition of a group right is the preservation of cultural difference, it may be appropriate and logically necessary that the right be insulated from a person's assertion of an individual right that in a real and fundamental way endangers the cultural vitality of the group.

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[199] The *Inquiry* advocates that each Aboriginal government consider a tailor- made Aboriginal Charter, "that incorporates only those fundamental freedoms and civil liberties that do not violate the beliefs and paramount collective rights of the Aboriginal peoples.", *Inquiry*, *supra*, note 68 at 335 and see, chapter 2.

[200] Manget, *supra*, note 156 at.775.

[201] Pentney, *supra*, note 133 at 53.

[202] *Ibid.*, at 54.

[203] "unremitting protection of individual rights," *Hunter*, *supra*, note 32.

THE WEIGHTED WORDING OF SECTION 25

But is this what section 25 actually means? The direction of section 25 is that the individual right, "shall not be construed so as to abrogate or derogate from" the group right. Pentney observes that these words would appear to proscribe the slightest, "diminution, impairment or infringement" of the group right,[204] whereas, the cultural survival test might be interpreted to permit any modification of the group right short of a virtual denial of it.

The drafting history[205] of this provision reveals that the phrase ". . . shall not be construed so as to abrogate or derogate from . . . " replaced an earlier version that read, ". . . shall not be construed as denying the existence of . . . ." This change was precipitated by arguments to strengthen the provision on the basis that, ". . . while the *Charter* may not in the future deny the existence of certain Aboriginal rights and freedoms, it could abridge or otherwise modify their meaning."[206]

MOVING THE FULCRUM

It is not at all clear how the interface between as yet barely discernible Aboriginal rights and the individual rights of the *Charter* eventually will be defined. Morse refers to this sort of analysis in a slightly different context as, ". . . like trying to describe the interface between a shadow and a brick wall. Need any more be said about the uncertainty of aboriginal and treaty rights."[207] However, section 25 is open to an approach that views the language as

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[204] Pentney, *supra* , note 133 at 111.

[205] *Ibid.* at 1 - 8

[206] *Ibid* . at 5, quoting Mary Simon. A somewhat similar argument was raised with respect to the Meech Lake Accord reference in section 2.1 (1)(a) to minority language groups "present" in Canada or Quebec: ". . . considerable infringement of the linguistic rights of individuals within such groups would be possible without jeopardizing their 'presence' ", *Rebuilding a Canadian Consensus* , *supra*, note 114 at 96.

[207] Bradford Morse and David Nahwegahbow, *The Interaction Between Environmental Law Enforcement and Aboriginal and Treaty Rights in Canada*, (paper prepared for Law Reform Commission of Canada,1985) at 142 [unpublished].

calculated to severely constrain the slightest diminution or impairment of a collective Aboriginal right by a conflicting individual right. Thus, collective rights, unlike any other rights in the *Charter*, could be interpreted as virtually absolute; a perhaps surprizing result from a document that is said, ". . . to provide for the unremitting protection of individual rights and liberties"[208] If this approach were adopted, it would be reasonable to anticipate that the concept of a "collective right" might be confined correspondingly strictly to those matters which are realistically essential to the culturally distinct survival of the collective. The test would remain as cultural survival, but the culture in question may be seen as rather more robust than under a more flexible interpretation. It is submitted that some "balancing" of interests will likely take place in the process of defining the collective interest as a right. Political weighing of values somewhere in this process is unavoidable. It perhaps does not matter in the result if this is done by prudently and selectively defining the content of a collective right, or by assessing the relative values of a hierarchy of collective rights from ancillary to essential. However, it is submitted that section 25 may not readily conform to the latter course, given the rationale of cultural survival.

"Minor" Collective Rights?

The nature of the cultural survival rationale advocated by this thesis raises a concern about Pentney's reference above to collective rights that are, "ancillary to the vital interests of the group." It may be that such "ancillary" collective interests could not be impaired or diminished by conflicting individual rights once they are found to be collective rights. It is submitted that a collective right cannot be ancillary to the vital interests of the group if cultural survival is the proper test for a collective right.

"Unacceptable " Exercise of Collective Rights?

This interpretation of the cultural survival rationale also raises a concern about Sanders' suggestion that a form of sexual discrimination: ". . . should be

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[208] *Hunter*, *supra*, note 32.

acceptable so long as it authentically reflects the continuing traditions of the community. Otherwise it is unacceptable."[209] Is this a sufficient definition of a collective right which potentially must prevail over individual rights? In a later article, Sanders points out that, "The more difficult cases involve minority cultural practices that violate highly valued human rights norms, such as life and health, sexual equality, and nondiscrimination."[210] He refers to examples such as the Islamic amputation of the hand of a thief, medical treatment for children of Jehova's Witnesses and African female circumcision.

One might wish to add to this list the potentially fatal, non-consensual Spirit Dancing described in Thomas. [211]

It is submitted that collectivities develop naturally, precisely because they are different and practice a culture which is distinct. The intention of section 25 is that this difference be preserved by protecting certain practices, even those "unacceptable" to mainstream society, such as the examples cited above, from even the most valued of individual rights, but only if this is necessary to cultural survival or the preservation of that difference. Such an interpretation would not preserve otherwise authentic cultural traditions, or perhaps the severable parts thereof, that do not meet a cultural survival test or which are "ancillary" thereto.

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[209] Sanders, *supra* , note 21 at 562.

[210] Sanders, *supra* , note 14 at 384.

[211] *Supra*, note 45.

HISTORICAL INDIANISM: ADJUDICATION HIATUS

Chief Justice Lamer noted in *Genereux* that a parallel system of military justice was "deeply entrenched in our history."[212] It is submitted that the extent to which a tradition can be said to be ancillary or essential to the cultural survival of a community will depend, in part, on the role that tradition has played in the history of that community. If justice in the contemporary Aboriginal community can be shown to require an adjudication component, then it becomes relevant to assess the extent to which an Aboriginal justice system can lay claim historically to an adjudication base.

The absence of an adjudication heritage would not preclude a separate Aboriginal justice system, but it would favour the incorporation of *Charter* values to strengthen what might otherwise prove to be a shaky cultural foundation on which to build an Aboriginal justice system that can meet the demands of actually existing Indianism:

> Paradoxically . . . the very success of independence movements in rousing the enthusiasm of the masses and directing it against foreign domination tended to obscure the frailty and narrowness of the cultural foundations upon which those movements rested.[213]

The next chapter examines contemporary fault lines in the harmony ethos which, it is submitted, indicate a fundamental shift in community ethics in the direction of individualist values and a commensurate need for an adjudication component and *Charter* values in an Aboriginal justice system. Chapter five examines an historical adjudication hiatus that mirrors the contemporary adjudication hiatus in the *Inquiry* position.

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[212] See *Genereux* , *supra* , note 160.

[213] Gibbins and Ponting, *supra* , note 129 at 187.

CHAPTER 4

THE INQUIRY: ADJUDICATION HIATUS

INTRODUCTION

This chapter is divided into two parts. Part one examines fault lines in the homogeneous harmony ethos[1] posited by the *Report of the Aboriginal Justice Inquiry of Manitoba* [2] which indicate a need for an adjudication process and the values of the *Canadian Charter of Rights and Freedoms* [3] in the contemporary Aboriginal community. It is submitted that the harmony ethos is an accurate, but incomplete, description of actually existing Indianism, which premises an insufficient response to the demands of contemporary Aboriginal justice.

Part two examines the relationship of the small size, or "localness," of the Aboriginal self-governing unit to the needs of adjudication. The positive mediation implications of this localness are contrasted to certain negative implications for adjudication

This thesis does not question the existence or relevance of the harmony ethos within the contemporary Aboriginal community. The communitarian ethic emphasized by the *Inquiry* does, in fact, justify a reconciliation-mediation approach to justice, which may well be more viable within an Aboriginal justice system than the dominant system. However, it is submitted that a more encompassing analysis of the contemporary Aboriginal community would give appropriate weight to the modernizing and conflict-generating effects of the

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[1] See chapter two.

[2] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg , Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair) [hereinafter *Inquiry*]

[3] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

colonization process, outlined in chapter one, which challenge the sufficiency of this mediation-reconciliation approach to justice.

PART 1: FAULT LINES IN HARMONY ETHOS

INTRODUCTION

The *Inquiry* notes that the attitudes, customs, traditions, or mores of the harmony ethos outlined in chapter two, ". . . developed in other times and for other circumstances, but they remain powerful and relevant in Aboriginal society today."[4]

Morse notes that traditional ways have remained alive and will continue to play a valuable role in the future, but acknowledges that, "Interaction between the original inhabitants and what has become the dominant society, along with increasing urbanization among the aboriginal peoples means that things have changed irreversibly to some degree."[5] The question is how, and to what degree? It is submitted that the colonization process has wrought a degree of change which mandates an adjudication component to Aboriginal justice which can impose settlement on the irreconcilable conflict which is an inevitable product of the individualizing, non-communitarian influences of that process. The *Inquiry* is silent on the issue of adjudication as the harmony premise generates no significant demand for such a process.

The apparent confidence of the *Inquiry* in the sufficiency of its position belies the lack of basic research into both the diverse effects of the colonization process on the Aboriginal world view and the nature of traditional Aboriginal justice mechanisms. As recently as 1979, this field was referred to as "virgin

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[4] *Inquiry*, *supra*, note 2 at 45.

[5] Bradford Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in Bradford Morse and Gordon Woodman, eds, *Indigenous Law and the State* (Dorecht, Foris Publications, Holland, 1987) 101 at 114.

ground,"[6] and, in 1981, as, "a neglected area of scholarly inquiry."[7] It is further described as an area requiring, "major in-depth research [as] many traditionally-assumed differences may no longer be valid."[8] In 1986 La Prairie noted that: "The analysis of the effects of colonization on traditional life remains at a broad and general level. Specific changes in social relations as a result of adaptation to external pressures have not been systematically documented."[9] In 1991, the Law Reform Commission of Canada acknowledged that, ". . . despite the extensive study of aboriginal justice issues that has taken place, there are major gaps in our knowledge."[10]

In the relative absence of definitive studies, it is easy to misjudge the modernizing effects of the colonization process. It is submitted that some, the *Inquiry* included, ". . . have under-emphasized the impact of mercantile and industrial colonialism on the native populations,"[11] in stressing a somewhat "romantic"[12] conception of Aboriginal society. LaPrairie states:

> The desire to hold on to notions of what appears to have been a more just, egalitarian, cohesive and less adversarial society is compelling, but the existence and maintenance of customary law in aboriginal society in Canada today must be examined in the contemporary context. Customs evolve from social relations, and it would be unrealistic to expect that rules and social mores

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6 Dorothy Hepworth, ed., *Explorations in Prairie Justice Research* (Regina, Canadian Plains Research Center, University of Regina, 1979) at 110.

7 Don McCaskill, *Native People and the Justice System* , (Paper presented to the Native Studies Conference, Brandon University, November 5-7, 1981) at 1.

8 Hepworth, *supra.*, note 6 at 111.

9 Carol La Prairie, *Aboriginal Criminal Justice in Canada: Some Theoretical Considerations* (A paper prepared for the Ministry of the Solicitor General of Canada, November,1986) at 8. [unpublished].

10 Law Reform Commission of Canada , Report no. 34,*Aboriginal Peoples and Criminal Justice* (Ottawa , Information Canada, 1991) at 87.

11 Simon Verdun-Jones and Gregory Muirhead, "Natives in the Canadian Justice System: An Overview," (1979-80) 7 Crime and Justice 3 at 4.

12 *Ibid.*

> would be the same today . . . as they were in pre-contact time.[13]

On the other hand, while the contemporary Aboriginal probably is something of a "post-industrial"[14] person, who may well ascribe to or reflect post-industrial values; some have over-estimated the effect of superficial modernism on native culture. A Northwest Territories resident notes there is no escaping television with satellite dishes that point south at almost every Arctic community, "We get three Detroit channels up here on TV and see everything that people in the south see."[15]

It is this type of shallow and misleading analysis that Jackson argues informs the majority judgement in *Naqitarvik*[16] and, by implication, much of conventional judicial decision-making about Aboriginal peoples.[17] The Alberta Court of Appeal rejected the non-custodial recommendation of the local council of elders, or "Inumarit", in the case of a Northwest Territories man convicted of sexual assault, and raised a 90 day intermittent sentence to one of 18 months imprisonment. The Court found that the culture in question was not "markedly different" from conventional society because: ". . . the incident arose as the victim and her sister played music on a modern player for which there was an electric cord. The complaint of sexual assault was conveyed to the police by telephone and the victim was taken to a modern nursing station for examination and treatment." The Court further found that the Inumarit, ". . . resembles the usual community counselling service rather than the traditional governing and counselling body of earlier times."[18] Jackson argues that the superficial

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[13] La Prairie, *supra* , note 9 at 7.

[14] Verdun-Jones and Muirhead, *supra* , note 11.

[15] Miro Cernetig, "Arctic Warms to Christmas Presence" *The Globe and Mail* (24 December 1991) at A1.

[16] *R* v. *Naqitarvik* (1986) 26 C. C. C. (3d) 193 (Alta. C. A.).

[17] Michael Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities* (Paper prepared for the Law Reform Commission of Canada, May 15, 1991) at 55-66 [unpublished].

[18] *Naqitarvik* ,*supra* , note 16 at 195-196.

trappings of modernism which the Aboriginal has inevitably embraced may conceal continuing and profound cultural difference, albeit adapted to contemporary reality. The failure to see this difference, naturally results in failure to respect the difference: "A substantial sentence of imprisonment, judged by the community after due deliberation to be unnecessary from the perspective of the community, the victim and the accused, is imposed with the clear message to the community that our non-native elders, or at least some of them, know better than theirs as to what will contribute to a just and orderly society."[19]

Aboriginal adoption of and adaptation to contemporary technology and ways of life does not bespeak the abandonment of a distinctive culture any more than the incorporation of, "metal, fabric, shot and glass"[20] soon after contact turned the red man into a white man. Nevertheless, it is submitted that there are indications of fault lines within the modern Aboriginal community signalling fundamental change to the harmony premise of the *Inquiry*, which should not be ignored by a prudently evolving indigenous system of justice. These fault lines are significant breaches in the homogeneous, harmonious, community-constituting understanding posited by the *Inquiry*, which justify concern about the adjudication hiatus in its analysis.

Sharing

The communitarian, sharing ethic posited by the *Inquiry*, outlined in chapter two, has been pervasively eroded by a more individualistically oriented wage and welfare economy. In the past, one truly shared equally in the collective product of ones individual efforts: "Each person contributes according to their ability, each receives according to their need . . . The practice of sharing

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[19] Jackson, *supra* , note 17 at 64. A section on the punitive attitudes of Aboriginal women, *infra* note 109, outlines significant public pressure on courts of the Northwest Territories to hand out, "tougher sentences for sexual assault." The judgement does not indicate whether these factors influenced the Court of Appeal.

[20] Chapter one, *supra*, at p. 4.

reminds everyone, regardless of their respective abilities, that collective well-being is the object of their conduct and interaction."[21]

Within such communities, where the functioning mentality encouraged continuously since birth is, "that each person view themselves as a contributing member of a group in combination with contributing others,"[22] the necessary preconditions for successful group suasion and mediation of disputes are in place. The requirement of, "a sense of responsibility and will to atone and restore'[23] is more readily fostered in a "face-to-face" community which is, "unified and internally consistent,"[24] and where, ". . . .the social relations that give rise to individuality did not exist."[25] In the result, "conceptions of appropriate human rights that grow out of a face-to-face communal experience will necessarily be different from those that grow out of a society of individuals acting for themselves."[26]

However, individualism, inequality and community schisms; the antitheses of communitarianism, are engendered by the very different wage and welfare environment created in the latter stages of the colonizing process. The Cree Report examined the influence of these factors on the Cree of Northern Quebec and concluded they, ". . . had profound effects on customary practices of sharing, the way people relate to one another, and social control."[27] This general dilution of the sharing ethic in conjunction with the other deleterious effects of the colonizing process outlined in chapter one results, according to

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[21] Jean-Paul Brodeur, Carol La Prairie and Roger McDonnell, *Justice for the Cree: Final Report* (Quebec, Cree Regional Authority, 1991) [hereinafter, Cree Report] at 18.

[22] *Ibid.* at 25.

[23] Chapter two, *supra*, at p. 7.

[24] Menno Boldt and J. Anthony Long, "Tribal philosophies and The Canadian Charter of rights and Freedoms" in, Menno Boldt and J. Anthony Long (in association with Leroy Little Bear),eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1984) 165 at 167.

[25] *Ibid.*

[26] *Ibid.*

[27] Cree Report, *supra*, note 21 at 2.

the Cree Report , in, ". . . real difficulties in handling any sort of dispute in an orderly manner."[28]

Asch noted similar effects in his study of the introduction of welfare and wage labour to the Dene:

> The traditional distribution system ensured that there was little wealth differentiation . . . the introduction of welfare payments, in their present form, created the individualization of poverty and helped relieve the community of the traditional responsibility to help one another.
>
> . . . in todays circumstances wage labour is often less of a solution than it is a problem . . . it is acting as a subtle influence to changing values away from mutual sharing and towards individualistic ones.[29]

In many contemporary Aboriginal communities the main source of funds is externally supplied in the form of grants, transfer payments and social assistance of various kinds: "On most reserves, vast sums of federal money are spent on welfare and other forms of social assistance - the largest single item in the budget of the Indian Affairs Department."[30] A principle function of local level politics is the distribution of these funds which creates, "internal divisions and pressures,"[31]and a local, "elite of privileged bureaucrats."[32] Shkilnyk documents the resultant creation of, "social inequality"[33] and, "a hierarchy of status, power, and influence"[34] centered on band connections. The general picture emerges of

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[28] *Ibid.* at 36.

[29] Michael Asch, "The Dene Economy" in, *Dene Nation: The Colony Within*, Mel Watkins, ed. (Toronto, University of Toronto Press, 1977) at 56, referred to in La Prairie, *supra*, note 9 at 4.

[30] Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (U.K., Lester and Orpen, 1989) at 60.

[31] La Prairie, *supra*, note 9 at 9.

[32] A. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Objibwa Community* (Yale University, 1985) at 151.

[33] *Ibid.*

[34] *Ibid.*, at 104.

a stratified society experiencing, "a fundamental shift in communal ethics away from the Indian values of mutual sharing and toward the values of individual accumulation characteristic of our own society."[35]

Such distinctly non-egalitarian, individualistic symptoms of the colonizing process tend to generate conflicts of the irreconcilable variety, which are less naturally inclined to the harmonizing influences of communitarian justice and lean to the confrontational side of the mediation-adjudication spectrum.

