ABORIGINAL JUSTICE IN THE NORTHWEST TERRITORIES

A DISCUSSION PAPER

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Every day in the Northwest Territories, native persons are arrested by the police, native persons are tried on criminal charges, and native persons serve time in correctional institutions. The majority of the time of police, courts, and correctional officials is spent dealing with native persons.

The majority of the population of the NWT is of native ancestry, but the number of native people who come into contact with the justice system significantly exceeds the proportion in the general population. While 62% of the NWT population is native, the native population in Correctional institutions here is about 86%.[1]

The paper *Locking up Natives in Canada*, which was prepared for a committee of the Canadian Bar Association in 1988 by Professor Michael Jackson pointed to a disproportionate number of native inmates in Federal and provincial correctional institutions, and said that this disproportionality is growing.[2]

If too many native people are finding themselves in conflict with the law, this is a signal that something is not working. There must be something (or some things) which are working against native people. The justice system can not be considered in isolation. It is part of society as a whole. It reflects broader societal problems, such as poverty and unemployment. Social problems, however, are only part of the picture, and must not be used as an excuse for avoiding the very real problems for native persons in the justice system itself.

The 1988 *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* said at page 11:

> For them (Indian, Metis, and Inuit people) the courts, police, prisons and lawyers represent elements of a foreign system - our "injustice" system. The values represented by basic tenets of the general private and public law are not values to which they adhere. The emphasis on individuals and on personal rights as against the interest of the community is not shared by many aboriginal peoples living in Canada. The legal system is not viewed as a protector of what they hold dear, but, rather, as an enforcer of non-aboriginal law upon them.

and at page 13:

> In light of the current make-up of the personnel of the justice system, it is no wonder that many aboriginal people feel alienated from it. However, proper representation would not provide a complete solution. If and when that comes about, the legal system, as it presently operates, would still administer and enforce values and legal rules that often do not mesh with those of traditional aboriginal laws and cultures.

> An examination of our justice system as a whole reveals that it is simply not working in a way that is in the best interest of aboriginal people.[3]

The Alberta Task Force on Aboriginal Justice, which released its report *Justice on Trial* on March 25, 1991, said that:

> Aboriginal people are exposed daily to racism in our society. This racism exists in the criminal justice system as it does in the larger society. Ignorance of aboriginal people and the issues and problems faced by aboriginal people appear to be a large part of the problem of racism.[4]

These same comments have application in the Northwest Territories. Aboriginal Members of the Legislative Assembly have consistently asked questions about why police treat native persons differently from non-natives in their communities.

It is too easy for those involved in the administration of justice to get tied up in practical issues like the costs of airplane travel for court circuits, and the availability of staff housing for RCMP officers. It is important to sit back once in awhile and take a long look at how resources are being used, and what purposes are being served.

The current justice system in the Northwest Territories has developed from the foundation laid by Northwest Mounted, and Royal Canadian Mounted Police who were posted to remote settlements in the arctic in the first half of this century. After a threat to the sovereignty of the arctic islands, an arctic administration was set up by the Government of Canada in 1903. Notices proclaiming sovereignty were posted on headlands in the eastern arctic, and police detachments were posted to two locations, one on the northern coast of Hudson Bay, and the other on Herschel Island. Other police posts followed over the next twenty years. Because there was not a lot of call for strategic defense activity, Diamond Jenness says that:

> the government found a practical use for them: they could introduce the reign of law, Canadian law, among the primitive Eskimos, a people who spoke no language except one that was unintelligible to outsiders, had never known a ruler nor heard of any laws save the unwritten customs of their forefathers. Accordingly, from the beginning of the century the laws of Canada prevailed throughout the Canadian Arctic, and Eskimos who offended them could be - and were - arrested by white police, tired by white judges, and subjected to penalties not intelligible to them, all with that perfect legality which salves the most tender conscience.[5]

Non-natives came to different parts of the north at different times, but it was the RCMP and the missionaries who had the primary role in imparting the legal and moral codes of mainstream Canadian society. With both early church missionaries, and early police and

government officials, there was the assumption that they were improving the lives of native people by giving them the benefit of southern beliefs and institutions. There was little recognition of the systems of beliefs and institutions which already existed in aboriginal society.

Today, the justice system suffers from the manner in which it was introduced. There may be many areas where the theoretical basis for legal principles is not that different from traditional beliefs of native people, but it remains a system run by non-natives, and not accepted by native people as representing their values or permitting judgement by their peers.

It is clear that there were traditional means of maintaining order in Dene and Inuit communities long before non-natives people arrived in the North. Gossip, public shaming, ridicule, social ostracism, banishment, physical fights, insults, and song duels are recalled as methods which were used to maintain social harmony. Moreover, there were well understood standards of behaviour guiding native people in their relations with one another.[6]

In many ways, how the system presents itself to the native community is as important as the principles which lie behind it.
Despite what the system is said to stand for, is it seen as a group of non-natives who talk to each other about technical rules without really including the people of the community in the process? Is it seen as a court which comes to the community weeks or months after an event, to impose a legal remedy on a situation which has already been resolved by the participants? Does the community observe members, widely recognized as having committed a reprehensible act, being released without sanction because of something the legal aid lawyer has argued, while a community sanction is precluded? Is a fine which is imposed on a man for beating his wife being paid through the efforts of the wife to earn money? Is a trial for a minor theft lengthy, while a child welfare hearing, to determine if parents will lose custody of their children, is rushed through at the end of the day? Are the reasons for these things understood, and accepted?

