FIRST NATIONS AND THE CANADIAN LEGAL SYSTEM: CONFLICT MANAGEMENT OR DISPUTE RESOLUTION?

by

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FOREWORD:

I was called to the *Barreau du Québec* (the Law Society) in 1974 and, in the course of my work, came into contact with First Nations very early in my career. Unfortunately, my first contacts were quite upsetting for me as it involved the murder of a young Aboriginal woman, in 1974, in the Abitibi area of Quebec by three "white" men. The subsequent court proceedings (in which I was not involved) showed concretely how divided were the Algonquin and the non-Aboriginal societies and how "unimportant" this case was to the mainstream society because the victim was Aboriginal.

Years after, in June 1988, I was working with the local Justice committee in Puvirnituq, Nunavik, and a young Inuk[1] woman, M. A.[2], was brutally raped by L. E. I was made aware of the incident through the community council because I was working for the Quebec Justice department and no police officer or justice personnel were available in the community to deal with the incident and people were very concerned about A.'s safety while E. was roaming around the community. Notwithstanding the fact I was not a police officer, I took the victim's statement and subsequently obtained from the *Sûreté du Québec* that they send an officer from Kuujjuaraapik, more than 1,000 km south, to arrest E. Once he was removed from the community, [the victim] and the other young women in the community felt safer but, unfortunately this man would create other

[1] Inuk, singular and plural Inuit: Aboriginal people of the Arctic formerly known as "Eskimos".
[2] In this edited version the names of victims and offenders have been omitted – they appear in the original paper.

victims. Ironically, approximately two years later I was working in Iqaluit, now the capital of Nunavut, and saw E's name on a police report: he had raped two women in Sanikiluaq. I was somewhat surprised to see that he was at large after having committed a serious sexual assault in Puvirnituq and found out that he had plead guilty and received a suspended sentence and was placed on probation for three years with one of the conditions not to return to Puvirnituq and go live in his home community, Sanikiluaq. I was shocked to find out that the Quebec court system had been so lenient with this man to the extent it seemed to me a travesty of justice. This was compounded by my sorrow for this man's other two victims, whose lives were shattered, like M. A's. I thought: How many lives need to be destroyed before something is done about this sexual predator? He was sentenced to five years in a federal penitentiary as a result of his crimes in Sanikiluaq. That was better, as while in custody he would not hurt more women, but would that solve the problem? I still cannot answer this question as I wonder whether, besides keeping women safe in his community while he was in jail, there is any other advantage to his incarceration.

Throughout my years of practice as a prosecutor in Aboriginal communities I came to realize not only how dysfunctional the justice system was but also how it could hurt and destroy people, victims and offenders, and this thesis is an opportunity for me to share with the readers those twenty-five years as a prosecutor and try to paint a realistic picture of the clash between Aboriginal Canadians and the court system. I deliberately call it a *court system* or a *legal system* and not a justice system because I am now aware that it does not bring justice to the communities. I realize my experience is unique because I know the system very well and I have seen it applied throughout northern

Canada, to Dénés, Crees and Inuit. I am a living witness of its conflict with those people and hope that this thesis can contribute to complete those necessary changes to the conflict management processes that are warranted. I would like to dedicate this thesis to M. A., C. K. and all the other Aboriginal victims of the Canadian legal system who suffered because their communities had been disempowered to the extent they failed to deal with conflicts that affected them.

I- INTRODUCTION

THE RESEARCH QUESTIONS

I have now set the stage, identifying a terrible gap between Aboriginal people and the mainstream court system, and this prompted two questions: What are the elements of traditional and modern Aboriginal dispute resolution mechanisms, if any, that conflict with the mainstream legal system, with a particular emphasis on the criminal court system? I also propose to explore the following sub question: Can this area of conflict substantiate, by itself, the failure of the mainstream court system to meet Aboriginal Canadians' needs or are there other sources of conflict that contribute to its failure?

Before I started my research and based on what I know of the conflict, I proposed the following hypotheses: **My first hypothesis is that cultural alienation is one of the most important factors that render the mainstream system ineffective and irrelevant. My second hypothesis is that if there was a dispute resolution system that was relevant to Aboriginal cultures, then it is likely that it would contribute to reducing conflicts.**

For the purpose of this thesis, the following definitions have been used:
'Cultural alienation' is a result of colonialism whereby Aboriginal cultures have been significantly eroded and replaced by the mainstream Euro-Canadian culture in a number of areas, including 'justice'.
'Dispute resolution system' means a new way for Aboriginal Canadians to deal with conflict based on their own cultures and also includes the absence of 'system'.
'Aboriginal cultures' means the diverse cultures of the first people inhabiting the land now called Canada at its modern stage of evolution.

In order to explore the two questions and verify my hypotheses, we need to examine first how the legal system was established in Canada, with a particular emphasis on Aboriginal communities and its impact on them. I will then proceed to 'map' the conflict, using Wehr's theory (1979)[3], so that a better picture of the conflict may serve as a foundation for an attempt at resolving it. What follows will serve as steps 1 (description), 2 (history) and 3 (context) of Wehr's mapping guide (p. 19) that will be finalized at the end of Chapter IV.

THE ESTABLISHMENT OF A LEGAL SYSTEM IN CANADA AND IN ABORIGINAL COMMUNITIES

When the Europeans came to North America and started to settle on this land, it became very obvious that the first inhabitants of the continent had a very different worldview than theirs and that clashes would become inevitable. Yet, at the beginning, Aboriginal people were far more numerous than the newcomers and were roaming everywhere throughout the continent. Thus, the Europeans were then in a position of weakness and alliances were negotiated, particularly in terms of trade partnerships, since that was the main reason for their coming to America (Palys, 1993, p. 2).

As time passed, newcomers slowly increased their number to the point where they formed the vast majority of the population while Aboriginal populations were declining significantly as a result of epidemics, particularly smallpox, and warfare (Duff, 1997, pp.58-61). Since contact, the Europeans believed their civilization was far superior to the indigenous societies and that the latter needed protection as their societies and cultures

[3] According to Wehr, conflict must be analyzed at two levels: the macroscopic view that explains the interaction of a multitude of circumstances, from transdisciplinary perspectives and the specific, where a particular conflict can be mapped, as a framework for analysis. The mapping guide suggests 9 steps: description, history, context, parties, issues, dynamics, alternatives routes to a solution, regulation potential and using the map.

had no real value (Davies, 1991, p. 33). Once the newcomers acquired enough power, they became more vocal about their "superiority" and started calling Aboriginals lawless "savages" and uncivilized (Fiske, 1997/98, p. 269). The legal system became part of a policy of "civilization" and assimilation (Palys, 1993, p. 3) and the mainstream, *Common Law* based[4], legal system was imposed to Aboriginal people without consultation.

Seen through today's eyes, this situation is appalling but it is important to keep in mind that those policies have been implemented in good faith, through ignorance of Aboriginal cultures and civilizations, as the Europeans considered themselves as "guardians" or "protectors" of the "Indians" (Davies, 1991, p. 33). The following quote from the *Report of Conferences between the Provincial Government* [British Columbia] *and Indian Delegates from Fort Simpson and Naas (sic) River* – 3rd and 8th February 1887 - is quite eloquent in that respect:

> The one difference, almost the only difference – between you [Fort Simpson and Naas (sic) River Indians] and the white men, is that being still Indians, or (as you put it a little while ago yourself) in the position of children, you are not permitted, so far, to exercise the franchise: that is, to vote for persons representing you and making the laws of the country;... We don't give our children the right to vote: they have to come to manhood – to be taught to read and write and think properly; and then we give them the franchise and a voice in making the laws which govern us all. You have not yet attained that position; but it is not our intention to deny it to you. (in Wilp Wilxo'oskwhl Nisga'a [WWN][5], 1997, p. 415)

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[4] With the exception of the Québec Civil Code, based on French Civil Law.
[5] Wilp Wixo'oskwhl Nisga'a, in English the Nisga'a House of Wisdom (college – university).

To suggest that the adults, particularly the Elders, who were participating to this meeting were like "children" is ludicrous and this statement is obviously aimed at giving non-Aboriginal participants good conscience.

Prosecutors have adopted an even stronger language in court when dealing with Aboriginal offenders. An example of this attitude can be found in the following quote from Crown counsel opening statement to the jury in a matter involving two Inuit men, Sinnisiak and Uluksuk, charged for the murder of Fathers Rouvière and Le Roux (Edmonton, 14 August 1917):

> These remote savages, really cannibals, the Eskimo of the Arctic regions have got to be taught to recognize the authority of the British Crown, and that the authority of the Crown and of the Dominion of Canada, of which these countries are part, extends to the furthermost limits of the frozen North. It is necessary that they should understand that they are *under the Law*, just in the same way as it was necessary to teach the Indians of the Indian Territories and of the North West Territories that they were under the Law; that they must regulate their lives and dealings with their fellow men, of whatever race, white men or Indians, according to, at least, the main outstanding principles of that law, which is part of the law of civilization, and that this law must be respected on the barren lands of North America... They have got to be taught to respect the principles of Justice – and not merely to submit to it, but to learn that they are entitled themselves to resort to it, to resort to the law, to resort to British Justice, and to take advantage of it the same way as anybody else does. The code of the savage, an eye for an eye, a

> tooth for a tooth, a life for a life must be replaced among them by the code of civilization. (Moyles, 1989, p. 38) (Emphasis in original)

These two quotes are excellent illustrations of the clash between the mainstream and Aboriginal cultures. There is a concern that civilization should be "brought" to those "remote" people, that they needed protection from themselves and that assimilation was the ultimate goal (Palys, 1993, p. 3). There is also a complete ignorance of, and contempt for Aboriginal dispute resolution mechanisms. There is a tragic irony to this situation as death by hanging was the prevalent sentence for murder at that time – a life for a life!

Once the legal system was imposed on Aboriginal peoples, that same mainstream system, with judges appointed by governments, was – and is still - used to determine the nature and extent of Aboriginal rights, based on legislation enacted by the federal and provincial jurisdictions, in other words, by the colonial power itself. Aboriginal Canadians never formally agreed to be ruled by this legal system. Older treaties make little, if any, reference to justice and modern treaties, like the *Nisga'a Final Agreement* (NFA) have a chapter about the "Administration of Justice" (Canada, British Columbia & Nisga'a Nation, 1998, p. 185) that provides for Nisga'a law making powers and Nisga'a courts based on the mainstream system (see particularly chapter 12, sections 30-51) but there is no formal acceptance of the mainstream system, except by inference.

This chapter has examined how the legal system was imposed on Aboriginal Canadians without any meaningful consultation with them, in a context where they were considered as "children", mainly because the newcomers did not understand they had their own complex and sophisticated cultures and their own social control systems. However, prior to looking into the conflict itself, the following chapter will provide a

very summary overview of the literature on the conflicts between Aboriginal peoples and the mainstream court system.

II. Review of the Literature

I will not dwell extensively on the review of literature as my research has a significant component based on existing literature about Aboriginal cultures and I will narrow my review down to the specific areas of Aboriginal justice and of culture and conflicts.

Aboriginal Justice

There is a significant body of literature in Canada, United States, Australia and New Zealand about the clash of cultures between Aboriginal peoples and colonial legal systems that stem from a common root, the British *Common Law*. I will however focus on Canadian literature pertaining specifically to the conflict with the legal system and I will suggest, as a result of this review, that while the literature is abundant, it has not yet addressed two issues: first, the very specific areas of conflict that show concretely the failures of the court system to respond to the need of Aboriginal Canadians and, second, to provide meaningful options that would address the conflict itself and the fact that it is an inter-ethnic conflict.

Numerous commissions of inquiry, the first dealing with the Donald Marshall prosecution in Nova Scotia (Hickman, 1989), then the Cawsey inquiry (1991) about the impact of the criminal court system on First Nations and Métis people of Alberta, the Manitoba justice inquiry (Hamilton & Sinclair, 1991) and, finally the Royal Commission on Aboriginal Peoples (R.C.A.P., 1996) dealt with the issue of the failures of the court system toward Aboriginal people and the latter is undoubtedly the most comprehensive. The R.C.A.P. issued its Justice report in February 1996 titled *Bridging the Cultural*

Divide: A Report on Aboriginal People and Criminal Justice in Canada. This report is based on a national consultation with Aboriginal people and justice personnel that extended over 5 years and focuses mainly on the over-representation of Aboriginal people in the court and corrections systems. It includes a short review of the Aboriginal concepts of law and justice followed by an overview of the present situation across the country, with the conclusion that the criminal court system failed Aboriginal people. It explores a number of accommodations that could be made to the system that could contribute to improve the situation but comes to the conclusion that a parallel court system for Aboriginal people would better respond to their needs. Unfortunately, besides stating that the system failed, the Commission did not explore the real, concrete reasons for this failure and I will address those issues later in this paper.

It is important to note that this report came after a stinging paper, *Locking Up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release,* written by Michael Jackson in 1988 that forcefully denounced the criminal court system as discriminatory against Aboriginal people particularly in that it tended to incarcerate them in disproportionate numbers.