Community-Constituting Understanding

The colonizing process has created an "internal cohesiveness,"[36] or, "community-constituting understanding"[37] about the need for a distinct justice system, however Aboriginal representatives at a recent native justice conference are reported as unable to form a consensus as to whether such a system should operate within or without constitutional limitations.[38] As the Cree Report has noted, ". . . complaints about the structures and systems which affect peoples lives, may not necessarily translate into a desire to be responsible for or the ability to operate their own systems."[39] There appears to be a consensus about the failures of the present system and the objective of autonomous change, but there are indications of internal concern and dissension with respect to the means, which parallel to some extent the concerns of the larger society, outlined in chapter one, for the inclusion of *Charter* values in Aboriginal justice.

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[35] *Ibid.*, at 155.

[36] Douglas Sanders, "Collective Rights"(1991) 13 Human Rights Quarterly 368 at 369.

[37] Michael McDonald , "Should Communities Have Rights? Reflections on Liberal Individualism (1991) 4 Can. J. of Law & Jurs. 217 at 231.

[38] David Shoalts, "Native Courts Inevitable, Chiefs Tell Justice Ministers" *The Globe and Mail* (7 September 1991) at A5.

[39] Cree Report, *supra*, note 21 at 5.

It is not a simple matter to determine either the nature or the extent of a community-constituting understanding with respect to the parameters of a separate Aboriginal justice system. Mercredi, on behalf of the Assembly of First Nations (AFN), has repeatedly agreed with the *Inquiry* position in asserting that the *Charter* is not consistent with Aboriginal collective values.[40] However, in the absence of any draft of the proposed Aboriginal charter of rights, it is as yet unclear precisely what this portends for individual rights in the criminal justice context, The extent of Aboriginal support for the position of the AFN is also unclear. It is frequently noted[41] that there is a, ". . . fragmentation within the aboriginal population that bedevils analysis in this field."[42] The result is that the Aboriginal community does not speak with one voice - perhaps it cannot, and possibly should not, be expected to do so. Long and Boldt note that, "intraorganizational factionalism [and] interorganizational differences [contribute to the] difficulty in getting agreement on the central issues."[43] They assert that the AFN, ". . . has never achieved political hegemony over the status Indian community with respect to policy issues that affect all status Indians,"[44] and that this difficulty, "is even greater among the Metis and non-status Indians,"[45] who are generally recognized as represented by the Native Council of Canada.

The difficulties for analysis caused by the lack of a national voice or, "one umbrella organization,"[46] are compounded by the relatively recent emergence of the autonomous justice issue, as outlined in chapter one, and by the

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[40] "A Constitutional Primer: Aboriginal Rights" *The Globe and Mail* (11 January 1992) at A6.

[41] See, for example, *Rebuilding A Canadian Consensus: An Analysis of the Federal Government's Proposals For A Renewed Canada* (Ottawa , December, 1991) at 176.

[42] R. Gibbins and J. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in Alan Cairns and Cynthia Williams, research coordinators, *The Politics of Gender, Ethnicity and Language in Canada* (University of Toronto Press, Toronto,1984) 171 at 174.

[43] Anthony Long and Menno Boldt, "Conformity Trap" (1984) 5 Policy Options 5-6.

[44] *Ibid.* , at 5.

[45] *Ibid.* , at 6.

[46] *Rebuilding A Canadian Consensus: An Analysis of the Federal Government's Proposals For A Renewed Canada* , *supra*, note 41.

extraordinary, almost frenetic, pace, of as yet unfinished, constitutional deliberations, which even Mercredi has characterized as, "not very comfortable [and] a process that is not designed to take care, it is not designed to take caution."[47]

La Prairie observes that: "In general, leaders . . ., take more radical positions regarding an autonomous Cree justice system [and] . . .More generally, contrary to what is often put forward by aboriginal politicians, there is not a consensus in the communities about justice issues. Local leaders commonly speak for communities on most issues, as do politicians everywhere, but variation in opinion exists and must be accounted for and accommodated in any future Cree justice initiatives."[48]

It is submitted that the *Inquiry* and AFN positions do imply a certain homogeneity of views on the basics of a communitarian-based justice system, which would displace conflicting individualistic *Charter* values by paramount collective values. The concern, however, as expressed by, for example, Donna Greschner, is that, ". . . the ideal of community denies the differences between persons."[49] The colonizing process, in the process of eroding the sharing ethic, has created important differences within the local community that a fully functioning, whole, justice system should accommodate and respect.

This thesis will not attempt to articulate the details of how an Aboriginal justice system would actually work in practice. Those that have attempted to define or codify traditional rules are frustrated by the apparent diffuseness of such rules which they describe as, ". . . religious in nature or. . . part of an unarticulated 'gestalt' or system of belief,"[50] for which they can hope, at best, to

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[47] Susan Delacourt, "Fast-paced Talks Alarm Natives" *The Globe and Mail* (22 April 1992) at A1.

[48] Carol La Prairie, *Justice for the Cree: Communities , Crime and Disorder* (Quebec, Cree Regional Authority, 1991) at 259.

[49] Donna Greschner, *Feminist Concerns With the New Communitarians: We Don't Need Another Hero* , in A. Hutchinson and L. Green, eds, *Law and the Community: The End of Individualism* (Toronto, Carswell, 1989) 119.at 139 (referring to comments of Iris Young).

[50] *Reflecting Indian Concerns and Values In the Justice System* (Joint Study: Government of Canada, Government of Saskatchewan and the Federation of Saskatchewan Indians, 1985) at 8. hereinafter, Saskatchewan Study]

"attempt to obtain a 'feel for' "[51] An Aboriginal proposal to the government of British Columbia states that, "several researchers have tried to codify Gitksan and Wet'suet'en law and have not succeeded," in part because so much of the content and interpretation of these laws depends on the specifics of, ". . . the context of the incident to which it is being applied."[52] It may well be, as the Gitksan Proposal contends, that this failure is just another example of the inherent futility of our expecting, "to fit the content of one system into the structure of another . . . ."[53] It may also be, as Llewellyn and Hoebel apparently contended, that the content is something of an."incommunicable art."[54]

Presumably those most affected by resort to traditional ways will fashion their own relevant understanding of them. The concern here is the extent to which such understanding can be said to be "community-constituting," and the extent to which non-communitarian difference or dissent or fault lines in the otherwise homogeneous harmony ethos, as generally implied by the dilution of the sharing ethic, may indicate a need for *Charter* values, which, as outlined in chapter three, are, ". . . designed to protect the equal treatment of individuals in a heterogeneous society."[55]

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[51] *Ibid.* , at 7.

[52] *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suet'en People* (A proposal to the B.C. Ministry of the Attorney General by the Gitksan and Wet'suet'en Education Society, and others, March 1985) at 25 [unpublished] hereinafter, Gitksan Proposal].

[53] *Ibid.*

[54] Saskatchewan Study, *supra*, note 50 at 8.

[55] F. L. Morton "Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois" in, *Minorities and the Canadian State* , Neil Nevitte and Alan Kornberg, eds, (Oakville, Mosaic Press, 1985) 71 at 81.

EROSION OF TRADITIONAL AUTHORITY

The Cree Report confirms the "erosion of traditional authority,"[56] which might be anticipated as a result of the political subjugation, outlined in chapter one. It does not suggest that the authoritative role of the elders and band councils has collapsed, but that, "it is, however, increasingly questioned."[57] The Saskatchewan Study likewise found that, ". . . traditional practices have been undermined in Indian communities leading to a loss of respect for elders, leadership, authority, traditional values and institutions."[58] This is not the most fertile ground for the Aboriginal leadership to nurture the harmony ethos posited by the *Inquiry*.

YOUTH

As might be expected, a significant source of potential conflict with traditional values is the youth segment of the Aboriginal community, which has been increasingly exposed to other, and sometimes competing, individualistic values. The Saskatchewan Study refers to this problem, which, it is submitted, must be fairly widespread: ". . . the first generation of those educated outside the community are starting to take control and there is a struggle with the elders in establishing mechanisms for problem solving."[59] A generation gap is common to all societies, but within the Aboriginal community it may assume more ominous cultural proportions because, "it implies a genuine reluctance toward the traditional way of life and a search for models outside those provided by the community."[60] This tension may be particularly important in the context of criminal justice as the principle consumers of the product are, of course, the

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[56] Cree Report, *supra* , note 21 at 57.

[57] *Ibid.*

[58] Saskatchewan Study,*supra*, note 50 at 35-36.

[59] *Ibid.*, at 11.

[60] Cree Report, *supra*, note 21 at 57.

young. [61] The combination of a lower life expectancy and a higher birth rate results in a relatively younger Aboriginal population,[62] which is likely to be reflected in the Aboriginal crime rate. The *Inquiry* notes that while Aboriginal adults are over-represented in the adult system, "we find even higher proportions of young Aboriginal people in the youth justice system."[63] The young generally, and disaffected youthful offenders in particular, are not naturally inclined to harmony and reconciliation. This natural disinclination to the harmony ethos is intensified by perhaps intermittent, but largely inescapable, contact with urban values and the diaspora first mentioned in chapter three.

DIASPORA

Constitutional Affairs Minister Clark supports the principle of Aboriginal self-government, but as the focus narrows to detail, he poses, "ten critical questions," one of which is, "How can self-government accommodate the vastly different needs of on-and off-reserve natives?"[64] This question refers to the "diaspora,"[65] or, the "unlanded" sub-group of the Aboriginal community, "for whom the scope and potential for self-governing institutions is extremely limited,"[66] because they lack what is generally assumed to be essential for self-governance; a territorial base: ". . . the proposals of aboriginal peoples for self-government cover a wide variety of possibilities, and vary greatly in their degree of development. One common element in all of these proposals is an

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[61] La Prairie, *supra*, note 48 at 260.

[62] Jim Sutherland, "All About Crime" *Western Living* (November 1991) 58a at 58c.

[63] *Inquiry*, *supra*, note 2 at 549.

[64] Peter O'Neil, "Conference Fails to Shed Light on Future of Self-government" *The Vancouver Sun* (16 March 1992) at A9.

[65] Gibbins and Ponting, *supra*, note 42 at 175.

[66] *Ibid.* , at 174 and see: C.E.S. Franks, ed., *Aboriginal Peoples and Constitutional Reform: Background Paper 12*, (Institute of Intergovernmental Relations, Kingston, 1987) at 35.

assumption that self-government exists on a land base."[67] The *Inquiry* extends this assumption to the jurisdiction of Aboriginal justice: "For First Nations, the question of territory is relatively clear. They have and would continue to have jurisdiction over the land included within their reserve."[68] The *Inquiry* adds: "Their distinctiveness as a community assumes that they also have a distinctive geographical area dedicated or available to them for their use, not necessarily on an exclusive basis."[69]

Statistics about the Aboriginal population are often confusing and incomplete, however, it appears that this sub-group is a significant portion of the Canadian Aboriginal community. Gibbins and Ponting suggest that this "marginalized" population, "probably exceeds the community-based population by a margin of three or four to one . . . ."[70] A Globe and Mail editorial reports that, "two-thirds of Canada's aboriginal population . . .live off reserve."[71] In any event, this diaspora likely constitutes at least half and perhaps even a majority of the total Aboriginal population:

> In Canada, less than half of the aboriginal peoples . . . are currently 'landed'.[72]

> A recent Statistics Canada report, called Canada's Off-Reserve Aboriginal Population, drawn from the 1986 census, shows that 50 per cent of Canada's Indians live in off-reserve centers.[73]

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[67] David C Hawkes, *Aboriginal Self-Government* (Kingston, Queens University, 1986) at 25.

[68] *Inquiry, supra* , note 2 at 319.

[69] *Ibid.* , at 318. The *Inquiry* stresses that,"One does not need to own land in order to assert jurisdiction over it," and cites examples, mostly Metis, of Aboriginal communities which assert jurisdiction over land they do not technically own. These examples do not seem to relate to the problem of the diaspora.

[70] Gibbins and Ponting, *supra*, note 42 at 202.

[71] "For Self-Government, In a Canadian Context," *The Globe and Mail* (3 June 1992) at A22.

[72] Robert Groves, *Options for Legal Pluralism in Canada* (Abstract, Native Council of Canada, Ottawa, 1989) at 224 [unpublished].

[73] Richard Wagamese, "Alienated and Alone: The Urban Indian", *The Vancouver Sun* (20 January 1992) at A10.

> This marginalized group not only encompasses most of the non-status Indian population, but also extends to Metis living in urban areas and to the approximately one in four status Indians who live outside Indian reserves and Crown land settlements. Thus, in focusing on self-government, politicians have in large part excluded from the political agenda the majority of the aboriginal population . . . .[74]

The *Inquiry* confirms the general proportions of the unlanded community in Manitoba: ". . . 37 per cent of Aboriginal people live on reserves and 63 per cent live off reserves."[75] The *Inquiry* does not, however, address the apparent fact that this significant group could be substantially excluded from the benefits of autonomous justice and, presumably, does not consider this fact significant.

In fairness to the *Inquiry*, the relevance of the diaspora may not be obvious as, perhaps, that voice has not yet been heard clearly. Ontario is said to, "be just beginning to deal with the problem of ensuring the rights of aboriginals living off the reserve,"[76] which constitute 140,000 of the 200, 000 Aboriginals in Ontario.[77] Wagamese reports that: "the AFN and the NCC[78] are out of reach. Although they purport to represent hundreds of thousands of native people, those of us in the cities never see them. In Calgary, for instance, there are 14,000 native people. Despite that figure, there is neither an AFN or NCC office here."[79] Similar sentiments are expressed by Rodney Bobiwash, representing the Native Canadian Center, which is trying to organize Toronto's 65,000 Indians in the absence of any NCC presence: "We consider ourselves

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[74] Gibbins and Ponting, *supra* , note 42 at 175.

[75] *Inquiry* , *supra* , note 2 at 8.

[76] Richard Mackie, "Self-rule for Natives Tall Order, Panel Told: In Ontario Most Not on Reserves" *The Globe and Mail* (30 July 1991) at A12.

[77] *Ibid.*

[78] Native Council of Canada representing 600,000 non-status, off-reserve and urban Indians, per Deborah Wilson, "Loud, Clear Voice of the 'other' Indians" *The Globe and Mail* (17 December 1991) at A1.

[79] Wagamese, *supra* , note 73.

the largest reserve in North America."[80] Indeed, Toronto is reported to have, "a larger aboriginal population than Northern Ontario or the Northwest Territories."[81]

Despite the relative lack of input from the diaspora to date, it is apparent that the urban areas are very important places both for the presence of Aboriginals and Aboriginal crime. Jackson notes, "there is considerable mobility between native and non-native communities and . . .a certain gravitational pull, particularly of young people, away from their communities . . . ."[82] In addition, of course, the urban space and all that implies has expanded ever closer to the reserves: "migration into the urban centers has continued to escalate, just as sprawling metropolitan areas have encroached on reserves."[83] Also, it is reported that one third of reserves in Canada are properly classified as urban.[84] The gravitational attraction of the city and its relevance to crime, particularly for Aboriginal youth, is suggested by the apparent fact that most Aboriginal offenders report leaving home for the city before they are 16 and being charged for the first time shortly thereafter.[85] Jackson states that, "the majority of offences committed by native offenders are committed out of band jurisdiction."[86] Justice Dussault, co-chairman of The Royal Commission on Aboriginal Peoples, notes that, "the migration of natives - particularly the young - to cities shows no signs of abating . . . ."[87]

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[80] "Urban Natives Fear Self-Government Will Leave Them Out In the Cold" *The Globe and Mail* (28 December 1991) at A1.

[81] Franks, *supra*, note 66 at 24

[82] Michael Jackson, "Locking Up Natives in Canada" (1989) 23: 2 U.B.C. L. Rev. 215 at 272.

[83] Christie Jefferson, *Conquest by Law: A Betrayal of Justice in Canada* (Burnaby, Northern Justice Society, Simon Fraser University, 1988) [unpublished] at 278.

[84] Rudy Platiel, "Status Indians Number Half a Million", *The Globe and Mail* (30 August 1990) at A7.

[85] Jefferson, *supra*, note 83

[86] Jackson, *supra*, note 82 at 255.

[87] Rudy Platiel, "Royal Commission on Native People Set to Begin" *The Globe and Mail* (21 April 1992) at A1.

It is submitted that there is relevance to the diaspora which should not be ignored. At a very basic level of utility and practicality, a level generally avoided by this thesis, it appears that the *Inquiry* solution of a fundamentally different autonomous Aboriginal justice system has little direct applicability to at least half of the Aboriginal crime and consequent over-representation that it sets out to address. At a more general level, it is submitted that the diaspora represents a not insignificant breach in the homogeneous harmony ethic presented by the *Inquiry*. Just as Aboriginals were contaminated criminally by their intercourse with whites, as caustically observed by Washington Irving in chapter two,[88] so too many, if not most, will have become exposed to, perhaps accustomed to and even attracted by, the individualistic attitudes and concomitant rights-based mentality of the urban environment, and thus less amenable to communitarian values. One assumes a considerable flow, back and forth between the urban and reserve communities: "...an Indian reservation is not an island unto itself, and there is constant intercourse between it and the surrounding communities."[89] The, "mobility between native and non-native communities" noted by Jackson above[90] must inject an added degree of individualism into the self-governing units which will increase demand for an adjudication component and associated *Charter* values. Additionally, as discussed more fully in chapter five, the *Charter* could serve to unite in a significant way the two possibly very different justice systems to which Aboriginals will be subject depending on whether they happen to commit an offence on or off-reserve. Schwartz states that: ". . . the ideal should be that an accused will not be treated any more harshly or leniently on account of his ethnic origin. Nor should the group affiliation of the victim or the place where the offence occurred, diminish the demands of equal justice."[91] Brakel argues that, "it is anomalous in the latter part of the twentieth century that one small ethnic group should be separated

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[88] Ken Peak, "Criminal Justice, Law , and Policy in Indian Country: A Historical Perspective", (1989) 17 Journal of Criminal Justice 393 at 394.

[89] Thomas W. Lucke, "Indian Law: Recognition of Field Values" (1977) The Indian Historian, Vol. 10, No.3, 42 at 46.

[90] Jackson, *supra*, note 82.

