Contemplating Aboriginal Reality in the Current Justice System: An Introduction

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Culture, in the context of inter-cultural communication can be defined as "...the cumulative deposit of knowledge, experience, meanings, beliefs, values, attitudes... hierarchies of status, role expectations and conceptions of the self, the self/universe relationship, space and time acquired by a large group of people over the course of generations." (1)

THE TRIGGERING EVENT

In February of 2000, a First Nations man filed a complaint with the Saskatoon city police [hereinafter "the city police"] reporting that he had been abandoned by city police officers in freezing temperatures outside the city of Saskatoon. The report indicated he had been told to walk home. While wishing to remain anonymous for fear of retribution, his decision to file a complaint was compelled by the fact that two other Aboriginal men had recently been found frozen to death in the same isolated area. The story was immediately linked to allegations of differential treatment of Aboriginal people by law enforcement agencies and personnel. Within three weeks, two senior Saskatoon police constables were suspended and the city police called for an internal police investigation. Further allegations of city police abandoning Aboriginal men in below-zero temperatures compounded the issue. Triggering a chain of emotional and politically charged events, this troubling story quickly dominated the local and national press leaving a dark shadow over the alleged discriminatory treatment of Aboriginal people by Saskatoon city police.

The controversy prompted the Federation of Saskatchewan Indian Nations and the Metis Nation of Saskatchewan to insist that the Government of Saskatchewan [hereinafter "the Province"] launch a public inquiry into the treatment of Aboriginal peoples in the criminal justice system. The Province requested that a Royal Canadian Mounted Police task force undertake what has become the single largest investigation in Saskatchewan history. This story brings forward the ongoing concern of many Aboriginal communities that the current justice system is not compatible with the value systems of Aboriginal people .

INTRODUCTION

My initial reaction to this conflict was to simply solve it. Upon further reflection and research into the methods and dynamics of conflict resolution, I quickly determined that the solution was not simply a matter of selecting an academic model of conflict resolution and incorporating my limited understanding of the facts into that model. I decided that an appropriate approach to understanding and resolving this conflict could only be determined through a diagnosis of the conflict.

My goal is to introduce a general framework of conflict resolution from which to understand and address this protracted social conflict. This framework is directed to those persons who are unfamiliar with conflict resolution and unacquainted with the longstanding issue involving Aboriginal people and the justice system. My analysis demonstrates that every aspect of conflict resolution is influenced by culture including the foundations of the conflict, the identity of the parties, identification and articulation of the

issues, who should intervene, what processes will be used, and what results are desirable.[(2)]

Part I of this case study will introduce the historical basis of the current crisis where Aboriginal people are requesting fundamental transformation to the criminal justice system. The historical relationship between Aboriginal and non-Aboriginal cultures frames the basis for numerous reports and commissions that identify the need to modify the current justice system to acknowledge the unique cultural interests of Aboriginal communities. Part II will discuss the importance of issue identification and will identify the parties to this conflict. This section will explore the underlying interests of the primary parties from a procedural, psychological, and substantive perspective and will emphasize the relevance of acknowledging and reconciling diverse cultural approaches to resolving conflicts. Part III will focus on a variety of solutions based on satisfying the underlying interests of the primary parties to resolve the more specific issue of over-incarceration of Aboriginal peoples (including mention of surrounding debates). Given the cultural variation of Aboriginal communities, I make no claim to be speaking for all Aboriginal people. The following commentary is predicated on my personal experience of being an Aboriginal female, my interpretation of the teachings of many Metis/First Nations Elders', and my independent study of conflict resolution.

PART I CONFLICT ANALYSIS

1.1 Historical Realities

The first step in designing a dispute resolution system or process is the diagnosis of an existing problem.[(3)] Effective problem diagnosis must look to the sources of the conflict.[(4)] Understanding the contemporary realities confronting Aboriginal peoples in the justice system must occur in a historical context of the relationship between Aboriginal and non-Aboriginal people. Prior to the arrival of Europeans, all Aboriginal societies relied upon a complex and sophisticated array of mechanisms to maintain social order in their societies. One of these systems was restorative justice where each Nation resolved interpersonal and community disputes utilizing customary law, a legal system established on cultural and spiritual principles.

Over time, Aboriginal realities and institutions were weakened by the residential school system, the reserve system, and the corrections system. Along with the implementation of the *Indian Act*,[(5)] such systems are seen as largely responsible for the loss of cultural values and identity experienced by many Aboriginal communities. This brief historical account represents the basis of the current issue where Aboriginal people are requesting changes to the criminal justice system to include recognition of Aboriginal systems of dispute resolution. The sense of illegitimacy that has come to characterize Aboriginal people's perception and experience of the justice system has deep historical roots.[(6)]

1.2 Different Approaches to Justice

Diagnosis should also identify needs that are not addressed within the current conflict management model.[(7)] At the most basic level, justice is understood differently by Aboriginal people. The purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged. On the other hand, the current justice system tries to control actions it considers deviant or harmful by interdiction, enforcement, or apprehension. The current system emphasizes punishment of the guilty party to promote conformity or to protect other members of society. This is a primary difference that significantly challenges the appropriateness of the current justice system for Aboriginal people.

