Reflections on Thinking Concretely about Criminal Justice Reform

Mary Ellen Turpel
Professor, College of Law, Dalhousie University

> Gentleman, I feel that I need hardly say a word as to the difference between a white man and an Indian to you, except in so far as this, that the conduct of an Indian cannot be judged or estimated in exactly the same manner as the conduct of a white man, and Indian ideas are not the same as ours, our ideas. The white man is a man accustomed to live under civilized forms of government. He knows what a large community it is, governed by fixed laws and administered by courts and judges above suspicion, dealing even justice to all that come before them . . . An Indian looks very differently at society . . . The Indian looks to his own little band; apart from them he can do nothing.
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> *Defence lawyer's summation,* Mis-ta-hah-mis-qua*'s (Big Bear's) trial Regina 1886*[1]

The criminal justice system is vast in size and rooted in expert professional discourses—the language and practices of police, lawyers, judges, corrections officers, parole officers. Not only are these discourses and the professional training institutions in which they are developed largely inaccessible to outsiders, they are also reflections of a highly bureaucratized state. Reflecting on the criminal justice system, which is constantly changing and so fragmented when viewed from any specific angle, is challenging to say the least. The discourse and practices of the Canadian criminal justice system are, for Aboriginal people, doubly intimidating. The system is constituted by these specialized discourses and highly defined procedures, and it is culturally and linguistically alien in many respects.

The adversarial system, the *Criminal Code,* the prison system of punishment, the psychological model of rehabilitation based on confession and repentance and the paternalism of parole are all foreign practices to traditional Aboriginal societies, even though Aboriginal people are well acquainted with them in practice. They are infused with the weight of force—the coercive power of the state over the individual. The bluntness of this coercion is somewhat softened by defined legal doctrines, procedures and

supposedly impartial institutions. It is nevertheless coercive, especially in the wider sense of the entire system being imposed on Aboriginal people in their own territories without their consent as part of a colonial project of acquisition of Aboriginal territories for settlement.

The apparatus of the criminal justice system would appear to stand in stark contrast to what I know about Aboriginal legal traditions.[2] Perhaps such comparisons are inappropriate from the outset, given that we have no universal language that transcends all cultures and provides an easy reference and evaluative framework to engage in this discussion. Nevertheless, we have to talk about Aboriginal legal traditions, even without the universal language, because Aboriginal Peoples have legal systems. These systems are not mirror images of the Canadian system because they reflect different purposes, means and ideals. While it is an oversimplification, and I appeal to it only for explanatory purposes here, it is my impression that Aboriginal societies do not have a coercive vision of social control. What struck newcomers to North America, and this can be seen in the works of Rousseau and his contemporaries, was the focus on liberty and individual autonomy which Aboriginal societies exemplified. While some understood this sense of liberty and personal freedom, which has always been valued in Aboriginal societies and families (sometimes called an ethic of non-interference),[3] many non-Aboriginal people have simply dismissed this as uncivilized and demonstrating a lack of culture or absence of social control. To me this is a fairly fundamental difference in approach.

Mr. F. B. Robertson, *Mis-ta-hah-mis-qua*'s defence counsel quoted at the outset, spoke to the court of these differences during the 1886 treason trial. He implies that Indians are without a legal system or the kind of civilization that the Canadian legal system represents. I believe it is crucial for us to contextualize this attitude because I see it today expressed in the doctrines and practices of the Canadian criminal justice system. It is a major obstacle in rethinking the system in light of Aboriginal Peoples' histories and cultures. The judge in *Mis-ta-hah-mis-qua*'s trial, Judge Richardson, remarked to the jury in his charge, "True it is and it cannot be gainsaid that the Indian, as a rule, has not the amount of enlightened education and has not, perhaps, so much civilization as white men, taken as a rule . . . I have told you what the law of the land is already. I have yet to tell you whether or not the evidence, if believed, amounts to a rebellious act and comes within that or covers the charge."[4] The law of the land for Judge Richardson was Canadian federal law. Given his views of Indian society, it seemed unthinkable to him that *Mis-ta-hah-mis-qua* could be judged by any other standard than Canadian law because "the law is there and it is binding upon the Indian."[5] The conception of the uncivilized Indian subject to the law of Canada has become entrenched in the criminal justice system in

many identical decisions, some recently more subtle.[6]