A number of professionals within the court system also started realizing how it was inappropriate for Aboriginal offenders and victims. Rupert Ross (1992, 1996), a Crown prosecutor from Kenora, Ontario, who was experienced in working with First Nation people wrote two books on this issue. The first, *Dancing with a ghost – Exploring Indian Reality* reveals the general misunderstandings between First Nations and the court system and its systemic problems. He suggests that we need to explore our respective *meanings* so that the two groups can, eventually, understand each other within the context

of the court system. Later in this paper I will explore how we can bridge that gap between two cultures when meanings are not clearly understood. His second book, *Returning to the Teachings – Exploring Aboriginal Justice* brings the issue one step further, to how this "misunderstanding", when understood, could lead to healing through Aboriginal justice. These two books are, in my view, the best effort yet from any legal professionals to translate this huge cultural misunderstanding into terms that most people can understand and provide inspiration for the future.

A number of academics published major papers on the topic. For instance, the University of British Columbia's (U.B.C.) Law Review issued a special edition on Aboriginal Justice (1992) that includes a series of articles of substance on the failure of the court and prison systems in general for Aboriginal peoples. In general, those articles do not go in any great details about the specific issues of the criminal court system that are offensive to Aboriginal cultures but there seems to be a general support for significant changes to the mainstream system to accommodate First Nations and Inuit, including the establishment of a parallel court system (Jackson, 1992).

Three books focus on the impact of the court system on Aboriginal people in specific regions. The first, *Les Inuit et l'administration de la justice: Le cas de Frobisher Bay (T.N.-O.),* is about the administration of justice in the Eastern Arctic (Finkler, 1980) and is somewhat outdated but is interesting in that it identifies many areas of conflict between the Inuit and the mainstream system. Finkler focuses on certain criminogenic areas, like alcohol and drugs, and suggests that the court system needs to be more accessible and understandable for the Inuit in order to be effective, as their own social control mechanisms have been eroded beyond repair. Many of his recommendations to

make the court system more accessible to the Inuit have been applied in subsequent years – I have personally worked in that system between 1989 and 1998 – and, unfortunately, it has not contributed to decreasing substance abuse and violence in the region. As well, having more court interpreters and Inuit court workers did help Inuit understand the system better but, as we will see later in this paper, the conflicts are still pervasive as my research is much more recent than Finkler's book.

The second book on this subject was written by the late Mr. Justice William G. Morrow (1995) who was the second resident judge of the Territorial court of the Northwest Territories after the late J. H. Sissons. His book, *Northern Justice: The memoirs of Mr. Justice William G. Morrow* was published many years after his passing, by one of his sons. Morrow worked in the north between 1960 and 1976 and his memoirs give an excellent overview of how the system works in Déné and Inuit communities of the then Northwest Territories. He expresses empathy for the Aboriginal population and was willing to make a number of accommodations within the system to take into account the cultural differences he could perceive. For instance, in Sissons' wake, he accepted traditional Inuit adoption as legitimate and legal (Morrow, 1995, pp. 149-155). He also realized that the Inuit had their own conflict resolution mechanisms and he writes with much empathy about a matter where an Inuk woman, Soosee, was executed by Shooyook for witchcraft, on behalf of the whole community, and where judge Sissons imposed a very light sentence, which he describes as "a complete vindication of the jury system" (p. 70). It transpires clearly in the book that, in his view, the mainstream system works well and is adaptable to the Inuit and such adaptations should be made to accommodate certain cultural differences. In my view, Morrow did not fully appreciate the extent of the

cultural gap between Aboriginal people and the system but his efforts certainly contributed to narrowing it.

The third book in this category is *A Feather Not a Gavel: Working Towards Aboriginal Justice* by the Hon. A. C. Hamilton (2001), a former judge of the Manitoba Court of Queen's Bench. With Murray Sinclair, Hamilton was the co-chair of the Manitoba Justice inquiry (Hamilton & Sinclair, 1991). This book, published in 2001, is certainly one of the most progressive contributions to Aboriginal justice in recent past. His experience covers the province of Manitoba where he exercised his profession and came into contact with First Nations as part of his work with the Manitoba Justice inquiry. He is extremely critical of the court system, even calling it a "travesty of justice" (p. 189) and shows empathy for First Nations' desire to control their own future. Unfortunately, he confines his observations to improving the actual court system and making it more "understandable" for them as well as creating an Aboriginal court (p. 204) but limits its eventual jurisdiction to minor matters (summary convictions) and its procedures would mirror the mainstream system to a great extent. This book is an excellent contribution to the justice dialogue with Aboriginal Canadians as it shows many contradictions and inconsistencies that are common among people who are involved in the court system. For example, Hamilton seems to understand First Nations are not "punishment" oriented, yet he advocates the concept of "let the punishment fit the crime" (p. 299) and later on agrees that jails are ineffective and "horrible places of confinement", "destructive", where the "[a]ssociation with hardened offenders and career criminals increases the damage to the first offender and bears a direct relationship to what happens on their release" (p. 302).

Actual literature on the clash between Aboriginal peoples and the mainstream court system is mostly about adaptation of a system that is believed to be excellent, so that Aboriginals can "fit in". It is seldom considered as a deep conflict between completely different cultures to the extent that it could become part of an identity crisis. Literature about intercultural or inter-ethnic conflicts abounds as they often trigger violence and warfare (Tidwell, 1998, p. 142). I will now turn to the literature about intercultural conflict that is the most relevant to the matter at issue.

Culture and Conflicts

So far the literature has been very general in terms of cultural conflicts and tends to focus on its potential for violence, as these types of conflict are the cause of most inter-ethnic wars and their consequences are devastating for the protagonists. Alan Tidwell's (1998) contribution to understanding cultural conflicts is very important in that he situates such conflicts in a more general context. In *Conflict Resolved? A Critical Assessment of Conflict Resolution*, he explores the evolution of conflict theories and then proceeds to show how they are applied to various types of conflicts, including intercultural conflicts in the chapter on "Enemies". He demonstrates that those conflicts tend to become intractable as they escalate and may lead to xenophobia. It is important to note his definition of ethnocentrism: it is "the belief in the primacy and centrality of one's own culture" (p. 142). Obviously, as I will demonstrate in this paper, it applies to this conflict. His review of conflict resolution processes demonstrates that the issue of intercultural conflicts within a state are extremely difficult to address, particularly because of the *imbalance in power*. In my view, none of the conflict resolution processes reviewed can be successful in our context and I plan to address this issue later.

Michele LeBaron Duryea's article *Mediation, Conflict Resolution, and Multicultural Reality* (cited in Macfarlane, 1999, p. 31) offers what I consider an extremely valid perspective to the actual conflict by showing the difference between individualist and collectivist societies and I suggest this applies to Canada as the mainstream society is clearly individualist while Aboriginals are collectivists and this will assist my discussions in clarifying each group's perspective. For example, Aboriginal people tend to prefer a group process to deal with conflict in their communities while the mainstream system relies heavily on adjudication and individual rights. I will explore these differences more in-depth later in this paper. This can be linked with Stella Ting-Toomey's theory (cited in Macfarlane, 1999, p. 28) that there are two main categories of cultures: those with a low context, like western individualist cultures, and those with a high context, like most Asian cultures – including Aboriginal cultures - that tend to be more collectivists.

One very important contribution to intercultural conflict is the article by George Irani and Nathan Funk (1999) *Rituals of Reconciliation: Arab-Islamic Perspectives*. It is obvious that western-based conflict resolution mechanisms are not appropriate for cultures that have different worldviews, like Arab nations. Trying to resolve such conflicts lead inevitably to misunderstandings and are counter-productive. This is a lesson that Canadian authorities need to learn in their dealings with Aboriginals. What is even more striking is the similarities between Arab-Islamic traditional means to address conflict and some First Nations processes. For instance, they both have a communitarian approach to conflict that must be resolved at the community level. The most remarkable similarity is between the Arab *Sulh* and the Nisga'a conflict resolution mechanism

described by Dr. Bert McKay, a recognized authority on the history of the Nisga'a nation, at a meeting we had in New Aiyansh in November 2001 (WWN & Department of Justice Canada [DOJ], 2001). Both have rigid rituals that are designed to avoid retaliation between the families. Both involve senior leaders of the community or clan and both end up with a meal or a feast. For Irani and Funk, those processes that stem from the people's cultures are more likely to be effective because they are connected with the culture and are relevant to the participants. Other foreign (western) processes have much less chances to be successful and I might add that this is demonstrated by the inefficiency of our court system in Aboriginal communities.

In the context of inter-ethnic conflict, there is the extremely valuable contribution by Vamik Volkan (1999), *The Tree Model* that proposes a psychopolitical approach to resolving those types of intractable conflicts based on rebuilding trust between the parties. I will elaborate later in this paper on the application of this model to the conflict at issue and I will propose a process based on it.

Finally, a recent book by Vern Neufeld Redekop (2002), *From Violence to Blessing: How an Understanding of Deep-rooted Conflict can open Paths to Reconciliation* is a valuable contribution to the intercultural conflict. Redekop uses the Oka Crisis as a case study to apply his theories about conflict resolution. According to the author, identity crisis tend to provoke deep-rooted conflicts and, through escalation, each party mirrors the "other" in their response to what they perceive as a threat. Scapegoats tend to crystallize the conflict and are often the trigger for violence when people become dehumanized. The Oka crisis (in 1990) is a good example of mirroring and scapegoating and is still unresolved. Mimetic structures of blessing have the

potential of effecting reconciliation between the parties. Redekop ties mimetic structures of blessing to justice: "A key ethical dimension within a mimetic structure of blessing relates to justice. There are many approaches to justice, including restorative justice, distributive justice, and historical justice. All of these contribute to better relationships among people." (p.278)

Redekop leaves many questions unanswered. For instance, according to his mimetic structures of blessing, will the eventual Aboriginal conflict management mechanisms mirror or mime the mainstream system? If that were the case, we may end up in a new assimilation cycle, particularly because many Aboriginal people have a better knowledge of the actual dominant system than their own traditional systems and this may in fact contribute to assimilation.

The literature provides us with excellent tools that can be used to analyze the conflict at issue and afford new, creative solutions. There is no connection between the two streams of literature, on Aboriginal justice and on conflict resolution, and there is a need to tie those two areas together and apply to our contemporary context, but with an Aboriginal perspective.

III. The Impact of the Legal System on Aboriginal Canadians

I will now examine the impact of the implementation of the mainstream system on Aboriginal communities. It is obvious that Aboriginal peoples have been disempowered through the application of mainstream laws and processes and the attempts to redress some of those torts, as we will see, can also contribute to the harm they are trying to address, particularly through acculturation. I will also examine how traditional Aboriginal conflict resolution mechanisms were eroded and, because of this, there is a gap between those traditional ways and the modern lifestyles. In other words, those traditional mechanisms did not have the opportunity to evolve along with the communities and the task is now difficult to link them with modern life.

The Dominant Society Takes Charge

According to Palys (1993), the legacy of Canadian colonialism has been "horrific" for Aboriginal Canadians in that it caused the almost complete disintegration of their societies (p. 5). The legal system is part of this legacy and contributed to this disintegration instead of bringing peace and safety to the communities (Hickman, 1989; Cawsey, 1991; Hamilton & Sinclair, 1991; R.C.A.P., 1996).

Basically, the mainstream court system is foreign for most Aboriginal people. The court system is generally composed of non-Aboriginals who are not familiar with Aboriginal cultures and who use their own perspectives and worldviews in doing their work. Judges use their own references to assess the credibility of witnesses and the process is always adversarial, which is offensive to most Aboriginal cultures (I will deal with this issue later in this paper). Lawyers and judges also tend to use legal jargon in court, which compounds the cultural gap between the court and the community,

particularly where people do not speak English or have English as a second language. The problem gets even worse when circuit or traveling courts are involved. Those courts come to the communities once in a while and in some communities, like New Aiyansh in Nisga'a territory, it could be once every four months. When the court gets to the community, there is little if any time for the lawyers to meet their clients or witnesses and the process is rushed as if courts were sitting in the community on a regular basis, like cities where there is a courthouse. Once the court is finished, the "court party" leaves town immediately without having time to meet with local justice committees or community leaders (York, 1990, p. 154 and personal experience in the Arctic). Thus, the judge and lawyers have little knowledge of the community except through their sporadic visit (assuming there is little turnover in lawyers and judges) and receive input only from the police or the probation officers, who are often outsiders.

Those are only few of many symptoms and not the cause of the problem. Yet, justice personnel, some very alarmed by those reports and others by what they were seeing in court, came to the conclusion that the court system could be "adapted", to some extent, in order to solve this problem. For example Mr. Justice Sissons, who was the first Territorial (circuit) Court Judge in the Arctic, accepted the traditional Inuit practices of adoption and integrated them as part of circumstances he would take into account in his judgments (Morrow, 1995, pp. 149-155). Other judges tried different avenues. Judge Barry Stuart (1997) of the Territorial Court of Yukon, thought of involving the community in the sentencing process by establishing a procedure, the *sentencing circle*, whereby members of the community would sit in a circle with court professionals, the accused and, where possible, the victim. The circle is meant to be a way for the court to

receive feedback from the community about the offender and the victim and assist in designing a "healing plan" if appropriate and where there is such capacity. The judge retains the ultimate decision and can accept, reject or modify the circle's recommendations.