The Canadian justice system, like other justice systems in the European tradition, is adversarial. The

concepts of accusation, confrontation, guilt, argument, criticism, and retribution are alien to the Aboriginal value system, although perhaps not totally unknown. In Aboriginal belief systems, confrontation is viewed as antagonistic to the high value placed on harmony and the peaceful coexistence of all living things. The adversarial methods used by the Canadian legal system to resolve conflicts are incompatible with traditional Aboriginal culture and methods of conflict resolution. Distinctions between single, two, three and multi - party dispute resolution processes and differing institutions such as courts and administrative agencies lose much of their relevance when we are trying to understand dispute resolution in Aboriginal societies.[(8)]

Elders' teachings tell me that the methods and processes for solving disputes in Aboriginal societies have developed out of the basic value systems of the people which are founded on community/individual responsibility. Approaches to conflict are holistic, relational, and non-antagonistic. Belief in the inherent dignity and wisdom of each individual person implies that any person can have useful opinions in any given situation and should be listened to respectfully. For example, Aboriginal dispute resolution systems allow for *any* interested party to volunteer an opinion or make a comment during dispute resolution. The "truth" of an incident is discovered through hearing many descriptions of the event and/or extenuating circumstances. However, the adversarial system, bound by strict evidentiary principles, places limits on the admissibility of testimony and appears to take a hierarchical approach to the value placed on testimony (as seen in the case of experts). For Aboriginal people, the essential problem is that the Canadian system of justice is an imposed and foreign system. In order for a society to accept a justice system as part of its life and its community, it must view the system and experience it as being a positive influence working for that society. Aboriginal people do not.

1.3 An Emerging Crisis

The problems facing Aboriginal people in the criminal justice system were first documented in 1967 with the publication of *Indians and the Law*.[(9)] This report recognized over-incarceration of Aboriginal people as a growing concern and called for a commitment by governments to recognize Aboriginal dispute resolution mechanisms that would focus on rehabilitation and reintegration of the "offender" as opposed to

incarceration.[(10)] Following the 1988 publication of *Locking up Natives in Canada*,[(11)] which also supported the development of an Aboriginal justice system, a host of commissions, inquiries and special initiatives took place.[(12)]

In 1991, the Aboriginal Justice Inquiry summarized its report:

The Justice system has failed...Aboriginal peoples on a massive scale. It has

been insensitive and inaccessible, and has arrested and imprisoned Aboriginal

people in grossly disproportionate numbers. Aboriginal people who are arrested

are more likely than non-aboriginal people to be denied bail, spend more time

in pretrial detention, and spend less time with their lawyers, and if convicted,

are more likely to be incarcerated. It is not merely that the justice system has

failed Aboriginal people: justice has been denied access to them.[(13)]

The 1996 Royal Commission on Aboriginal Peoples publication, *Bridging the Cultural Divide*,[(14)] is the most comprehensive study of the social, political, and economical realities facing Aboriginal communities. The Commission played a significant role in dispute resolution by raising public consciousness and concern about the justice system in relation to Aboriginal people. This report, like the Aboriginal Justice Inquiry, concluded that the Canadian criminal justice system had failed Aboriginal people across Canada and that fundamental changes to the current system were necessary.[(15)]

Part II DEFINING THE ISSUES, THE PARTIES, AND THE INTERESTS

2.1 The Issues

Defining and articulating the issues to be discussed is a cardinal component of conflict resolution. The process of identifying an agreed upon set of issues, often referred to as a "bargaining mix,"[(16)] can present confusion, misunderstandings, or disagreement on: (1) what the actual issues are; and/or (2) what priority, if any, each issue should take. The issues, here, are centered on cross-cultural relations, opposing methods of conflict resolution, access to justice, systemic discrimination, over-incarceration, and differing philosophies on crime and punishment. The sensitive, political nature of the historical relationship between governments and Aboriginal people including the lack of faith in government policies (by Aboriginal peoples) will make agreement upon issues difficult. Given that the issues in this case study are numerous, complex, and difficult, a possible approach might be to begin without a fixed agenda but with a progression of topics.[(17)]

2.2 The Parties

The third stage in resolving conflict involves identifying the parties to the conflict. All parties need to be known to ensure accurate identification and articulation of the issues, a prerequisite to building effective solutions. Parties to this conflict comprise provincial and federal governments, the Aboriginal community, and federal/provincial police divisions. There is a large influence by the general public. An independent analysis of all parties is essential to fully understand the nature and extent of this conflict. However, the disputants can be categorized into two primary parties. On one hand, there are the federal and provincial governments whose policies are implemented by law enforcement agencies including the Royal Canadian Mounted Police [hereinafter "the RCMP"] and the city police. On the other hand, there is the Aboriginal community with a set of unique cultural interests, values, and frustrations. These two major parties, with distinct interests, are interdependent through a complicated controversial constitutional framework which establishes a uniform legal system.