One of the findings of the *Royal Commission on the Donald Marshall, Jr., Prosecution* in Nova Scotia was that:

> In our view, Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.[7]

In considering how to ensure that this goal is met in the Northwest Territories, certain fundamental questions must be considered. Is it possible to have a justice system of universal application which reflects native beliefs and practices? Is a justice system of universal application the desirable objective, or should the goal be to develop a separate aboriginal justice system? Although the progress of self-government is beyond the scope of

this paper, it will affect the manner in which questions such as these are answered.

In the Northwest Territories the majority of the population is native, and many native people maintain close ties to a traditional lifestyle. It should be possible here, of all places, to have a justice system which serves the needs of the native community.

The justice system is not static, and there are a variety of steps being taken right now to improve the interaction of the justice system with the aboriginal community. Because an understanding of existing plans is important to informed analysis, descriptions of current activities are contained in Appendix "A". These provide a starting point for planning the justice system of the future.

In assessing the value of current initiatives in the justice system, it is important to look at the way they are being implemented, as well as the principles on which they are based. There may be situations where the requirements for statitistics and paperwork are so onerous that the usefulness of "community based" programs is compromised. Similarly, when programs must comply with centrally controlled guidelines, true community involvement may be discouraged.

One area where much more is possible within the current justice system is diversion, for both adults and young people. There is no statutory mandate for diversion for adults, as there is for young people under the Young Offenders Act, but with cooperation from police and others in the justice system, it could operate without changes in the law. There is plenty of room for communities to take on responsibility for dealing with those accused of crimes, either before charges are laid, or at some later stage in the legal process. Communities would need to be involved in the designing the diversion model that they would participate in. As with other community justice initiatives, a balance would need to be maintained with Charter of Rights considerations, and with the interests of victims.

Much of the discussion of "native justice" has revolved around how to deal with native offenders within the current system, and how to involve more native people in official roles in the current system. There is a need to look more deeply than this.

In the United States, where native justice systems do exist, they have their origins in attempts to assimilate native people. It was felt that native police reduced the authority of the traditional chiefs, and helped replace traditional practices with "American" laws. Those selected for police and judicial duties were those willing to adapt to white man's ways.[8] While it is useful to examine American examples, this background limits the applicability of American models to modern day Canada, where the objectives for native justice are based on a positive view of native culture.

The term native justice system has many possible interpretations. Within the existing system, it might involve things such as community elders serving as JPs, or community supervision of probationers. Adult diversion could occur on an informal basis with cooperation between

police and communities. With program or legislative changes which are within the powers of the Territorial Government, it could involve things such as appointment of aboriginal persons without law degrees as judges of the Territorial Court, or establishment of community led hunting camps as an alternative to correctional institutions for some offenders. Changes in Federal legislation or the Constitution, would be required for more substantial changes such as the establishment of completely independent aboriginal community courts, or a separate system of laws. This last category would probably be linked to major self-government initiatives.

Within Canada's constitutional framework, there is more scope to devolve responsibility for dealing with municipal by-laws, territorial offences, and possibly even less serious criminal offences, to aboriginal institutions, than there is with respect to the most serious criminal cases. Changes which require amendments to federal legislation, or even constitutional reform, are not out of the question: they just require a lengthier and more complex process to be accomplished.

In the Speech from the Throne which the Governor General of Canada delivered on May 13, 1991, he said, "Finally, my Government will consult aboriginal Canadians on changes in the system of administering justice."[9] This appears to be an indication of openness to change at the Federal level which has not always been present.

Looking at the basis for the Canadian justice system, and how that compares to aboriginal traditional law, may help provide answers about the form of native justice system which is desirable.

Laws reflect the things which people think are important, the ways that they think disputes between people should be resolved. Is the individual central, or is it the community? This is one of the questions which identifies differences between native and non-native cultures. Both things may be considered important, but where one must be sacrificed for the other, the choice that is made makes a clear statement about the society's values.

In Pauktuutit's publication *The Inuit Way*,[10] we are told that in a traditional Inuit community there was no institution, and no specific person responsible for settling disputes. All members of community bore responsibility for the maintenance of peace and order. Where reference to what had been done in the past was needed, the elders were consulted. The focus was on restoring harmony to the community, not specifically on punishing the offender. The disposition depended on the circumstances of the offender, and of the crime.

Part of what worked in the traditional community related to the nature of that community. People lived in small groups often based on family relationships. Groups were small enough that each person interacted with all others. There was a high degree of interdependence for the basics of life: hunting, making clothing, etc. Because of interdependence, subtle social mechanisms could be very effective. Ostracism or banishment were likely to be very effective because they could have dire consequences.

Today's aboriginal society is very different. People primarily reside in fixed settlements, rather than living a nomadic lifestyle which allowed groups to physically move away from others they did not agree with. There is now much less dependence on one another for the basics of life. The wage economy and the delivery of health, education, and other social programs have altered this. Outside influences have brought "new crimes": drugs, pornography, etc. There is more diversity in standards of living (between those with government jobs and those without, for example) which may give rise to resentment. Unemployment, and the relative ease of meeting basic survival needs, provides more time and opportunity for discontent.

A half century or more of church and government (initially represented by the RCMP) imposing rules on native communities has not had the effect of having those rules become the dominant values of the society. It has, however, had effect of making modern native people unclear about what their traditional values were. The generation with a memory of traditional practices is dying out. This history has also accustomed native people to having social control exercised by someone else, rather than it being the responsibility of the entire community.

This is a society in transition, and one of the manifestations of that are what appear to be contradictory demands. More RCMP and better access to lawyers are wanted, at the same time as the authority of Canadian justice system, and the basis for Canadian laws, are questioned. This is a natural consequence of a system having been imposed and administered by outsiders to the community for most of the lifetime of most of those alive today. This is a demonstration of the need to include aboriginal people in decision making.