Those two examples show that the mainstream system is trying to "accommodate" or integrate some Aboriginal features in its own system in order to make it more acceptable to First Nations. Unfortunately, and as mentioned above, those initiatives did not reduce the number of Aboriginal people in the court system; in fact it did exacerbate the problem as in 1996 the R.C.A.P. found that over-representation of Aboriginal offenders in prisons had worsened (p. 32). Instead of leaving traditional Inuit adoption to the local authorities, the court system integrated the Inuit customs and "legalized" the process so that Inuit now must go before the court when they want to adopt a child instead of using their own traditional process. The net is thus widening and some of these initiatives can have significant adverse impacts on the participants (R.C.A.P., 1996, pp. 125-126). I was personally made aware of victims who were intimidated into participating in sentencing circles even though they objected to the process but the most common are the victims that are silenced by the circle (Crnkovich, 1993, pp. 11-14).

EDUCATION OR ACCULTURATION?

Coupled with *Public Legal Education and Information* (PLEI) programs funded by the Department of Justice[6], accommodations to the system are viewed as educational tools. Indeed, either by integrating some Aboriginal features in the system or providing

[6] Throughout this document "Department of Justice" (DOJ) refers to the federal Department of Justice a.k.a Justice Canada.

information, it helps the authorities to explain its functioning to Aboriginal peoples. There is also a thrust to indigenise the system, that is, hire Aboriginal personnel within the system so that they can understand it better and, thus, make it more beneficial for their communities.

Unfortunately, in a cross-cultural environment, this strategy has the side effect of eroding the "other", weaker cultures. Since the system is deeply rooted in the mainstream culture, educating Aboriginal peoples amounts to trying to teach them the advantages of the system at the expense of their own traditional conflict resolution mechanisms and with the ultimate results of contributing to their assimilation to the dominant culture (Rouland, 1983, p. 310).

In fact, the proposed solutions mainly involve Aboriginal people adapting themselves to the mainstream system. Conversely, that includes cross-cultural courses for judges and other court personnel so that they can apply the law in a way that Aboriginal people can understand. The most notorious proponents of a parallel justice system for Aboriginal people, like the Honourable A. C. Hamilton, suggest that what *they* need are "judges who will understand them, their communities and their background and they need culturally appropriate services to help them resolve problems so they will not run *afoul of the law*." (Hamilton, 2001, p. 193 – emphasis added by author) Again, the insidious effect of this type of education, whereby the system is indigenised or the justice personnel is more sensitive to Aboriginal cultures, is, ultimately, assimilation to the mainstream society and I will discuss further in this paper how this could be addressed. I will now turn to the impact of the system on traditional conflict resolution practices.

THE IMPACT ON TRADITIONAL CONFLICT RESOLUTION MECHANISMS

It is now well accepted that Aboriginal peoples in America did have their own conflict resolution mechanisms at the time of contact with the Europeans. In fact, this system was so sophisticated that the Europeans could not understand the subtleties of family and clan relationships since these were oral traditions, as opposed to the European way of writing everything down (R.C.A.P., 1996, pp. 13-14). Jennings (cited in R.C.A.P., 1996, p. 15) states that each First Nation had its own unwritten code of conduct that was known by all members of the community through oral teachings and example. Any derogation to those rules was addressed by the family or a leader whose duty was to enforce those unwritten laws. Obviously, those rules were very important to avoid retaliation and revenge even though that existed and still exists today in most societies. One of the most important differences with European laws was the fact that conflicts involved people, i.e. the perpetrator was in conflict against the victim's family while, for the Europeans, a crime was committed against the state. Jennings gives an example of disposition as a result of murder: In the European society the offender was executed publicly while in the Aboriginal society, the perpetrator had to spend the rest of his life serving the victim's family.

Of course, this is only one example of Aboriginal conflict management mechanisms, which tended to vary widely between cultural groups in the Americas. Another culture, the Inuit of the Arctic, reacted differently to murder as it often lead to endless retaliation or "vendetta" between families which were so destructive to the group that it was often replaced by duels (fists, song etc.) (Rouland, 1979, pp. 50-68; Rousseau, 2003, p. 198).

My purpose though is not to make an inventory of dispute resolution mechanisms but rather to show that they have been significantly impacted to the point where most of them disappeared to the profit of the mainstream court system. One of the common characteristics of how Aboriginals dealt with conflict was the flexibility of the response and the fact that the matter would be addressed collectively, either through the family, clan or through the whole community. There was a sense of freedom in addressing conflict and when the Europeans took over, that sense of freedom was eroded, at least in the Aboriginals' view. The newcomers were imposing rules and were taking over the daily life of those people who were used to freedom. For instance they were relocated in reserves and villages or communities as opposed to their traditional nomadic way of life, even for those that were more sedentary, like the people of the British Columbia coast who used to travel inland during the summer and were back in their coastal villages for winters (Duff, 1997, pp. 85-98). Slowly, a bureaucratic administration was set in the reserves and people were ruled by the *Indian Agent* and other newcomers. Finally, with the implementation of the court system and the coming of the police in the communities, people did not feel free anymore and were always told how to behave and what to do (Ross, 1992, pp. 107-111).

Thus, the dominant society took over, managing the life of Aboriginal people in all respects and the traditional social mechanisms were marginalized and, in some cases, eradicated. As an example, I will examine the Sechelt Nation traditional conflict management mechanisms.

- SECHELT

This is an unfortunate example of traditional ways that were eroded by the contact with the mainstream society, its rules and laws. The Sechelt Nation occupies the lower Sunshine Coast of British Columbia on Georgia Straight, north of Vancouver, between Howe Sound and Jervis Inlet, since time immemorial and is part of the broader cultural group called "Coast Salish". Their population was estimated between 5,000 and possibly up to 20,000 at the time of contact. However, because of diseases and as a result of contact, their population almost vanished and only 167 were still alive in 1881 according to the first official census (Francis, 2000, p. 638). By 1871 the Sechelt were converted to Catholicism through the work of Father Durieu who imposed a new social and political structure based on four chiefs, watchmen and soldiers and the Sechelt had to give up all their traditional dances, potlatches and shamanism (Duff, 1997, pp. 134-135). Today there are an estimated 1,000 Sechelt members and it is the first First Nation in Canada to have achieved self-government in 1986 (Francis, 2000, p. 638).

Probably the most remarkable difference with western cultures is the complete ignorance the Sechelt used to have of anger and the resulting conflict resolution process they used, the TSOH'-LOH-MAT, whereby the "person wronged established his true greatness through giving to the perpetrator of the wrong more than he could give back." (Peterson, 1990, pp. 19, 67). This was based on the belief good (the Condor) surpassed evil (the Serpent) and, thus, the only way to repay a hurt could only be done by an act of generosity – a good (p. 20). In other words, the only power of a supernaturally good entity was to do good as those entities could not do anything that would bring evil – they could not punish the wrongdoer but only do something beneficial. Punishment was not known as a response to a wrong since it would have been a manifestation of evil. Yet,

this response to wrongdoing, while it appeared to condone a bad action for western cultures, was very powerful in the Sechelt society as receiving gifts in response to a wrongdoing was such a disgrace that the wrongdoer would lose face in front of his community. Such a way of losing face was intolerable in that society but the newcomers did not understand this. In fact, losing face is not only intolerable to the Sechelt but also to other Aboriginal cultures and many eastern cultures. For instance, Cohen (1991), referring to non-Western societies writes:

> Face (one's standing in the eyes of the group) must be preserved at all costs. Dishonour (the loss of a good name) is a fate worse than death. The honour of one's family has equivalent priority; the family name is sacrosanct. In the face-to-face society, where all transactions are personal and anonymity is not an option, no humiliation is ever forgotten. Because the social disruption caused by loss of face is likely to be severe – in some of these societies the feud is still endemic – elaborate mechanisms have evolved to protect not only one's own face, but also that of others. (p. 24)

This did not apply for homicide or very serious matters and the wrongdoer would be banished from the community in those serious cases. It reflected the fact that this was not an individualistic society but rather collective and the exclusion from the group was the most drastic sanction (Peterson, 1990, p. 51). It is also important to note that this process was only valid within the Coast Salish group and if a wrong was inflicted by someone outside the group, the TSOH'-LOH-MAT would not apply and retaliation was the rule (p. 29).

Like for all the Aboriginal people on the Northwest Coast, the traditions of the Sechelt were suddenly eroded by the contact with Europeans and, as mentioned earlier, the decimation of the Sechelt people also contributed to the replacement of the old traditional culture by Christianity (Peterson, 1990, p. 129). There have been many attempts at reviving traditional Aboriginal cultures, including the ancient conflict resolution mechanisms. However, it has become difficult to determine what exactly was traditional "justice" because, over time, contact has influenced peoples' perception of the old cultures. For instance, many First Nations in Canada have embraced the Healing Circle as their traditional way of dealing with problems while it appears that this process might have been confined to the Plain Aboriginals, where the "Medicine Wheel" was used. Yet, at some point in time, many First Nations may have adopted the concept of the circle as their own and there is no reason to reject this process if it responds to the needs of the communities. In that context, circles are mentioned in Sechelt traditions, as reported by Peterson (1990):

> Basil Joe commented on the process by which affairs were conducted in a village such as TSOH'NYE, in Deserted Bay, his birthplace. The chief and his adult male aristocracy would sit in a circle, so Basil recalled, to discuss matters on which decisions must be made. Each member of the ring was entitled to offer an opinion – carefully weighed, so that it would not bring discredit to his reputation. He must, among other inhibiting conventions, avoid telling a lie. (p. 41)

We understand from this quote that the old concept of saving one's face is present as people must speak the truth so that they are not discredited, which is akin to loosing the face. Moreover, this process is done in a *circle* and it is likely that it is a genuinely

traditional process as the story told by Basil Joe predates the expansion of the "Healing Circles" concept throughout North America. This might provide a lead as to how traditional conflict resolution mechanisms would have evolved if they had had a chance to flourish after contact.

This chapter has demonstrated that the dominant society took charge of Aboriginal people and that impacted negatively on their traditional conflict regulation mechanisms. With all the best intents, more education about the court system causes indirectly the erosion of Aboriginal cultures. More specifically, we know that the Sechelt had their own conflict management mechanisms based on a culture that does not include punishment but that was not known by the settlers. The impact of contact has been devastating to Aboriginals and their cultures have been impacted so deeply that I will argue their very identity is threatened. How should that be addressed? Before answering this question, we need to analyze the conflict through the identification of a number of elements that concretely show what the conflict is about and examine the conflict theories that could apply in the circumstances.

IV - The Conflict – an Analysis

Before addressing the sources of conflict within the mainstream system, I will examine how my research was conducted and how the process changed between my first proposal and what I would discover later through my work.

Research Methodology

My planned methodology proved not to be suitable for this project because the very nature of this type of conflict involves traumatic personal experiences. Initially I had planned to interview a number of members of two First Nations in order to have their perception of the situation in general. This data collection process proved to be unhelpful because the best information would come from those who had personal contact with the justice system, particularly the criminal courts, and this proved too emotional for most protagonists in the system to allow them to open up to a stranger. In fact, it became clear that an inductive approach was the only way I could make the situation *understandable.* Like Becker for his research on marihuana, I had easy access to Aboriginal victims of crime and witnesses, for approximately 25 years, providing me with qualitative information that allows me to explain the phenomenon (Palys, 1997, p. 46). That unique experience would be much more helpful in discussing the conflict than interviewing a random selection of people that would not have the time to develop a rapport with me and share with me their most profound concerns about the system. According to my own experience, Aboriginal victims, if given some time, do not hesitate to confide in the prosecutor, despite the legal concept that prosecutors, being agents of the state, must remain aloof from the victims. Thus, the contact with hundreds of witnesses, most of them Aboriginals, provided me with a unique insight about the conflict between the court

system and those individuals who, for the most part, also became victims of the clash between the mainstream system and Aboriginal cultures.

Yet, my face-to-face interviews with members of the Sechelt Nation confirmed that this information applied also very well to them. I used a questionnaire (Appendix A) so that my interviews would be uniform and I met with six members of the Sechelt Nation. During the interview process I decided not to follow exactly the order of questions because it was important for me to let the participants express themselves comfortably, without interruption, letting them elaborate on the subject. I was able to adapt to any new direction taken by the participants because of my own familiarity with the subject matter and the court system. My questionnaire was useful to ensure all the topics were covered. In fact, it had some characteristics of participant-driven action research except that the topic, as I will demonstrate further in this paper, is so broad that the process will have to take many years to unfold (Dick, 2002, p. 3). Thus, since action research is cyclic, we are in the first stage and the action outcomes are yet to come.