- Governments

It is essential to appreciate the constitutional relationship between Aboriginal people, the criminal justice system, and both levels of government. Aboriginal communities have consistently requested that control of justice be returned to Aboriginal communities so they can address the underlying issues and sense of isolation experienced by Aboriginal offenders in the current system. From an Aboriginal perspective, this can be done by utilizing dispute resolution mechanisms based on traditional practices and approaches to resolving conflict. However, Canada's constitutional framework complicates this plea:

(i.) s. 91 (27), *Constitution Act*, 1867, confers federal jurisdiction over "criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."[(18)]

(ii.) s. 92 (14), *Constitution Act*, 1867, confers provincial jurisdiction over "the administration of justice in the province including the constitution, maintenance, and organization of provincial courts, both of

civil and criminal jurisdiction, and including procedure in civil matters in those courts." (19)

(iii.) s. 91 (24), *Constitution Act*, 1867, confers federal jurisdiction over "Indians and land reserved for Indians." (20) This relationship involves an ill-defined, controversial fiduciary duty. (21)

Because these constitutional arrangements establish a uniform legal system, Aboriginal societies are precluded from re-establishing and administering dispute resolution mechanisms based on traditional practices, traditions, and customary law. This jurisdictional dispute is intensified by further constitutional debates related to sovereignty, land claims, and Aboriginal/treaty rights. While existing Aboriginal and treaty rights have been recognized and affirmed with the enactment of s. 35 (1) of the *Constitution Act*, 1982, (22) Supreme Court of Canada interpretations of this complex constitutional provision have been criticized for being overly narrow in many cases. (23) The legitimacy of Canada's constitutional framework represents another aspect of the historical conflict between Aboriginal and non-Aboriginal people and will impact on the current issue. Therefore, it is important that the issues be clearly defined and articulated from each party's perspective.

While the Aboriginal leadership has called for a public inquiry, the Province's decision not to conduct a public inquiry, at this point, is dictated by judicial interpretation of s. 92 (14), *Constitution Act*, 1867, (24) which restricts the Province from conducting inquiries linked to criminal investigations. (25) It is clear that Canada's constitution dictates the actions of governments on criminal justice matters and Aboriginal people.

- The Royal Canadian Mounted Police

The RCMP, under federal jurisdiction, is currently conducting the investigation surrounding the February 2000 report. The RCMP, as independent investigator, plays a key role in resolving this conflict. However, many Aboriginal people view the RCMP as another foreign institution, an authority to be feared and not trusted. To address this trust issue, Senator Thelma Chalifoux, a Parliamentarian Senator, and a Metis woman, recently recommended that the RCMP investigation involve the input of an Aboriginal Elder. (26) While the involvement of Elders may sound foreign to the technical, procedural methods of police investigation, the presence of Elders in Aboriginal justice systems is critical to the decision-making process. Traditional Aboriginal and non-Aboriginal approaches to resolving conflict are procedurally quite different.

- Saskatoon City Police

The February allegations seriously challenge the integrity and reputation of the city police. To restore public confidence in the justice system, the city police have responded diplomatically by establishing an internal investigation. While the police officers under investigation may eventually be exonerated, this will not ameliorate the deeply rooted apprehension experienced by many Aboriginal people who are distrustful of this foreign system of law enforcement. Many Aboriginal communities state that the only way to alleviate this mounting distrust is to develop a justice system that is controlled and administered by Aboriginal people. (27)

- Aboriginal Communities

As indicated, Aboriginal political organizations have insisted that a public inquiry take place. The Aboriginal community in Saskatchewan has taken a firm, yet pro-active approach to resolving this conflict. Peaceful demonstrations, 1-800 lines to collect information and provide support to those persons

affected by discriminatory practices within the justice system, and an invitation to governments to discuss alterations to the justice system are strategies being utilized to resolve this conflict. Aboriginal political organizations are in a difficult position. While Aboriginal communities are hoping for answers and political action from their elected leaders, cross-cultural differences, disproportionate resources, and constitutional arrangements present significant obstacles to resolving this conflict quickly.