[91] Bryan Schwartz, "A Separate Justice System?"19 Man. L. J. 77 at 80.

from the judicial system that extends to all other citizens . . . ."[92] These sentiments largely refer to uniformity between white and aboriginal society which is a slightly different issue also addressed in chapter five. Whatever the merits of justice separation from the white system, the merits of the *Charter* as a minimal bond within the larger Aboriginal society itself should not be overlooked. It is assumed that many members of the diaspora will wish to continue an association with their landed friends and relatives and to continue to assert an Aboriginal identification. *Charter* values could provide a meaningful bridge between these two major Aboriginal communities, which may otherwise be driven further apart or ghetto-ized by any failure of landed self-government to sufficiently respect individual rights which its unlanded brethren may have, perhaps unavoidably, come to expect. If the *Inquiry* were merely repeating the "mild" proposals of the past, outlined in chapter one, which involved tinkering with the common system rather than creating a radically different system, such bridging concerns might not be relevant. It is the very fact of fundamental change, one likely necessarily restricted to the reserve, that has the potential to segregate Aboriginal kin and, ironically, to increase the assimilationist pull of the urban magnet in the absence of the leavening effects of the *Charter*.

DISCRETE AND INSULAR MINORITIES

Resistance to communitarian paramountcy and a possible correlative attraction to individual rights is not limited to the urban Aboriginal, or the self-centered or mobile young. It is obvious that the victim, Mr Thomas, did not subscribe to the particular tradition of Spirit Dancing, but there is some suggestion in the case that some others within the community shared his dissent: "Dorothy Joe expressed the opinion that she did not think it was right for them to do it."[93]

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[92] Samuel Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (American Bar Foundation, 1978) at 100.

[93] *David Thomas v.Daniel Norris et. al* (16 September 1991), Victoria 88/412 (B. C. S. C.) at 18.

Freda Cooper, a Salish woman, raises the possibility of a broader dimension to this dissent encompassing a "discrete and insular minority,"[94] which is no stranger to a "tradition of disfavour,"[95] namely, the Aboriginal Christian community; again, largely a product of the colonization process, which may view such practices as akin to paganism.[96] It is reported that Mrs Cooper's, "major fear is the spirit dancers who sometimes roam her reserve late at night carrying heavy sticks with their faces painted." She is further reported as concerned that, "the traditional ways of her Salish community have returned in the past 20 years and Christian believers now make up a minority of the population [that is[vulnerable and require the fundamental protection of the *Charter.* "[97]

LAW AND ORDER ATTITUDES

Mrs Cooper expresses a protectionist, fear-of-crime, attitude common to mainstream society and, contrary to the thrust of the *Inquiry*, increasingly part of Aboriginal society.

Brakel's well-known, if not universally admired, critical study of the American tribal court system in the late 1970s, attempted to include some information about the, "day-to-day affairs of contemporary reservation life."[98] He concluded, inter alia, that, whatever the mediation-reconciliation rhetoric of the political leaders, such attitudes were, ". . . not part of their [the judges, parties

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[94] In, *Andrews* v. *Law Society of British Columbia* [1989] 56 D.L.R. (4th) 1 at 32, Wilson J. applies this concept borrowed from American jurisprudence to include non-citizens as members of a group in special need of *Charter* protection.

[95] In, *City of Cleburne, Texas* v. *Cleburne Living Center*, 87 L. Ed. (2d) 313 (1985) (U.S.S.C.) at 329, Stevens J. refers to a "strict scrutiny" test of legislation discriminating against groups which have been, "subjected to a 'tradition of disfavor'."

[96] The mother-in-law of a victim of the ritual in 1990 refers to the practice as "shamanism" and is of the view that ". . . shamanism is witchcraft and the healing spirits invoked by shamans are evil." David Cunningham, "Take Two Roots and Call In the Morning" *British Columbia Report* (8 June 1992) at 10.

[97] Jack Aubrey, "Fearful Native Women Plead for Protection Against Ancient Rituals" *The Vancouver Sun* (16 March 1992) at A3.

[98] Brakel, *supra*, note 92 at 1

and reservation residents] operational language . . .[and] . . .verbalizations about justice on the reservations were not different from those elsewhere"[99]:

> The so-called traditional goals of mediation and harmony do not appear to weigh in the routine thoughts and actions of . . .the reservation residents . . . Instead, talk on the subjects of justice and crime took a conventional, unsophisticated, law-and-order form . . .residents spoke of being tougher on trouble-makers.[100]

This attitude, if common, seems at variance with the *Inquiry's* non-coercion ethic and its observation, outlined in chapter two, that, "sentencing the offender to incarceration . . .is viewed by Aboriginal people as as a total vindication of the wrongdoer and an abdication of duty by the justice system."[101] It seems more consistent with the "soft-on-crime" criticism of the justice system so often heard in the dominant society, which the *Inquiry* implies is alone in seeing, "retribution as an end in itself."[102] The Cree Report confirms to some extent the relevance of Brakel's observations about this retributive attitude to the Canadian Aboriginal scene: "The signs that the criminal justice system was operating much below expectations are not markedly different in the Cree community than in the rest of Canada. People complain that the criminal sanctions imposed by the judges are in a significant proportion of cases overly lenient . . .non-custodial sentences sorely lack credibility and are perceived as non-sanctions."[103]

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[99] *Ibid.*, at 97.

[100] *Ibid.*

[101] *Inquiry*, *supra*, note 2 at 37.

[102] *Ibid.*

[103] Cree Report, *supra*, note 21 at 59-60.

Women

Such punitive attitudes are the polar opposite of the reconciliation premise of the *Inquiry*, but appear to be espoused most vehemently by a significant portion of the Aboriginal community, namely Aboriginal women, who are described by the *Inquiry* as among, "the least powerful members of the community"[104] and subject to, ". . . unconscionable levels of domestic violence,"[105] which, ". . . has reached epidemic proportions."[106] Indeed this is true, if statistics reported by the Canadian Committee on Violence Against Women, which recall Shkilnyk's anecdotal descriptions of abuse outlined in chapter two,[107] are even approximately correct: "Eight women of ten are subjected to physical abuse. In the Northwest Territories, 80 per cent of native girls . . . are sexually abused. Gang rape is a common occurrence."[108] Mr. Justice de Weerdt, the Senior Judge of the Supreme Court of the Northwest Territories, reported in 1989, that petitions had circulated in that area for several years signed by hundreds of native women ". . . pleading for less lenient sentencing and pre-trial treatment of violent offenders and especially sex offenders."[109] These sentiments are repeated in 1992 by Mary Sillett , the president of the National Inuit Women's Association and member of the Royal Commission on Aboriginal Peoples, who is reportedly of the view that , "Judges in the Northwest Territories must start handing out tougher sentences for sexual assaults [and], while it is difficult for those convicted of crimes to be sent away

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[104] *Inquiry*, *supra*, note 2 at 481.

[105] *Ibid.* , at 475.

[106] *Ibid.* , at 481.

[107] Shkilnyk, *supra*, note 32.

[108] Lysiane Gagnon, "Anglo Feminists Aren't Standing Up for Their Native Sisters" *The Globe and Mail* (28 March 1992) at D3.

[109] Justice Mark M. de Weerdt, Opening Remarks, Conference on Discrimination in the Law and the Administration of Justice, Kananakis , Alberta (Canadian Institute for the Administration of Justice (12 October 1989) at 14 [unpublished].

for lengthy periods to southern penitentiaries, it's also difficult to the victim when her attacker is back in the community in a few months."[110]

These sentiments indicate a need for a justice system that can resort to "true penal consequences"[111] rather more often than the *Inquiry* harmony premise would seem to imply. They also highlight the obvious fact that, "community sanctions do not work when they are not supported by the community"[112] and, "releasing an offender within a small community, where his or her behaviour had been a major factor of disruption, is not a move with obvious benefit to the community."[113]

A comprehensive Aboriginal justice system should be able to reflect this retribution component, which appears to constitute a legitimate part of the Aboriginal community understanding and expectation about justice.

TYRANNY

The position of Aboriginal women will be examined more closely, partly because they have emerged as the most organized and vociferous "second community"[114] probably exceeding in impact the diaspora, but also because their concerns merge into the larger, more general, issue of the "tyranny of the majority,"[115] which was identified in chapter three as a major theoretical reservation expressed by liberals about communitarianism. It now appears that the concerted campaign of Aboriginal women to retain some *Charter* values may have persuaded the Assembly of First Nations to temper its opposition and

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[110] "Inuit Leaders Call for Stiffer Sentencing" *The Globe and Mail* (29 January 1992) at A6.

[111] *R. v. Genereux* [1992] S. C. J. No. 10 at 20.

[112] Cree Report, *supra*, note 21 at 61.

[113] *Ibid.*, at 42.

[114] McDonald, *supra*, note 37 at 231.

[115] Gibbins and Ponting, *supra*, note 42 at 218.

at least recognize gender equality in Aboriginal law.[116] However, it is submitted that the concerns of women transcend the specific problem of abuse and the general issue of feminist equality to raise the potential of local totalitarianism in the absence of *Charter* constraint.

One must be careful not to exaggerate, or infer too much from, this recently voiced, but fairly loud, dissent. Much of it stems from the concerns of so-called "Bill C-31 Indians," who had previously lost their status on marrying a non-native. Indeed Mrs Jeanette Corbiere Lavell, whose loss in the Supreme Court of Canada[117] in 1974 galvanized the Aboriginal women's rights movement, is a former head of the Native Women's Association of Canada.[118] The 1985 legislation, which permitted women to regain status and otherwise share in the benefits thereof, was actively resisted by the male-dominated power structure, and some may have even resisted their return after the legislation was passed.[119] The rationale of the men for their opposition and the dynamics of this complex political and legal issue do not concern this thesis and have been covered elsewhere,[120] but it appears that the concerns of Aboriginal women go far beyond this genesis. The extent of their support is not entirely clear, but is not without significance. The Native Women's Association of Canada appears to be the lead group representing 120,000 women,[121] supplemented by the Native Mediation Representatives, which reports a membership of 350 on 20 reserves in Manitoba and Ontario,[122] the Indigenous

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[116] See, "Dealing with Native Demands" *The Globe and Mail* (30 April 1992) at A20.

[117] *A. G. Can. v. Lavell*, [1974] S. C. R. 1349.

[118] Darcy Henton, "Women Fear Their Communities Will be Dictatorships" *The Vancouver Sun* (21 January 1992) at A6. See chapter three, *supra*, for a brief reference to this case.

[119] Sarah Scott, "Aboriginal Men Have Learned Sexism, Women Fearing Self-Rule on Reserve Say" *The Vancouver Sun* (30 March 1992) at A7.

[120] Douglas Sanders, "The Renewal of Indian Special Status" in, Bayefsky and Eberts, (eds) *Equality Rights and The Canadian Charter of Rights and Freedoms*, 529 at 539- 547.

[121] Scott, *supra*, note 119.

[122] Perils Lurk in Self-Rule, Outsiders' Group Says" *The Vancouver Sun* (21 February 1992) at A4.

Women's Collective of Manitoba[123] and the Aboriginal Womens Unity Coalition, which appears to represent urban Aboriginal women.[124]

A brief summary of their expressed concerns, which recall themes similar to Adams' outlined in chapter two,[125] lends support to the view of this thesis that that the conflict-suppressing, non-confrontational communitarian ethic is an insufficient description of actually existing Indianism. The unifying themes are controlling power and facilitating channels of dissent, which echo the values of liberalism as a civilized restraint on communitarian excess.

Grace Meconse, of the Native Mediation Representatives, reportedly alleges, inter alia, that:

> Native administrations are rife with corruption.[126]
>
> It is a dictatorship-type of leadership at the band level involving rigged elections, misuse of band money and intimidation of opponents.[127]
>
> If you are friends of the chief you can have it all - a new house, a new car, you name it. If you are not a relative or a friend of the Chief, you can be deprived of anything and everything.[128]
>
> Some were denied jobs, others had their welfare benefits cut and others have been told they're not going to be given housing or have their university fees paid simply because the chief didn't like them,

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123 *Ibid.*

124 Rudy Platiel, "Aboriginal Women Challenge Leadership" *The Globe and Mail* (24 April 1992) at A4.

125 Howard Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon, Fifth House, 1989).

126 Perils, *supra*, note 122.

127 *Ibid.*

128 *Ibid.*

> wanted to give the job to a relative, or just didn't feel like it.[129]

Winnie Giesbecht, of the Indigenous Women's Collective of Manitoba, reportedly expresses concerns familiar to any society and, apparently, not excluded from Aboriginal society:

> Native leaders are seeking more power - a politician is a politician. A politician is there for one reason - for themselves.[130]

Gail Stacey-Moore, of the Native Women's Association of Canada, expresses the individual-rights thread which seems to connect these concerns. She reportedly believes that Aboriginal men have "learned to discriminate" and her association "wants the *Charter* to protect native individuals against unfair actions of native governments . . . ."[131]

These concerns about male power and influence are confirmed to a degree by the *Inquiry*, however it focuses more on the specific issue of domestic violence:

> Most chiefs and council members are male and often exhibit bias in favour or the male partner in a domestic situation. This can effectively chase the woman from the home and community.[132]

> The unwillingness of chiefs and councils to address the plight of women and children suffering abuse at the hands of husbands and fathers is quite alarming.[133]

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[129] Patrick Nagle, "Fear of Chiefs Prompts Self-Government Battle" The Vancouver Sun (2 April 1992) at A8.

[130] Perils, *supra*, note 122.

[131] Scott, *supra*, note 119.

[132] *Inquiry*, *supra*, note 2 at 485.

[133] *Ibid.*

Mrs Corbiere Lavell reportedly expands her concern about *Charter* exclusion beyond the particular concerns of women:

> There will not be one person in our first nations communities who won't be potentially at risk from the result of this exclusion.[134]

It may be that the views expressed above do not reflect the dominant values within Aboriginal society. They may not even fully represent feminist opinion. However, they do reveal a significant element of dis-unity, or an apparent lack of a community-constituting understanding about the paramountcy of communitarian values, that further challenges the homogeneous harmony premise of the *Inquiry*. Diversity of opinion and dissent from communitarian values are a product of the weakening of traditional authority and values consequent upon interaction with the values of the dominant society. A society which is relatively less homogeneous and more stratified than that posited by the *Inquiry*, will likely generate tensions and conflicts, riven with concerns for individualistic values, that are less amenable to mediated compromise and voluntary sublimation of the individual interest to the general communitarian will. Instead, particularly in the context of very small Aboriginal communities, the theoretical concern about the imposition of the general will or the "Kolkhose Steamroller,"[135] outlined in chapter three, appears manifestly warranted. A spokesperson for the Aboriginal Womens Unity Coalition states that, "Aboriginal women have been reluctant in the past to challenge the positions taken by the leadership in the perceived need to present a unified front to the outside society which oppresses us equally."[136] It is reported that some of the chiefs had warned the women not to speak out publicly on the issue, as so to do is, "divisive and harmful to natives' political agenda."[137] Gibbins and Ponting refer to this potential threat to the secular Indian and the liberal value of individualized choice as follows: ". . . in the case

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[134] Henton, *supra*, note 118

[135] Joseph Manget, "Collective Rights, Cultural Autonomy and the Canadian State" (1986) 32 McGill L. J. 171 at 181.

[136] Platiel, *supra*, note 124.

[137] *The Globe and Mail* (16 December 1991) at A4.

of extreme smallness we might well find a preoccupation with what in Quebec was called 'la survivance' (the struggle to survive as a distinct group). As an ethos this can produce a rigid conservatism that, at the level of personal lifestyle and choices, is far from liberating.[138]

Richard Wagamese describes a particular incident which personalizes this general potential. A group of Aboriginal people, including himself, were discussing Oka shortly after that momentous assertion of Aboriginal rights, when an Aboriginal woman suddenly:

> . . . blurted out that she strongly disagreed with the Mohawk position. She was offended at what she felt were outright terrorist tactics. She disagreed with the idea of the Warriors masking themselves and questioned whether traditional philosophy advocated the use of disguise in battle. Just as suddenly the quiet venom which had been directed towards the governments of Quebec and Canada, the military, media and 500 years of history was redirected toward her. Her Indianness was challenged, her devotion to her people questioned, her understanding of cultural things denigrated and her degree of assimilation into mainstream attitudes, lifestyles and thinking were outlined in uncompromising and uncomplimentary fashion. It had been some years since I'd heard the word 'apple' used against a native person but I heard it then. An apple of course, is red on the outside and white inside. As putdowns go in Indian country, it's as low as you can go. It's the ultimate denunciation.[139]

Wagamese points out that often solidarity on issues, is linked to cultural survival, "la survivance," to the point that, "barricades, demonstrations, protests and armed confrontations result in a mass exodus on to the side of the Indians involved without regard for other possibilities."[140] He feels that ". . . Like

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[138] Gibbins and Ponting, *supra*, note 42 at 184.

[139] Richard Wagamese, "Every Voice Has a Right To Be Heard" *The Vancouver Sun* (13 January 1992) at A10.

[140] *Ibid.*

everyone else, native peoples need free-thinkers and challengers within their own communities to foster the development of their circles."[141]

Berger's *Fragile Freedoms* refers to the likes of Solzhenitsyn, Biko, Walsea, Timerman and others such as this woman who, ". . . have claimed the right to question - and to challenge - the political ideas undergirding the regimes in their countries. They speak for all mankind."[142]

Rule of Men or Law

A function of *Charter* values is to protect such possibly contrary-minded individuals from the potentially intimidating power of the group, or its governing institutions, to impose its particular, "collective definition of the good," as outlined in chapter three.[143]

Wendy Grant, chief of the Musqueam band and vice-chief of the Assembly of First Nations in British Columbia, is reported to have responded to the concerns of Aboriginal women by opposing resort to, "legal documents such as the *Charter*,"[144] and asserting that their real protection lies in trusting First Nations governments to do the right thing:

> . . . self-governing First Nations must be trusted to answer the collective needs of their communities including perceived problems with traditional practices. You have to understand that we are responsible governments. If there is a concern about the long house and the spiritual practices, we will take care of that.[145]

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[141] *Ibid.*

[142] Thomas R Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto, Clarke, Irwin and Co. Ltd., 1982) at i.

[143] Chapter three, *supra*, at 79.

[144] Rudy Platiel, "Aboriginal Women Divide on Constitutional Protection" *The Globe and Mail* (20 January 1992) at A3.

[145] Aubrey, *supra*, note 96.