I have also used history as part of the basis for this paper. I hasten to note that I am mindful history is often coloured by the worldview of the authors, particularly when it is based on historical documents. The authors of those documents saw the world according to their own culture and to quote Stuart Macintyre (2003), history "does not give unmediated access to the past, it is simply a trace and to it the historian must bring a trained imagination." (p. 3) I did not hesitate to use information based on oral history for the Sechelt Nation (Peterson, 1990) since it is now an accepted source of information and reflect the Aboriginal perception of history (Palys, 1997, p. 158).

Moreover, I was mindful that my own culture could blur the information I had received from Aboriginal people. On the one hand, there is the danger of overidentifying with the group in question and, on the other hand there is a need to give them a voice, without interpreting their meaning with my own culture (Palys, 1997, pp. 14, 203-206). I tried to respect this difficult balance between those two poles.

I now realize that one has to do the 'job' to understand the system and its clashes with individuals of a different culture. I will therefore explore what those years of interaction with Aboriginal witnesses and offenders taught me and what I can contribute to the discussion about the failure of the mainstream court system towards Aboriginal Canadians. In the next section, I will review a number of concrete factors that demonstrate the inappropriateness and the irrelevancy of the criminal court system for Aboriginals.

THE FAILURE OF THE MAINSTREAM COURT SYSTEM IN ABORIGINAL COMMUNITIES

In general, the problem for Aboriginals is described as "lack of adequate legal representation, problems with language and communication of legal concepts and assertion of legal rights." (Zimmerman, 1992, p. 383) I propose, though, that the most fundamental clash between Aboriginal cultures and the mainstream system resides in the fact that the court system is, through its very nature, *adversarial.*

• THE ADVERSARIAL LEGAL SYSTEM

Adversarial, in this context, means that the system is composed of two adverse parties – in criminal matters, the prosecution and the defence - that are trying to put the *blame* on the other one – the offender or the victim - for the purpose of "winning" the case, through a decision made by a neutral third party, the judge. For Aboriginal people,

this is contrary to their cultures whereby conflict is resolved through conciliation and the restoration of peace and harmony (York, 1990, p. 155; Ross, 1992, pp. 12-28). Ross cites Clare Brant, a Mohawk psychiatrist: "We are very loath to confront people. We are very loath to give advice to anyone if the person is not specifically asking for advice. To interfere or even comment on their behaviour is considered rude." (p. 13)

This fundamental feature of the mainstream system invites Aboriginal witnesses to behave in a manner that is entirely inappropriate for them. In fact, the system compels those witnesses to comment about someone else's actions in front of the whole community, as people tend to attend court sittings when they take place in small communities (personal experience). Most of the time, it is one of the most embarrassing situation a person can encounter and people often have nightmares and are sick when it is time to go to court. In extreme circumstances a victim or and offender will commit suicide instead of having to face their communities in such a way. There was the case of C. K., an Inuk woman born and raised in Resolute Bay (Nunavut) who had been sexually assaulted by a non-Inuk teacher in her youth. When over thirty former students came forward to disclose what this teacher, M. C., had done to them, he was charged and the victims were ordered to testify at a preliminary inquiry. K. testified but she was mortified for having to do this in front of the court and the community, even though Cloughley was not a member of the community and was not even Inuk. Months after the preliminary inquiry and shortly before trial she was upset at the prospect of having to testify in front of a jury and traveled to Yellowknife, the main city of this part of the Arctic, looking for help. She could not find any assistance in the city and ended up intoxicated on the streets in the middle of a bright end of June night. She was arrested by

the police and placed in the 'drunk tank[7]' where she was found lying dead in the morning, having hung herself with a piece of clothing. There are numerous other examples of Inuit that committed suicide just before having to go to court and that is caused by the traumatic experience of having to do publicly something they consider wrong.

The oath or the promise to tell the truth also compounds those difficulties. Witnesses are sworn to tell the truth and, when the accused is acquitted, they believe that the judge thinks they have lied. I had numerous witnesses who asked me if they would be punished for having been disbelieved by the court as they testified under oath and, obviously the judge did not believe them. For them it is an embarrassment in front of the whole community since the system is based on a win-lose approach and if the accused is acquitted, it means for the community that the victim has lost the trial and, thus, is considered as a liar.

Since the system has been in place for many years now, many witnesses protect themselves by stating they don't remember what happened for fear that if they testify and are not believed they would be rejected by the community or loose the face. Some of them will simply disappear and move to other areas of the country to avoid facing court. K. N. is an example on point: she was raped and immediately after the crime she left the north and went to live in British Columbia. She failed to appear as a witness at the accused's preliminary inquiry and a warrant for her arrest was issued. She was arrested in B.C. and had to travel across Canada back to Iqaluit, which took a week, while she was detained and handcuffed. When she finally appeared in court, the accused decided to

[7] A large cell at the police station destined to house intoxicated people until they sober up and can be released.

enter a guilty plea. N. [the victim] was detained in extremely difficult circumstances because she had failed to appear in court and, as a victim, she was treated like a criminal. This was caused by her fear to face the accused, the community and the court.

- THE RIGHT TO SILENCE

Another feature of the criminal court system that is mystifying for Aboriginal people is the right to silence. In our legal system, the accused has the right to remain silent, that is, he cannot be compelled to testify and no adverse inference can be drawn. On the other hand, for many Aboriginal cultures, it is absolutely crucial to let everyone who has something to say about an incident to speak. Of course, the most important subjects in that discussion are the protagonists and it is important to let them say their position (not to blame the other but simply to let them express themselves). So, it is expected that an accused person will say something about the event that is at stake and when the accused remain silent, people are completely mystified and feel that there is so much that is missing that they are helpless.

But the picture gets even worse when we compare the fact that the victim is forced to testify, as she is compellable, while the offender has an absolute right to remain silent... Many told me this was extremely unfair and held the system into disrepute because they thought the victims were treated unfairly. Coupled with the N. case where the victim was incarcerated for over a week for failing to appear, it is easy to understand why the system is perceived as unfair and unduly harsh on victims. But, unfortunately, this is not all – there are many other areas where the system is dysfunctional.

- VICTIMS' OSTRACISM

In sexual abuse and family matters, often the victim is shunned by the community and may even be banished. This happens because the victim is perceived as turning against her community because she got the court system involved, which may result in the offender being sent away, to jail. This is compounded by the fact that the family unit is crucial in small Aboriginal communities and that the court could cause a couple to split is seen as highly inappropriate. It is not clear whether the strength of the family unit is a result of Christianisation or whether it results from the traditional needs of men and women to unite as a family and care for each other and the children but, nevertheless, the impact on victims is overwhelming. Many Aboriginal victims told me before going to trial that they called the police only to stop the pain from occurring and to get a sort of "time out" but that they had no intention of going to court with this and see their family or their relationship destroyed. They often told me they did not want to testify against the offender as they thought the court system could not help them and, worse, the offender would be more dangerous when he returns to the community after a period of incarceration. I can attest that they were right as violence usually escalated after the offender returned to the community.

- WITNESSES

  I) CHILDREN

Child abuse is an unfortunate reality in many Aboriginal communities and the situation is usually dealt with two different approaches. First, there is the Child welfare intervention, often a community process, where the purpose is to protect the child from further abuse and provide treatment to the victim and the family so that the emotional wounds can heal. The second approach is to deal with the offender, if known, through

the criminal court system and the child becomes a witness in a court procedure. For a young Aboriginal child, having to testify in court, often twice, is a frightening experience, particularly in smaller communities where a child may have little interaction with non-Aboriginal people. The first step in the investigation is usually for the police or a social worker, to take a videotaped statement from the child. The child is then asked very personal questions about events that he often does not understand but realizes are wrong and important for adults. Then the child will be called as a witness at the preliminary inquiry and must testify even though the law allows the use of videotaped statements (section 715.1 *Criminal Code*) as he must confirm under oath or a promise to tell the truth that the tape is true.

The child witness is questioned by both Crown and defence lawyers, whom he generally doesn't know and has never met. He must perform before a judge, in a solemn environment, and, in most instances, in front of the public. Most Aboriginal children I met were completely terrorized about having to speak about the offender in front of the court, let alone the community. We tried screens between the child and the offender or even closed circuit television but the fact of having to tell all those personal things in front of strangers remained very upsetting for children. Under cross-examination by the accused's counsel, children may be asked leading questions, trying to confuse them and discredit their testimony, which often occurs. As mentioned earlier, it is not appropriate in Aboriginal cultures to comment about another person's actions and the court system is asking children who are victims of violence to do exactly what they were taught by their culture not to do. Thus, in most cases, child witnesses come out of the experience re-victimized and, the accused being acquitted, they feel they have done something very

wrong, since they think the judge or the jury did not believe them. Child victims also get confused about what happened to them and there is no resolution in the community about the incident and no healing takes place after court. Often the court process destroys the early intervention by social workers because of its impact on the child. Even where the offender is found guilty, the child will personally take responsibility for sending him to jail and for causing pain to his family.

II) ADULTS

Aboriginal people do not question other people, it is inappropriate and it is believed the other person will volunteer the information if they wish. As mentioned, it is inappropriate to comment about other peoples' actions. So, they will often say that they don't want to answer the question because what they said is already in their statement and when the judge forces them to answer the questions, they become very vague and provide only minimal information. When they are cross-examined, because they don't want to challenge the lawyer, they will often follow his suggestions instead of speaking up and saying the question is not accurate, thus creating a number of inconsistencies. In fact, cross-examination is perceived by witnesses as putting them on trial instead of the accused and they become very nervous. They may not understand the question but are afraid to say so because it would be embarrassing for them, in front of all these educated people and the community. So, they try to answer whatever they think the question is and it takes no time that there is a major misunderstanding, which will impact negatively on the witness' credibility. It is interesting to note that in Greenland, forceful cross-examinations that are seen as essential in our system are considered inappropriate and counsel who would venture in that field could be cited for contempt of court (Inutiq & Rousseau, 1994, pp. 24-25).

Thus, what the system claims is the search for truth is based on human witnesses for the most part, on information that is not forthcoming and that has to be elicited through coercion. This evidence, forming the basis for the determination of guilt or innocence of an accused person, is far from complete and exhaustive to the extent that, in my view, it is generally insufficient to provide the court with the tools it needs to make that determination.

Assessing witness credibility is one of the most difficult task that a criminal lawyer or judge is asked to perform, let alone when working in a cross-cultural environment. For instance, people of western cultures tend to believe that if the witness does not look at the questioner or the judge in the eyes, he is not truthful. This collides with an Aboriginal concept that it is not appropriate to stare at someone that you don't know or that is in a position of authority. So, an Aboriginal witness may not look at the lawyers or the judge in the eyes because, for that person it is highly inappropriate and his testimony will be rejected for that reason (personal observation).

III) SEXUAL CRIMES

In all matters involving a sexual crime, where the witness must speak about very personal matters and where the victim is often cross-examined on her previous sexual history, they find it even more difficult to testify than in any other type of crimes. In a very recent case involving non-Aboriginal offenders and an Aboriginal victim, they were acquitted partly because, according to a newspaper article, "the girl failed to give details of the September 2001 [date of the offence] encounter." (Warick, 2003) The reporter goes on to state: "Crown prosecutor... admitted Thursday that made it more difficult to prove the case. 'She is almost the only person that we could rely on to give that evidence. There were no other eyewitnesses'". This matter was even more complex

because the jury that acquitted the two men who were "white" was exclusively composed of "whites" too and it sparked a fiery debate about jury selection in Saskatchewan. This is a clear indication of inter-group tensions and it may even exacerbate them, as public demonstrations were sparked by the verdict. This is a typical example of what happens to many Aboriginal victims of sexual assaults and obviously the court system is absolutely unable to provide them with any closure to that traumatic event.

IV) Evidentiary Issues

In Canadian law there are numerous rules determining the types of allowable questions and what a witness may testify about. One of the most difficult rules for Aboriginal witnesses bans hearsay, i.e. a witness cannot testify as to what another person told him. This is a problem for Aboriginal witnesses because they promised, most of the time under oath, to tell the whole truth[8] and when they testify and thinking they are complying with the oath and reporting what another person told them as part of the incident, they are told by the judge not to say that. I witnessed this situation numerous times but the most notable was in Pond Inlet, Nunavut, when an elderly woman was testifying and saying what the victim told her after she claimed she was raped. The court directed her not to testify about what the victim said and, henceforth, the witness refused to testify further because she had promised to tell the "whole" truth and she was now asked not to fulfill her oath.

The rule against leading question causes also many problems. That rule provides that the party calling a witness cannot ask any question that would suggest the answer. Usually this rule is understood to prevent any question where the answer would be "yes"

[8] This is a reference to the oath formula that states: "You swear to tell the truth, the *whole* truth and nothing but the truth, so help you God".

or "no". As mentioned above, people feel it is highly inappropriate for them to testify about another person's conduct. When Aboriginal witnesses have to testify, they think that because the prosecutor has a copy of their statement, he or she will be able to "lead" them and reduce the risk that they upset the community. Because of the rule, this does not happen and witnesses tend to get very anxious and nervous and they remain as vague as possible, thinking that if the lawyer wants a specific answer he or she will ask a leading question. Most of the time, the information elicited from the witness is far less comprehensive than what the witnesses told the police in their statements. Thus, the court gets only partial information about the event and the final decision must be made on that basis, not on previous statements.