- The Public Interest

The strength of this conflict appears to have over-shadowed the efforts that governments and police departments throughout Canada have made to employ more Aboriginal people in the criminal justice system. These efforts have included the provision of cultural training for police officers and the stated desire to improve working relationships with the Aboriginal community. Both the Aboriginal and non-Aboriginal communities have called for accountability. Labour associations, church organizations, and students have supported the concern that the justice system is not working for Aboriginal people. Public confidence in government and the criminal justice system can be preserved by governmental acknowledgment of public concerns.

2.3 Exploring the Underlying Interests

The fourth stage to conflict resolution involves exploring the underlying interests or objectives that each party hopes to achieve or accomplish.(28) If issues help parties define what it is the parties desire, then discovering the interests requires the parties to ask "why" they want it.(29) The critical values, needs, or principles of the parties are brought forward when asking the "why" question.(30) Conflict resolution models in a non-litigious setting generally provide for the acknowledgment of procedural, substantive and psychological interests of the disputants.(31) By attempting to uncover the underlying interests, there is a better likelihood of discovering greater numbers of and better quality solutions. These discoveries offer the possibility of meeting a greater variety of needs both directly and trading off of different needs, rather than forcing a zero sum balance over a single item.(32) The principle underlying such an approach is that discovering a greater number of actual needs of the parties will create more possible solutions because not all needs will be mutually exclusive.(33)

- Psychological Interests

The most powerful interests are basic human needs which include security, economic well- being, a sense of belonging, recognition and control over one's life.(34) Aboriginal people need to control their own lives and to be acknowledged and accepted as a unique culture with different values and practices. Further, Aboriginal communities possess a strong sense of community responsibility to address the social problems facing the majority of Aboriginal societies. Lack of cultural recognition (the disappearance of prior societal institutions) is viewed as being largely responsible for many of the social problems in Aboriginal communities. Social problems include alcohol/drug abuse, poverty, unemployment, and suicide. Thus, we see the demands for cultural recognition.

A prerequisite to successful conflict resolution is the establishment of a minimum degree of trust between the parties. This is not an easy task, particularly if contact between the two groups is minimal or antagonistic. Trust is a major concern for Aboriginal people given the government measures and policies mentioned in Part I. A sensible approach with a likelihood of success is to build trust through the conflict resolution process itself. While difficult to predict, trust can be built into this process by selecting an approach that ensures all party interests will be heard and acknowledged. Solutions which recognize and attempt to satisfy these basic psychological needs will be most effective and successful.

- Procedural Interests
- Preliminary Cultural Considerations

Parties to a dispute must have an opportunity, a forum, to make their viewpoints known. There are a variety of dispute resolution mechanisms and combinations thereof where parties can have their views acknowledged.(35) John Paul Lederach provides an interesting account of traditional and modern approaches to conflict resolution which is beneficial when selecting an appropriate process to resolve this conflict.(36) Lederach characterizes modern societies as autonomous/individualistic, impersonal/professional, rational/formal, and technical/specialized. In contrast, traditional societies tend to embrace family/group dependence, personal/relational priorities, and an informal/holistic approach when resolving conflict. While these generalizations may not be applicable to every society, Lederach's paradigm reflects the conflict resolution approaches of governments (modern) and the Aboriginal community (traditional).(37)

Aboriginal decision-making is remarkably different from government decision-making. Government interests are motivated by desires to resolve politically uncertain situations as quickly and economically as possible. In Aboriginal societies, decisions come from community members to the "leaders" at the top, not "from the top down" as seen with governments. Community decisions are reached through consensus involving extensive dialogue, consultation, and reflection. This consensus-building approach to decision-making is not constrained by time or formality.(38)

Additionally, Elders play a significant role in conflict resolution within Aboriginal communities. Elders are integral to the decision-making process both in terms of their wisdom and their presence. In contrast, modern approaches to resolving conflict generally do not include such advisors. The selected approach will need to accommodate the presence of spiritual advisors. Governments may perceive the Aboriginal approach (traditional) as too informal, not adhering to set agendas, and overly concerned with relational priorities. These cross-cultural differences can be addressed by acknowledging that they are present.(39) Being aware of hidden assumptions and alternate viewpoints, careful listening, and acknowledgment of the historical relationship between Aboriginal people and governments can "bridge" this gap. Numerous government departments have developed cross-cultural awareness programs facilitated by Aboriginal people to address these cultural differences. This step illustrates the willingness of governments to improve the working relationship with Aboriginal communities and is a progressive step towards reconciling the broken relationship.