Every Aboriginal person knows that it is not accurate to conclude that there are no mechanisms, laws or procedures for social control in Aboriginal societies. Increasingly, non-Aboriginal people are also acknowledging and accepting this fact. We know it is a conceptual mistake of seeing the world only through the existing system. In other words, if someone else does not have what you have then they have nothing. It would seem this is a common by-product of colonialism and it is used as a justification for Europe having to export civilization to the world. I find it a great challenge to chart the differences between the Canadian and Aboriginal systems because I am suspicious of simplistic anthropological inquiries, and I am increasingly aware of how dynamic, interacting and undivorced culture is from history, politics and economics. Should we strive to describe a pre-colonial state of affairs? What is the point anyway? Can the pre-colonial regime ever be resurrected? My own view is no, not except as a relic of the past. It cannot be resurrected because we have all been touched by imperialism and colonialism, and there is no simplistic escape to some pre-colonial history except a rhetorical one. In my view, we need to regain control over criminal justice, indeed all justice matters, but in a thoroughly post-colonial fashion.

It is impossible to speak in terms of absolute separation or duality of systems (Canadian and Aboriginal) when a considerable overlap between Aboriginal and non-Aboriginal ways of doing things and seeing the world has resulted in convergence at many levels. This is not necessarily convergence born of consent, but convergence born of colonialism and the terribly colonial nature of the history (and arguably ongoing politics) of Canada. This is one of the most difficult issues to grasp when we look at Aboriginal justice issues because the experience of colonialism and imperialism blurs cultural distinctions as much as it highlights them. After all, this is being written in English and it is about the Canadian criminal justice system more than anything else. The problem is not unlike that which we face with revitalizing Aboriginal governments after over a century of the *Indian Act*—in many ways the *Indian Act* has supplanted Aboriginal governing traditions and it is not as easily kicked aside as some imagined.

Convergence is as important as difference. Understanding how to work with the other side requires some critical reflection, dialogue and creativity. One cannot erase the history of colonialism, but we must, as an imperative, undo it in a contemporary context. The challenge of this process is great because we are not conversing outside the colonial context. We are aware that it is part of what we say and do, and that we are attempting to resist and dismantle it. Perhaps this explains why some proposals for an Aboriginal justice system are simply the Canadian justice system with In-

dians instead of non-Indians in all the conventional roles. If this is the option a community chooses, I would like this choice to be made as a truly post-colonial option, as opposed to a neo-colonial turn dictated by those in the system.

How we approach reform—and how we talk about cultural differences, systems and the process of change—is then very much influenced by the current system. But it cannot stop there because this is not the only influence. What is required is a language of critique of the system embedded in both an acute awareness of the historical experience of colonialism and an Aboriginal vision of change sensitive to how we have been influenced by colonialism and how complex reform and problem-solving is in this field. We have to accept that there are profound social and economic problems in Aboriginal communities today that never existed pre-colonization or even in the first few hundred years of interaction. Problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime—these are indications of a fundamental breakdown in the social order in Aboriginal communities of the magnitude never known before. Our reform dialogue or proposals in the criminal justice field have to come to grips with this contemporary reality and not just retreat into a pre-colonial situation.

This critique I am calling for is emerging. The dozen or more major justice studies[7] were almost universally done without significant Aboriginal involvement in report writing. Nevertheless, an agenda for reform is coming from those justice studies with Aboriginal involvement, as well as from the experiences of First Nations people and communities across the country who have started sentencing circles, justice projects and have engaged in efforts at networking with other Aboriginal people about justice reform. I spent some time in 1993 meeting with people who run these community projects in an effort to understand their motivation, successes and challenges. The forces of change are certainly present, but there is no framework for really addressing, at a national, provincial and regional level, the kinds of issues that must be tackled on justice reform. We have seen the organization of justice conferences, justice reports and some initiatives beginning in communities (mostly at the back-end or sentencing component of the criminal justice system), but we have not seen significant change.