Unless it is provided by a witness that the court previously declared an 'expert', no witness can give their opinion. Yet, Aboriginal witnesses often feel that they need to explain the reasons why they did something and often this is based on an opinion they had. When they want to share that opinion with the court, they are prevented from doing so, which often unsettles them. In a trial I was conducting in Iqaluit in 1991, an older Inuk hunter was testifying that he was of the opinion that the polar bear he had shot was dangerous. He was stopped by the court but shortly after he was asked by one of the lawyers how far the bear was from him... The witness was quite puzzled because he had not measured the distance with a tape and yet, he was invited to give his opinion as to the distance.

- DELAYS

Trials often occur a long time after the incident and after the community had to deal with its fallout. It is thus interesting to note the Inuit call the judge *Iqqaqtuiji* or, in

English, "a person who contributes in recalling a wrong action rather than a good one; helping somebody to express something not yet mentioned but not beyond memory" (Therrien in Brice-Bennett, 1997, p. 263). It reflects the concept that it is remarkable that someone's job is to make people remember sad things while the matter was already dealt with by the community and should have been laid to rest.

This is a complex issue because delays are often shorter in smaller jurisdictions than in cities and large centres. Yet, the problem for Aboriginal peoples is the lack of synchronization between the informal ways of resolving conflicts in small communities and the court system. Often those informal processes come from traditional ways of dealing with conflict or are simply a reaction to a situation that may escalate if nothing is done to address it. While everyone know that the court system is the only instance that has the legal 'jurisdiction' to deal with crime, they cannot wait that long for fear of escalation. Hence, the matter gets somewhat 'resolved' between the time an offence is committed and the trial and, in most cases and for most people, a trial usually reopens old wounds and brings forward painful memories that had been put to rest. A stranger, the judge, will then order a disposition, which is likely to be inconsistent with what the community has already done and that often exacerbates the problem or creates new ones.

Criminal procedures do also contribute to delays and to the hardship caused to the communities. The best example is the preliminary inquiry where the victim is often the only witness as the purpose of the inquiry is to show to the court there is enough evidence to send the accused to trial. Yet, this procedure means that the most vulnerable witness, the victim, may have to testify twice as the matter will be adjourned again to set a trial date. It is hard to imagine how this procedure can assist in dealing with conflicts in the

community and appears to serve the sole purpose of the court system. I can attest that this procedure often intimidated victims to the extent they refused to testify at trial. The delay after the inquiry is even more difficult to bear because the victim now realizes what will happen at trial and suicides that occur between the inquiry and the trial may reflect this.

- PUNISHMENT AND RESTORATION

This is an area where there have been lots of discussions as it also refers to the over-representation of Aboriginal offenders in Canadian prisons (Jackson, 1988; Hickman, 1989; Cawsey, 1991; Hamilton & Sinclair, 1991; R.C.A.P., 1996). I will not focus on that fact as it has been very well documented and the causes are multiple (LaPrairie, 1996) but rather on the profound divergence between the Aboriginal concept of reparation and restoration and the mainstream concept of retribution (Zimmerman, 1992, p. 391). From my personal experience dealing with many Aboriginal victims, it became quickly clear to me that punishment was foreign to their concept of justice. When victims speak up about what should happen to the offender, they often say they would be satisfied with anything that would prevent the assault from re-occurring. Most think in terms of treatment or counselling but very seldom in terms of incarceration and then only to keep the offender away for a period of time, as one victim once told me, for a "time-out". A significant jail term is only warranted for the most vicious criminals that they cannot find a way to rehabilitate.

The Canadian Criminal Justice Association (CCJA, 2000) illustrates this difference as follows:

	Western Justice	Traditional Aboriginal Justice
Function of Justice	-Ensure conformity, punish deviant behaviour and protect society.	-Heal the offender; -Restore peace and harmony to the community; -Reconcile the offender with victim/family that has been wronged; -Punishment is not the objective.
Incarceration/ Probation	-Means of punishing/ rehabilitating offender	-Completely absolves Aboriginal offender of responsibility of restitution to victim.

Since the criminal court system is basically the only official system allowed in Canada, this conflict results in its ineffectiveness in resolving conflicts in communities. One of the major reasons, as stated in the chart, is the fact that an Aboriginal offender who is incarcerated considers he has "paid his debt" to society and is therefore absolved from any other consequences of his crime. Hence, at no point in the system does he have to take responsibility for his actions and, furthermore, he feels absolved from any responsibility once he is released from jail. The system does therefore work against the Aboriginal traditional processes and against fundamental Aboriginal values that are at the foundation of the Aboriginal identity and fails to address the underlying conflict between the offender, the victim and the community.

- SECHELT

I had the privilege of interviewing members of the Sechelt Nation and am in a position to confirm that the impact of the system on the Sechelt Nation is similar than other First Nations. All the participants, Elders, people close to the court system or offenders, find that the court system fails to address criminal behaviour in the community.

The Elders who have seen many of the transformations the Sechelt went through and who had knowledge or more traditional justice practices find that people have little if

any respect for the courts, particularly young people. Government laws seem to have eroded the traditional role of parents and Elders who have now difficulties trying to educate young people. In other words, young people feel that the only laws that may have any impact on them are those of governments and local laws and customs have lost their ability to have an impact on their behaviour. The adversarial nature of the system makes offenders more belligerent and hostile when they go to court instead of trying to discuss the matter in a reasonable fashion as is normal in Sechelt culture. Communications between Elders and young people are difficult to the extent that the Elders often wonder whether youth listen at all.

They also had many examples of people sent to jail who came back much worse than when they were sentenced. For instance one offender came back as a drug addict while he was "clean" when he was sent to jail. Another offender thought nothing of going to jail and it looked like going back to residential school. When they come back to the community they seem to be part of a downward cycle of violence and crime, most of the time fuelled by alcohol, instead of having improved their behaviour and the community is somewhat at a loss to try and help them get back on track. When offenders come back to the community, they feel there is no support for them except through their families and many noticed that it took lots of time and efforts to pull them back out of that cycle.

A number of offenders were sent to treatment centres outside of the community and, unfortunately, when they come back, there is no formal support for them and they often quickly revert to their old habits when they get acquainted with old friends.

For the Elders who had direct experience with the court system, they felt the lawyers were condescending but the local judge is seen positively. They are not usually told what is happening in court and they find it difficult to understand what is happening unless there is an Aboriginal lawyer or helper who can inform them.

People who are closer to offenders, like close relatives, think the system stigmatizes them when they come back from jail and they receive no support but are rather branded as 'criminals'. They are so much targeted by the police as criminals that many of them feel safer in jail than "outside" because when they come back to the community they are constantly targeted by the police and that leaves them with a sense of insecurity as they think they could be "picked up" for anything that happen in the community. I should mention that it includes an Aboriginal police officer that is also perceived as harassing offenders and their families and it was speculated that it might be because that officer is feeling pressures from his colleagues, non-Aboriginal officers. Obviously, incarceration in such a context is extremely counter-productive and does not attain its stated goal of deterrence, as some offenders will feel safer in jail. Worst is the fact that people think the system does not and has never worked because it produces more angry men, more professional criminals.

In terms of the local court, these people view the judge as a pivot of the system. If judges know the offenders' background and the community, they are more likely to be effective while those who base their decision on criminal records are useless. The contact with other players in the system is even more difficult, particularly with the prosecutors who are perceived as very adversarial. This is not surprising given that the

system itself is adversarial but it mischaracterizes the real role of the prosecutor who should be speaking on behalf of the whole community, including the offenders' families.

People who work peripherally with the court system feel intimidated by it even though they know the players. Often it comes from bad experiences they had with the courts. They see the system as a revolving door with people who are sent to jail usually coming back before the court much worst. Again, it was noted that incarceration does not scare hardened criminals anymore and that perception seems shared by most participants. Moreover, those returning from jail often exhibit non-Aboriginal macho exterior and it is perceived as if the prison system was contributing to the erosion of their Aboriginal identity. In my view this is a very serious indicator as it shows a direct contribution by the corrections system to the perceived threat to identity felt by most Aboriginal people and such threats to identity may have profound negative consequences, contributing significantly to the escalation of inter-ethnic conflicts between Aboriginal Canadians and the mainstream society (See Northrup's, 1989, escalation scale, pp. 68-76) and tend to make such conflicts intractable (p. 55).

An issue that was raised by most of the people was *racism*, as they qualify it. Many experienced some form of harassment by the police and if something goes wrong in the neighbourhood, people are looking at the "Indians". Whether there is any foundation to that is somewhat irrelevant as it is the *perception* of the Sechelt that is important in analyzing this conflict and there is a general sense of racism in the surrounding society and particularly with the police. Perception can be key to conflict and Tidwell (1998) cites Tillett (p. 34): "Conflict does not only come about when values or needs are actually, objectively incompatible, or when conflict is manifested in action;

it exists when one of the parties *perceives* it to exist." (Emphasis in original) Some of them, particularly young people, react by trying to fit in the non-Aboriginal society, which is often at the expense of their own culture. Thus, a number of young people are slowly drifting away from their community to be absorbed by the mainstream society and the court system contributes to that assimilation by dealing with them as if they were no different than any other non-Aboriginal people. This is therefore another aspect of the threat to identity I mentioned above that could contribute to the escalation of the conflict with the mainstream society.

- ANYTHING GOOD?

Since I am doing a conflict analysis, it is normal that I focus on the areas of the court system that are, in my view, either the cause of or a contributing factor to the conflict at issue. I should note, however, that there are some aspects of the court system that have had a positive impact on Aboriginal communities or on individuals. The most important feature of the court system is its finality: there is an end to the process as the accused person is either acquitted or sentenced. I recall a sexual assault case in Iqaluit in 1991 where the victim's watch was seized by the police in the accused's bedroom as proof that the victim had been there as he was denying having brought her to his place. After the trial was completed, the victim asked for her watch, as it was very important to her, more than the fact that the accused was convicted. She was very attached to this object and the court was bringing some finality to the matter.

Many Inuit also told me they appreciated the fact that the Supreme Court was going to their communities and that court personnel, police and lawyers were taking their cases very seriously because they were using all the trappings of the courts that they

could see on television (red serge for the police, robes for judges and lawyers). People often tend to forget the symbolic significance of those 'accessories' for the communities. There is also support in the communities for lay Justices of the Peace who hold court under normal procedures but are often Inuit and usually from the community. Finally and of more substance, the courts have the power to remove from the communities dangerous peoples. Even though they have little faith in incarceration, there is often a sense of relief when an individual that is perceived dangerous is sent to jail for a significant period of time.

We have examined a sampling of the most obvious problems faced by Aboriginal people when they deal with the court system and it is now useful to have a sample of how they react to this situation.

- THE ABORIGINAL REACTION

In this section I will provide the Aboriginal perspective as to how they do or could manage conflict with the limited power and resources they have. I will first review the Sechelt reaction to the court system and then provide some examples of other communities' reactions.

i) SECHELT

In Sechelt, the people interviewed unanimously believe that their own traditional system would work better than the courts but there are some that expressed concerns about families or clans who might take advantage of such a system. This system would need role models and dedicated people that can teach through example. It could take the form of a "justice group" or justice committee. However, before resorting to such a system, many believe it is important to start first at the family level and try to resolve problems between the families.

A new approach based on healing and treatment is needed for the community at large. For instance many people mentioned healing circles as a much better process than the courts. Some participants considered the circle as one of the traditional Sechelt processes. Circles could be held to settle family disputes, even disputes between families and all sorts of conflicts, including crimes. Those who participated in circles about criminal matters attest that the process is very hard on the offender (one cried in the circle) but most of the time he will take responsibility for what he has done and this helps them. It also gives an opportunity for the participants to give advice to the offender, the victim and the other people involved in the incident and it is believed that those who went through the circle came out in a much better way than those who went to court. People who do commit sexual abuse would be provided with counselling about their problems and that would be coupled with a number of healing circles. People do care for their relatives and, in such a relatively small community, it feels like living in a large family.

Mediation is also a process that people referred to. A blend of mediation and traditional process could take place in the Long House, where the mediator could help the parties to design themselves the solution to their problems. Talking circles already take place in the community to discuss some matters. Those circles include a smudge ceremony and an eagle feather is passed around and only the person with the feather can talk, without any fear of being interrupted or an argument started.

Another process is being considered: the Community Justice Forum whereby some conflicts are discussed with fewer people than in the circles. This process is encouraged by the police (R.C.M.P.) and is inspired from the Maori Family Group Conferences.

Where the offender does not accept responsibility for the incident, a participant suggested that a circle would be held with as many participants as possible. The parties would be given a chance to have their say and everyone who wants to say something would be heard. Since the truth is spoken in the circle, it is believed that the participants would come to a consensus about the events and, then, could design a disposition, if need be. Most dispositions would include compensation for the victim, which is not the case with the actual system and is seen as a major flaw. Jail would not be included as a possible disposition and thus, it is felt that people would also be truthful because their liberty is not at stake. For more serious matters, a participant proposes to address their trauma, i.e. the root cause of crime, and look at possible treatments. It is suggested that it is likely to be more effective than the actual system.