The role of elders has been supplanted in some ways by government institutions, the police, and the courts. This does not mean that they do not continue to play a significant role in aboriginal society, nor does it mean that responsibility cannot be returned to elders and respected people in their communities. There cannot necessarily be simply a return to the "old days".

Some aspects of the current Canadian justice system may not have equivalencies in aboriginal traditional law. Policing is one good example of this. Correctional facilities are another. Neither were part of the world known to traditional communities. That makes it a little more difficult to determine what traditional concepts should be applied to them.

Whether a separate native justice system would rely only on customary law, or would attempt to apply general Canadian laws as well, is one of the questions which needs to be considered. The other side of this question is whether general Canadian courts should be attempting to apply customary law at all, and if so, on what basis.

Customary law must not be seen as only a preservation of historical methods. By definition, "customs" are based on past practice, but are able to be modified to meet modern circumstances. The contrary view is condemned by Professor Jackson in the *Locking up*

Natives report:

> There is also another part of this stereotyped thinking about native peoples which requires that if they wish to assert rights to aboriginality, they must demonstrate that their "traditional" practices and laws have remained intact and unchanged. the assumption behind this thinking is that native societies are inherently static and not-adaptive; hence, they provide a corollary to the assumption that necessarily any change will be in favour of the incorporation and adoption of non-native practices and laws.[11]

In the Northwest Territories, the courts recognize custom adoptions, and custom marriages. The demand for this recognition arose because of a need for native people to be able to have recognition for their family arrangements from the larger Canadian society, and especially from the Government. Because there may be a tendency for the courts, or even the Legislative Assembly to define or codify that which has existed unquestioned in the aboriginal community, this legal recognition is risky. Like the common law, customary law is better left to gradual, thoughtful evolution or adaption to circumstances.

A similar problem is identified in the Australian Law Reform Commission Research Paper, *Reference on Aboriginal Customary Law*, where it is stated:

> Codification of customary law is out of the question, but such schemes tend toward codification.....Attempting to enforce Aboriginal customary law in a way in which it never operated in traditional society risks undermining the traditional law and authority that still exists. It also takes the control and interpretation of customary law out of Aboriginal hands.[12]

The Australian paper sets out possible models for recognizing native custom law, or for giving native people more authority within the justice system:

- diversion (to an aboriginal community program);

- aboriginalization of lower courts (native personnel) and aboriginal inputs to superior courts (The Commission suggests that this approach would not be going far enough);

- community courts - enforcement of local by-laws in courts operated by persons appointed from among members of the community;

- "Yirrkala scheme" - a form of aboriginal court which attempts to combine aspects of a western type court enforcing local by-laws with the traditional authority structure of the community. Judicial powers would be exercised by a community court. (The name Yirrkala refers to the community which proposed this model.);

- local mediation panels;

- indigenous advice (to magistrates and judges);

- administrative recognition (better police community relations, etc.);

- enforcement of aboriginal custom law in the courts.[13]

These options, and more, are also available in the Northwest Territories. The same solutions may not be suitable for all communities. Dene and Inuit have different traditions, and customary practices differ from region to region, and even community to community. Allowing for different options in different communities may seem the best solution, but there are complications with that too. Arrangements must be made for dealing with cases which affect persons from more than one community. Those from communities which choose to impose harsh sanctions may be justified in complaining that they have not been treated fairly, because they have been subjected to a harsher penalty than someone living in another community would have received.

Concern about inequality is one of the main objections which has been advanced in relation to separate native justice systems. In a paper which was presented to the Manitoba Native Justice Inquiry in October of 1989, Professor Bryan Schwartz of the University of Manitoba Faculty of Law urges against going too far toward a separate system. He says that reforms should be:

> ..... consistent with the principle of the equality of all citizens and the integration of aboriginal communities within the network of institutions and values common to all Canadians.[14]

The argument is that a separate justice system would institutionalize different treatment on racial grounds. The view that all Canadians must be treated equally by the justice system might be challenged by those who urge recognition of the sovereignty of aboriginal nations.

The equality issue also arises when one considers cases which involve both native and non-native persons, or native persons of different cultural backgrounds. A set of rules would need to be developed to determine who the native justice system applied to. Even for native people, it would be necessary to be clear about the mandate of the native system. Native persons may wish to have the option of going through the courts of general application, and, for example, relying the protections afforded under the Charter of Rights, where that might bring a more favourable result for them.
An analogous point has been raised elsewhere. A working paper prepared for the Australian Law Reform Commission summarizes the point, "An Aboriginal has rights under the general law as well as obligations within his community: not every Aborigine may be prepared to forego these rights."[15]

One of the differences in looking native justice in the NWT as distinct from the rest of Canada, is that with the excepti the Hay River Reserve, we are talking about native

persons as members of mixed communities with predominately native populations, not as residents of reserves. For this reason, serious consideration needs to be given to systems which can apply to all people in the community.

Another distinction is that in southern Canada, there are large native populations in big cities, which means that although their basic values may be the same, they are living within a different social structure than those in small, northern communities. In the United States, there are large geographically concentrated native populations, in contrast to the small and widely dispersed populations in the Northwest Territories.

A separate native justice system might, or might not, handle all kinds of cases. The Navajo courts, for example, have jurisdiction over only the lesser crimes. The U.S. *Major Crimes Act* provides that responsibility for fourteen major crimes lies with federal courts.[16] This is the same approach which has been taken in the initial establishment of native courts in Australia.