This attitude betrays a probably sincere, but somewhat naive faith in the rule of man (or woman), or what chapter five refers to as the, "ingenuity of the moment," over the rule of law. It assumes the uniformly beneficent use of powers which are potentially despotic in the absence of meaningful control. It also appears to minimize the stated Aboriginal commitment to the paramountcy of collective rights over conflicting individual rights. W.P. Kinsella's character, Ballard Longbow, counselled against trusting white government as follows: "Trusting the government is like asking Colonel Sanders to babysit your chickens."[146] It is, with respect, a mistake to be complacent about any potential abuse of power. All governments, past and present, Aboriginal or otherwise, sooner or later, advertantly or inadvertantly, threaten the freedom of their citizens. At best this is effected through the, "subtle despotism of the interventionist state"[147] and, at worst, by the excesses of totalitarianism. To counsel that *Charter* values advocated by Aboriginal women and others are not required, is either to advocate the need for a closed society where, "the state knows best," or, to believe that such governments will never abuse such powers and, therefore, that such rights are superfluous. History suggests that, "abuse of the individual by the state is a cross-cultural phenomenon,"[148] and there is no reason to believe that Aboriginal governments will be the sole exception. Indeed such governments may be particularly prone to the "tyranny of the majority" which Gibbins and Ponting describe as follows:[149]

> In the debate surrounding the establishment of the U.S Constitution in the late 1700's, U.S. nationalists associated with James Madison developed a generally compelling argument that the rights and freedoms of individuals are most likely to be threatened in small, relatively homogeneous communities. Where social and economic diversity is lacking, Madison argued, the tyranny of the majority is most likely to prevail. Therefore, individual rights and freedoms are best protected within larger, more

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[146] W.P Kinsella, "Jokemaker" in *Born Indian* (Oberon Press, 1981) at 39.

[147] John Galbraith and Tom Velk, "What It Is and what It Isn't" *The Globe and Mail* (20 February 1992) at A17.

[148] Steven Muhlberger, "Individual Comes First" *The Globe and Mail* (21 November 1992) at A18.

[149] Gibbins and Ponting, *supra*, note 42 at 218.

> diverse communities, where it is more difficult to articulate a majority will and a multitude of conflicting and competing interests fragment and immobilize the majority.
>
> This argument seems of special relevance to aboriginal communities which are not only small but very homogeneous relative to the larger Canadian population. Within such aboriginal communities, individual rights and freedoms may come under intensified pressure. Moreover, the small size of communities may prevent any effective separation of powers, and thus may compromise the neutrality of government. In a trial, for example, it could well happen that the defendant, the police, the lawyers, the judge, the jury and the aggrieved would all be known to one another; many could be linked by ties of kinship and clan. Whether justice would prevail in such a situation is, of course, dependent on the way in which one would define justice.[150] There is a strong possibility,however, that the procedural foundations of the Canadian justice system would not prevail

PART TWO: LOCALNESS

These references to "tyranny" introduce the closely related problems of judicial bias and abuse of power, which may be magnified by the small size, or what this thesis will refer to as, the "localness," of such governing units. The concept of "localness" is intended to distinguish the attributes, positive and negative, of small size, from the mere technical capacity of small numbers of people to govern themselves. The fault lines in the harmony ethos outlined above suggest a greater need for the process of adjudication than the mediation-reconciliation emphasis of the *Inquiry* would seem to imply. The negative tendencies of localness raised by Madison tend to inhibit a fair and effective adjudication process and invite *Charter* modulation. At the same time,

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[150] The ends and means of "justice," whether Aboriginal or conventional, are analyzed in chapter five.

however, certain obverse positive aspects of this same localness strengthen the mediation-reconciliation orientation so natural to these communities.

BIAS

The concern for partial or biased justice is not unique to the Aboriginal system. Political interference and judicial favoritism or, "cronyism," was common in American law enforcement at the turn of the twentieth century,[151] and was also noted in both Upper and Lower Canada: ". . . the dispensation of justice was attended by unsavoury political favoritism that did not lend prestige to the system."[152] However, the traditions of the British common law have firmly ingrained the independence of the judiciary into the fabric of the administration of conventional justice, and, periodic breaches of that tradition are generally adequately remedied by the *Charter* guarantee of an "independent and impartial tribunal,"[153] which the Supreme Court of Canada, in *Genereux*, confirms is, ". . . fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice."[154] The potential for such bias in the Aboriginal system may be, ". . . accentuated in the closed societies of the reservations, where there are no traditions of separation of powers in government or of judicial professionalism in particular."[155]

Similar concerns were noted in La Prairie's study of the Cree who stressed, "the need for fairness and objectivity and for independence from local politics and politicians,"[156] and who were, "adamant . . . about not having judges

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[151] Brakel, *supra*, note 92 at 96

[152] Jefferson, *supra*, note 83 at 102.

[153] *Charter*, supra, note 3, section 11(d).

[154] *Genereux*, *supra*, note 111 at 25.

[155] Brakel, *supra*, note 92 at 109.

[156] La Prairie, *supra*, note 48 at 22.

who are part of formal structures sitting in home communities."[157] The Cree were also concerned that some serious matters would simply be too divisive for local communities to handle as, ". . . irresolvable conflicts and dilemmas could result from dealing with these locally."[158] It was felt by many that such matters would be, "best handled by non-Cree(even non-natives) because it could not be thought that anyone was taking sides on the matter if they were strangers."[159] The Saskatchewan Study noted this problem, but reported that there was no consensus as to whether an Indian Justice of the Peace should preside in the reserve of residence.[160]

The Australian Law reform Commission noted that " . . . there are a large number of cases which because of kinship difficulties, the Aboriginal justices do not wish to hear and which they are quite happy for a non-Aboriginal magistrate on circuit to hear."[161] Brakel's blistering indictment of American tribal justice noted that, "political influence is perceived to be so pervasive and systematic as to constitute the norm [and that] . . . being a part of a closed society in which family and clan affiliations exert a powerful influence, tribal judges are very vulnerable to social pressures."[162]

ABUSE OF POWER

Schwartz refers to the potential for tyranny by the Aboriginal majority in power as follows: "In a small community, it is fairly easy for one faction to take over, to dominate all aspects of life, to favour its own and discriminate against

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[157] *Ibid.*, at 23.

[158] *Ibid.*, at 22.

[159] Cree Report, *supra*, note 21 at 36.

[160] Saskatchewan Study, *supra*, note 50 at 20.

[161] The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws, Report No. 3I* (Canberra: Australian Government Publishing Services, 1986) (hereinafter Australian Report) referred to in Jackson *supra*, note 82 at 233.

[162] Brakel, *supra*, note 92 at 95-96.

others."[163] Shkilnyk refers to, "a breeding ground for nepotism and patronage,"[164] where individuals, families and clans carve out "fiefdoms" assuring jobs, progress, and relative success to their own at the expense of others less well connected. These comments repeat the concerns of women outlined above, but they are not their concerns alone, although their voice, being the loudest, has attracted the most attention. The Assembly of First Nations' Circle on the Constitution, the status Indians' version of the parliamentary joint committee, has repeatedly heard the theme that, "a structure should be in place for native communities to seek redress when their governments go bad [as]. . . some reserve residents are fearful self-government may leave them unprotected from corrupt leaders,"[165] or, from what the sociologists refer to as, "an intensification of the inherent tendency of the political elite and bureaucracy to enhance their monopolization of power and prestige."[166]

Perhaps nothing can eliminate such potential abuses of judicial or political power, but the *Charter* provides, at least, a remedial process to seek salutary correction of it. The *Charter* principles of fundamental justice provide some protection for the political "free thinkers and challengers"[167] or just plain unpopular accused who might find themselves on the wrong side of some community factionalism and prejudiced by governmental tyranny or judicial bias.

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[163] Schwartz, *supra*, note 91 at 79. (This factor is related to the section 33 override power in chapter five.)

[164] Shkilnyk, *supra*, note 32 at 106.

[165] Jack Aubrey, Restigouche: One Band's Experience of How Self-Government Works When You Try It" *The Vancouver Sun* (18 February 1992) at A4.

[166] Gibbins and Ponting, *supra*, note 42 at 190.

[167] Wagamese, *supra*, note 139.

MEDIATION V. ADJUDICATION

The *Inquiry* endorses, ". . . the principle that each and every distinct Aboriginal community be entitled to its own justice system,"[168] which means precisely what it says; each and every individual community may create its own fully-functioning and self-contained system of justice. The *Inquiry* recommends that:

> Aboriginal communities be entitled to enact their own criminal (and civil and family) laws and to have these laws enforced by their own justice systems. If they wish they should also have the right to adopt any federal or provincial laws and to enforce that as well.[169]

However, because of the relatively small size of such communities, it recommends, "joint justice-management agreements" between Metis communities and Indian reserves which are side by side, even though these units will have, "different legal bases."[170] Alternatively, it advocates a regional model grouping a number of bands together where, ". . . the law that is followed, however, in all these situations is the law of each tribe."[171]

Aboriginal self-governing units and their justice components will be very small indeed, even if regionalized into "supra" level governments encompassing two or more local governments. There are 633 bands[172] represented by the AFN. The average band population appears to be about

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[168] *Inquiry*, *supra*, note 2 at 315.

[169] *Ibid.*, at 323.

[170] *Ibid.*, at 315.

[171] *Ibid.*, at 316.

[172] A Constitutional Primer, *supra*, note 40. This seems to be the accepted figure, although the number of 597 is also reported; see Jeffrey Simpson, "Broad, Bold and Breath-Taking, But What Does It Mean?" *The Globe and Mail* (25 March 1992) at A11.

550.[173] Only three percent are estimated to have a population in excess of 2,000.[174] Some studies argue the obvious fact that that this relatively very small size, "poses constraints on what they can accomplish."[175] The all-encompassing, expansive, even "breath-taking"[176] scope of the *Inquiry* recommendations prompts one to wonder whether even regional units might not have difficulty with the intricacies of sophisticated policy-making on the scale of whole justice systems and charter creation. However, this thesis is not concerned with the capacity of such small units to govern themselves and enact their own possibly very distinct substantive and procedural criminal law. Nor does this thesis address the practicality or impracticality of one Aboriginal court's applying different Aboriginal laws and procedures, as apparently envisaged by the *Inquiry*. This thesis accepts the position of the *Inquiry* that such decisions and the timing of their implementation for each community, "would be up to the Aboriginal people and their governments to make."[177] However, assuming the requisite capacity to initiate and administer a total justice system, the positive mediation implications of localness must be contrasted to the negative implications for adjudication, which, as outlined in chapter two, is a distinctly different process.

Van Dyke observes that what he calls the "Little Community" is, ". . . so small that everybody in the community is either related to most others, or at least knows everybody else (including one's worst enemies) on a deeply personal basis."[178] This is especially, and perhaps obviously, true of Aboriginal small communities. York observes, for example, that: "beyond the walls of the white

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[173] First Ministers Conference: The Rights of Aboriginal Peoples, *Background Notes.*(Ottawa, April 2-3, 1985) at 3.

[174] *Ibid.*

[175] Franks, *supra*, note 66 at 45.

[176] Simpson, *supra*, note 171.

[177] *Inquiry*, *supra*, note 2 at 326.

[178] Edward W. Van Dyke, *Policing the Little Community: The Personal Touch* (November 1 1982) at 4 [unpublished].

compounds, Shamattawa is a tightly knit community. Almost all the Cree are closely or distantly related to each other."[179]

In addition to being small, such Aboriginal communities share a common culture and language and emphasize intensely personal relationships which naturally tend to be informal.[180] The advantages of indigenized, personalized, informal localness as distinct from alien, impersonal, detached and centralized administration have been demonstrated in child welfare,[181] alcohol treatment,[182] education[183] and other matters, where it simply makes sense to utilize local people who can respond immediately and with relevant local knowledge to a problem.

This is equally true of some, but, it is submitted, not all aspects of justice. Such a community may quite reasonably insist, for example, on local, personalized and often relatively informal policing, by agents who have personal involvement and interact with the whole way of life of the community.[184] This localness facilitates a high degree of social control through personal, non-adversarial charisma, rather than formal enforcement.[185] In such a community, offences may be actually experienced, not just theoretically as in the larger more impersonal society, as a personal affront to the community. In such circumstances, informal community censure in the form of gossip or ridicule may be quite effective where both the aberrant behaviour and its sanctioning are likely to be highly visible and personally embarrassing.[186]

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[179] York, *supra*, note 30 at 7.

[180] Van Dyke, *supra*, note 178 at 3-4.

[181] See, York, *supra*, note 30, chapter eight, "From Manitoba to Massachusetts: The Lost Generation."

[182] See, York, *Ibid.* , chapter seven, "Alkalai Lake: Resisting Alcohol."

[183] See, York, *Ibid.* , chapter two, "From Lytton to Sabaskong Bay: Fighting For the Schools."

[184] Van Dyke, *supra*, note 178 at 9-13.

[185] *Ibid.* , at 13.

[186] See, Jackson, *supra*, note 17 at 84 and 90 for a discussion of the "Shame Feast."

In a like manner, it is submitted, these positive characteristics of localness facilitate resort to the restorative, non-adversarial, community-based model of justice which Jackson[187] and others[188] have shown is common to Aboriginal justice systems and the contemporary Alternative Dispute Resolution Movement. Jackson refers to a Law Reform Commission study on diversion which found that ". . . in a significantly large number of disputes the relationship between the parties is one for which adjudication does not provide an answer."[189] In many cases, especially "polycentric relationships,"[190] where the criminal matter is perhaps just a symptom of a more complex ongoing relationship, ". . . what the parties want is a solution that will harmonize their difficulties, not necessarily a judgement that will crystalize their discord."[191] In such cases the parties and the community involved may well be better served both in the short and long run by a "reconciliation"[192] model of justice which can emphasize mediation, restitution and harmonization, all of which are likely to benefit from interested local knowledge and input.

It is precisely these principles,of course, that the *Inquiry* characterizes as the foundation of an Aboriginal justice system:

> The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony . . . Atonement and restoration of harmony were the goals - not punishment.[193]

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[187] See, Jackson, *Ibid.* , Part III: "The Development of Alternative Dispute Resolution in the Canadian Criminal Justice System."

[188] Michael.Coyle "Traditional Indian Justice in Ontario: A Role For the Present?" (1986) 24:3 Osgoode Hall L. J. 605 at 628.

[189] Jackson, *supra*, note 17, at 36 (Referring to Law Reform Commission of Canada, Studies on Diversion (1975).

[190] Jackson, *ibid*, at 37.

[191] *Ibid.* , at 36.

[192] *Ibid.* , at 44.

[193] *Inquiry*, *supra*, note 2 at 27.

Chapter two suggests that the successful use of such an approach will be limited practically and substantially to disputes which are in some way reconcilable and parties who are likewise disposed. There must be a basic desire to further some sort of mutual interest. The general communitarian features of localness will go a long way to fostering, nurturing and exploiting such a commitment, but the essential precondition is the consent of the parties based on the mutuality of interest in the outcome of the process, the likely existence of which is somewhat diminished by the fault lines in the harmony ethos.

The Saskatchewan Study which referred to conciliation and mediation as, "in general," the "preferred method of resolving disputes,"[194] recognized that, "court is not a solution to all problems,"[195] and that mediation and reconciliation can play a very significant and effective role in criminal matters. However, this role is one which is supplementary or complementary to the adjudication process. Such programs may be "pre-charge" or "pre-trial" to remove some offenders from the court process, but conditionally, in the sense that the prosecution is deferred pending successful completion of the program. Other programs may be "post-trial" where the goal is to provide alternatives to sentencing.[196] However, the implication is that the conventional adjudication, adversarial system is always available if compliance with the "essential precondition" of consent or, "voluntary agreement to participation"[197] is not forthcoming.

The negative features of localness could also interfere with the mediation process as, "community and/or family pressures could affect the outcome of mediation or other alternate dispute resolution processes."[198] However, the concern for the individual involved in such a process is not as great as he or

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[194] Saskatchewan Study, *supra*, note 50 at 33.

[195] *Ibid.*, at 32.

[196] *Ibid.*, at 30-31.

[197] *Ibid.*, at 31.

[198] La Prairie, *supra*, note 48 at 22.

she is such an active and controlling participant in seeking a mutual resolution. There is not the same concern about a mediator using local "knowledge" or, "taking sides on the matter" when the sides are, at least to some minimal extent, facing in the same general direction.

However, in the adjudication context, where culpability is in dispute, concerns about the impartiality of the court and the tyranny of the community in which it functions, focus attention on the vulnerability of the individual, who could be anyone and everyone. It is in this context that the relative procedural informality permitted in the mediation context must be constrained if the interests of the individual are to be protected. The *Inquiry* description of a preferred procedure where anyone may, "volunteer an opinion or make a comment "[199] and where, "everyone is free to contribute information"[200] may advance the mutual interests of the parties to mediation, but could be distinctly unfair to the interests of an accused who disputes the claim of the other side, which is, in essence, the community. An open invitation to all members of the majority to offer opinion and comment in a hotly disputed and possibly emotionally charged matter is tailor-made to further the interest of the possibly tyrannical majority against the procedurally unprotected accused minority.

The *Inquiry*, with respect, fails to distinguish adequately the very real differences between mediation and adjudication and to sufficiently appreciate the potential dangers to individual freedom engendered by applying the procedural techniques of the one to the other. These dangers to the individual are discussed more fully in chapter five.

It is submitted further that the *Inquiry* simply goes too far in insisting that the Aboriginal value and justice system, "requires"[201] reconciliation and restitution as part of the harmony, mediation ethos.

Pat Conroy captures the essentially non-compensable nature of some crime, especially violence, in these poignant words of a fictional victim of rape:

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[199] *Inquiry*, *supra*, note 2 at 36.

[200] *Ibid.*

[201] *Ibid.* , at 37.

> In our sleep he would rise from the dust of my terror and rape me a thousand times again. In immortal grandeur he would reassemble his torn body and burst into my room like evil khans, marauders, and conquerors, and I again, would smell his breath in mine and feel my clothes ripped away from my body. Rape is a crime against sleep and memory; it's afterimage imprints itself like an irreversible negative from the camera obscura of dreams. There is a terrible constancy that accompanies a wound to the spirit. Though my body would heal, my soul had sustained a damage beyond compensation.[202]

Mediation and reconciliation will not always be possible or even desired. Aboriginal women victims are suggesting that, for some offences and offenders, they seek immediate protection from harm through denial of bail and increased incarceration. In some cases, the crystalization of discord is beyond the potential for or interest in harmonization. In other cases there may be no previous or ongoing relationship. Perhaps most importantly, in some cases the alleged miscreant may simply wish to assert an innocence which is inherently incompatible with, and irreducible by, mediated compromise. The potential to see the offender as a means to a communitarian end, possibly through the imposition of true penal consequences, arises in the adjudication, not the mediation context. In such cases, the otherwise very positive aspects of localness can become rather more negative, especially in the absence of the tempering effects of procedural formality and *Charter* values of fundamental justice.