I have sometimes made a plea for pragmatism in approaching criminal justice reform, but like so many of the ideas one advances to open dialogue, this one has been hijacked into a credo that we should not deviate far beyond the status quo. That is not my point when I talk about pragmatism. My point is we should be aware of the challenges in establishing the dialogue and especially aware of the actual experiences in real communities or cities and place these in a contemporary cultural and historical context

without retreating into simplistic "us" versus "them" scenarios. We need to dismantle the application of the criminal justice system, and that will require some serious analysis of how the system is not working and why. New justice arrangements will come from a critique of what is not now working—it will not come out of a totally new space, as appealing as this might sound in the abstract. As theorist Edward Said observes, in another context:

> No one today is purely one thing. Labels like Indian, or woman, or Muslim, or American are not more than starting points, which if followed into actual experience for only a moment are quickly left behind. Imperialism consolidated the mixture of cultures and identities on a global scale. But its worst and most paradoxical gift was to allow people to believe that they were only, mainly, exclusively, white, or black, or Western, or Oriental. Yet just as human beings make their own history, they also make their own cultures and ethnic identities. No one can deny the persisting continuities of long traditions, sustained habitations, national languages, and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness, as if that was all human life was about. Survival in fact is about the connections between things; in Eliot's phrase, reality cannot be deprived of the "other echoes [that] inhabit the garden." It is more rewarding—and more difficult—to think concretely and sympathetically, contrapuntally, about other than only about "us". But this also means not trying to rule other, not trying to classify them or put them in hierarchies, above all, not constantly reiterating how "our" culture or country is number one (or not number one, for that matter).[8]

The imperative I framed of post-colonial thinking in a contemporary setting requires a healthy dose of lived experience and self-awareness of convergence and connections: thinking *concretely and sympathetically*. Romantic projections of perfect cultural regimes with superior concepts of goodwill do not get far because they are disconnected from the real experiences of Aboriginal people across the country. I admit, traditional teachings and metaphors of seeking balance, harmony and holistic justice in all our relations are powerful and compelling, but they have not yet been connected in any persuasive fashion to the challenges we face here, now and today in unravelling the colonial system.[9] We have much more work to do to get to the level of concrete reform proposals. However, descriptions in isolation from dialogue will not be enough. We need to engage in an intercultural dialogue with the federal and provincial governments and all the stakeholders in the criminal justice system. I am not saying we need to enter into agreements with all of these parties—please do not misunder-

stand my point here—we need to have an intercultural dialogue about the criminal justice system so that we can have a framework for specific agreements where they might be needed or desirable.[10]

The absence of a critical cultural capacity internal to the criminal justice system has proven again and again to be disastrous. The individual toll is vast, to say nothing of the impact on our collective existence and identities. I sometimes imagine a kind of Vietnam Wall of names will be erected (maybe at the site of *Mis-ta-hah-mis-qua*'s trial in Regina, Saskatchewan). On it the names will be inscribed—a national place of mourning. The lives of Donald Marshall Jr., Wilson Nepoose, J. J. Harper, Helen Betty Osborne and so many others can be brought forward to remind us of the gut-wrenching failure of the criminal justice system to see the injustices it perpetuates before it is too late. I would hope none of us has become hardened to the emotional impact of their stories—wrongful imprisonment of a teenager, racially motivated rape and murder, and many other heinous experiences. A national wall of mourning might be needed to allow us to collectively weep for the loss of childhoods, lives and battered hopes of so many Aboriginal people and nations. I wonder if change can happen without interacting at a deeper level with the injustices other than in the current non-Aboriginal language of policy reform and public governance. This is what I mean by considering how to reflect and converse concretely and sympathetically and how to create the conditions for an intercultural dialogue on justice reform.