Another important issue to be considered if a transfer of judicial responsibility to community representatives is contemplated, is whether this will allow for the necessary impartiality on the part of the decision maker. The whole notion of what is meant by impartiality of the judiciary would need to be reconsidered. "Impartiality" has been taken to mean no knowledge of the circumstances, even at the expense of meaning no understanding of the social milieu in which the event occurred. In a small community, those making decisions would have known very well the circumstances, but would be expected to be impartial in the sense of not being allied to one party or the other.

One feature of a separate native justice system might be avoidance of the adversarial format of the Canadian justice system. The intention of the adversarial system is that advocates for each point of view will put the arguments in their favour to the judge. The idea is that in this way all relevant information will come forward. If members of an aboriginal culture are raised to avoid conflict, and to refrain from speaking against one another, the adversarial approach will not necessarily have the effect of putting all necessary information before the court. It may even result in the court getting a distorted picture of the situation.

There is a perception that the technical rules by which the justice system may actually prevent the full circumstances from being considered by the courts. The rules may seem to be more important than the real issues. This is compounded by having decisions made by outsiders who do not have direct understanding of the community.
The concepts described in modern legal terms as mediation or arbitration might be useful in developing native justice models. In the United States the Navajo Peacemaker Courts apply a culturally based mediation approach to situations where both parties agree to submit to their jurisdiction. This is something that could form part of an alternative justice system, or could operate as part of the Canadian justice system as it exists, with some minor modifications.

One of the confusing things for modern native people viewing the justice system is that it reflects a real separation between formal and informal methods of dealing with unacceptable behaviour. This dichotomy did not exist in their traditional society. There is confusion between the different standards of church and state in Euro-Canadian system. There may be confusion as to whether when a person is found not guilty, it means his behaviour was acceptable.

The focus of the Canadian criminal justice system has traditionally been the preservation of order by apprehending and punishing offenders. An elaborate set of protections against unjust conviction is inherent in the system. This may represent a different focus from traditional aboriginal societies, where reconciliation of the parties, restoration of harmony to the community, and justice to all concerned, was paramount.

There may also be some distinct differences in how various types of sanctions are viewed. It is fundamental to the Canadian system of Justice is that deprivation of liberty is the most serious sanction that can be applied. In practice, for people whose lives involve struggles with a severe climate, or with unemployment and boredom, a period of time spent in a facility that features warm shelter, regular meals, plentiful companionship, and recreational activities, may not seem such a major punishment. Loss of respect or ostracism within a small home community may be much more meaningful.

The Department of Justice is working with the Department of Social Services to respond to community requests for greater involvement in the justice system. Coordination is important here, because while Government Departments have distinct divisions of responsibility, the distinctions have little relevance at the community level.

Governments must be prepared to listen to what communities want, where they want changes, and what role they wish to play. Where costs are a factor, these must be indentified, and a cooperative approach to allocating funding must be developed. There must be support for communities which wish to take responsibility for elements of the justice system.

Some of the possibilities would be easier to carry out than others, but all of them, and many more, are worth discussing. These discussions, and a commitment to change, are relevant today, and they become increasingly important as the settlement of land claims comes closer to reality.

Solutions which are progressive for the short term may be inadequate in the longer term. Aboriginal persons must have control of the process by which reform of the justice system for aboriginal peoples is sought. The native majority must have ownership of whatever system is developed.

There are many questions that need to be answered in developing justice reforms or alternatives to the justice system. The important thing to remember is that despite the

complexity of considering all of these things, there are solutions to every problem which may be raised. Solutions may not be easy, but they can be found. The solutions may not be universal ones. They may have to be developed on a community or regional basis, and the solutions may be evolving ones, not immediate ones.

Appendix "A"

Current Justice Initiatives in the Northwest Territories

Justices of the Peace Program

Justice of the Peace Court has been an important part of the NWT justice system for many years. It is often the first contact with a courtroom for those who come into conflict with the law. Justices of the Peace generally preside in their own communities, and are able to deal with matters more promptly than Territorial or Supreme Court judges who travel from the larger centres.

Following the *Report of the Task Force on Justices of the Peace*[17] in 1988, plans were made to make changes to the JP program which would allow greater responsibility to be placed on JPs at the community level, and which would allow them to fulfil a more "judge-like" role. In 1990 a full time administrator for the Justices of the Peace Program was appointed. The JP Administrator works with Justices of the Peace across the Northwest Territories, and reports directly to the Chief Judge of the Territorial Court.
Vigorous efforts are being made to recruit aboriginal persons to sit as JPs in their own communities. In the past, recommendations had often simply been received from the local RCMP detachments. Now communities are being asked recommend, or give approval to persons who have the confidence and respect of the community members. The JP Administrator is visiting communities in all regions to discuss ways in which people can exercise more local control over the justice system.

A new training program for Justices of the Peace is being developed, involving video presentations, written materials, and regional sessions. Improved training about law and legal procedures will give JPs the confidence and ability to handle a wider range of cases.

The efforts to improve the JP program are aimed at giving aboriginal persons more authority within the existing justice system. The assumption is that their knowledge of the people, and their understanding of the values of the communities where they preside, will allow them to exercise their discretion in a manner consistent with aboriginal traditions.

There are adaptations which can be made within JP court practice to enable greater involvement by aboriginal JPs, and by local communities. For example, panels of JPs could sit together to hear cases. This would relieve any one JP from being solely responsible for a decision, and might more closely approximate a traditional group of elders which gave leadership in decisions affecting the community.

Some may feel that these are not large enough steps: that the aboriginal persons should be given the opportunity to preside over a uniquely aboriginal system of justice, instead of being given responsibilities within the existing system. Depending on how this question is ultimately resolved, the current efforts may be improvements in the justice system which are

important in themselves, or they may be interim measures which are part of a progression towards a completely separate system.