Chapter two argued that an unknowable portion of "major" and "minor" Aboriginal crime was likely not amenable to pure restorative justice. This inherent potential need for adjudication processes is confirmed by the fault lines revealed in the harmony ethos and justifies concerns about the adjudication hiatus in the *Inquiry* position. The next chapter examines a similar historical adjudication hiatus which challenges the cultural survival rationale for the paramountcy of collective rights in contemporary Aboriginal criminal justice. This final chapter argues for the incorporation of the *Charter* values of

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[202] Pat Conroy, The Prince of Tides (Boston, Houghton Mifflin, 1986) at 483.

fundamental justice into an otherwise autonomous Aboriginal system to meet the very real adjudication demands of actually existing Indianism. It is argued, adopting the words of the Supreme Court of Canada in *Genereux*, that this is necessary:

> . . . not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice.[203]

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[203] *Genereux*, *supra* , note 111 at 25.

CHAPTER 5

HISTORICAL ADJUDICATION HIATUS: CHARTER VALUES AND CULTURAL SURVIVAL

INTRODUCTION

The *Report of the Aboriginal Justice Inquiry of Manitoba* [1] does not indicate how autonomous Aboriginal justice would differ from conventional justice in dealing with the considerable adjudication demands of actually existing Indianism that do not readily conform to its harmony-reconciliation, communitarian mould. It rejects the *Canadian Charter of Rights and Freedoms* [2] and recommends an Aboriginal charter in its stead. However, it is silent about the contents of this proposed document, except to assert that collective rights would take precedence over individual rights, in conformity with what the *Inquiry* apparently believes is a sufficiently homogeneous communitarian ethic. The fault lines outlined in chapter four challenge this assumption. However, conceding the validity of such a community-constituting understanding about communitarian justice, chapter three developed the theme that the "only defensible rationale"[3] for the paramountcy of a collective right over the possibly conflicting claims of individualism rested on a base of "cultural survival."[4] As outlined in chapter three, this justification was expressed by Mercredi to the *Inquiry* and adopted by it as "the unarticulated premise underlying the concerns of other Aboriginal presenters "[5] on Aboriginal justice. This justification for

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[1] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg , Queen's Printer, August 12, 1991) (Commissioners: Associate Chief Judge A.C Hamilton and Associate Chief Judge C.M.Sinclair) [hereinafter *Inquiry*].

[2] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

[3] Chapter three, *supra*, at 91.

[4] See generally, chapter three, *supra*.

[5] *Inquiry* , *supra* , note 1 at 256.

separate Aboriginal justice, centered on paramount communitarian values, is repeated here to introduce a closer analysis of the nature of the suggested link between Aboriginal justice and cultural survival: "Unless we affirm our rights and rebuild our social and political institutions now, we are fearful that within decades, assimilation will be complete and our civilization will disappear."[6] This chapter confirms that the mediation cultural link to the past is strong, but argues that the adjudication link, needed by actually existing Indianism and ignored by the *Inquiry*, is weak or missing. This historical adjudication hiatus implies that a contemporary Aboriginal adjudication process will have to be substantially invented, rather than merely rebuilt or revived. It is argued that the *Charter* provides a seasoned procedural framework of fairness to the individual that can meaningfully stiffen this relatively weak adjudication cultural foundation, without threatening the legitimate goals of cultural distinctiveness furthered by an otherwise quite autonomous Aboriginal justice system.

The theme of cultural survival is encountered in a variety of forms which encompass the pressing need for a minority group enmeshed in an "asymmetrical power relationship"[7] to protect and assert its "cultural identity,"[8] "group identity,"[9] "cultural essence,"[10] "core of Indianness,"[11] or, "right to culture"[12] by preserving values or interests or traditions, "with which my identity is bound,"[13] or, which relate to the, "integrity of the group,"[14] "the right to exist as

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[6] *Ibid.*

[7] June Starr and Jane F Collier, "Introduction: Dialogues in Legal Anthropology", in J. Starr and J. Collier, eds. , *History and Power in the Study of Law* (Ithaca, Cornell University Press, 1989)at 1.

[8] *Reg.* v *Oakes* (1986) 24 C. C. C. (3d) 321 (S. C. C.) at 346.

[9] *Ibid.*

[10] Chapter three, *supra* at 100.

[11] Bruce Ryder, "The Demise and Rise of the Classical Paradigm" (1991) 36 McGill L.J. 308 at 369-371.

[12] David C Hawkes, *Aboriginal Self-Government* (Kingston, Queens University 1986) at 2.

[13] Darlene Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. of Law and Jurs.19 at 21.

[14] Chapter three, *supra*, at 91.

distinct peoples,"[15] or, are "central to their individual and collective self-definition."[16] This revitalization or renaissance of Aboriginal distinctiveness is based on connections to the past, some more tenuous than others, which are considered to have survived in varying degrees the ravages of the colonization process and the long period of apparent, but sometimes misleading, irrelevance, outlined in chapter one. With the imminence of self-government, there can be little doubt that the beginning of "the reversal of that process"[17] is, indeed, at hand.

There also can be no doubt that legal systems are cultural systems and and can be "appropriate vehicles for asserting, creating and contesting national identities."[18] The specific focus here, however, must be on one very particular aspect of a legal system, the criminal justice component, and the extent to which it relates to the theme of continuing Aboriginal cultural distinctiveness. One must be careful not to seek a static remnant of the past, unchanged in the present, which would be tantamount to equating "survival" and "preservation" with something " . . . more suited to fossils or laboratory specimens than to people."[19] It is understood that traditions can evolve and adapt to the demands of the present and that, as the *Inquiry* states, " . . . for Aboriginal people, their faith in the ability of their cultural institutions and their leaders to undertake the revival of ancient principles for modern institutions is quite high."[20] However, it is submitted that one may legitimately ask: what are the Aboriginal justice traditions that are "to evolve"; what are the institutions that Mercredi intends to "rebuild"; what are the ancient principles that are to be "revived," which, specifically, can meet the adjudication needs of a comprehensive criminal justice system, suitable to the demands of actually existing Indianism as

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[15] Rudy Platiel, "Native Rights Debated at UN" *The Globe and Mail* (20 February 1992) A4.

[16] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination", [1991] 36 McGill L. J. 383 at 451.

[17] Michael Jackson, "Locking Up Natives in Canada" (1989) 23: 2 U.B.C. L. Rev. 215 at 218.

[18] Starr and Collier, *supra*, note 7 at 11.

[19] "Defining Quebec's Distinctiveness" *The Globe and Mail* (6 February 1992) at A16.

[20] *Inquiry*, *supra*, note 1 at 258.

outlined in this thesis? This particular strand of the tradition is not readily discernible in the relative absence of research data; nevertheless, ". . . there is a widespread and pervasive belief among aboriginal groups that if customary ways of dispute settlement are uncovered and employed, these will be more useful and relevant than contemporary justice responses."[21] It is the position of this thesis that this belief is only partly justified. The adjudication hiatus apparent in the *Inquiry's* harmony ethos of justice appears to be a reflection of a similar historical void. This historical adjudication hiatus weakens the cultural foundation of a modern Aboriginal justice system and thus, the validity of cultural survival as a rationale for the paramountcy of collective rights in that system. This cultural weakness increases the need and justification for *Charter* reinforcement.

HIATUS

"LAW" - "ENDS" AND "*MEANS*"

Commentaries on historical Aboriginal justice commonly start, as does the *Inquiry* in its introduction to the Aboriginal harmony world view, with the somewhat compendious, largely irrefutable, and, it is submitted, obvious assertion to the effect that: "Aboriginal peoples have always had governments, laws and some means of resolving disputes within their communities."[22] "Law" is often defined by reference to the work of Hoebel, a pre-eminent anthropologist, who spent years studying American Indian ways and who was seeking,". . . the machinery relied on by the Comanches [which would be] significant for the student of jurisprudence and social control."[23] Hobel stated that:

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[21] Jean-Paul Brodeur, Carol La Prairie and Roger McDonnell, *Justice for the Cree: Final Report* (Quebec, Cree Regional Authority, 1991) at 4 [hereinafter Cree Report].

[22] *Inquiry*, *supra*, note 1 at 18.

[23] E. Adamson Hoebel , "Law Ways of the Comanche Indians" in Paul Bohannon, ed. , *Law and Warfare* (New York, National History Press, 1967) 184 at187. (Hoebel also studied the Cheyenne. See, *supra*, note 32).

> A social norm is legal if its neglect or infraction is met by the application, in threat or in fact, of the absolute coercive force by a social unit possessing the socially recognized privilege of so acting.[24]

This approach was used by Coyle who, in a relatively modest attempt to study the justice ways of Indians in Ontario, concluded that, ". . . in light of Hoebel's definition of law, a definition which is frequently referred to by modern scholars studying traditional societies . . . traditional Indian societies in Ontario . . . had rules . . . that could be considered law."[25] Coyle goes further to itemize the, ". . . functions assigned to our modern criminal justice system [as] specific and general deterrence, public condemnation and punishment of offenders [and] mechanisms designed to reform offenders and restore harmony in the community."[26] He concludes that the traditional Aboriginal methods of social control, "laws", ". . . collectively served every one of the functions assigned to our modern criminal justice system."[27]

The *Inquiry* refers both to Coyle[28] and Hoebel,[29] and adopts a similar line of analysis, adding the Gitksan and Wet'suet'en mechanisms of ostracism and shame to ". . . the definition of enforcement offered by the legal anthropologist, E. Adamson Hoebel,"[30] and concludes that, "Aboriginal enforcement mechanisms, although not codified in to-day's sense, served the same purpose

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[24] *Ibid.*

[25] Michael.Coyle, "Traditional Indian Justice in Ontario: A Role For the Present?" (1986) 24 Osgoode Hall L. J. 605 at 626-627. Coyle notes at p. 626 that, "three years of puzzlement" went into Hoebels work and "no such detailed investigation has as yet been done of traditional native methods of dispute resolution in Ontario."

[26] *Ibid.*, at 627.

[27] *Ibid.*

[28] *Inquiry*, *supra*, note 1 at 51.

[29] *Ibid.*, at 53.

[30] *Ibid.*

in Manitoba's pre-contact Aboriginal society as did the justice system of the European societies of that time."[31]

There should be no question that Aboriginal societies had laws and whatever enforcement mechanisms were necessary. LLewellyn and Hoebel quote High Forehead in *The Cheyenne Way*: "The Indian on the prairie, before there was the White Man to put him in the guardhouse, had to have something to keep him from going wrong."[32] The Law Reform Commission refers to the essential inevitability of "law": "Laws are necessary to define unacceptable acts and protect people from the harm caused by such acts. Lawlessness is the seed of societal disintegration."[33]

The law, and criminal law in particular, is an instrument of "coercive force," "social control" and "enforcement mechanisms" as outlined by Hoebel, Coyle and the *Inquiry* respectively. However, such descriptions of the function of criminal law, while accurate, are insufficient and potentially misleading. They fail to distinguish adequately ends from appropriate and measured means. They fail to even signal the possibility of individual-group conflict inherent in the

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[31] *Ibid.* , at 53. This thesis does not seek to quibble with the *Inquiry* , or to exaggerate the relative merits of "the justice system of the Europeon societies of that time." While an adjudication process involving a "not guilty" plea, evidence under oath and verdict by a unanimous jury was in place at least by Tudor times; the accused was disadvantaged in not having the full right to counsel until 1836, the facilities to compel the attendance of witnesses until 1867, or the "dangerous privilege" of testifying under oath until 1898. There were few , if any, rules of evidence before the eighteenth century. See, *J. H. Baker, An Introduction to English Legal History* (2nd. ed.) (London, Butterworth, 1979) pp. 411-419. However, it is submitted that the common law adjudication tradition and respect for the individual is well documented and has evolved significantly to the present. This thesis does not attempt to deal with the complex issue of extinguishment, however, the working assumption is that, whether or not any Aboriginal right to justice has been legally extinguished according to the justificatory standards of *Reg. v. Sparrow* , (1990) 56 C. C. C. (3d) 263, the conventional criminal justice system has, in fact, rightly or wrongly, substantially displaced any conflicting Aboriginal justice processes, at least since Confederation and the treaties, and probably for a significantly longer period. The adjudication hiatus is nonetheless real, even if the result of the premature smothering of the evolution of Aboriginal justice. See generally: Christie Jefferson, *Conquest by Law: A Betrayal of Justice in Canada* (Burnaby, Northern Justice Society, Simon Fraser University, 1988) [unpublished] and see, John Whyte, "Indian Self-Government: A Legal Analysis", in Leroy Little Bear, Menno Boldt and J. Anthony Long, *Pathways to Self-Determination: Canadian Indians and the Canadian State,* (Toronto , University of Toronto Press, 1984) 101 at 106-107.

[32] K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1941) at 2.

[33] Law Reform Commission of Canada, *Report: Our Criminal Procedure* (Ottawa, Information Canada, 1987) at 12.

imposition, as distinct from the mediation, of settlement of a dispute. The criminal law "forces" or "controls" through the medium of a living, breathing offender, a human factor which should impose ". . . limitations upon the use of the law, moral and practical, as a means of social control."[34] Kadish and Paulsen provide, it is submitted, a more comprehensive and accurate analysis of the function of criminal law which is properly and necessarily sensitive to this crucial distinction between ends and means. It is one which highlights the presence of the individual offender in the process and thus raises questions relevant to that individual's rights, if any, in the process:

> The ends it serves involve social and human values of the highest order comprehensible by persons without legal sophistication. Its means, entailing the imposition of brute force upon the lives of individuals are potentially the most destructive and abusive to be found within the legal system . . . one of its underlying themes is the great issue of the reconciliation of authority and the individual. . . .[35]

A more complete description of "the functions assigned to our modern criminal justice system" would include how this underlying theme of the inevitable conflict between the individual and authority is addressed. Other representative analyses of the function of criminal law do not ignore this "great issue":

The Report of the Canadian Committee on Corrections affirms, like Hoebel, Coyle, and the *Inquiry*, the coercive purpose of the criminal law to protect society at large:

> The basic purpose of the criminal justice system is to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct. [36]

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[34] Sanford Kadish and Monrad Paulsen *Criminal Law and its Processes: Cases and Materials* (Boston, Little Brown & Co. , 1962) preface.

[35] *Ibid.*

[36] *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ottawa, Information Canada, 1969) (Chair, R. Ouimet) at 11 (hereinafter Ouimet Report).

However the Ouimet Report immediately goes on to address the balance between the collective and the individual interest:

> The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary.[37]

The Ouimet Report then articulates the ultimate individual interest in the criminal law context, one never mentioned by the *Inquiry*, which it deems to be "self-evident":

> Recognition of the innocent must be assured by proper protection at all stages of the criminal process.[38]

A federal policy statement on the function of criminal law[39] approximates Hoebel's definition in stating that, "The criminal law is necessary for protection of the public and the establishment and maintenance of law and order," but adds that, " . . . the criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms [and therefore] . . . The purpose of the criminal law should be achieved through means consonant with the rights set forth in the *Charter* . . . ."

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[37] *Ibid.*

[38] *Ibid.*, at 12.s

[39] Government of Canada, *The CriminalLaw in Canadian Society* (Ottawa, Supply and Services Canada, 1982) at 4.

FAIRNESS - THE INDIVIDUAL

Coyle refers to the Law Reform Commission of Canada[40] as the source of the "functions assigned to our criminal law," but the same Commission in a later report, which "attempts to explain and rationalize"[41] its work in the area of criminal procedure, expands on the rationale for the liberal concern for the individual developed theoretically in chapter three of this thesis. The Commission emphasizes that in the "hierarchy" of principles of criminal justice ". . . fairness [is to] be regarded as *primus inter pares*."[42] This principle of fairness recognizes that, "Canadian procedural law has as its principal objective and basic orientation the construction of a just method for the disposition of a dispute . . . "[43] and that, ". . . 'bringing alleged offenders to justice' involves a process for fairly determining their guilt or innocence."[44] The Commission suggests that it is part of the ". . . wisdom of the Canadian system of criminal procedure that it takes into account . . . protection against the risk of convicting innocent persons."[45] It reminds us that, ". . . the common law is haunted by the ghost of the innocent man convicted"[46] and that this traditional concern for the individual is manifested in the *Charter*, which confirms the primacy of fairness:

> Criminal procedure undeniably inclines toward the protection of rights and liberties. The presumption of innocence, the Crown's burden of proof in a criminal trial, the right to silence, and the right to make full answer and defence all bear testimony to this fact. They are indicia of what we have elsewhere referred

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[40] Law Reform Commission of Canada, *Report: Our Criminal Law* (Ottawa, Information Canada, 1976)

[41] Law Reform Commission, *supra*, note 33 at 2.

[42] *Ibid.*, at 28.

[43] *Ibid.*, at 5.

[44] *Ibid.* at 9.

[45] *Ibid.*

[46] *Ibid.*, at 11.

> to as the 'primacy of justice.' If there is any dispute as to the veracity of this assertion the introduction of the *Charter* stands as an overwhelming rejoinder. The legal rights provisions of the *Charter*, in particular, speak directly to the subject of criminal procedure.[47]

The harmony ethos emphasized so strongly by the *Inquiry* rests comfortably and securely on a sound cultural foundation and should inspire confidence in Aboriginal justice to the extent that a reconciliation-mediation response is indicated. When, not if, an adjudication response is required, the conventional system is in place with its time-honoured "fairness" answer to the "great issue." If this is to be rejected as "inappropriate" or "alien,"[48] traditional Aboriginal justice must generate a considered adjudication alternative if this confidence is to be maintained.

MEDIATION HERITAGE - ADJUDICATION IMPASSE

Coyle reminds one that ". . . in considering traditional Indian mechanisms of social control, it is necessary to rid oneself of non-Indian presumptions about how authority is normally exercised in society."[49] This is largely because in most Aboriginal societies ". . . the people ruled collectively, exercising authority as one body with undivided power, performing all functions of government."[50] The mechanism used is generally described as "direct participatory democracy and rule by consensus."[51] Such societies, without "state-coercive apparatus,"[52] are sometimes referred to as "Aristotelian" implying, "a natural non-violent

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[47] *Ibid.*, at 28.

[48] *Inquiry*, *supra*, note 1 at 37.

[49] Coyle, *supra*, note 25 at 614.

[50] Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", in Menno Boldt and J. Anthony Long (in association with Leroy Little Bear) eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1984) 333 at 337.

[51] *Ibid.*, at 338.