I know there are individuals in the political and legal system who have taken up the challenge of understanding, and their role has been crucial in raising awareness of the problem. The Honourable Bob Mitchell, attorney general of Saskatchewan, has led the way here. He has looked at the situation and concluded that "the current justice system has profoundly failed Aboriginal people."[11] A wide consensus on this point seems to be emerging in the non-Aboriginal community. We know there are profound problems; my point is that we have to start to take responsibility for understanding why and enter into a serious dialogue on change at every level. The dialogue is not only among Aboriginal people but additionally, and arguably more importantly, with non-Aboriginal people, who themselves have to understand how the system has failed and become more open and receptive to change. Reviewing the statistics on incarceration and pronouncing that the system has failed is an opening, but we need a structured dialogue on reform that can address the reasons why the statistics are what they are.

This will mean critically interrogating the underlying ideas, doctrines, values and institutions of the criminal justice system, which have produced the incarceration figures and systemic discrimination so widely acknowledged.

Intercultural dialogue requires a broader, supporting critique of the Canadian criminal justice system. The statistics tell us little more than that there is a problem:

> Neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations that include notions that even territories and people require and beseech domination, as well as forms of knowledge affiliation with domination: the vocabulary of classic nineteenth-century imperial culture is plentiful with words and concepts like "inferior" or "subject races," "subordinate peoples," "dependency," "expansion," and "authority." Out of the imperial experiences, notions about culture were clarified, reinforced, criticized, or rejected.[12]

The vocabulary of the Canadian criminal justice system is rife with the nineteenth-century language of domination of Aboriginal Peoples and the thinly veiled supporting dogma of domination: civilization, dependency, subordination and inferiority. There has never been an acknowledgement that Aboriginal Peoples have legal traditions and legal systems. It is presumed that Canada means only common law and civil law systems. This premise has generated a monumental ideological edifice—the Canadian legal system—based on erasing and denying Aboriginal Peoples' legal traditions. Undoing this edifice requires commitment and creativity. It is more than anything proposed to date.

Moreover, the intercultural dialogue on reform is something other than cultural awareness training. Cultural awareness training is important, but it is often taken as a passive add-on training for those already in the system. For example, judges attend a workshop on Aboriginal culture. While this might be helpful, in my view it does not go to the very foundations of cultural differences and the colonial experience. For example, the Law Reform Commission of Canada, in its recent report on criminal justice reform, identified the need for cultural sensitivity in the following way:

> Aboriginal persons face unique difficulties in the criminal justice system: cultural misunderstandings may lead a police officer or a prosecutor to lay charges or continue charges; conditions of bail that are otherwise routine may be unusually arduous for an Aboriginal accused; an Aboriginal person may have unusual difficulties in understanding the trial process; legal defences unique to an Aboriginal accused may be appropriate; an understanding of Aboriginal culture may be necessary for the trier of fact to assess credibility; a sentence may have unusually harsh effects on an Aboriginal accused. In each of these cases sensitivity on the part of police, prosecutors,

> judges, juries, and probation officers is required, and a failure by any one group can have unintended adverse consequences.[13]

An intercultural dialogue is more than sensitivity as imagined by the Law Reform Commission. It could mean exploring the very question of whether the non-Aboriginal judge should even be the trier of fact in the first place. Cultural misunderstandings within the criminal justice system are bound to happen, and reforms aimed at correcting this without examining the broader colonial and culturally particular nature of the system will not likely get to the root of the problem.

I know cultural awareness training cannot be working because we are told by those who have gone through that training that as a precondition to discussions on justice reform we have to accept, among other things, the *Criminal Code,* the *Canadian Charter of Rights and Freedoms* and the judicial review power of the superior courts. Again, this is not about intercultural dialogue and reform. You cannot say, "We would like a dialogue," then dictate the terms, conditions and objectives—thereby cutting off discussion of the underlying problem. This is not intercultural dialogue, or thinking either concretely or sympathetically. To me, this is repackaging the underlying problem. We need a new kind of political openness and honesty.