Legal Aid and Native Courtworkers

The Legal Aid system in the NWT has been a leader within Canada in developing resources for assisting aboriginal persons. It is probably the single most important factor in providing aboriginal persons with access to the existing justice system.

Maliganik Tukisiniakvik, the clinic in the Baffin Region, was established in the late seventies. It is operated under the direction of a community board made up of Inuit persons from the region. It has a lawyer Executive Director based in Iqaluit, full time courtworkers working from Iqaluit, and part time community representatives in most communities in the region. Since 1989, it has also had a lawyer based in the north Baffin community of Pond Inlet.

The strength of the system depends to a large extent on the Inuit courtworkers and community representatives, who play a major role in interviewing clients and witnesses, and who appear in court in young offenders cases and in some summary convictions matters. When there are frequent staffing changes or vacancies in these positions, the stability of the clinic's services are at risk. The close relationship that the courtworkers and community representatives have with the lawyers is an important feature of this system. Members of the private bar fill in when the clinic lawyers have conflicts of interest, or when there is an excessive workload. The practice has been for certain lawyers to be assigned regularly to the region, and for the Executive Director of Maliganik Tukisiniakvik to play a role in the selection and scheduling of them.

The clinics in Tuktoyaktuk (Arctic Rim) and in Rankin Inlet (serving the Keewatin Region) operate on similar principles. A legal services society has been formed in the Kitikmeot region as well, although at this point, there is no resident lawyer there.

Most of the western arctic is served by the Mackenzie Courtworkers, who work with members of the private bar who provide legal aid duty counsel services on circuit.

The regional boards of the legal aid clinics and the Mackenzie courtworkers are intended to ensure that the services provided are acceptable to their communities. This is an important link to the community for the clinic lawyers, who so far have all been non-native.

The legal aid system in the Northwest Territories is by no means limited to serving aboriginal persons, but the majority aboriginal population, and the even greater proportion of aboriginal persons who appear before the courts, mean that most legally aided clients are aboriginal persons.

The vast majority of accused persons in criminal cases in the Northwest Territories are assisted by legal aid lawyers. Civil legal aid has had a much smaller role in the legal aid system, but this role is increasing. At least part of the reason for the traditional low volume of civil work has been the lack of accessibility to lawyers in the regions, except on court circuits where their time is completely taken up with the cases on the docket. Even in the communities where there are clinics, the high volume of criminal work has meant that there is very limited capacity to do civil work, let alone provide the types of services referred to as "poverty law".

Legal Interpreter Training Program

Effective interpretation is essential to allow fair treatment in the courts for persons who speak only aboriginal languages. It is important, too, for anyone who is most comfortable in an aboriginal language. Victims and accused persons who speak aboriginal languages need to be able to understand the court proceedings, and non-native judges and lawyers need to be able to understand them.

The *Official Languages Act* of the Northwest Territories names eight official languages: Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut, and Slavey. Some of these represent several distinct dialects. The *Act* provides specifically that any of the aboriginal languages can be used by any person appearing in a Territorial court.

Short of judges and lawyers who speak and understand the languages of the people they serve, well trained court interpreters are the key to meeting these obligations. The training program which the Department of Justice has developed for court interpreters in the Northwest Territories is unique in Canada, and probably in the world.

It is a complex task to make qualified interpreters available for court proceedings. The aboriginal languages used in the NWT are structured differently from English, and were developed within cultures to which different concepts were important. Precise interpretation of words or phrases often involves an element of explanation. For example, Dene languages have dual verb forms, and Inuktitut has dual noun forms, so that interpretation to or from English, which is limited to singular and plural forms, may require explanation. Similarly, the terminology for describing kinship relationships is more detailed in aboriginal languages than in English, so that there may be several words for a single English term. Legal topics, where terminology tends to be recondite even to those fully conversant in the English language, and where the wording of a statutory provision, or the phrasing of a question to a witness, may be significant to the outcome of a case, can be particularly challenging to interpreters..

The courses for legal interpreters provide the students with information about the legal system, and the operation of the courts, so that they will have a basic understanding of the concepts and procedures which will be the subject of their interpretation. Each course also

includes some terminology development work, and this often involves consultation with elders who have a good understanding of traditional applications of words in aboriginal languages.

There are four modules in the interpreter training program. Each two week module covers a different area of the justice system. Since the program was initiated in 1988, ninety-two students have entered the program, and eighty-five have completed at least one module. Twenty-seven students have completed the entire eight weeks of the program. Students from all aboriginal language groups except Cree have participated in the program, with the largest representation from Inuktitut speakers. This is reflective of the demand for interpreters, since there are very few people in the NWT who speak Cree, compared to a very large population of Inuktitut speaking people, many of whom are unilingual. Trained interpreters are not available yet for every court sitting, but this is the ultimate goal.

Interpretation for the benefit of the parties to a proceeding or the officers of the court is normally provided consecutively, so that everyone hears both the actual evidence, and the interpretation. Improved court interpretation brings benefits to the broader community, as well as to those directly involved in the court proceedings. Where practical, simultaneous translation of proceedings is provided so that onlookers from the community can understand what is going on in court. Five sets of simultaneous translation equipment with multiple headsets have been acquired: two based in Iqaluit, two based in Yellowknife, and one based in Inuvik. Simultaneous translations of court proceedings are not always provided, but efforts are made to do this more frequently than in the past.

Jury Act Amendment

In the Canadian justice system, juries are a mechanism which allows an accused to have his case judged by his peers. The findings of fact, and the decision as to whether the person is guilty or not guilty, is made by the jury.