[52] Moshe Berent, "Collective Rights and the Ancient Community" (1991) 4 Can. J. Law & Jurs.387 at 392.

harmonious society, ruled by consent rather than by force [where] . . . the absence of a State as a distinct organ responsible for the public realm meant that its burden fell directly upon the community and the citizens."[53] Such societies will naturally consolidate a strong ". . . 'public sentiment' which turns into an effective tool for preserving law and order [which is complementary to the fact that it is a] small 'face to face' community or what is sometimes called a 'shame community'."[54] Such communities were ". . . highly dependent upon the correct behaviour of each of its members"[55] and, in the past, may not have had much necessity to deal with the exceptional, dissenting or individualistic behaviour increasingly found in contemporary Aboriginal communities. Indeed, Coyle notes that the Iroquois, who otherwise ". . . became renowned. . . for the sophistication of their political life,"[56] did not have an elaborate penal code, in part , because ". . . crimes and offences were so infrequent under their social system."[57] In any event , the maintenance of law and order ". . . were part of the general structure of inter-personal and inter-group relations"[58] and not, as Coyle puts it, " . . . the domain of an institutional hierarchy of full-time bureaucrats."[59]

Nevertheless, Coyle quite properly concludes that the Iroquois, Objibwa and Cree did have a ". . . sophisticated array of mechanisms to maintain order."[60] He describes many examples which illustrate the value and effectiveness of clan participation in the Iroquois process: ". . . conciliation efforts by clan councils, the obligation of each clan to atone for wrongs committed by

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[53] *Ibid.* , at 393.

[54] *Ibid.* , at 394. and see Jackson, *supra*, note 125 at 84 and 90.

[55] *Ibid.*

[56] *Coyle*, *supra*, note 25 at 611.

[57] *Ibid.* , at 616.

[58] C.E.S. Franks, ed., *Aboriginal Peoples and Constitutional Reform: Background Paper 12*, (Institute of Intergovernmental Relations, Kingston, 1987) at 13.

[59] Coyle, *supra*, note 25 at 615.

[60] *Ibid.* , at 624.

its members and corresponding responsibility of individual Iroquois to their clans for their conduct."[61] More generally, these mechanisms included, "mediation and negotiations by elders, community members or. . . clan leaders aimed at resolving particularly dangerous private disputes and reconciling offenders with the victims"; [the] use of ridicule or ostracism by the community at large to shame offenders"; [the] payment of compensation by offenders (or their clans) to their victims or their victim's kin, even in cases as serious as murder; [and] in the case of wrongs that posed a grave threat to the community . . . coercion or execution."[62]

Perhaps the most important factor underlying the justice machinery in such close communitarian societies, an aspect of the "localness" outlined in chapter four, was the desire "to gain and preserve the esteem of the community in which he or she lived."[63] Nevertheless, important issues of fact and responsibility must have arisen occasionally, but Coyle does not describe any adjudication process to deal with an assertion of innocence based either on genuine mistake, or, plain contrariness in the interest of selfish survival. Such a quintessentially individualistic attitude seems to have been statistically rare. Hoebel found that, "denial of guilt by an accused . . . was so uncommon that there are not cases enough to draw sound conclusions."[64] Jefferson adds that, in general, "complaints were simply not acted upon unless the party was clearly guilty."[65] Additionally, of course, the primary emphasis was on reconciliation, not punishment, which might lessen the motivation to deny an allegation; both then, and where appropriate, now. Even in the case of murder, appeasement of the victim's family by sufficient presents ". . . forever obliterated and wiped out the memory of the transaction [and therefore] . . . the question of guilt or innocence of the accused was generally an easy matter to determine, when the

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[61] *Ibid.*, at 620.

[62] *Ibid.*, at 625.

[63] *Ibid.*

[64] Hoebel, *supra*, note 23 at 193.

[65] Jefferson, *supra*, note 31 at 22.

consequences of guilt were open to condonation."[66] The motivation to reconcile through confession and compensation must have been powerfully buttressed by the fact that failure to do so would likely lead to "private retaliation" or "revenge" by the bereaved kin who, ". . . either took upon themselves jointly the obligation of taking what they deemed a just retribution, or appointed an avenger, who resolved never to rest until life had answered for life."[67]

Hoebel indicates that the essence of Aboriginal justice procedure was "bargaining,"[68] backed up in Comanche law, "as in all all law,"[69] by resort to force, however, the "social unit possessing the socially recognized privilege of so acting,"[70] was not the government, but the parties involved.[71] The aggrieved party might confront the offender himself, "stating the offence and the extent of damages which would satisfy him,"[72] or, he might send others to prosecute on his behalf, thus "minimizing the chance of violent outbreak."[73] Jefferson describes a process among the Huron where the victim's family would indicate "the quantity of gifts required to quench their grief and cries for vengeance by the number of sticks presented . . ."[74] The details of the process could vary considerably, but Hoebel stresses that, " . . . the crux of the procedure was bargaining. There was no question of evidence."[75] In virtually all cases, it appears that: ". . . the bargaining was begun with guilt accepted by both parties . . . [and] there was no technique for obtaining evidence from the defendant. Nor

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66 Coyle, *supra*, note 25 at 619.

67 *Ibid.*

68 Hoebel, *supra*, note 23 at 191.

69 *Ibid.* , at 193.

70 *Ibid.* , at 187 and see, *supra*, note 24.

71 *Ibid.* , at 193.

72 *Ibid.* , at 190.

73 *Ibid.*

74 Jefferson, *supra*, note 31 at 64.s

75 Hoebel, *supra*, note 23 at 191.

was the defendant usually confronted with witnesses. The aggrieved had to ascertain to his own satisfaction who the guilty party might be. After this had been done the defendant could then be confronted."[76] The bargaining or negotiation would involve "delicate" factors each having "many shades and facets [but] . . . only by agreement could the case be settled [and] . . . the sole way to agreement was bargain."[77]

Mandelbaum in his study, *The Plains Cree* , reports a similar resort to, "gift giving [as] the socially accepted method of mollifying an aggrieved person,"[78] which was refined by the intercession sometimes of the chief,[79] or, on other occasions by "Worthy Young Men,"[80] who would facilitate settlement and avert disastrous blood feuds.

It is difficult to know the extent to which these few studies of Aboriginal justice are accurate, complete, or representative of other groups. The research data is sparse in any event.[81] Reliance on written records usually implies a non-Indian source which may be more or less accurate[82] and, ". . . by the time that western scholars began to study aboriginal cultures they had already been influenced by the European invasion."[83] Nevertheless, it is submitted that a general picture emerges of a system that largely assumed guilt or culpability. It concentrated on the equitable and mutually satisfactory resolution of disputes that were reconcilable because the offender almost always exhibited the

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[76] *Ibid.* , at 192.

[77] *Ibid.* , at 193.

[78] David G. Mandelbaum, "The Plains Cree", Anthropological Papers of the American Museum of Natural History, Vol.xxxvii, Part II, 1940, 157 at 222.

[79] *Ibid.*

[80] *Ibid.* , at 230.

[81] Coyle, *supra*, note 25 at 613, and see; chapter four, *supra*, notes 6-10.

[82] Coyle, *ibid.*

[83] Franks, *supra*, note 58 at 14.

requisite "sense of responsibility and will to atone and restore."[84] The Aboriginal justice heritage is one of negotiation leading to reconciliation and the restoration of community harmony. It appears that the consequence of unwillingness or failure to settle was often forceful self-help. Since this was the accepted norm, it no doubt met the definition of law provided by Hoebel and, as Hobel points out, may approximate, " . . . a situation exactly comparable to that observed among nations which recognize certain practices of international law, but which reserve to themselves the sovereign right to resort to force if things don't suit them. Then in the words of Post Oak Jim, 'Lots of trouble, lots of people hurt.' "[85] As viable as this system may have been, just as in international relations, there must have been situations where negotiation was minimal or even non-existent, depending on the "shades and facets" of the situation. Jefferson describes one such case of an Ojibway women who, ". . . was known to have murdered her baby and escaped to her brother's abode. The husband stalked her trail, and finding her seated beside her brother, declared the woman to be the murderer of their infant. The brother immediately turned and struck down his sister, executing her on behalf of his family."[86] Such summary justice within the family might be accepted, however, in other situations, the revenge or retaliation killing by the kin of the victim might not be accepted by the kin of the offender and the cycle of the feud may begin: "They strike back, and the siphoning of blood is on."[87]

The historical sources generally are detailed about the Aboriginal definition of offences and the acceptable responses to them. Llewellyn and Hoebel refer to law as having the ". . . peculiar job of cleaning up social messes when they have been made [and] a major portion of its essence [is] in the doing something about such a breach."[88] Accordingly, relatively much is known about

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[84] See, chapter two, *supra*.

[85] Hoebel, *supra* note 23 at 193.

[86] Jefferson, *supra*, note 31 at 45.

[87] Hoebel, *supra*, note 23 at 188.

[88] Llewellyn and Hoebel, *supra*, note 32 at 20.

how a particular transgression, a ". . . known and clear grievance or offence"[89] was treated. They suggest, however, that relatively little insight is provided, ". . . when one turns to that other problem-type which so baffles most primitive cultures: the dispute of fact,"[90] the precise area ignored by the *Inquiry*. In his description of the Comanche law ways, Hoebel stresses that, in addition to being rare, the system simply could not adequately address a plea of not guilty. He puts an important question, one the *Inquiry* fails to pose in the contemporary context, and answers it with precision:

> And what if guilt was denied? Usually it was not. When the defendant refused to own up, the procedure apparently came to an impasse.[91] (emphasis added)

In their study of the Cheyenne, Llewellyn and Hoebel address this problem of adjudication to some degree and conclude that, "devices . . . were invented from occasion to occasion to deal with some doubtful point of fact - and this although the culture showed no sign of working toward a single general pattern for the purpose."[92] They point out that, "true dispute of fact, secrecy of the relevant truth, tries ingenuity."[93] An example of this ad hoc, "legal elasticity,"[94] ability to ascertain facts involved the discovery of an aborted foetus and the consequent disrobing of the young women to reveal recent lactation and, thus, the offender, who was banished.[95] One is not told if the woman in question asserted any defence, however, in only four of the 53 cases described by Hoebel was an allegation not acknowledged or actually disputed. One accused remained mute to an allegation of boot-leg hunting and his guilt was

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89 *Ibid.*, at 304

90 *Ibid.*, at 306.

91 Hoebel, *supra* ,note 23, at 192.

92 LLewellyn and Hoebel, *supra*, note 32 at 306.

93 *Ibid.*

94 *Ibid.*, at 119.

95 *Ibid.*, at 118-119.

taken to have been confirmed by his silence.[96] In another similar case, the accused protested his innocence; a search of his lodge found nothing and he was thus exonerated.[97] Another was accused of stealing a bow string and his denial merely postponed a bloody beating by the owner until he was actually found in possession some days later.[98] In another case, two persons swore on the "Holy Hat" denying an allegation of adultery. The oaths were apparently false, but avoided further process as, "legally, the oath cleared him."[99]

This very brief reference to traditional law ways suggests that historical Aboriginal justice was principally and appropriately concerned with the wise disposition of fairly clear transgressions of the local customs or expectations. The prevailing motivation was to reconcile the parties and to promote the harmony of the community. The system involved legality in the sense of consistency and public acceptance. It was not burdened with legalisms or a "wooden arbitrariness"[100] and reveals a sensitive flexibility very different from the "tyrant's arbitrariness of whimsy or temper."[101] At the same time, the adjudication process, such as it was, rested essentially on the ad hoc ingenuity of the moment and the particular wisdom of the parties. It reveals no pattern, formalism, principle or distinctive "world view" which could be said to significantly contribute to Aboriginal cultural distinctiveness or identity. Indeed, it is submitted that it is the lack an adjudication heritage which stands out. If the colonization process had not intervened, perhaps a distinctive adjudication process may have evolved.[102] However, to the extent that contemporary Aboriginal justice must provide an adjudication component, it largely will be creating anew, rather than perpetuating or refining the traditions of the past.

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[96] *Ibid.*, at 116-117.

[97] *Ibid.*, at 117.

[98] *Ibid.*, at 119.

[99] *Ibid.*, at 151-152.

[100] *Ibid.*, at 288.

[101] *Ibid.*

[102] See note 53, *supra*.

CHARTER VALUES

The quintessential expression of individualism and fairness in the criminal law context is the opportunity to plead not guilty and take refuge in the presumption of innocence placing the burden on the accuser to prove the contrary. This adjudication process, if resorted to, necessarily precedes any issue of disposition or reconciliation. The conventional system, centered on the values of the *Charter*, provides a relatively mature adjudication framework which the *Inquiry*, as outlined in chapter two, dismisses as "alien to the Aboriginal value system."[103] It is submitted that *Charter* values which appear alien in the mediation context may become essential to fairness in the adjudication context overlooked by the *Inquiry*.

"NOT GUILTY" - DISHONEST OR GUARANTOR OF FAIRNESS

The *Inquiry* assumes an unrealistic degree of offender selflessness in dismissing the arguably salutary, but, in any event necessary, traditions of the "not guilty" plea, in overly broad strokes which betray, it is submitted, a degree of naivety or excessive reformative zeal. As outlined in chapter two, the *Inquiry* dismisses the relative ease with which the conventional system facilitates such a plea as the "conventional response to an accusation."[104] There is no doubt that many in the conventional system " . . . plead not guilty to a charge for which that person is, in fact responsible."[105] However, it is submitted that the Law Reform Commission exhibits a more appropriate understanding of, and thus respect for, the hallmarks of adjudication which are the presumption of innocence and the burden of proof. These foundations of the right to make full answer and defence by pleading not guilty are characterized as, " . . . the foremost example [of] . . . an institutionally entrenched skepticism, or perhaps

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[103] *Inquiry, supra*, note 1 at 37.

[104] *Ibid.*, at 22.

[105] *Ibid.*

better put, caution or wariness [which] . . . are foremost among the guarantors of a just and regular process."[106]

ADVERSARIAL SYSTEM: TRUTH *AND* FAIRNESS

The *Inquiry* is equally dismissive of the adversarial system where,as outlined in chapter two, opposing counsel control the process through cleverly chosen questions in the pursuit of a "truth" which, according to the the *Inquiry*, the conventional system sees as "definite and definable."[107] The *Inquiry* prefers a more open system where "more of the truth can be determined" by allowing "any interested party to volunteer an opinion or make a comment."[108] However, the Law Reform Commission emphasizes that the rules of evidence which control and limit the introduction of evidence are in fact part of a process which is a ". . . qualified search for the truth [where] . . . truth must find its place in the context of a larger concern to do justice. Prejudice, innuendo, opinion and speculation are viewed by our system as poor handmaidens in the cause of justice . . . 'Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much'."[109] Llewellyn and Hoebel recall one of the potentially negative aspects of Aboriginal "localness" in the adjudication context: "A close knit community comes readily to depend on general knowledge and report."[110] The Law Reform Commission describes the procedurally proscribed system as perhaps: ". . . the *best* method for securing the truth. Even judges, who are individuals well-schooled in the task of disregarding extraneous matter, may fall victim to the overwhelming effects of irrelevant and prejudicial material. Therefore the rules of evidence prohibit the

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[106] Law Reform Commission, *supra*, note 33 at 7, (and at note 15 at 7).

[107] *Inquiry*, *supra*, note 1 at 41.

[108] *Ibid.* , at 36.

[109] Law Reform Commission, *supra*, note 33 at 10, quoting from *Pearse* v. *Pearse* (1846) 1 De G. & Sm. 12, at 28-29.

[110] Llewellyn and Hoebel, *supra*, note 32 at 306.

introduction of such evidence *ab initio*."[111] The wide-open, informal approach advocated by the *Inquiry* places great reliance on the "ingenuity of the moment" and minimizes the tensions of localness which chapter four indicates may be particularly taut in the small Aboriginal community.

BENEFIT ALL

Chapter four cautioned in the context of trusting governments that, "it is a mistake to be complacent about any potential abuse of power."[112] The same is true of a justice system untrammeled by the "technicalities" of procedural rules, most of which are embodied in the *Charter* guarantee of the "principles of fundamental justice."[113] The *Inquiry* implies that these formalities can become mere "conventions" which permit the guilty to plead not guilty and thus avoid "justice" on a charge "for which that person, in fact, is responsible."[114] Such observations are basically correct, but, it is submitted, betray a tendency to treat "justice (or fairness). . . as the sole preserve of the accused person in the criminal process."[115] Such criticism also recalls the observation about the tyranny of the majority in chapter three, based on Dworkin that, ". . . due process concerns for the individual which permit the guilty to go free tend to be replaced by an emphasis on accuracy and efficiency in the process."[116]

The Law Reform Commission emphasizes what should not have to be argued at length:

> Laws which protect accused persons protect society as a whole. The law should never be indifferent to

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[111] Law Reform Commission, note 33 at 10-11.

[112] See chapter four, *supra*, note 146.

[113] The *Charter*, *supra*, note 2, section7.

[114] *Inquiry*, *supra*, note 1 at 21-22.

[115] Law Reform Commission, *supra*, note 33 at 15.

[116] See chapter three, *supra*, note 104.

> the safeguards which surround a person facing a criminal charge."[117]
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> . . . society is composed of the individuals within it and . . . the procedural laws which guarantee fairness to those charged with a crime are laws which guarantee fair treatment to us all."[118]

It is not suggested that the *Inquiry* is indifferent to these values, but the adjudication hiatus in the *Inquiry* analysis makes their value to all members of the Aboriginal community less apparent.

CULTURAL SURVIVAL

The conventional system is far from perfect, but at least recognizes and tries to address the, "underlying theme of the conflict between the individual and authority"[119] by providing a principled adjudication process which is intended to assist the individual, who is everyone and anyone, in what might otherwise be a most unfair and potentially abusive confrontation. The *Inquiry* either ignores this confrontation or assumes a type of conflict which is reconcilable by mediation to achieve mutually sought objectives. It places great faith in the capacity of revitalized Aboriginal harmony concepts of justice to address contemporary reality. However, it is submitted that:

> It is not enough to simply uncover and apply customary law. Any justice alternatives whether customary or contemporary, must be more beneficial than the existing system because their value lies in what they do rather than where they came from or what they are called.[120]

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[117] Law Reform Commission, *supra*, note 33 at 6.

[118] *Ibid.*, at 13.

[119] Kadish and Paulsen, *supra*, note 35.

[120] The Cree Report, *supra*, note 21 at 4.