- Comparative Approaches

The choice of an effective conflict resolution process is a difficult one and depends on the nature of the issue, the parties involved, and the desired solutions. In the context of inter-cultural conflicts, R. Fisher encourages the adoption of cooperative processes that allow each party to a dispute to speak and be heard.(40) Fisher also recommends utilizing processes that require the suspension of judgment in an effort to better understand the other side's perspective.(41) A cooperative process allows the exchange/clarification of information about values, positions, and needs in order to build trust and to identify and resolve the underlying issues.(42) In Fisher's view, competitive processes, in which there can only be one winner at the expense of the other, will produce characteristic behaviors of conflict escalation which includes rationalization of one's own behavior and negative stereotyping.(43) Furthermore, competitive processes often result in distorted perceptions, enhanced biases, and insensitivity to differences.(44) As a result, a competitive process is not recommended in this case study.

According to W. Ury, a certain balance of power exists between the parties in a dispute.[45] In resolving a dispute, Ury asserts that parties may seek to: (i.) determine who is right; (ii.) determine who is more powerful; and/or (iii.) reconcile their underlying interests. Ury's paradigm is instrumental when selecting an appropriate process.

- Determining Who Is Right

Ury's first approach to dispute resolution involves relying on an independent standard with perceived legitimacy or fairness to adjudicate between competing rights. The prototypical rights procedure is to turn to neutral third party arbitration to make the decision on the merits of the case, after a formal hearing which usually includes presentation of evidence and oral argument. However, arbitration is a process external to the relationship and results in a declaration of a winner and a loser. Compromises are out of the question.

Legal questions relating to constitutional arrangements and jurisdiction over Aboriginal people are issues of complex debate in national and international forums.[46] In Canada, a court - like approach to resolving any issues concerning Aboriginal people threatens the working relationship between Aboriginal communities and governments for there is only one winner.[47] Because participation is indirect and parties are unable to directly present their own versions, interests, and solutions to the problem, binding arbitration will only exacerbate the trust factor experienced by Aboriginal people who desire involvement at every stage of the conflict resolution process. Further, arbitration does not address the procedural or psychological interests of the parties. A court - like system is a reminder for many Aboriginal people of a system they perceive as not working in their best interests.[48] Therefore, arbitration is not recommended at any stage of resolving this conflict.

- Determining Who is More Powerful

Many disputes are resolved according to which party can exercise the most power. Sources of power include formal authority, expert/information power, resource power, procedural power, habitual power, and moral power.[49] Resolving conflicts according to who is more powerful (or who is perceived to be more powerful) often involves coercion or force. For many Aboriginal communities, government policies and actions are culturally inappropriate. Because constitutional arrangements dictate that governments hold jurisdiction over all justice matters including First Nations people, governments are viewed as "holding all the power." A power-based approach by governments that relies solely on constitutional authority and the structure of the current legal system will lead to escalated social conflict, will deny the opportunity to resolve underlying interests, and will encourage disharmony between the parties. A recommended process, where the balance of power is shared, is Ury's interest-based approach.[50]

iii. Reconciling Interests

Ury's interest-based method involves searching for underlying concerns, devising creative solutions, and making trade-offs and concessions where interests are opposed.[51] Negotiation is the most common strategy to satisfy the goals of an interest-based approach. Negotiation is a conflict resolution process that is voluntary and direct. Through negotiation the parties are allowed to speak for themselves. Further, the process of negotiation brings an opportunity to understand the issues, interests, and goals of all parties. It is important that Aboriginal people believe their interests are being heard for their stories have been told many times before. Alternative dispute resolution literature indicates that conflicts cannot be resolved unless all parties are confident that their versions of the conflict have been heard and acknowledged.[52]

Direct negotiation allows: (1) an opportunity for the participants to determine appropriate compromises for which they will be responsible; and (2) an opportunity for parties to have a measure of control over all aspects of the conflict resolution process. Because negotiation is consensual, the solutions reached have a collaborative and uniting effect on the parties. This model produces a greater likelihood of mutual satisfaction and leads to workable solutions framed on party interests. Agreement reinforces the relationship and provides some impetus for a continuation of the relationship.

Making a concession in one area to win in another is characteristic of successful negotiation. Policies and bottom lines must be flexible if agreement is to be reached in this conflict. The consequences of refusing to negotiate in Fisher's cooperative style may result in social disorder. Hence, there is a compelling incentive to negotiate. Negotiation will be perceived as most fair and accessible for Aboriginal leaders who must consult extensively with community members for the negotiations to be a true success. Moreover, negotiation is beneficial for governments who can hear the concerns directly from the Aboriginal community.