Juries, which allow judgement by non-legally trained people from one's community, are particularly important in the Northwest Territories, where the judge is often from a different cultural group, and different community, than the accused person. Previously, the ability to speak either English or French was a requirement for every juror in the Northwest Territories, as in the rest of Canada.

The amendment to the *Jury Act* was passed by the Legislative Assembly in 1986. It was proclaimed in 1989 after a comprehensive study was conducted by the Committee on Law Reform, and after an improved legal interpreting program had been developed. It makes it possible for aboriginal persons who do not speak and understand either English or French, but who do speak and understand an aboriginal language, to serve on juries in the Northwest Territories. This provision is unique in Canada. For aboriginal persons in the Northwest Territories, it gives greater meaning to the concept of being judged by one's peers.

There have been a number of jury trials with unilingual aboriginal language speaking jurors in the Northwest Territories since the proclamation of the *Jury Act* amendment. The provision are used only where the judge and both counsel agree that the circumstances are appropriate, and this agreement is closely tied to the availability of trained interpreters.

Public Legal Education

The Arctic Public Legal Education and Information Society operates from Yellowknife, but has the mandate to serve all of the Northwest Territories. Its objective is to provide the public with information about the justice system, and about their legal rights. It receives funding from the Northwest Territories Department of Justice, the Department of Justice Canada, and from private sources.

The activities of Arctic PLEI recognize the need to communicate with many people whose mother tongue is an aboriginal language, and with those who are not literate in any language. Translations of publications are prepared, especially in Inuktitut since many Inuit are literate in their own language. In many cases, alternatives to written material are chosen. Radio or television messages are used, and community workshops are held.

Policing

Policing in the Northwest Territories is performed by the Royal Canadian Mounted Police, under contract with the Territorial Government. There have been suggestions from time to time that a separate northern police force should be established. Economies of scale would make it difficult to replace all of the functions of the RCMP in a Territorial Force, and the technical requirements make this at least a proposition which would need to be developed over the long term. There may be a need for consideration of the more basic question of whether northerners would wish to duplicate all of the functions of the RCMP if an NWT Police Force was established.

In recent years, there have been important changes in the approach the RCMP takes to policing of northern and native communities. There is an active program for recruitment of native constables, and they are now recruited as regular constables rather than as special constables. This reflects a change in roles from the historic "special" services as guides and interpreters, to full participation in all police functions. Opportunities for educational upgrading of native constables are provided. A strong program has been developed to give native students experience with the police through summer employment with detachments. Non-native police members receive basic cross-cultural training to gain a better understanding of the people they are working with. There is an increased emphasis on community consultation.

RCMP efforts to understand and serve native communities better have not always been successful. The fact that the police force in the NWT does not come anywhere near matching the general population in the proportion of native persons indicates that there is still a long way to go with native recruitment. The level of cross cultural understanding of non-native members, and the relationship police have with the communities they police vary greatly, often depending on the individual police members concerned.

Police discretion is a pivotal factor in determining how the system affects people. Even within the current system, there is room for communities to take a much more active role in directing the police as to how this discretion should be exercised. It is possible to ask the community to set help set local policing priorities, to recommend how to deal with young people, and to indicate whether they are willing to take responsibility for dealing with accused persons in some manner outside of the court system.

Cross Cultural Education

As long as the current reality, that many of those holding positions of authority within the justice system are non-natives, exists, it is important that they receive training to give them an understanding of the values of the aboriginal groups which make up the majority of the NWT population.

Increasingly, this is being done. RCMP members receive some cross cultural education as part of their basic training. Newly appointed judges in the Northwest Territories participate in a cross cultural training session, as do lawyers appointed to work in legal aid clinics, and court staff, where possible. The Chief Judge of the Territorial Court will host the Western Canada Judicial Education Workshop in Yellowknife in June, and this will include discussions of aboriginal justice issues.

The Coordinator of the Legal Interpreting Program has offered instruction about aboriginal languages to judges, lawyers, and court support personnel. This helps provide a basic idea of the concepts and terminology which can lead to misunderstandings, and unlocks some the clues to culture which are found in language.

There is no set formula for cross-cultural training, and there is room for comment both about the training that is done, and the way in which it is carried out. Whether there are sufficient opportunities for cross cultural training, whether training should be required rather than voluntary for more people, whether the training which is available is adequate, and whether there is enough involvement from aboriginal persons in developing cross cultural training programs, are all important issues.

Victims of Crime

The Northwest Territories was one of the first jurisdictions in Canada to bring in a *Victims of Crime Act*. This legislation was passed by the Legislative Assembly in 1988, and proclaimed in force April 1, 1989. Across Canada, the justice system is giving increased recognition to the interests of victims of crime. The shift from the almost complete focus on the offender which existed previously is consistent with the origins of the social contract which allowed public prosecutions to replace individual retaliation.

Perhaps this is a lesson learned from the traditional aboriginal approach of dealing with situations holistically, considering the needs and interests of the collective.

A pilot project which allows a victim to complete a victim impact statement which will be considered by the judge who is deciding what sentence to impose on the offender, has recently been started in nine communities. This will give the victim a more direct way of communicating the full impact of the offence to the judge. The pilot project is being carried out with the cooperation and assistance of the RCMP, and will be evaluated after eighteen months.

Under the *Victims of Crime Act*, offenders convicted of offences under territorial legislation are required to pay a surcharge, which goes into the Victims Assistance Fund. Parliament also amended the *Criminal Code* to bring in a similar surcharge in relation to most Federal offences, and the money collected in the Northwest Territories under these provisions goes into our Victims Assistance Fund too. This money is available for distribution to individuals and groups in the Northwest Territories to support projects or programs to assist victims.