A number of Elders are accessible to members of the community who would like to discuss their problems with them. However, it is important for all and particularly for youth, to learn to respect Elders and realize how helpful they can be. One way of restoring the culture is, of course, to teach Sechelt language *and* culture in schools and within each family.

A participant mentioned that in the past there was a curfew and people used to patrol the community after the curfew and ensure young people were at home and this is seen as a way to keep an eye on youth at risk. As well, people who were sent to jail were welcome back in the community and people had a feast. This has stopped many years ago[9]. It is interesting to note that, generally speaking, the Sechelt's concept of conflict is

[9]It is interesting to note that this is still happening in Nunavut, when offenders are brought back to the community after serving their time, and where often the whole community is at the airport welcoming them and wishing them good now that they are back. Most of the time a meal will take place at the community

not significantly distant from the traditional TSOH'-LOH-MAT, that deemed to respond to conflict in kindness; now treatment and counselling are seen as alternatives to the court system and this approach is also based on kindness and empathy.

II) OTHER COMMUNITIES

In one Aboriginal community in B.C., T'it'q'et, people reacted to the discharge of a member of the community who had been charged with sexual abuse of children. They submitted to the Aboriginal Justice Directorate a proposal (Parker, 2003) titled 'Making a Difference' to establish their own process. It states:

> The Chief and Council met with the Elders Council to discuss the community members concerns. It was agreed that the justice system did not work for our children who were very brave to attend court and testify, and in the end their account of what happened did not stand up in court. The children were further victimized by the justice system. (Section 2, par. 2)

They therefore proposed a more traditional process but need funding to get the proposal to be implemented. They are thus at the whims of governments to get the resources and build capacity to change what they consider needs to be changed.

Most alternatives to the court system are largely based on volunteers and the processes vary greatly. I mentioned above the Community Justice Forums and that process, also called 'conferencing', is widely used across Canada because of its support by the R.C.M.P. (2003). While C.J.F. are inspired by the Aboriginals of New Zealand, the Maoris, this process is not a genuinely Canadian process and may not respond adequately to individual First Nation cultures.

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hall with the intent to heal the wounds. Non-Inuit frown upon such a process of welcoming back a "criminal" and this is often a source of misunderstanding.

Others, like the Nisga'a, use traditional Feasts: when a person has committed a wrongdoing, it makes the whole family or clan ashamed and, if possible, a feast is held where the offender will make a public apology and will clean himself as water will be poured over him so that the wrong done is washed away. From then on, no one is allowed to talk about the incident (WWN & DOJ, 2001, p. 5). As mentioned before, this is a process that mirrors the Arab Islamic *Sulh* as described by Irani & Funk (1999) and supports my contention, developed later in this paper, that Aboriginal cultures in Canada are mostly collectivists and hign-context, like most oriental cultures, the Arabs for instance, but unlike western cultures that are individualistic and low-context.

In Nunavut, the Inuit have reacted by having more lay Justices of the Peace that can deal with minor cases. As well, Elders may sit with judges of the Nunavut Court of Justice, at the invitation of the judge, and provide the court with their comments about offenders and victims. Diversion programs, whereby minor matters are referred to local programs, exist in almost all communities (personal experience). Yet, there is a general dissatisfaction with the system that is perceived as clashing with traditional Inuit values (Griffiths, Zellerer, Wood & Saville, 1995, pp. 138-140).

All those models and others that are now in place depend on the willingness of justice professionals (police, prosecutors, judges, probation officers) and are not based on the communities making their own choices. Consequently, these are mitigated responses from Aboriginal communities that are left with no choice but to be on the margins of the system and wait, hoping that justice professionals refer cases to them. At best, as we will discuss later, this only manages the conflict to a certain extent but it does nothing to

resolve it and I will now proceed to map it, using Wehr's (1979) grid of analysis (pp. 18-22).

General Analysis – A Conflict Map

In order to measure the amplitude of the problem we face, it is important to define broadly what did actually happen. In my view, we are in a situation where *ethnocide* was attempted and the court system is a contributing factor. According to Stavenhagen (1998, p. 11),

> When a given ethnic group is able to extend its cultural hegemon over other, weaker groups, then it can safely be said that a violation of cultural rights occurs. In extreme cases, this has been labelled 'cultural genocide', but this notion is not actually referred to in the *Genocide Convention* or other legal human rights documents. More commonly, this process is referred to as *ethnocide*, and it occurs all over the world. (Emphasis in original)

He defines ethnocide as "a process of deliberate cultural destruction" (p. 16). Through its residential schools, its reserve system and its disenfranchisement of Aboriginal peoples, it is obvious that the Canadian state has engaged in such a process of cultural destruction. This suggests we are in a major conflict situation and mapping that conflict according to Wehr's theories (1979, pp. 18-22) may assist in applying the appropriate conflict resolution theories.

Previously, in chapters I, III and IV, I have already been through Steps one, two and three (*Summary description, Conflict History* and *Context*). I will then proceed with the next stages.

Step 4: Conflict Parties:

Primary: On the one hand, all First Nations and Inuit and, on the other hand, federal, provincial and territorial governments are opposed parties as their respective goals do conflict. In general, for the Aboriginal parties, the conflict usually lies at the individual level and rarely at the institutional level as individuals mostly come into contact with the court system. In the case of the Sechelt Nation, they are in direct conflict with British Columbia through its responsibilities for the police, courts and prosecutions and Canada for its responsibility for criminal law, superior courts and federal prosecutions. This is therefore an *asymmetrical conflict* because the Aboriginal parties have little *power* in the face of the governments' overwhelming authority. The Aboriginal leadership – that is, when it gets involved - is often fractured, overwhelmed with local priorities while government leaders count on legitimacy and are consistent in their will to impose the dominant court system. I do not consider any coalition between Aboriginal entities and any level of government possible in the short and medium term but a coalition between Aboriginal governments is possible and it may alleviate, albeit to a small scale, the asymmetry between the primary parties.

Secondary: In the case where the Aboriginal authorities (Band Councils, First Nation governments, municipal councils) are not primary parties, they do have an indirect stake in the outcome of the dispute, as their constituents are the victims of the court system. Likewise, non-Aboriginal municipal or other local governments have an indirect interest in the conflict because of its potential impact on them, if and when the conflict escalates. Among secondary parties, the conflict gains symmetry as local leaders usually have similar legitimacy, whether they are Aboriginal or not.

Interested Third Parties: This is a major conflict that could have a significant impact on Canadian society at large with a high potential for escalation and hence, I suggest that all Canadians individually as well as corporations are interested third parties. In that context, the media would play a major role in influencing where public support will go. Should the conflict escalate, it is fair to expect Canadians will get involved as their own interests might be affected.

Step 5: Issues.

Facts-based: From the mainstream society's perspective, the court system is one of the best in the world and is fair to all. However, from the Aboriginal perspective, as we have seen above, there are many areas in its continuum that are offensive and in conflict with Aboriginal cultures. The impact of courts on Aboriginal communities is often extremely negative and it is perceived as failing to perform its duties.

Values-based: There are fundamental clashes between the values at the foundation of the court system and Aboriginal values. For the mainstream society, the system protects the individuals against the overwhelming power of the state while for Aboriginal people who generally have a more collectivist approach to conflict and for whom the goal is not to protect the individual but to restore the relationship between the parties to a conflict and harmony in the community, the system fails. In that context, it is clear that the mainstream society is *low-context* and individualistic, "seek[ing] to manage conflict toward an objective and fair solution" with "a linear and logical worldview that is problem oriented and sensitive to individuals". The Aboriginal community has all the characteristics of *high-context* societies: the "issues and people are interrelated", focusing "on affective, relational, personal and subjective aspects... [precluding] open conflict"

and where they "see the conflict, event, and all actors as a package" (Pedersen & Jandt, 1996, pp. 11-12). Both parties feel very strongly about their own sets of values but only one party, the mainstream society, has had and still has the power to impose its values on the other party.

Interest-based: The governments hold the strings of the public purse and nurture the court system so that it has the resources to function. Conversely, there are far less resources available for Aboriginal communities to deal with justice issues. Generally speaking those programs receive a limited amount of funding and the money trickles to the communities[10]. In this major competition for resources, only one party has the control of resources. Yet, despite this concentration of resources in the hands of governments for courts and prisons, the Aboriginal communities have little, if any, respect for the court system and no respect whatsoever for incarceration.

Non-realistic: To some extent the governments try to ignore the problem and communications with the communities is often a dialogue of the deaf. Governments set the agenda, for instance having already ruled out any specific or parallel "justice" system for Aboriginal people, and then try to 'negotiate' on their own terms. Aboriginal peoples are left with no choice but to accept this 'bottom line' otherwise they will get no public funding.

Step 6: Dynamics.

Precipitating events: Such events are difficult to predict and occur from time to time. For instance, in May 2003 three Fishery Officers raided the Cheam reserve on the Lower Fraser, B.C., and arrested a senior band councillor of the Cheam Nation, using

[10] Personal knowledge of the Aboriginal Justice Strategy that funds only 16 programs in B.C. (2002 – 2003) with only $1.07M, leaving vast areas of the province, like the whole of Vancouver Island, without any funded Aboriginal justice program.

pepper spray and handcuffs (personal knowledge). This sparked an immediate reaction and blockades were installed. In 1986 a theft in an aircraft at the Puvirnituq airstrip prompted the community to react and place the young people involved in confinement. When the court heard of that, they – the judge and crown counsel - threatened the councillors involved with criminal prosecution for unlawful confinement. The court was advised not to come back to the community (personal knowledge as I participated in the discussions between the court and the community about the local justice program – *Sapuulutait* – in 1998). Those are two examples of incidents that can precipitate events and contribute to the escalation of the conflict.

Issue emergence, transformation, proliferation: While the difficulties Aboriginal people have with the legal system go back to the imposition of the mainstream system on them and the destruction of their own mechanisms to deal with conflicts, one of the issues that emerged, as we have seen above, is the sentencing of Aboriginal offenders to jail and, thus, their over-representation in our penal institutions. This particular issue, dealing with only one small part of the system, took so much profile that it even provoked changes to the Criminal Code in 1997 whereby "all other sanctions than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention* to the circumstances of *aboriginal offenders*" (*Criminal Code*, section 718.2 (e)) (Emphasis added by the author). The other issues received less attention and now that the courts are aware and concerned about sending Aboriginal offenders to jail, other aspects of the conflict may surface, depending on the circumstances. I am concerned about the situation of Aboriginal victims, particularly women and children, who have to testify in court and are re-victimized to the extent that

some may commit suicide. As well, any specific issue around law enforcement could transform the conflict and, depending on whether it is of general concern, could proliferate. In my view, we are at an early stage of transformation and things could evolve quickly.

Polarization: So far, there has been little polarization, as this conflict is not perceived by the Aboriginal community as deserving priority. However, any triggering event could in fact polarize Aboriginal communities against the mainstream system very quickly if such an event happened. Thus, the *potential* for polarization is significant. Many people within the mainstream society as well as a number of members of the system will support Aboriginal people in their struggle against the dominant system and thus, I anticipate that the *institutions* would be the target of polarization, not the mainstream society *per se*. In terms of escalation, this will be important, as institutions are easily dehumanized and this is a factor that makes violence more tolerable (Northrup, 1989, p. 74).

Spiraling: So far spiraling has been avoided and local or regional incidents have been defused. For instance, in the late nineties the court was told not to come back to Davis Inlet (Labrador) because they were unable to address the substance abuse issues that had engulfed the community. Negotiations took place that allowed the court to return to the community within a relatively short period of time. Nevertheless, there is a potential that such sporadic conflicts between communities and courts end up in a spiral of escalation if individual negotiations fail to address the problems and the unrest flares in those communities. If the conflict becomes general, the escalation spiral could become extremely difficult to reverse.

Stereotyping and mirror-imaging: I have personally experienced numerous stereotypes being conveyed by court personnel that work in Aboriginal communities since most of them do not live there and have little, if any, knowledge of the people and their culture. Cross-cultural training was tried, some with success, others with more limited results, particularly those that are held in office boardrooms instead of the communities. On the other hand, because of the misunderstanding that often occur between the system and the community, Aboriginal people also tend to have a stereotypical view of court personnel. This is not surprising given the past relationship between the communities and government officials where Aboriginal people often felt they had been betrayed and abused. To quote Warfield (1993), "[f]or low-power cultural groups such as racial or ethnic minorities [like Aboriginal people]... the history of how others have dealt with them and their group is as much a part of the context of a policy conflict that impacts their personhood as are the conflict-specific issues." (p. 187) According to him, the parties are actually speaking a different language, i.e. they don't understand each other, partly because of *context*. Therefore, the court is perceived in the shadow of past encounters with government officials, including the police and the 'Indian Agent', and its legal jargon does nothing to alleviate the negative perception Aboriginal people have of the bureaucracy. Thus, stereotyping is pervasive between the parties to this conflict.