I believe the imperative of cultural awareness and sensitivity is articulated better in the recent work by former Ontario Crown Prosecutor Rupert Ross, *Dancing with a Ghost.* Mr. Ross describes his effort to understand and talk across cultures in order to ensure that the criminal justice system is fair:

> It remains critical, in my view, that we begin the process of trying to explain ourselves to each other in terms that the other can understand. For my own part, it is much better that, for the purposes of trying to achieve real understanding, we be loudly inaccurate than silent, that we expose ourselves to the risk of being soundly rebuffed rather than perpetuate undisturbed ignorance. We cannot continue acting as we have . . . What has not, to date, been mutual, is accommodation between the two cultures. That has been a one-way street, with all the concessions coming from Native people.[14]

This conception of the role of the non-Aboriginal person within the system and the imperative of cultural dialogue is useful because it is sensitive to the power imbalance in the relationship and the responsibility on the Crown to do things differently. Unfortunately, there may not be a single language that will make transparent different cultural imaginings or even shared cultural imaginings. Intercultural dialogue must begin with an acceptance

that even the goal of a single language may not be possible and is not required for us to begin dismantling the colonial nature of the criminal justice system's application to Aboriginal Peoples.

I enjoyed *Dancing with a Ghost* not because I necessarily agreed with its contents or conclusions but because I agreed with the goal—intercultural understanding and being open to criticism for misunderstanding or insensitivity to cultural differences. Changing the criminal justice system is a complex task. Political change does not happen simply because people become aware of a problem or because they become "sensitive." If it did we would be engaged in the kind of dialogue I am describing on justice reform. People, particularly politicians and stakeholders in the system, require incentives to change. Not surprisingly, it often takes fiscal incentives. For a nation built on Empire and colonialism it is hardly surprising that the same logic rules today. Nevertheless, it is regrettable that the human costs are not enough to motivate decision-makers to change.

We are focusing our contributions here on Saskatchewan. In many ways, Saskatchewan is representative of the situation in the three prairie provinces. Let's examine some statistics, which might reveal some incentive for immediate change and the intercultural dialogue I have been describing. I preface this exercise with an acknowledgement of how notoriously unreliable such data are when taken from government sources like the census.[15] In Saskatchewan, the Aboriginal population is approximately 13 percent of the provincial population. The First Nations' component is 85,000. Based on demographic projections from the latest census, the First Nations population will double by the year 2011. Of the First Nations population, 55 percent reside on reserves and 45 percent in urban centres or off-reserve in the North (the figure are obviously higher for Métis and non-status Indians). Even more telling, 43 percent of the First Nations population is under 15 years of age. The economic future is not terribly bright. In 1990, 55 percent of the registered Indian population reported no income.

Instead of projecting the criminal justice interaction rate in Saskatchewan through incarceration rates or policing records, a consideration of fiscal resources dedicated to Aboriginal Peoples is more eye-catching. It is estimated that of the 1992–93 provincial budget dedicated to administration of justice, approximately $81 million, or 74 percent of the budget, goes to finance various aspects of Aboriginal Peoples' interaction with the criminal justice system. Although this amount could not be entirely disaggregated from existing programs, it is useful to contrast this figure with the fiscal resources given to First Nations in Saskatchewan to undertake justice projects. My own estimate is that no more than $200,000 has been dedicated to this area in the past three years.[16] This comparison is

significant because Aboriginal justice projects operate to divert Aboriginal people from mainstream institutions (like prisons) at a considerable cost savings to provincial and federal coffers. The contrast is startling but so too is the burden on the provincial treasury of the colonial relationship. With strong population growth predicted, the annual budgetary projections for the province will be in the hundreds of millions in only five years. This is an enormously enticing provincial incentive for reform.