Given the complexity and multi-faceted nature of the issues, mediation during the negotiations may be a constructive option. Mediation is the intervention into a dispute or negotiation, by an acceptable, impartial, and neutral third party who has no authoritative decision-making power. Mediators assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute. (53) Mediators also present ways of moderating positions (54) along with different means of achieving important goals and objectives. To be credible and effective, the mediator must have the respect and trust of all the parties. (55) Despite the neutrality of an independent mediator, mediation can and will likely highlight the trust issues for Aboriginal people who may perceive a power imbalance in the mediation process. (56) Alternatively, co-mediation may be a workable model where party interests are equally represented. (57) Given the diversity of the issues and dispute resolution methods, a variety of methods could be utilized throughout the process. There is no single correct approach to resolving conflict. However, certain models of conflict resolution are more effective than others. Selection of an appropriate process will depend on the parties, the issues, the underlying interests, and cultural considerations.

- Substantive Interests

Substantive interests are directly related to the focal issues under negotiation and involve resource allocation. A recognized, culturally appropriate justice system that reflects Aboriginal values and approaches to justice forms the basis of the Aboriginal position. However, political and financial commitments from all levels of government are necessary to meet this aspiration. The central question is whether or not governments will acknowledge such an interest and if yes, to what extent will governments support, politically and financially, the proposed amendments.

PART III CONFLICT RESOLUTION The final stage of my conflict resolution model involves generating options to mitigate and if possible eliminate the conflict. At this problem-solving stage, parties must feel free to bring forward any and all solutions they believe are appropriate. However, sufficient exploration of the issues is a prerequisite. Moving prematurely, accepting a quick solution without generating multiple options, or accepting a solution that addresses only one party's interests are common pitfalls which can lead to communication breakdown and potential violence in protracted social conflict.

The dismal view of the impact of Canada's criminal law on Aboriginal people has generated a search for positive solutions. Various initiatives have been undertaken to redress the effects of the current justice system on Aboriginal communities. Recent changes have seen the greater involvement of Aboriginal people in the administration and reform of criminal law and the creation of more autonomous Aboriginal-controlled systems. This reform has been positive and promising. However, disconcerting statistics on the

numbers of incarcerated Aboriginal people indicate the issue is far from being resolved. Aboriginal people comprise 3% of Canada's total population yet 12% of federal inmates are Aboriginal.(58) In the Prairies, Aboriginal inmates represent 64% of the federal inmate population.(59) In response to the national problem of over-incarceration, a recent Supreme Court of Canada decision, *R.* v. *Gladue*,(60) directed that the remedial provisions of s. 718 (2) (e), *Criminal Code*(61) be interpreted to provide restorative measures to decrease the number of Aboriginal people currently incarcerated.

3.1 A Look at Past Initiatives

In an attempt to address the over-incarceration of Aboriginal people, a variety of restorative justice projects have been developed and utilized in various Aboriginal communities. The sentencing circle is the most popular model.(62) This initiative is designed to address the underlying interests of Aboriginal communities by recognizing prior forms of Aboriginal justice mechanisms which focus on reintegration and rehabilitation of the offender.

While the restorative justice model is a constructive attempt to address the issue of over-incarceration, two primary criticisms are apparent. Firstly, the judge has absolute decision making power in relation to outcomes.(63) The judge's powerful discretionary role precludes Aboriginal communities from achieving a measure of control over justice matters affecting their communities. Secondly, judicially imposed criteria restrict the range of cases that can be addressed in the sentencing circle model.(64) The types of offenders who can benefit from restorative justice models are also limited. This approach leaves the community under the imposed decision-making authority of a foreign system. Greater involvement by Aboriginal people in the administration of justice will restore Aboriginal community confidence in the current justice system.(65)

3.2 Possible Outcomes

- Things Remain the Same

For the Aboriginal community, this outcome is familiar and is the most feared. For many Aboriginal people, government promises have been broken in the past. This possible result ignores the underlying interests of Aboriginal societies who desire cultural recognition as a means to repair the social problems in their communities. This outcome (avoidance) threatens the public safety of all community members and offers the possibility of increased social tension in all areas of community life. While violence is not an effective means to conflict resolution, the Mohawk crisis and the Battle of Batoche represent the consequences of unresolved historical conflicts. Short term solutions, "cosmetic changes," and low-level financial commitments are no longer options.(66)

- An Aboriginal-Controlled Justice System

On the other extreme, and popular to many Aboriginal communities, is a solution based on the political philosophy that Aboriginal communities have the inherent right (self-determination) to establish their own system of justice which would include traditional dispute resolution mechanisms.(67) When Aboriginal people seek the right to exercise self-determination, they mean the right to determine how matters such as health care, education, and child welfare are provided to their people, in their own communities. This includes the right to establish their own court system with their own unique methods of adapting and applying long established cultural mores. The exercise of self-determination includes the right to apply traditional ways of resolving interpersonal and community problems. This option meets the substantive and psychological interests of those Aboriginal communities who desire an Aboriginal-

controlled system. However, the issue of self-determination is linked to the issue of sovereignty and involves a complex legal debate currently being discussed in international legal forums where much uncertainty exists.