There is also a significant part of mirror-imaging between the protagonists. As I mentioned above, the courts are perceived as an institution crystallizing the legacy of government bureaucracy and while the players may be sympathetic to the Aboriginal demands, the institution itself incarnates the opposite or the threat to their identity. In the

same way, court personnel, through stereotyping, tend to generalize Aboriginal communities as "bad" because everything they see is negative. In other words, courts deal with crime and there is only a small step, when court personnel are not familiar with the community, to believe that the whole community is "bad" or "dysfunctional" and it becomes an easy excuse to exacerbate the harshness of the system.

Step 7: Alternative Routes to a Solution(s) of the Problem(s): Given the amplitude of the problem between the parties I will deal in depth with a possible process later in this paper. However, for the purpose of mapping I will list here the different options that have been proposed so far (except for doing nothing, which I suggest is not an alternative):

- Public legal education in Aboriginal communities about the legal system.
- Cross-cultural training and/or cultural immersion for Court personnel.
- Indigenisation of the system in Aboriginal communities (replace non-Aboriginal court personnel by Aboriginal people but use the system as is).
- Circuit courts (that travel to the communities but with normal court personnel).
- Decentralized courts (establish court services in small communities or better use of local Justices of the Peace).
- Adapt some features of the legal system to Aboriginal cultures (for example: integrate Aboriginal adoption methods as part of the legal system).
- Create new mechanisms that appear to be based on Aboriginal cultures (for example: sentencing circles).
- Create a parallel court system for Aboriginal peoples (like the US Tribal Courts).

- Create a new Aboriginal-based conflict resolution mechanism specific to each First Nation and to the Inuit.
- Variations and/or combinations of the above.

It is important to note that all the actual solutions are systemic, i.e. the possible systems or processes that might be considered to improve or replace the court system. None of those include a conflict management / resolution process that would address the historical, colonial relationship between Aboriginals and governments.

Step 8: Conflict Regulation Potential:

Internal limiting factors: Some underlying values of the legal system, like the presumption of innocence, are consistent with Aboriginal values and most Aboriginal Canadians are educated in a system that teaches them the mainstream values and knowledge. In other words, while the processes used and the intricacies of the court system are foreign to Aboriginal people, many of its values are either shared or known by most. For instance, language is a major underpinning of a legal system and most Aboriginal people do use English or French or even both, either as primary or secondary languages. Moreover, there is an interdependent relationship between the Aboriginal community and the mainstream society that people do not want to see compromised or destroyed. Those are primary mitigating factors that could help in managing this conflict.

External limiting factors: There is no doubt that ultimately the governments have the ability to use force and end the conflict. However the use of force is likely to be limited, as it would impact on Canada's reputation at the international level. The Oka crisis (1990) is an excellent example where governments had to be restrained in the use of force as the world, through media and international observers was watching (Redekop,

2002, pp. 225-251). In addition to moral suasion, the United Nations could intervene if the situation escalated, monitor the situation and offer third party assistance to try and resolve the conflict. More unlikely but yet possible, the United States may come forward if it is felt that their national security is at risk were the situation to escalate beyond control.

Interested or neutral third parties: This is a difficult area because of the asymmetry between the parties. Third parties must be accepted by the protagonists and must be credible and knowledgeable. There is no assurance though that a "neutral" third party can assist in resolving the issue; the process is probably more important than the persons involved. In the next chapter I will suggest a process with neutral facilitators.

Techniques of conflict management: Because it is an inter-ethnic conflict, a number of techniques, like mediation, are not appropriate. We need to look at techniques that would work at a higher, intergroup level. For instance, Denmark used a "juridical expedition" (or a commission of inquiry) to look into the creation of a court system in Greenland that would blend principles of Danish and Inuit laws and customs (Inutiq & Rousseau, 1994, appendix 2, p. 3; Schecter, 1983, p. 81). Other techniques include negotiation (Nation to Nation), extensive consultation with First Nations and Inuit, a working group with the mandate to identify changes to be made to the legal system and a Reconciliation Commission. It is important to note though that there was a Royal Commission on Aboriginal People (1996) that made recommendations to address the over-representation of Aboriginal people in the court system but most of the recommendations were never implemented. This, in my view, excludes another "Royal

Commission" as it would have no credibility anymore, at the least for the next few decades. I will elaborate on managing this conflict in the last part of this paper.

In summary, we now have a map of the conflict between Aboriginal Canadians and the mainstream court system that identifies all its most important components. We have seen that this is a conflict that is identity-based, where the perception of each party for the "other" is important but might be misleading. There are a number of elements to that conflict, like stereotyping and dehumanization, which might trigger escalation, perhaps to the extent of violence. We need to determine what conflict management theories may apply to this conflict.

V – SUMMARY AND CONCLUSION

Conflict is not always negative and can have a very positive impact on society. For instance, Aboriginals may have chosen to assimilate within the mainstream society and abandon their own cultures and, thus, the mainstream system might have been far less damaging to individuals than it is now. By taking the more difficult route of resisting to preserve their cultures, they contributed to the enrichment of humanity, a humanity that thrives through its myriad of cultures. Opposition, in that sense, creates a sort of balance (not symmetry) between the two groups because there is actually a *relationship* while if there had been no opposition and Aboriginal cultures had disappeared, that relationship would have simultaneously disappeared (Simmel, 1955, p. 19).

Going back to the root of the conflict at issue, i.e., the imposition of the dominant system, it shows a symptom of a much broader inadequate interaction based on ethnocentrism. In my Review of Literature, I looked at Tidwell's (1998) definition of "Ethnocentrism", that is, "the belief in the primacy and centrality of one's own culture" (p. 142). *Per se*, this is fairly innocuous as people in general think very highly of their own cultures. However, when ethnocentrism goes to the extent of perceiving another culture as nefarious, as happened in Canada, this leads to ethnocide, as I have indicated earlier in this paper. This impacted directly on Aboriginal identities. The court system, by replacing traditional conflict management mechanisms and by its ethnocentrism, contributed significantly to the erosion of Aboriginal identities.

Northrup (1989) defines identity "as an abiding sense of selfhood that is the core of what makes life predictable to an individual" and adds: "To have no ability to

anticipate events in essentially to *experience terror*" (pp. 63-64) (Emphasis added by the author). In this paper I gave many examples of collisions between the court system and Aboriginal cultures, including the adversarial nature of the system, the way witnesses are treated and punishment. Consequently, Aboriginal people cannot anticipate events as conflicts are dealt with in a way that is mainly foreign to them, their cultures and, hence, their worldviews. I have personally witnessed victims experiencing *terror* at the prospect of having to go to court and I suggest that it is an illustration of a collective sense of unpredictability felt by Aboriginal people when confronted to the court system.

According to Northrup (1989), there are four, escalating, stages in this type of conflict: threat, distortion, rigidification and collusion. The more a conflict moves from one stage to the other, the less likely it will de-escalate or the more intractable it becomes (p. 68). Thus, it is useful to analyze what stage this conflict has reached so that we can assess to what extent de-escalation is probable. I argue that this conflict has reached stage 3, *rigidification*, short of stage 4, collusion.

There is no doubt that the first stage, threat, is already passed. Indeed, Aboriginals perceive colonialism and the imposition of a foreign court system that is deemed to replace their own conflict resolution mechanisms "as invalidating the core sense of [their] identity" and, thus, they experience threat (p. 68). As a response to threat, there is distortion, stage 2 (p. 69). Also termed "aggression", there is distortion when a group "forces a meaning onto the invalidating events that is inconsistent with the actual events, for the purpose of making them validating" (p. 70). The court system is often perceived as the cause of many problems for Aboriginal communities while it is, in fact, only a dispute resolution mechanism that does not work appropriately for those

communities. For example, when the court was told not to come back to Puvirnituq (Quebec), it was because it was perceived as the *cause* of the problem of young people breaking into Air Inuit planes while, in fact, the reason why Air Inuit would not come back to the community was the actual series of break and enter. Confining those youth proved to be efficient but banning the court did nothing to resolve the issue, save for the perception that this action was placing the local Inuit authorities back in charge and it was contributing to maintaining the core sense of Inuit identity.

I argue that we have reached stage 3, *rigidification*, because it is clear to me that Aboriginals have developed an "increasingly impermeable construct" of the world that is entirely different from the mainstream culture. Traditional values make a remarkable come back but it is often also interpreted as a distanciation from the "others" and that tends to separate the two groups as mutually exclusive. This is not surprising given the negative experience Aboriginal people have had with the dominant culture and government bureaucrats. They have been "separated" in reserves and everything, short of genocide, was done to eradicate Aboriginal cultures. Thus, and to quote Warfield (1993), the best intentioned bureaucrats "may find their overtures spurned when confronted with deeply held values and culturally defined human needs. For in essence, you have opposing parties attempting the dialogue of negotiations, who are speaking different languages." (p. 187) Indeed, rigidification redefines the meanings of the past in a way that exacerbates the separation with the dominant culture.

As discussed in mapping, the conflict's dynamics include possible polarization, and pervasive stereotyping with a high potential of escalation. Therefore and according to Northrup (1989, p. 74), there is a significant danger of dehumanization. While

Aboriginals tend to promote their own values, stressing the gap with the dominant group, the latter is active in the opposite process of stereotyping the former to the extent of dehumanizing them. For instance I was told that in certain places, if a crime happens, the police will immediately react by looking at the 'Indians' which is often used in a pejorative way nowadays and that may, insidiously, tend to make a category of people less human. That tends to crystallize the conflict and dehumanization or objectification makes violence more tolerable. Obviously, the conflict with the court system evolves in that broader context and given the strained relationship between court professionals and Aboriginal communities, dehumanization may become a factor in an escalation leading to violence.

I believe we are short of reaching stage 4, *collusion*, because, even though the conflict has lasted for many decades, it is not part of our identity. In other words, Aboriginal cultures are increasingly returning to their traditional dispute resolution mechanisms while the dominant society embraces some forms of accommodations. Thus, while there is a broad misunderstanding between the two groups, none has an interest in feeding on the conflict and all agree that we should work towards resolving it. The *Aboriginal Justice Strategy* (Department of Justice, 2003 – See Appendix B) is an example of the willingness of governments to work on addressing those issues but, in my view, it falls short of having any chance to resolve the conflict but can only, at best, manage it.

So, the situation is serious and the broader conflict between Aboriginals and the mainstream society, to which the court system contributes, has reached a point where violence caused by objectification is real and will remain a serious possibility. The Oka

crisis certainly confirmed this and further incidents at Gustafsen Lake, B.C. demonstrate that the conflict is in the process of becoming *intractable*. Northrup (1989, p. 62), identifies three main characteristics for intractable conflicts:

1. It is resistant to being resolved,
2. It has some conflict-intensifying features not related to the initial issues in contention,
3. It involves attempts (and/or successes) to harm the other party, by at least one of the parties.

While I demonstrated this conflict exhibits the first two characteristics, it hasn't specifically degenerated into any attempt to harm the other party yet. I also demonstrated in this section (in Primary conflict parties, p. 54) that, in the context of the broader relationship between Aboriginals and the governments, *asymmetry* plays a significant role in pushing the conflict towards intractability and a higher level of violence (Wehr, 1979, p. 16) and could eventually bring the third characteristic into play. This does answer positively to my second question, that is, can this area of conflict substantiate, by itself, the failure of the mainstream court system to meet First Nations needs or are there other sources of conflict that contribute to its failure? Indeed, we are now facing a major identity crisis and culture is at the foundation of identity, as we have already seen. It therefore also validates my first hypothesis, that is, cultural alienation is one of the most important factors that render the mainstream system ineffective and irrelevant. Can this conflict be managed and is there a potential for resolution?

IN THE SHORT TERM

So far the legal system, through government's law making powers, has taken care of this matter and, as mentioned earlier, it failed. First of all, it contributes to the

asymmetry of the conflict as laws contribute to maintain and centralize power (Nader & Todd, 1978, p. 20). Moreover, this is not surprising as "law is *not culturally or politically neutral* and does not always serve the causes of justice and social harmony, hence the importance of studying law and conflict resolution cross-culturally, with an eye to the diverse ways in which disputes are resolved and to the *ends and values which these approaches serve.*" (Irani, 2000, p. 231) (Emphasis added by the author) It is therefore arguable that laws, because they reinforce the dominance of the mainstream society and contribute to the misunderstanding between the two groups because of their cultural irrelevance, cannot meaningfully assist in resolving this conflict.

The mainstream society must open a new dialogue with Aboriginal Canadians, on the basis we know the court system does conflict with their values and cultures. It may be argued that this dialogue has been ongoing for decades through the numerous writings on the subject and the report of the Royal Commission on Aboriginal Peoples (1996). Unfortunately, in my view, it has rather been what Cohen describes as 'a dialogue of the deaf' (cited in Avruch & Black, 1993, p. 139) where there is mutual *noncomprehension.* Being non-Aboriginal, I do not pretend to speak on behalf of Aboriginals but it is obvious to me that the Aboriginal perspective on conflicts is not reflected in any of the documentation so far. Why am I so sure? Because there are many Aboriginal cultures in Canada and a multitude of different views on conflicts and on how to deal with them and this would be reflected but, unfortunately, what we have now are general statements or very narrow and specific examples but no comprehensive dialogue from the Aboriginal perspective.