Regrettably, we are not engaged in any kind of intercultural dialogue on criminal justice reform at a national level, and no significant dialogue at a provincial or regional level. We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream justice system. This is a false dichotomy and a fruitless distinction because it is not an either/or choice. The impetus for change can better be described as getting away from the colonialism and domination of the Canadian criminal justice system. Resisting colonialism means a reclaiming by Aboriginal Peoples of control of the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages with the existing criminal justice system and perhaps phased assumption of jurisdiction. For example, is there a community with the capacity to take on cases of individuals who have been charged with first-degree murder and are considered criminally insane and violent? These are not problems that Aboriginal communities dealt with traditionally and it will take some time before such offenders could be streamed into an Aboriginal system (if ever). Communities may not want to or may not be ready to take on these kinds of cases.

What I learned from meeting community justice workers in 1993 is that public security and a gradual process of criminal justice reform is what people are looking for, not a sudden break and some completely isolated regime. Community members want lots of time for discussion, training (including training on the relevant aspects of the Canadian legal system) and a phased-in process of criminal justice reform implementation. They also require fiscal resources. There might be some aspects of the current criminal justice system that will never be taken on by Aboriginal justice systems. There will be many points of convergence between Aboriginal justice systems and the Canadian criminal justice system. These have to be negotiated over a period of years in a context that is designed to address the underlying problems described earlier.

The federal government has not responded to any of the major studies on criminal justice reform. They do not have a comprehensive justice policy that can facilitate the intercultural dialogue described herein and implement the reform proposals produced through that dialogue. The platform

of the Liberal Party of Canada included many promising commitments in the area of justice reform, summarized in the following commitment:

> There is a clear consensus from all the studies to date that change is needed and now is the time for action. There is an emerging consensus that what is required is a separate Aboriginal justice system or, at the very least, major reforms to the present justice system to accommodate the unique cultures and interests of Aboriginal peoples.[17]

Having said that the debate between separate and inclusive justice reform is unhelpful, I wonder how this commitment would get us very far on justice reform. I am not sure what they mean by "a separate Aboriginal justice system." Does this mean one separate system for Aboriginal people everywhere? What we need in terms of a policy development is a commitment to facilitate the intercultural dialogue and to implement all changes proposed through those discussions. Especially we need financing for the kinds of changes required. The federal government has been providing resources to Aboriginal justice projects in the past three years, although the amount of resources dedicated has been minuscule.[18] Accessing these resources is cumbersome and to get even a few thousand dollars requires endless meetings, proposals and perhaps even the need to hire an Ottawa-based non-Aboriginal consultant to work the proposal through the system. This is neither accessible nor adequate. There is no community-based input on what is funded, at what levels or for what purposes. At this point, very limited funding will be provided for a three-year period, at which time the federal government will retreat from the area expecting the provincial government to come in and fill the void. The attitude toward Aboriginal justice initiatives is that they are experimental, temporary and "alternatives" to the mainstream system.

Some other developments, not connected with the Department of Justice fund, seem promising. For example, in the Yukon there were significant breakthroughs on justice administration as part of the self-government agreements negotiated recently. In May 29, 1993, the Council for Yukon Indians signed an umbrella agreement with the federal and territorial governments on self-government.[19] This umbrella agreement affords each of the fourteen First Nations in the Yukon the option to implement a negotiated self-government framework. These agreements provide the First Nations that opt into them jurisdiction over a wide range of subject matters, including the administration of justice. Full jurisdiction will only be available after a ten-year period, allowing negotiations to begin in the transition period. This authority includes policing and law enforcement, corrections, probation services and community conflict resolution.[20] The Yu-

kon example may not work for others because of the ten-year delay period and the fact that the self-government agreement is not a treaty. Nevertheless, very detailed work on justice reform is being facilitated by this recent agreement, especially in communities like Teslin, and greater attention and full resources should be given to these initiatives because they have national implications. Unfortunately, it would appear to be the attitude of officials in the Department of Justice that the administration of justice arrangements in the Yukon were special and are not available to other Aboriginal Peoples. This position, whether official or not, has to be reconsidered as does the policy on no new treaties.