Opponents of an Aboriginal-controlled justice system see this option as too drastic.(68) These public interest arguments are concerned with financial resources, constitutional arrangements, and notions of fairness. These concerns are legitimate. All issues must be openly discussed during the negotiation process. However, public interest arguments that oppose an Aboriginal-controlled justice system are often based on a definition of equality where "everyone should be treated the same." This view fails to recognize the historical basis of the current issue. This definition of equality, as long as it is accepted, will continue to deny the interests of Aboriginal communities. Only when cultural diversity is recognized and promoted in all social systems and when historical realities are explored from all perspectives will this social conflict de-escalate. A greater public understanding is required.

- An Integrative Approach Retried

Another method to resolve disputes is by searching for integrative solutions that recognize and attempt to accommodate at least some of the underlying interests of all sides.(69) This third outcome represents "a halfway point" between ignoring the problem and an Aboriginal-controlled justice system. This result involves a long term compromise where governments would relinquish a measure of control over Aboriginal people in the justice system. In turn, Aboriginal societies would receive less than full control. This option is

likely the most attractive for governments who are concerned with ensuring a uniform criminal justice system and who endorse the legitimacy and authority of Canada's constitutional framework.

Reform proposals could include a comprehensive evaluation of current alternative dispute resolution methods in the criminal justice system. Further, a modified restorative justice approach that provides Aboriginal communities with more input into the administration, design, and control over justice issues affecting their communities could be explored. Initiatives might also include race relations training for everyone involved in the legal system and affirmative action programs designed to truly accommodate the cultural interests of Aboriginal people.

I have refrained from endorsing any specific model because the particular model will be linked with each community's view of its path towards self-determination. Ultimately, it is for them to choose. It is not unrealistic to anticipate that models of Aboriginal justice systems can be worked out in a Canadian context which can reflect the accumulated wisdom of both Aboriginal law and the common law.

CONCLUSION

This case study begins with one Aboriginal man's encounter with the criminal justice system. However, the majority of Aboriginal people continue to encounter a criminal justice system which they do not understand. Numerous commissions and reports demonstrate that the current justice system has adversely impacted Aboriginal communities. There is a need to institute fundamental reforms to overcome the deficiencies of the current approach to providing justice services to Aboriginal people. This paper has examined this sentiment and has provided an introductory conflict resolution model from which to understand the current crisis in Canada concerning Aboriginal people and the criminal justice system.

A cooperative process is the most appropriate mechanism to resolve conflicts that involve Aboriginal people. An interest-based approach which acknowledges the psychological, procedural, and substantive

interests of all parties establishes a basic and trustworthy framework. Because cultural considerations impact on all stages of the conflict resolution process including problem diagnosis, identifying the parties, articulating

the interests, and developing effective solutions, cross-cultural awareness is integral to resolving conflicts that involve Aboriginal people and Canadian governments.

The need to restore the faith of all Canadians in the criminal justice system is critical. It is the writer's opinion that a lone inquiry is not the answer. While public inquiries allow a broad range of parties to participate in the process with informal procedures, they are designed only to report back to governments. Inquiries can combine a retrospective focus on assessing past events in an adjudicative fashion, bringing forward, once again, the impact of foreign practices and institutions on Aboriginal societies. However, governmental acknowledgment accompanied by an active commitment to modify the current criminal justice system is required to restore this faith.

The parties must be ready and willing to reach an agreement. Successful resolution of this conflict, where party interests are addressed, will require cautious and principled negotiation. These will not be easy discussions, proposals, or actions. My hope is that all people will be treated with respect in the process.

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15. *Ibid*. at 309.

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18. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

19. *Ibid.*

20. *Ibid.*

21. *R.* v. *Geurin* (1985), 1 C.N.L.R. 120; *Blueberry River Indian Band* v. *Canada* (1995), 130 D.L.R. (4th) 193.

22. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

23. *R.* v. *Badger* (1996), 1 S.C.R. 771; *R.* v. *Horseman* (1990), 3 C.N.L.R. 95.

24. *Supra* note 19.

25. *Starr* v. *Houlden* (1990), 1 S.C.R. 1366.

26. Quoted in Tekawennake "Aboriginal Justice Issues" Six Nations News, Ontario, Wednesday, March 8, 2000 at 6.

27. *Supra* note 12 at 567.

28. C. Menkel-Meadow, "Towards Another View of Legal Negotiation: The Structure of Problem Solving Model" (1984) 31 UCLA Law Review 754 at 794.

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30. *Ibid* at 128.