If the *Inquiry* has a better way of dealing with the inevitable irreconcilable conflicts of actually existing Indianism, it has not made the principles and benefits of the alternative process clear. Brakel argues that:

> The burden of persuasion for separatist ideas should fall on the proponents of separatism. In the case for separate tribal courts, instead of advancing the usual political and mystical arguments, proponents should show that the courts have concrete operational advantages.[121]

Jackson argues that a distinctive Aboriginal system should be, "based on a realistic assessment of the strength and limitations of both their own institutions and those of the larger Canadian society."(emphasis added)[122] The *Inquiry* makes a persuasive case for a degree of separate Aboriginal justice which would preserve and promote the cultural survival of the harmony essence and strength of that system. However, it is submitted that *Charter* values are essential to address the adjudication limitations apparent in that system. The adoption, or even the judicial imposition, of *Charter* values would not, "mean the end of Indian culture, realistically defined."[123] A more realistic assessment would recognize that adjudicative justice is largely ancillary to its cultural distinctiveness, but necessary to its contemporary viability.

CONCLUSION

Jackson asserts that, "it should not be beyond our legal imagination to reach . . . an accommodation . . . between collective and individual rights . . . [which] . . . can reflect the accumulated wisdom of both aboriginal law and the common law."[124] In searching for different "pathways to justice" Jackson

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[121] Samuel Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (American Bar Foundation, 1978) at 99.

[122] Michael Jackson, "Locking Up Natives in Canada" (1989) 23: 2 U.B.C. L. Rev. 215 at 250 (referring to the Gitksan and Wet'suet'en system)

[123] Brakel , *supra*, note 121 at 100.

[124] Jackson, *supra*, note 122 at 254-255.

stresses a, ". . . mutual respect for aboriginal law ways and the larger system"[125] and seeks, ". . . to find the points of intersection, those of conflict and also those where mutual accommodation is possible."[126]

The *Inquiry* has strongly advocated an autonomous Aboriginal justice system premised on a communitarian cultural heritage of harmony, reconcilable conflict and mediation. It has virtually ignored a relative cultural void in addressing dis-unity, irreconcilable conflict and adjudication. In stressing the wisdom of the Aboriginal law ways so appropriate for the negotiated settlement of reconcilable conflict, it has dismissed the wisdom of the conventional system appropriate to the imposed settlement of irreconcilable conflict, which is a hard fact of actually existing Indianism.

The *Inquiry* does not address the "great issue."[127] The *Inquiry* devotes only four of its 789 pages to the related issues of the *Charter*, individual rights and "due process."[128] The *Inquiry* emphasis is almost wholly on points of "conflict" between the two systems to the virtual exclusion of points of "intersection," or "mutual accommodation." This thesis is a modest attempt to address the interface between two systems; one mature, but in need of change, the other, fledging and in need of assistance. These two systems will have to co-exist somehow. It is submitted that the *Charter* provides a ready and flexible framework to join the Aboriginal community both to the larger white society and to the the diaspora by principled standards of justice. These fundamental indicia of fairness recognized by all civilized self-governing units, constitute no significant threat to the cultural survival of the Aboriginal mediation justice heritage, while buttressing its inherent adjudication frailties.

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[125] Michael Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities* , (Paper prepared for the Law Reform Commission of Canada, May 15, 1991) at 77 [unpublished].

[126] *Ibid.* , at 116.

[127] Kadish , supra note 35.

[128] *Inquiry*, *supra*, note 1 (pages 333-336).

JUSTIFYING *INQUIRY* POSITION: SECTIONS 1, 25 OR 33.

Section 1

Confirming the prophecy of Schwartz, the *Inquiry* proposal is a "bold" and "radical" response to " . . . aboriginal demands for more self-government."[129] If the conventional court is not pre-empted by Aboriginal resort to section 33, it would likely judge the appropriateness of the collective paramountcy inherent in this response by applying section 1 of the *Charter*, or the "Oakes test,"[130] which has been referred to in this way:

> Section 1 is the genetic code of the *Charter* guarantees. It is the blueprint for the maximum stress which the Constitution permits the ordinary or conventional law to place on a guaranteed right or freedom. In the *Oakes* case, the Supreme Court of Canada has provided the key to that code or blueprint "[131]

The *Oakes* "key" to the inner sanctum of section 1 has three broad teeth: "objective,"[132] "means,"[133] and "proportionality."[134] An autonomous Aboriginal justice system would be justified under this analysis if the objective is legitimately pressing and substantial and the autonomous means utilized are proportional to the objective. This thesis is not intended to be a definitive analysis of the application of the *Oakes* test to the issue of Aboriginal justice. It is submitted that the implementation of a justiciable inherent right to self-government will generate suitable concrete issues for such analysis in relatively

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[129] Bryan Schwartz, "A Separate Aboriginal Justice System?" [1990] Man. L.J.77 at 90.

[130] *Reg.* v. *Oakes* (1986) 24 C. C. C. (3d) 321 (S. C. C.).

[131] *Badger et. al. v. A-G Manitoba* (1986) 27 C. C. C. (3d) 158 (Q. B.) at 161.

[132] *Oakes* , *supra* , note 130 at 348- 349.

[133] *Ibid.*

[134] *Ibid.*

short order. However, the, perhaps deceptively simple, essence of this test, which is transparently political,[135] is reasonableness:

> If I have any qualifications to make, it is that I prefer to think in terms of a single test for section 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.[136]

The colonization process outlined in chapter one confirms the pressing and substantial objective of Aboriginal revitalization and cultural distinctiveness. The means of self-government, and autonomous justice as a component thereof, are rationally connected to the general objective and, more specifically, to correcting the " . . . symptomatic problems of over- incarceration [by] and disaffection [with]"[137] the conventional criminal justice system. Chapters three and four confirm a "community-constituting understanding"[138] about this objective, which supports the finding of a collective right to the necessary means to achieve that objective. The conventional court , however, would be concerned that the fault lines in the harmony ethos outlined in chapter four undermine such an understanding about the means to achieve the objective.

This concern, coupled with the conventional system's commitment to the "unremitting protection of individual rights,"[139] would generate skepticism about a claim to the paramountcy of collective rights over individual rights as proportionate means to the attainment of the objective. It would be concerned that the *Inquiry's* dismissal of the "wisdom"[140] of conventional justice mechanisms outlined in chapter four and above betrays, if not "a strategy of

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[135] Peter H Russell, Rainer Knopff and Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa, Carlton University Press, 1990) at 452.

[136] *Andrews* v. *Law Society of British Columbia* (1989) 56 D. L. R. 1 at 41, (S. C.C., LaForest J.).

[137] *Inquiry* note 1 at 2.

[138] Michael McDonald , "Should Communities Have Rights? Reflections on Liberal Individualism (1991) 4 Can. J. of Law & Jurs. 217 at 231.

[139] *Hunter v. Southam Inc.*, [1984] 2 S. C. R. 145 at 155.

[140] Jackson, *supra*, note 124.

deliberate overstatement,"[141] a disproportionate response to the inertia of the past and the sometimes strident demands generated in the self-government evolution process outlined in chapter one

Contextual Interpretation

The conventional court would be concerned that the *Inquiry*, in referring to the premises of the conventional system, substantially embodied in the *Charter*, as "alien,"[142] has failed to consider the inherent dynamic capacity of the *Charter* to promote a culturally appropriate interpretation of the rights it seeks to protect. Pentney argues that section 25 serves this function. In his view, section 25 acts as a "prism," which is applied to modify the definition and scope of the individual right to protect the threatened Aboriginal right , before any limit of the individual right is subjected to a section 1 analysis.[143] The court might be attracted to this approach, however, it is submitted that a contextual interpretation is mandated by *Genereux*, independent of the interpretive provision. The failure of the *Inquiry* to appreciate the potential significance of this approach is underlined by its uncritical endorsement of the proposition of the Assembly of Manitoba Chiefs that a major motivation for a "tailor-made" Aboriginal charter is that, "full compliance by Aboriginal justice systems of the *Charter of Rights* , would amount to nothing less than blackmail and hypocrisy."[144] It is submitted that this concern is exaggerated in light of *Genereux* which posits only substantive, not necessarily formal, compliance with the "essence"[145] or the "heart "[146] or the "core value"[147] of rights which may

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[141] Bryan Schwartz, . "A Separate Aboriginal Justice System?" [1990] Man. L.J.77 at 90.

[142] *Inquiry*, *supra*, note 1 at 37.

[143] William Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (LL.M. Thesis, University of Ottawa, 1987) at 155-156.

[144] *Inquiry* , *supra* , note 1 at 335.

[145] *R. v. Genereux* [1992] S. C. J. No. 10 at 20 at 24.

[146] *Ibid.*, 23.

[147] *Ibid.*, 50.

have a " . . . different content . . . in different institutional settings."[148] It is submitted that this is some indication of the capacity of the *Charter* to evolve and encompass new or different points of view. Any present understanding of the meaning of an individual right may be better viewed as "a pattern rather than a strait -jacket."[149] *Genereux* supports the proposition that in resolving a clash between an individual right and a collective Aboriginal right to an alternative system of justice, the individual right must be defined and refined in ways appropriate to the context of the alternative system. Irreconcilable conflict will exist, if at all, only in the case of a limit on the contextually-tailored essence of the right.[150]

The contextual approach would also distinguish the processes of mediation-reconciliation and adjudication-punishment. Since effective reconciliation is largely premised on the consent or will of the parties, it is difficult to see how the *Charter* would significantly interfere with the implementation of those Aboriginal justice processes which are truly consistent with the harmony ethos.

The serious nature of at least a portion of Aboriginal crime and the increasingly adversarial and punitive orientation of actually existing Indianism, indicate a need for adjudication processes and "true penal consequences."[151] It is in this context that significant judicial resistance to collective paramountcy can be expected.

Aboriginal self-government should permit the people most abused by the inertia of the past to implement many of the alternatives that the Cawsey Report

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[148] *Ibid.*, 33.

[149] *Ibid.*, 18.

[150] The Law Reform Commission states that "communities may wish to safeguard rights and secure fairness in different ways than our system." See, Law Reform Commission of Canada, Report no. 34,*Aboriginal Peoples and Criminal Justice* (Ottawa , Information Canada, 1991) at 19. *Genereux* would permit very different "ways," so long as the essence of fairness is thereby maintained. See also, *infra*, note 183 for how different, military justice, for example, can be.

[151] *Genereux*, *supra*, note 145 at 20.

finds are "still applicable."[152] The proportionality arm of the *Oakes* test would reasonably require that these less intrusive alternate means to achieve the objective should be exhausted or proven to be irrelevant before a greater interference with rights could be justified.[153] Nevertheless, section 1 provides that all rights are relative and any Aboriginal limit on individual rights, as defined in context, theoretically will be justified if it is a reasonable one.

Section 25

If, as is quite possible, the limit on individual rights is not found to be justifiable according to the reasonableness test of conventional justice, chapter three outlines how section 25 would nevertheless permit an otherwise unprecedented denial of individual rights in the constitutionally mandated greater interest of cultural survival. As indicated above, the mediation heritage of Aboriginal justice is not seriously threatened by the *Charter*. Section 25 ensures that any "revived" or "rebuilt" Aboriginal adjudication process, which is authentically integral to the viability of culturally distinct Aboriginal justice, will not be corrupted by conflicting individual rights. However, the historical adjudication hiatus outlined in this chapter poses obstacles to successful resort to this section. It may be difficult to establish a persuasively rational connection between adjudication justice processes and Aboriginal cultural survival.

The possibility of opting out of the Aboriginal system may be relevant to a section 25 analysis. This involves the somewhat awkward theory of "voluntary exit" and will be considered only briefly here. This argument in favour of collective rights asserts that optional exit from the group minimizes concern for the internal procedures of the group.[154] It is no doubt technically true that the secularly minded Indian may shed Indian status or leave the self-governing unit if the collective practices are considered seriously incompatible with personal

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[152] *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*, March 1991, Vol. 1, *Main Report* at 1-5.

[153] In *Edwards Books and Art Limited* v. *the Queen* [1986] 2 S. C. R. 713, Dickson J. includes an examination of alternate means as a part of the proportionate means test.

[154] Jan Narvesson, "Collective Rights?" (1991) 4 Can. J. Law & Jurs.329 at 341.

views. However the utility of this technical option is questionable. One does not change cultures without paying a price. It is submitted that Iris Young captures the poignancy of such a dilemma in stating that," . . . such changes in group affinity are experienced as a transformation in one's identity."[155] The Aboriginal, of all people, given the history of dislocation outlined in chapter one, should not have to face such wrenching change yet again, if at all avoidable.

It is submitted that a more practical form of "voluntary exit" in the context of a criminal matter is the concept of electing the mode of procedure or waiver of certain rights on a case by case basis.[156] It must be recognized that such an element of choice has the regrettable potential to undermine the authority of the Aboriginal system and to lead to "forum shopping."[157] If Aboriginal justice is to realize its potential, this type of fragmentation should be avoided as much as is practically possible. The argument for an element of jurisdictional choice would be significantly undermined by adopting the conventional legal rights of the *Charter* as the unifying thread connecting the two systems, as outlined shortly. It is the lack of consent or choice in a case like *Thomas* [158] that is most disturbing. A Section 25 analysis might reasonably include an assessment of the extent to which non-consensual participation in the group activity is essential to group cultural survival. Even in traditional Aboriginal society, it was not uncommon to exercise the option to "vote with one's feet" if one dissented.[159]

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[155] Iris Young , " Polity and Group Difference : A Critique of the Ideal of Universal Citizenship", in *Feminism and Political Theory* , Cass R. Simstein , ed., (Chicago, University of Chicago Press, 1990) 117 at 127.

[156] This possibility is raised by the Law Reform Commission, *supra*, note 150 at 21, apparently in the context of the Aboriginal court's jurisdiction being conditional "in part" on the "agreement of the accused." The jurisdiction envisaged by the *Inquiry* , and addressed by this thesis, is in no way conditional on the consent of the accused.

[157] *Inquiry*, *supra*, note 1 at 320.

[158] *David Thomas v.Daniel Norris et. al* (16 September 1991), Victoria 88/412 (B. C. S. C.).

[159] Joseph Pestieau, " Minority Rights: Caught Between Individual Rights and Peoples' Rights" (1991) 4 Can. J. Law & Jurs. 361 at 370.

Section 33

It is not clear at this time whether the inherent right to self-government would include the same "notwithstanding" clause granted the federal and provincial governments,[160] but the Aboriginal leadership favours its inclusion as appropriate to an equal third order of government. Failure to successfully invoke section 1 or section 25 would, presumably, compel consideration of this section.

The Supreme Court of Canada in *Ford*[161] " . . . made it clear that it wished to minimize judicial review of the use of the override."[162] Thus, there would not likely be any significant legal impediment to the use of this power by an Aboriginal government. If not otherwise justifiable under section 1, this section might be used to implement such relatively benign local exceptions as banning alcohol or insisting on vouchers instead of cash for welfare,[163] authorizing arbitrary searches of vehicles, persons and aircraft entering a reserve for alcohol or drugs, criminalizing gas sniffing, or, a variety of other limitations about which one can only speculate, which might seem attractive to an Aboriginal community. However, section 33 might also be used malignly to further the tyranny of the majority, which this thesis argues should be of special concern to Aboriginal communities. This concern is particularly apposite in the area of criminal law where the attraction of treating the individual as a means to an end can be so seductive as suggested in the, albeit civil, case of *Thomas*.[164] It is the federal government that has substantial jurisdiction in this area, but it is

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[160] Agreement to entrench this power was reported on May 12, 1992 , however this was denied the following day by Alberta. See Susan Delacourt, "Talks Shape Third Order of Government, *The Globe and Mail* (12 May 1992) at A1; and see Tom Barrett, "Self-Rule for Natives Unresolved", *The Vancouver Sun* (13 May 1992) at A1. More recently, it is reported that that this override power will be included in the final agreement: *The Globe and Mail* (3 June 1992) at A22.

[161] *Ford* v. *Quebec* [1988] 2 S.C.R. 712.

[162] Russell, Knopff and Morton, *supra*, note 133 at 559, and see; *Ford, ibid.* , at 741.

[163] See, Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (U.K., Lester and Orpen, 1989) at 176 and 181 for examples of these initiatives at Alkalai lake.

[164] *Supra*, note 158. See chapter three where it is argued that the imposition of similar procedures by Aboriginal government, or the state, would trigger section 25.

submitted that national political reality minimizes[165] the likelihood of federal resort to section 33 to limit individual rights in the criminal law context. However, the risk of the abuse of this power is dangerously magnified in the small Aboriginal community where, to repeat Madison, the majority will is so much easier to manipulate and, thus, to impose:

> . . . individual rights and freedoms are best protected within larger, more diverse communities, where it is more difficult to articulate a majority will and a multitude of conflicting and competing interests fragment and immobilize the majority.[166]

If Aboriginal government arguments for infringing individual rights legitimately fail to meet the cultural survival test of section 25, then, the rhetoric of politics aside, the predictable debate generated by prospective resort to section 33, logically, should focus on some other rationale. If an autonomous Aboriginal justice system were in place, subject only to contextually interpreted *Charter* values, that potentially very constructive debate should have to make clear, what the *Inquiry*, with respect, has failed to demonstrate - precisely how the principles of fundamental justice frustrate the desire to ". . . run our own affairs, in our own communities, in our own way."[167] The harmony ethos should involve only the willing consensual participation of the populace. Such a debate must highlight some collective imposition on the individual such as revealed in *Thomas*.[168] It will be politically incumbent on the proponents of such procedures to demonstrate, not just assume, a community-constituting understanding about such potential violations of the principles of fundamental justice. It will not be sufficient in this debate to invoke the shibboleth of cultural survival as this rationale does not, at least in theory, require resort to section 33. If such a

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[165] The imposition of the War Measures Act in Canada and the suspension of certain legal rights in U.K. terrorist cases, perhaps indicate that the possibility of federal resort to such power cannot be totally excluded.

[166] R. Gibbins and J. Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in Alan Cairns and Cynthia Williams, research coordinators, *The Politics of Gender, Ethnicity and Language in Canada* (University of Toronto Press, Toronto,1984) 171 at 218.

[167] *Inquiry*, supra, note 1 at 259

[168] *Supra* note 158.

consensus emerges from this debate, those who dissent from within, or from without, can make an informed decision as to future relations with that community.

SYNTHESIS

The contextual interpretation approach suggested by *Genereux* [169] is a possible example of what Gibson has referred to as "judicial statesmanship," or," . . . a willingness to abandon traditional solutions that have ceased to serve long-term needs."[170] The Supreme Court of the United States expands on this theme of principled evolution to meet changing needs: "History makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."[171] The Supreme Court of Canada has taken an activist role in what the *Inquiry* refers to as a "remarkable shift in judicial attitudes"[172] since the end of the period of judicial irrelevance marked by *Calder*,[173] as outlined in chapter one, and continued by the cases of *Guerin* [174] and *Simon*,[175] which are " . . . clearly inconsistent with the hostile judgements of

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[169] *supra*, note 143.