In 1990/91, the first full year of operation of both the federal and territorial surcharge provisions, $120,478.04 was received in the Victims Assistance Fund. Funding has been provided for a range of activities. Frequently, support has been given to volunteers or professionals working with victims in NWT communities to attend training conferences or workshops. There have also been larger expenditures such as a guide for community groups wishing to start up victims services which is being prepared by Arctic Public Legal Education and Information Society, initial support for follow up workers for McAteer House, funding for a drop-in service for victims at Ingamo Hall in Inuvik, and, most recently, funding to the NWT Status of Women Council for the production of short public information videos on family violence, aimed at the northern audience.

Distribution of funds from the Victims Assistance Fund is made by the Minister of Justice on the basis of recommendations from the Victims Assistance Committee which is appointed under the *Act*. The Department of Justice has a full time Victims Coordinator working with the Committee, and representing the Department in consultations with community groups.

With new funding for victims of crime approved in the 1991/92 budget of the Department of Justice, training for community workers who assist victims is being developed. This will be implemented with advice from Pauktuutit, and from the Native Women's Association, both of which have made recommendations about the need for work in this area.

Support for victims programs at the community level is emphasized. This reflects the view that victims must have support and assistance in their own communities if they are to overcome the effects of their victimization.

Aboriginal Rights Court Challenges Program

In 1990 the Department of Justice established a fund to pay legal expenses for individuals and non-profit organizations who seek, through the court process, to define and protect aboriginal, treaty, or other rights that pertain to the aboriginal peoples of the Northwest Territories. The Aboriginal Justice Advisory Committee reviews all applications, and makes funding recommendations.

For example, funding was provided to assist in preparing the case of an aboriginal hunter who was challenging the mandatory firearms provision in the *Criminal Code* on the basis that it imposed a disproportionate punishment, contrary to the Charter of Rights, for an Inuk who followed the tradition of hunting to feed his family and members of his community. This argument was accepted by the Supreme Court, and the "mandatory" firearms provision was not imposed.

Advisory Committee on Aboriginal Justice

The Advisory Committee on Aboriginal Justice was established to provide the Minister of Justice with advice on justice issues as they affect aboriginal peoples. It may respond to specific requests for advice from the Minister, or it may initiate review of a particular issue, and then provide the Minister with recommendations. When the Aboriginal Rights Court Challenges Program was established, this Committee was given the added responsibility of reviewing applications for funding under that program.

This year, the Committee has been expanded to enable it to play a central role in considering aboriginal issues related to the Gender Equality Review.

Gender Equality Review

As part of the response to public concerns over gender bias in the justice system, the Special Advisor on Gender Equality was appointed in December 1990 to review the justice system, identify any areas where men and women may be treated differently on the basis of their gender, and make recommendations on how any gender bias in the system can be avoided.

When the Special Advisor was appointed, it was recognized that some of the most difficult areas under her review would be those which involved potential conflict between aboriginal

traditions and gender equality rights. Do aboriginal men and women define their cultures differently? Are aboriginal women doubly disadvantaged in a system where non-native men hold the dominant positions? In those areas she will be consulting closely with the Advisory Committee on Aboriginal Justice. This Committee was expanded to enable it to play a more active role in this review.

Issues where the special advisor and the advisory committee will be working together include those relating to responses to family violence and violence against women, community involvement in the justice system, and treatment of offenders. For example, when a woman has been assaulted, is a stiff penalty needed to ensure that the action is recognized as a serious crime, or should the views of the community's elders be sought as to what sanction should be imposed? If community views are to be part of what the court considers, whose views should they be, and how should they be obtained? Are there traditional ways of dealing with those who engage in violence against family members, which should be considered by courts?

These are not simple issues, but they are important ones for consideration. Listening to what the Advisory Committee on Aboriginal Justice has to say on these and other points will be an important part of the process by which the Special Advisor on Gender Equality develops her recommendations.

Ministers' Meeting on Aboriginal Justice

In September 1991, Ministers of Justice from across Canada will come to Yellowknife to meet on a range of topics including aboriginal justice and gender equality, and will travel on to Whitehorse for a special meeting entirely devoted to aboriginal justice. At the Whitehorse meeting, aboriginal persons from every jurisdiction will be invited to meet with the Ministers to discuss justice issues with them.

A meeting of Ministers devoted entirely to aboriginal justice is a significant landmark. The NWT Minister of Justice has always pressed for discussion of aboriginal issues at meetings of Justice Ministers. The Marshall Inquiry, the Manitoba Aboriginal Justice Inquiry, the Cawsey Committee and the Blood Inquiry in Alberta, have all been important factors in recognizing aboriginal issues on the national agenda.

The decision to devote a special meeting to this is an indication of the desire of all Ministers to address these issues in a serious way. Circumstances affecting aboriginal persons in southern Canada, where there are large urban aboriginal populations and reserves, are not necessarily equivalent to those in the Northwest Territories, but there undoubtedly are many common concerns.

Dene Cultural Institute Custom Law Project

The NWT Department of Justice, and the Department of Justice Canada are both contributing to the funding of a custom law research project being conducted by the Dene Cultural Institute. Research into customary practices is being conducted in the Dogrib community of Lac la Martre by aboriginal researchers from the community working with an anthropologist from the Arctic Institute at the University of Calgary. Members of the community form the main committee directing the project. There is also a technical advisory committee of professionals from within the justice system, and from interested agencies.

Interviews of elders in Lac la Martre will form the main part of the original research. This may be supplemented by meetings with elders from neighbouring communities. The results of the research may not be directly applicable to other Dene communities, but through the use of comparisons, they will provide a starting point for others to determine what information applies to their own communities.