31. M. Benson, "Alternative Dispute Resolution" (Lecture delivered at University of Saskatchewan, Saskatoon, February 2000).

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36. Cited in M. LeBaron Duryea, "Mediation, Conflict Resolution, and Multicultural Reality" in E. Kruk, ed., *Mediation and Conflict Resolution in Social Work and the Human Sciences* (Chicago: Nelson-Hall, 1997) at 321-23.

37. See also K. Fullerton, "Building Effective Working Relationships: The Necessity of Protocol and Cultural Awareness" (Paper presented to 3rd Annual "Doing Business With the First Nations" Ottawa, June 1994).

38. This distinction is supported by P. Edmond, "Alternative Resolution Processes for Comprehensive Land Claims" (Paper presented to the C.B.A. Ontario Section Conference on "Current Issues on Aboriginal and Treaty Rights" 25 May 1984).

39. J. P. Lederach, "The Mediator's Cultural Assumptions" in Mennonite Conciliation Service, *Mediation and Facilitation Training Manual* (Akron, PA: Mennonite Conciliation Service, 1995) at 80-85; M. Hube, "Mediation Around the Medicine Wheel" (1993) 10 Mediation Quarterly at 355.

40. *Supra* note 17 at 54-57.

41. *Ibid.*

42. *Ibid.*

43. *Ibid.*

44. M. Deutsch, *The Resolution of Conflict* (New Haven, CT: Yale University Press, 1972) at 353-354.

45. W. Ury et al., *Getting Disputes Resolved* (San Francisco: Jossey Bass, 1988) at 4-19.

46. Given the scope of this paper, it is not possible to address this issue from an international law perspective; therefore, the discussion is general and limited to a Canadian context.

47. *Supra* note 37.

48. As a result, the trend in land claims issues has been to move from a litigious approach to the more participatory process of negotiation.

49. B. Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987)16 Mediation Quarterly 75 at 77-79.

50. See also B. Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 Mediation Quarterly 75 at 77-79 and G. Chornenki, "Exchanging Power Over for Power With" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Edmond Montgomery, 1997) at 164 for a discussion on managing power within a conflict.

51. This recommended approach is also articulated by C. Moore, The *Negotiation Process*, 2d ed. (San Francisco: Jossey Bass, 1996) at 310. Interest-based negotiation (in contrast to competitive negotiation) works best when parties have at least a minimal level of trust in each other; parties have some mutually interdependent interests; parties have a high investment in a mutually satisfactory outcome because of mutual fear of potential costs that might result from impasse; and when parties desire a positive future relationship.

52. *Supra* note 18.

53. C. Moore, *The Mediation Process*, 2nd ed. (San Francisco: Jossey Bass, 1996) at 257.

54. Party positions are that which the parties believe they are entitled to.

55. See G. Chornenki, *Bypass Court* (Toronto: Butterworths, 1996) at 79-81; C. Moore, *The Mediation Process*, 2nd ed. (San Francisco: Jossey-Bass, 1996) at 41; L. Riskin, "Mediator Orientations, Strategies and Techniques" (1994) 12 Alternatives 111 at 111-12; and C. Morris, "The Trusted Mediator" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Edmond Montgomery, 1997) at 319-327 for a more detailed account of mediation and the role of the mediator.

56. M. Shaffer, "Divorce Mediation: A Feminist Perspective" cited in G. Watson, et al, *Civil Litigation. Cases and Materials* (Toronto: Edmond Montgomery Publications Ltd, 1991) at 77 - 82; D. Kolb & Associates, *When Talk Works: Profiles of Mediators* (San Francisco: Jossey Bass Inc., 1994) at 479-483.

57. See L. Love and J. Stulberg, "Practice Guidelines for Co-Mediation" (1987) 13 (3) Mediation Quarterly 179 at

179-181 for advantages and disadvantages of co-mediation along with proposed guidelines for co-mediators to enable maximizing the potential of a co-mediation team.

58. *Supra* note 9 at 410.

59. *Ibid.*

60. (1999), 23 C.C.R. (5th) 197.

61. *Criminal Code*, R.S.C. 1985, c. C-46.

62. See *R.* v. *Moses* (1992), 71 C.C.C. (3d) 347 (Yuk. Ter. Ct.).

63. See *R.* v. *Joseyounen* (1995), 6 W.W.R. 48.

64. *Ibid.*

65. This brief commentary is only an introduction into restorative justice and is not meant to be a comprehensive analysis.

66. See "Determining Who is More Powerful" Part 2.3 (b).

67. *Supra* note 9 at 15.

68. B. Schwartz, "A Separate Aboriginal Justice System?" (1990) 28 Manitoba Law Journal 56 at 71-81.

69. See "Reconciling Interests" Part 2.3 (b).