A useful first step would be a *cultural analysis* throughout Canada to determine each specific Aboriginal group's perception of the nature of this conflict and how to manage or resolve it, based on their own cultures. Such an analysis should be conducted by Aboriginal peoples themselves, possibly in partnership with non-Aboriginals experts in the field, and could follow the four steps proposed by Avruch & Black (1993, pp. 135-136):

1. Collect the data without trying to explain;
2. Once data are collected, do not assign any value to it, do not judge it, keep it neutral;
3. Translate the data into meaningful references and
4. Discuss the results, between cultures, to verify the meaning (this is an iterative process that goes back and forth between the parties).

In fact, what we are looking for is the meaning: each culture perceives the world through its own culture or lenses, and the goal is to make those different 'meanings' understandable for the other party.

The cultural analysis in this context has to focus on how each culture *deals* with conflict – I deliberately use the word *deal* because we need to remain open minded and make no assumption as to whether there are mechanisms or processes conveyed by the culture in question. In other words, our western concept of *justice* as a system or process should not influence the analysis and it may very well be that there is no process at all. As well, a cultural analysis gives a voice to Aboriginal people and become a quest for all of us to find a starting point for that new dialogue.

Collecting data and a better understanding of the Aboriginal point of view will not resolve the conflict. We are navigating in dangerous waters; the collective trauma of

Aboriginal people, felt individually, needs to be taken into account and any attempt at reconciliation must first deal with the traumas of the past. I therefore suggest a psychopolitical approach inspired from the *Tree Model* of Dr. Vamik Volkan (1999) whereby a facilitated dialogue takes place in an unofficial fashion between people from each group in order to build a relationship based on trust. I will elaborate on this process later but, at this stage, I recommend to hire a neutral multidisciplinary facilitating team, chosen by both governments and Aboriginal groups, that would take the opportunity of the cultural analysis to diagnose the situation and start planning psychopolitical dialogues. It is important that the team "identifies an entry point through which they can earn the trust of members of both groups and the credibility necessary to launch a psychopolitical process." (p. 204)

The Aboriginal Justice Strategy [AJS] could also afford the possibility of testing pilot projects in order to evaluate whether programs designed under a different paradigm are actually responding to the needs of the communities. As mentioned at Annex B, the AJS is deemed to support "communities as they take more responsibility for the administration of justice" which undoubtedly applies to what I propose and it could allow testing and evaluating a number of new designs, as proposed by Costantino & Merchant (1996, pp. 152-158).

In summary, in the short term, it would be possible to:

- Identify ways of dealing with conflicts that would be relevant to Aboriginal cultures;
- Perform cultural analyses for each cultural group that will assist in understanding the real meaning from the Aboriginal perspective

- Start a new psychopolitical dialogue between governments and Aboriginal peoples through an assessment by a multidisciplinary facilitating team;
- Initiate pilot projects.

IN THE LONGER TERM

Consultation with so many diverse cultural groups will take time and any resolution of this crisis can only be achieved in the long term. That is, this type of conflict is rooted in identity, thus basic needs, and is not generally amenable to negotiated or coerced settlements but only by the satisfaction of basic needs (Fisher, 1997, p. 6). Volkan (1999, p. 145), citing Burton, states: "Value-based disputes, on the other hand, reflect *demands that are not negotiable*... it is impossible to barter with values and needs."(Emphasis added by the author) This is where the *Tree Model* enters into action. According to Volkan (1999), the tree represents a process whereby serious ethno-political conflicts can be resolved by building on a dialogue between the parties. In a nutshell, the roots of the tree are the psychopolitical diagnosis, the trunk is composed of the ongoing psychopolitical workshops and, eventually the contact groups, and the branches are the activities, practical projects and/or institutions created as a result of the workshops. I suggest this model because it is based on resolving serious inter-ethnic conflicts where at least one of the groups, here the Aboriginals, have been traumatized by a series of events designed to eradicate their identities and those traumas have become 'chosen traumas', i.e. catastrophic events that are passed to the next generation. The "transgenerational transmission of trauma takes place, and the mental representation of the trauma, now highly mythologized, becomes a marker of the ethnic group's identity" (p. 153). Earlier in my paper I gave examples of significant clashes of culture and I would only stress here

some of the most pervasive traumas that stemmed from strategies aiming or contributing to the eradication of Aboriginal cultures: the *Indian Residential Schools*, the criminalization of Indian spirituality like *potlatches* and shamanism and the re-victimization of victims by the mainstream system. If a genuine dialogue is to take place between the mainstream society and Aboriginals, these issues will necessarily come out as they actually need to be aired.

This is where an interdisciplinary team of facilitators, composed of psychoanalysts, psychiatrists, historians and other relevant social and behavioural scientists can facilitate a dialogue between the parties that might be extremely emotionally charged. It might be argued that this is a western-based approach, but as I will discuss later, facilitators must remain at the margins of the discussions and be there only to facilitate and provide support to the dialogue. While I worked in Nunavut, I attended to a number of community justice meetings with Inuit where some participants took this opportunity to tell their own stories of trauma and violence. I was always concerned that they should be provided with all the professional support they may need and the interdisciplinary team could provide this safe support for people who have been traumatized. Likewise, when I was discussing the court system with Sechelt members, I could see that for some participants tears welled in their eyes and it was obviously bringing back sad memories – I decided not to go further on that route but the dialogues will need to go deeper into the trauma if the conflict is to be resolved. It is important to keep this conflict in context as it is a symptom of a broader interethnic conflict between the two groups: the process will affect both of them.

First Nation and Inuit should decide the composition of their groups and workshops are then organized between each group and representatives of the mainstream system. Ideally, for each workshop, there should be about 30 – 40 people, representing equally each party, who participate in a four day session four times a year, at each turn of season, which is highly symbolic for all Aboriginals, spanned on several years (probably 2 – 3 years), the time needed to build trust. The format of each workshop would be decided between the team of facilitators and the parties but it is essential they remain informal and confidential unless participants, through consensus, agree to open some of the workshops to the public.

Facilitators, agreed upon by both parties, must be *neutral*, that is, showing the participants they are "truly interested in the process rather than in suggesting or imposing particular solutions" (Volkan, 1999, p. 161). It is expected from the facilitators that they have "an ability to hear multiple *meanings* attached to what is discussed and to a loosening of rigidly held views." (p. 161) (Emphasis added by the author) Facilitators must be selected because of their competence and a cross-cultural team of facilitators may respond to all those criteria, provided that they do not get involved in trying to offer a solution.

For each Aboriginal group, the cultural analysis would be discussed during those workshops according to a schedule approved by the parties and it is anticipated that towards the end of the process, there would be an understanding from all the participants of a conflict management mechanism that would be relevant to the Aboriginal group. This will provide the foundation for the building of new institutions, the branches of the tree. The parties would have a possibility at that stage, when workshops are coming

closer to a conclusion, to decide whether a contact group should be established. The contact group, composed of members of the two parties, would be responsible, at the local level, for coordinating the implementation of new projects (Volkan, 1999, p. 185).

The purpose of this process is not to change everything overnight but rather develop programs, projects and institutions that will change the *interaction* between the parties and afford the possibility of evaluating them so that the parties can learn from experience. Evaluation tools should then be developed that indicate changes at two levels: First, at the community level so that it can be determined if the new process is relevant and works for the community. Second, at a higher level, determine whether the interaction between the Aboriginal group and the mainstream society is changing in a positive way. The ultimate goal will be to ensure that Aboriginal Canadians regain the control over their own conflict resolution mechanisms.

THE FUTURE

We have seen that many attempts were made by the dominant society to "accommodate" Aboriginal people through a number of initiatives in the court system or through alternatives. The most notable are diversion, alternative measures and sentencing circles. Unfortunately, they have proved to be either marginal or unsatisfactory. Marginal because the initiatives that strive to keep cases out of the court system through diversion, deal with minor matters and do not prevent major cases from going to court where the clashes identified earlier in this paper cause the most profound traumas to Aboriginal witnesses and offenders. Unsatisfactory because strategies like circle sentencing come only at the tail end of the process and deal only with consulting the community on sentencing; again it fails to address the main flaws of the court system. Yet, they kept the lid on the dissatisfaction of Aboriginal people, as they often collaborate

eagerly with the AJS or the courts to get the crumbs from the court system. This is useful only to the extent that it *manages* the conflict. It falls short from even trying to resolve the conflict.

What I propose is a process whereby Aboriginal peoples would have the opportunity to design their own systems while, at the same time, create a new positive interaction between them and the mainstream society. The design will be interest-based, i.e. with the participation of the stakeholders and they will therefore "become true partners in identifying, understanding, and managing their disputes – and have a more vested responsibility for the successful operation of the conflict management system." (Costantino & Merchant, 1996, p. 54) This, in my view, is the only way for Canada to build a new and successful partnership with its first inhabitants.

Further academic research will be needed meanwhile and Aboriginal conflict resolution mechanisms based on tradition and culture should be explored and an inventory be constituted. So far, there has been little research done in that field, when considering the number of Aboriginal cultures in Canada, mainly because funding is extremely limited. Research in that field would also have the advantage of assisting Aboriginal groups in reviving their traditions and designing mechanisms that could work for them. This would be very helpful for Aboriginals and non-Aboriginals in their discussions about crime and conflict.

In my view, universities should also integrate the Canadian Aboriginal conflict with the dominant culture and Aboriginal conflict management techniques and rituals as part of their curriculum. Canada has much to offer in terms of inter-ethnic conflicts, particularly from its own Aboriginal peoples' perspective, and this could be useful not

only to resolve our own conflicts but, as well, to assist other nations that struggle with this type of issues.

This chapter provides a road map, to paraphrase the peace plan prepared for the Palestinian – Israeli conflict, to address the pervasive conflict between Aboriginal people and the dominant society in Canada. While a cultural analysis will provide a better understanding between the two groups, it is believed that this inter-ethnic conflict needs a process that is based on a psychopolitical approach because values and identity are not negotiable. The *Tree Model* can be a source of inspiration in designing the process of building a new partnership between the groups, based on trust and understanding. This is a long process but it does address hundreds of years of colonialism and traumas that deeply affected Aboriginal peoples. Nothing short of such a comprehensive approach can have any chance of *resolving* this lingering conflict.

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APPENDIX A

Interview Guide

Personal information (age, gender, First Nation)

Previous experience with the court system? If so, please elaborate.

Previous experience in conflict? Conflict resolution?

When conflict occurs in the community, how is it addressed at the local level (if at all)?

If the court system gets involved, what happens and what are the consequences in your community?

Description of what you think is a traditional way of dealing with offenders, crime and/or conflict.

Can you give some examples? Do you know someone who is involved in those traditional ways and who could provide examples?

Your assessment: effective, relevant, useless, ineffective etc.? Elaborate.

Are you aware of any local / traditional "laws"? Are these laws enforced in any way?

What is your perception of the court system? Does it work?

When a crime is committed in your community is it dealt with in court or otherwise? Please describe.

How do you perceive the courts?

Do the courts work well in and/or for the community? Elaborate.

What, in your opinion, are the greatest challenges of the courts when dealing with Aboriginal offenders?

Can you identify any component of the court system that you think doesn't work in Aboriginal communities or for Aboriginal people?

Ideally, if a crime is committed in your community, how do you think it should be dealt with? In a traditional way? In a way that is consistent with contemporary Aboriginal cultures? By the mainstream criminal courts? Otherwise? Elaborate on the reasons and the model you think would work.

If you don't know what would work, how should that be addressed? How do you think such a conflict resolution mechanism could be found that would be relevant and effective for the community?

APPENDIX B

The Aboriginal Justice Strategy

The Aboriginal Justice Strategy (AJS) is composed of three components: community-based justice programs that are cost-shared with provincial and territorial governments, the Aboriginal Justice Learning Network and self-government negotiations in the field of administration of justice. Of these three, only the community-based justice programs provide contribution funding to Aboriginal communities.

Objectives

- to support Aboriginal communities as they take greater responsibility for the administration of justice;
- to help reduce crime and incarceration rates in the communities that administer justice programs; and
- to improve Canada's justice system to make it more responsive to the justice needs and aspirations of Aboriginal people.

Key Activities

The AJS supports four types of alternative justice activities and programs at the community and regional level, cost-shared with the provincial and territorial governments:

- diversion or alternative measures;
- community sentencing circles and peacemaking;
- mediation and arbitration in family and civil cases; and
- justice of the peace or tribal courts.

AJS programs supported to date have been managed by First Nations and Tribal Councils, community groups, urban Aboriginal coalitions, and other non-profit organizations.

Source: Dept. of Justice Web Page "The Aboriginal Justice Strategy", Dept. of Justice Canada, 2003. http://Canada.justice.gc.ca/en/ps/ajln/strat. Reproduced with the permission of the Minister of Public Works and Government Services, 2003.