[170] William F. Pentney, Interpreting the Charter: General Principles in Gerald-A Beaudoin and Ed Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2nd. ed. (Toronto, Carswell, 1989) at 27, quoting Professor D. Gibson, *The Law of the Charter: General Principles* (Toronto, Carswell, 1986) at 47.

[171] *City of Cleburne, Texas* v. *Cleburne Living Center*, 87 L. Ed. (2d) 313 (1985) (U.S.S.C.) at 337.

[172] *Inquiry*, *supra*, note, 1 at 118.

[173] *Calder* v. *Attorney-General of B. C.* [1973[S.C.R. 313.

[174] *Guerin* v. *R.* [1984] 2 S.C.R.335, ("which affirmed an Indian band's title to reserve land on the basis of the pre-contact Indian legal order.", *Inquiry*, *supra*, note 1 at 118).

[175] *R.* v. *Simon*, [1985] 2 S.C.R. 387 ("treaties and statutes relating to Indians should be liberally construed . . . in favour or the Indians, *Inquiry*, *supra*, note 1 at 118.)

the past."[176] This disposition to a judicial statesmanship that would " . . . favour those interpretations most likely to have beneficial impact"[177] is furthered by *Sparrow* which emphasizes that, in the area of constitutional interpretation involving Aboriginal issues: "Fairness to the Indians is a governing consideration."[178]

It is much too early in the evolution of autonomous Aboriginal justice to jettison the accumulated wisdom of the conventional system or to conclude that the *Charter* is necessarily incompatible with the aims of an Aboriginal system. The conventional system must be given the opportunity to channel this shift in judicial attitudes toward supporting the Aboriginal aspiration to fashion a system that "bears the hallmarks of their own system"[179] without denying the consumers of that system that basic minimum of standards which the conventional system embodies in the *Charter.* At the same time, the *Charter* could play a much needed role in uniting the Aboriginal community with the larger white society; the landed Aboriginal community to the diaspora; and even contiguous Aboriginal communities with "different legal bases," that might utilize a common regional court as envisaged by the *Inquiry.*[180]

Pluralism is not necessarily inconsistent with minimum unifying standards. At the time of writing it is not clear where current decentralizing constitutional negotiations will lead, however, the federal spending power has facilitated the creation of national programs in provincial jurisdictions such as health and welfare, by paying a substantial portion of the cost on condition that "the provinces meet Ottawa's standards of service."[181] The military justice system described in *Genereux* apparently continues as a very distinct, but

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[176] *Inquiry*, *supra*, note 1 at 118.

[177] Pentney, *supra*, note 170 at 27.

[178] *Reg. v. Sparrow*, (1990) 56 C. C. C. (3d) 263 at 286.

[179] Jackson, *supra*, note 125 at 91.

[180] *Inquiry*, *supra*, note 1 at315-316, and see, chapter four under "localness."

[181] "A Constitutional Primer: How Powers are Divided" *The Globe and Mail* (8 January 1992) at A4.

viable one[182] despite the Supreme Court of Canada's insistence on a minimum *Charter* standard of impartiality. This distinctiveness was noted by L'Heureux-Dube J: "The military is, after all, something of its own society within the greater one . . . it entails a certain number of traditions, rules, and taboos which are not within the normal ken of outsiders."[183]

In a like manner, section 23 of the *Charter* permits a minority language group to establish and control an independent school system, where numbers warrant, " . . . as the most effective guarantee to prevent assimilation,"[184] but the province can set "minimal standards" of instruction in areas other than the minority language itself.[185] Home educational instruction and private schools may be permitted for whatever purpose, but insistence on "provincial standards of efficiency"[186] are upheld as, " . . . it would be unreasonable to permit the appellant to ignore the province's laws on a matter as important as the education of the young."[187]

The Social Charter proposed by the Ontario government, whatever its other merits, highlights the potential contribution of minimum uniform standards as a "national adhesive"[188] to balkanized local control of programs and policy. The proposal notes that, "people are not necessarily opposed to changes in the distribution of powers [but] . . . favour the maintenance . . . of national principles

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[182] *Genereux*, *supra* , note 145 at 25, Lamer J. notes that changes have been made to the regulations governing court martials which " . . . have gone a considerable way towards addressing the concerns. . ." of the Court.

[183] *Genereux*, *Ibid* , at 58. (A General Court Martial consists of a five to nine member tribunal which determines criminal guilt or innocence by majority vote and also determines the sentence. One of the members of the tribunal, the trier of fact, acts as president of the court and ensures that the trial is conducted in an orderly and judicial manner. A "judge advocate" officiates much as a judge in determining questions of law or mixed law and fact, but that ruling may be disregarded by the tribunal "for weighty reasons." See pages 35-36 of the judgement.)

[184] *Mahe* v. *The Queen in Right of Alberta* (1987) 42 D.L.R. (4th) 514 at 537.

[185] *Ibid.* , at 539.

[186] *R.* v. *Jones* [1986] 2 S.C.R. 284 at 299.

[187] *Ibid.* , at 301.

[188] "A Constitutional Primer: The Social Charter" The Globe and Mail (13 January 1992) at A4.

in social programs."[189] Therefore the purpose of a social charter is "to guarantee that basic national values and principles are guaranteed"[190] and " . . . to provide essential public services of reasonable quality to all Canadians."[191]

The basic utility, if nothing else, of minimum uniform standards of justice to the Aboriginal community itself, is raised by the imminent prospect of casinos on the reserves as outlined in chapter two, as a, "solution to . . . the revival of the Indian communities across Canada."[192] This revival will be seriously compromised if people who "live, pass through or do business in an Aboriginal community"[193] have to check their *Charter* rights at the door before their cash is put on the table. If this is to be the case, these people may want to know in advance whether the "voluntary exit" door is to be left open or slammed shut behind them in the case of irreconcilable dispute.

In recognizing the need for pluralism, the goal should be to integrate rather than further separate two systems and peoples which, it is submitted, share a greater interest in and need for *Charter* values than the *Inquiry* emphasis on the Aboriginal communitarian world view might imply. It is submitted that the Aboriginal person is more properly seen as a synthesis of two cultures, which only a sensitive and gradual mixing of the strengths of both justice systems will effectively accommodate.

This duality is suggested but not quite accurately captured in the phrases "Canadian Indian" or "citizen plus"[194] each of which, perhaps unwittingly, places the dominant society foremost. Actually existing Indianism can be seen, in part, as the product of the "civilizing", acculturizing, assimilationist experience, that intended, and to some degree effected, a displacement of what was considered

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[189] *Ibid.*, *Official Text.*

[190] *Ibid.*

[191] A Constitutional Primer, *supra*, note 180.

[192] Terrence Corcoran, "Indian Casinos: One Way to Renewal", *The Globe and Mail* (21 May 1992) at B2.

[193] *Inquiry*, *supra*, note 1 at 320.

[194] H. Hawthorn, *A Survey of the Contemporary Indians of Canada*, Vol. 1 (1966) at 6.

a static identity in favour of the new European norm. However, the Aboriginal person may view the process differently and perceive his or her identity as dynamically expanding to include and adapt to an outside influence, while maintaining a distinct and unbroken continuity with the past : " . . . the twin poles of total assimilation and total maintenance of indigenous culture in a contact situation represent theoretical alternatives which are never realized. Between them lies the range of what actually occurs . . . cultural adjustment and/or synthesis."[195] The Aboriginal is Canadian. He or she is Indian. He or she is both. The influence of each viewpoint will vary greatly in individual cases, but " . . . neither is valid to the exclusion of the other; rather, both are true, and full understanding of the Indian's present and past cannot exclude either view."[196] This divided loyalty poses a " . . . more exacting problem for solution, for it supposes more than one loyalty on the part of the Indian."[197]

It is submitted that the words of the Inuit entertainer Susan Agluekark to the Dobbie-Beaudoin Committee capture the essence of a synthesized world view which is more accurate than the singular view that informs the *Inquiry* call for fundamental change. She believes there is a future for the Inuit in which they can adopt the best of the Qablunaat (white) way without sacrificing Inuk identity:

> We'll never go back to hunting on dog sleds, living in igloos or living in tents. It's never going to happen. It's past. It's gone. And, one way or the other, it was going to happen.
>
> There's nothing in the world that says that we're going to lose our culture. We're not going to do that. We can go on, speaking Inuktitut, teaching Inuktitut, living Inuit ways. Like, I can hunt, I can sew; that's part of Inuit tradition that any Inuk woman has to hunt and sew, and I can do that. But I can come down south and be on stage and work with Inuit Tapirisat, and shop for my clothing.

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[195] E.P. Patterson, *The Canadian Indian: A History Since 1500* , (Don Mills, Collier-Macmillan, 1972) at 169.

[196] *Ibid.* , at 3.

[197] *Ibid.* , at 30.

> I can go back home and go into an elders home and sit on the floor and eat raw meat with my elder. But I can also come back to Ottawa the next day and eat in a restaurant with a Qablunaat, and that doesn't affect me, doesn't change me. [198]

The shift in judicial attitudes noted by the *Inquiry* is reflected in, and probably has contributed to, the acceleration of the pace of political change which, as previously noted in chapter four, now concerns even Ovide Mercredi.[199] Nevertheless, time seems to move very slowly for those who wait in adverse circumstances and whose essential cause is just. Adams notes this impatience with characteristic and justifiable passion: "The Indian seeks as with most Canadians, a real cultural identity. Because we are so oppressed, because our culture has been so eroded and disorted, our search for identity is so urgent."[200] The concern, exemplified both by the dissent within the Aboriginal community outlined in chapter four, and the relative isolation of the *Inquiry* from much of mainstream thought, as outlined in chapter one, is that this understandable urgency, taken by some to the extremes of "Red Power"[201] and "radical nationalism,"[202] not carry rhetoric beyond the assertion of cultural identity to a distortion of it. The White Paper of 1969[203] triggered the "Red Paper" of 1970 wherein the Indian Chiefs of Alberta adopted Hawthorn's idea of "citizen plus":[204] "Indians should be regarded as 'Citizens plus'; in addition to the normal rights and duties of citizenship, Indians possess certain additional

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198 "A Qablunaat is a Human Being, So is an Inuk. I Can Put the Two Together." *The Vancouver Sun* (8 January 1992) at A4.

199 Susan Delacourt, "Fast-paced Talks Alarm Natives" *The Globe and Mail* (22 April 1992) at A1. Mercredi has characterized the pace of negotiations as " . . . not very comfortable [and] a process that is not designed to take care, it is not designed to take caution."

200 Patterson, *supra*, note 187 at 185.

201 Brakel, supra, note 121 at 2, and see, chapter one.

202 Howard Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon, Fifth House, 1989) at 169, and see, chapter one.

203 Dept. of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy , 1969*

204 Hawthorn, *supra*, note 186.

rights as charter members of the Canadian community."[205] The unilinear, romantic, and only partially accurate communitarian world view posited by the *Inquiry* includes a potential to justify "additional rights" at the unnecessary expense of existing individual "rights of citizenship."

It is submitted that actually existing Indianism, wherein the Aboriginal person may be both the holder of individual rights and the bearer of group responsibilities,[206] demands the more balanced approach suggested by Greschner's analysis of the relationship of feminism to individualism and communitarianism.[207] She argues that neither communitarianism nor individualism, for all their merits, is a sufficient base for feminism. In a like manner, this thesis argues that communitarianism, while an appropriate "world view" in some circumstances, generates an incomplete response to the needs of actually existing Indianism which requires a significant individualistic component.

She describes feminism as stemming from an oppression "in every facet of life"[208] She states that women have very diverse views as to the precise causes of and solutions to this oppression, but the very generalized goal of ending that subordination to men is "the common catalyst and objective of feminism."[209]

Chapter one of this thesis relates an Aboriginal experience of oppression generating a "community-constituting understanding"[210] about the objective of relieving the yoke of subjugation and achieving self respect. Chapter four

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[205] Patterson, supra, note 187 at 180.

[206] See Patrick Macklem, " First Nations Self-Government and the Borders of the Canadian Legal Imagination ", [1991] 36 McGill L. J. 383 at 390.

[207] Donna Greschner, *Feminist Concerns With the New Communitarians: We Don't Need Another Hero* , in A. Hutchinson and L. Green, eds, *Law and the Community: The End of Individualism* (Toronto, Carswell, 1989) 119.

[208] *Ibid.* , at 121.

[209] *Ibid.*

[210] McDonald, *supra*, note 138.

describes how such a process can provoke a diversity of opinion about the means to achieve that common goal.

Greschner observes that the diversity of views within feminism is related, in part, to whether the course should be the amelioration of the feminist experience or the promotion of it; is motherhood a condition to be improved or "an experience that can lead us to a new society?"[211] A central question with respect to the issue of Aboriginal justice, highlighted by the *Inquiry's* relatively isolated call for "major changes,"[212] is whether the colonization experience is a reason to improve the system, or, the basis for a fundamentally different and separate system; is the role of Aboriginal self-government to "[adjust] the yoke so it chafes less"[213] or to remove it altogether?

Greschner states that, " . . . the foremost insight and complaint of feminists [is that] standards, rules and theories have been constructed by men using male experiences, valuing what has been important to men and ignoring, if not denigrating, the experiences and interests of women."[214] In a similar vein, J.C. Smith notes that discrimination against Indians is, ". . . the result of the fact that the Native peoples of Canada are not valued, their experience is discounted and their world view denied or ignored."[215]

Feminists are described as relating strongly to some aspects of communitarianism. They are said to analyze conflict in terms of an ongoing relationship, whereas men are said to analyze such issues in terms of hiererarchical rules. The women's way is referred to as the "care"[216] model and

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211 Greschner, *supra*, note 207 at 123.

212 *Inquiry*, *supra*, note 1 at 265.

213 John D. Whyte, "The Aboriginal Self-Government Amendment: Analysis of Some Legal Obstacles" in, David C. Hawkes and Evelyn Peters, *Aboriginal Peoples and Constitutional Reform: Workshop Report* (Institute of Intergovernmental Relations, Queen's University, 1987) 77 at 78.

214 Greschner, *supra*, note 207at 122

215 J. C. Smith "Psychoanalytic Jurisprudence and the Limits of Traditional Legal Theory" Critical Legal Studies (materials, graduate seminar, University of British Columbia, 1991).

216 Greschner, *supra*, note 207 at 126.

the men's way as the "justice"[217] model, a distinction which parallels to some extent the restorative and adversarial models of justice contrasted by the *Inquiry*. Additionally, women are said to articulate their identity in terms of relations with others, the "situated" self,"[218] whereas men tend to more singular conceptions of self, the "unencumbered" self.[219] In a somewhat similar way, the Aboriginal conception of society is described by Boldt and Long in uniquely "situated" and communitarian terms as: "cosmocentric rather than homocentric [where] . . . their reference point was not the individual but the 'whole,' which is the cosmic order. Their conception of the individual was one of subordination to the whole."[220] Aboriginals and feminists could comfortably share the view that, " . . . connectedness and care, as a metaphysics and an ethics, more accurately reflects [their] experiences than liberalism's paradigm of separate persons relating to each other through the mechanism of abstract rights."[221] The feminist rejects the liberal notion of an atomistic, unconnected, unsituated self as simply inconsistent with the experience of the connectedness of pregnancy, birth and motherhood.[222] In a like manner, the unsituated self is inconsistent with the experience of the Aboriginal steeped in the communal traditions of clan, tribe or reserve.

However, Greschner raises a warning flag about communitarianism that informs the repeated references in this thesis to actually existing Indianism. She argues that an impulse behind communitarianism is a nostalgic attempt, " . . . to reclaim the political theory and practice of a prior time when politics was allegedly guided by a consensus on the common good."[223] The Aboriginal

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[217] *Ibid.*

[218] Michael Sandel, *Liberalism and Its Critics* in, Smith, Elliot and Grant, *supra*, note 116 at 1-24.

[219] *Ibid.*

[220] Menno Boldt and J. Anthony Long, "Tribal philosophies and The Canadian Charter of rights and Freedoms" in, Menno Boldt and J. Anthony Long (in association with Leroy Little Bear) ,eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1984) 165 at 166.

[221] Greschner, *supra*, note 207 at 127.

[222] *Ibid.* , at 134.

[223] *Ibid.* , at 128.

memory of a past "common good" may be distinctly more positive than women's, but they share a concern about the contemporary sufficiency of an ethical theory that places the family or group before the individual woman or Aboriginal person

Greschner counsels that women should reject communitarianism for positing "the notion of a self that is formed completely by the groups within which it finds itself."[224] Women must have the choice to escape or reject the values into which they were born: "One is not born but rather becomes a feminist."[225] She argues that, "an adequate conception of the self must include all of women's experiences, not just our connections but also our rejection of existing attachments and our creation of new ones."[226] In a like manner some Aboriginals will harbour a " . . . genuine reluctance toward the traditional way of life and . . . [wish to] search for models outside those provided by the community."[227]

Greschner concludes that neither liberalism nor communitarianism is sufficient from the perspective of feminism. The experience of women suggests that a comprehensive, more realistic conception of self borrows from both sides of the debate. She asserts that feminists must seek a "synthesis,"[228] "a middle way,"[229] which is not necessarily simply between the two, but may be superior to either alone. The appropriate language of feminism is "interdependence," - a "connection with others, but not a fusion."[230]

Women seek to forge a different, but continuing, relationship with men, founded on mutual respect. In a like manner, effective Aboriginal justice will be

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[224] *Ibid.*, , at 135.

[225] *Ibid.*

[226] *Ibid.* at 136.

[227] Cree Report, *supra*, note 21 at 50; and see, chapter four.

[228] Greschner, *supra*, note. 207 at 125.

[229] *Ibid.*

[230] *Ibid.* , at 141.

a synthesis, or, "principled interaction"[231] or middle way between two justice systems that draws from the strength and wisdom of each. It is submitted that *Charter* principles of fundamental justice would buttress the adjudication weakness of Aboriginal justice without detracting from its reconciliation strength. Such integration would significantly contribute to Aboriginal confidence in the capacity of its own structures of justice to sensitively respond to the demands of actually existing Indianism.

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.[232]

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[231] *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suet'en People* (A Proposal to the B.C. Ministry of the Attorney General by the Gitksan and Wet'suet'en Education Society, and others, March 1985), summary, [unpublished].

[232] *Genereux*, *supra*, note, 145 at 25, quoting from *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 at 689.

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