It is intended that the study will document traditional practices which were used to resolve disputes and deal with aberrant behaviour in this Dogrib community. This will lead to consideration of which traditional ways the community would still like to use, and how they can used to develop a system which also reflects contemporary values of aboriginal people.

Family Law Review

The report of the Family Law Review working group is expected to be received by the Minister of Justice and the Minister of Social Services in August 1991.. This group, which has included aboriginal representatives as well as legal professionals and government officials, is to recommend changes in family law which will be consistent with aboriginal customary practices. The recommendations are to deal with procedural matters such as who should make decisions, as well as with substantive matters of law.

It is anticipated that a major legislative reform package will be developed based on the Working Group recommendations. There may also be areas where the recommendations will be that legislation would be inappropriate, that customary practices should continue without interference from the legal system.

The work related to customary practices is only one component of this major review of all aspects of family law in the Northwest Territories.

Appendix "B"

Discussion notes for discussion of community justice alternatives
Some of these relate to the Department of Justice, some relate to the Department of Social Services, and others require cooperation by both Departments.

- Elders or community persons as advocates (in court, at other places in the system)
- Elders as advisors to court on community values
- *Victims coordinators in Crown office
- *Community victims support training
- victim impact statements
- community advisors for police
- *Elders as JPs (including panels of JPs)
- *community service programs
- *fine option programs - community role
- Elders/community people as counsellors/supervisors
- *Youth Justice Committees
- *Adult Diversion
- *Elders/community people taking offenders out on the land, bush camps
- *solvent abuse treatment
- *Batterers programs (for inmates, or as a sentencing alternative for offenders, or as part of a "crime prevention" program for potential offenders)
- *victims advocacy
- +family law arbitration/mediation
- +child welfare local authority and decision making
- +community law making power (matters within municipal authority, or which could be delegated by the Territorial Government)
- +community people as Territorial Court judges
- +#community courts
- #community law making authority (criminal law, and other areas given to the Government of Canada in the Constitution)

* Can be done within existing legal system, but have direct cost implications.

\+ Would require changes in NWT Legislation.

\# Would require constitutional change.

Appendix "C"

List of Points to Be Resolved in Developing Justice Reforms or Alternatives to the Justice System

How are "judges" chosen?

What is the relationship between the community or band council and the judicial decision maker?

Are decisions made by an individual, or a panel?

What types of things does the community judge make decisions about? Sentencing only, or all aspects of the case? All crimes? Less serious crimes? Child welfare matters? Other civil matters? All other civil matters, or only those with a limited amount of money or property at stake?

Who does the community court have jurisdiction over? Aboriginal persons living in that community? Aboriginal persons from that community whether currently living there or not? All people who live in the community? Anyone involved in an incident which takes place in the community?

Do people have a choice whether they will go to the community court or the general court? Can people who would not otherwise fall under the jurisdiction of the community court, (such as non-natives perhaps) opt to go before it instead of the general court?

Does the community court use the adversarial system? Does it use a consensus model instead? Does it use some other means of making decisions?

What laws does the community court apply? The laws of Canada and the NWT? Laws developed for that region? That community? Does this depend what the topic is?

How are the rulings of the community court enforced?

Are there appeals from the community court decisions? If so, where and how are these heard?

ENDNOTES

1. N.W.T. Bureau of Statistics, Population Estimates by Ethnicity, June 1989.

2. Professor Michael Jackson, Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release, (June 1988) at 2.

3. The Canadian Bar Association Committee Report, Aboriginal Rights in Canada: An Agenda for Action (Ottawa: C.B.A. Communications, 1988) at 11-13.

4. Alberta, Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Alberta, March 1991) (Chair: Mr. Justice R.A. Cawsey) at 8-22.

5. Diamond Jenness, Eskimo Administration: V. Analysis and Reflections, (Technical Paper No.21) Arctic Institute of North America (March 1968) at 24.

6. The Inuit Way: A Guide to Inuit Culture (Pauktuutit, Inuit Women's Association) at 6-8.

7. Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations 1989 (Nova Scotia, December 1989) (Chair: Chief Justice T. Alexander Hickman) at 11.

8. Barbara Duffield, Tribal Policing in the United States by Barbara Duffield (The Ontario Indian Police Commission, February 1989) at 15-16.

9. His Excellency Right Hon. Ramon John Hnatyshyn, P.C., C.C., C.M.M., C.D., Q.C., "The Speech From the Throne" (Address to Parliament, 13 May 1991).

10. The Inuit Way: A Guide to Inuit Culture (Pauktuutit, Inuit Women's Association) at 6.

11. Professor Michael Jackson, Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release (June 1988) at 64.

12. Australian Law Reform Commission, Reference on Aboriginal Customary Law: Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals (Working Paper No. 11/12) by P.K. Hennessy (Australia, February 1984) at xvii.

13. Australian Law Reform Commission, Reference on Aboriginal Customary Law: Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals (Working Paper No. 11/12) by P.K. Hennessy (Australia, February 1984) at xiii-xvii.

14. Professor Bryan Schwartz, A Separate Aboriginal Justice System? (1990) v.19 Manitoba Law Journal No.1, at 77.

15. Australian Law Reform Commission, Reference on Aboriginal Customary Law: Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals (Working Paper No. 11/12) by P.K. Hennessy (Australia, February 1984) at xvi.

16. Bradford W. Morse, Indian Tribal Courts in the United States: A Model for Canada, (University of Saskatchewan Native Law Centre, 1980) at 14.

17. N.W.T. Report of the Task Force on Justices of the Peace and Coroners (N.W.T.: Territorial Printer, August 1988) (Chair: Mr. R. Peter Baril).