While the Yukon example is encouraging, even if viewed as an anomaly by the federal government, it was not part of the kind of national intercultural dialogue I am proposing. While the structure for change has been put in place in the Yukon, now the tough work of implementing that change is starting. The federal government, in partnership with Aboriginal Peoples, needs to fund and facilitate this intercultural dialogue through a new agency, such as an independent Aboriginal law reform round table, which would have an ongoing, active role in overseeing the changes that are required across the system. A more dramatic policy shift is required if we are to deal with the fiscal and human resources crisis that the criminal justice system has been in for some time. Such a dramatic policy shift is long overdue, as are changes to all aspects of the criminal justice system to make it post-colonial.

I want to end my paper by telling the story of a young man I met last year. I cannot reveal his name and I am reluctant to tell you the name of the particular justice project he is with because it is currently under review. I believe his story is not unique. I heard it everywhere I went when I travelled to visit various justice projects in the summer of 1993. I had a chance to meet with one particular elders' justice circle during these travels and to learn how they are running their justice project; what they are doing, and where they would like to go. I spent only a short period of time with them and given that I do not speak their language, I understood only some part of what they are doing with their dispute-resolution and healing project.

Their project had handled over one hundred cases when I visited with them. I thought it would be useful for me to talk to someone who had been through their system in order to assess how it worked in practice. The elders were very helpful and offered to get different people. The one individual I spoke with at length was a twenty-eight-year-old man who had left the reserve when he was about ten with his mother, who was a single mother. They had moved to an urban centre, where he was raised on skid row. His mother was an alcoholic and he became an alcoholic at a very early age.

He had been before the courts repeatedly for assaults, always stemming

from his drinking. His violence was directed at everyone around him: police, friends, family. He was in a relationship with a woman who was also drinking heavily, and they had two children. The children were being neglected and abused by this young man. The child and family services agency had apprehended his children several times. They had been in and out of protective custody and foster homes. This young man, his wife, indeed his entire family, was out of control. He had profound problems in his life, which were escalating with each offence. This young man was not taking responsibility for his life or his family. He had never been taught responsibility. He did not even know his wider family because he was taken away from the community and raised on skid row. The court had ordered him to anger management classes. Social workers were involved. He had no success in changing his behaviour. The Canadian criminal justice system did not reach this young man.

Through the wisdom of a Crown prosecutor working with an Aboriginal justice project, this man's case was diverted to the elder's council. He agreed to have his case diverted to his community, which was running the project, and they agreed to take him on. This is how the system works—both sides must consent. He was then diverted *before* a next round of charges was laid. The young man had been working with the elders for over a year when I met him. He was a man who had obviously changed quite fundamentally in his behaviour. The elders, particularly the elders from his clan, took time to explain his place in his community, his family and clan.

They told him, "You have been in an urban centre, you have been away. Welcome home. Here is your family. Let's go, we are going to introduce you to everybody in your family." He was introduced to everybody in his family again. He was integrated into the community. The elders spent every single day for four months meeting with him, and they still meet with him on a weekly basis. They involved non-Aboriginal social workers in part of his healing because they believed they did not have all the answers, and they saw that neither did the social workers. Their attitude was one of working together and not looking for solutions in any one place.

The elder that was working with this young man had himself been an alcoholic for fifteen years in his youth. He had been out of control and had moved to an urban centre to drink. He had been convicted for violent offences stemming from his alcoholism. Because of the intervention of elders in his life, he stopped drinking and came back to his community, re-assuming responsibility for his family. This elder knew what the young man was going through. He did not have to preach to him, to shame him or punish him. He told him his own story and explained to him, in the way elders do, how he had to assume his responsibilities for himself and his family.

Through their compassion, teaching and family re-integration, the

elders have assisted this young man to gain control of his life for the first time. The person that I met had been sober for almost two years. His children are back with him, although his wife, who is not living with them, is still drinking in the city. She has not yet become part of the new family, but this is the goal that they are working hard to achieve. I asked him what he learned from his experiences in the Canadian system. He said he just wanted to get out of jail and drink again. It was nothing more. I asked him what he saw for the future. He said he wanted to raise his children right. I listened very carefully to his story because what was happening with this man's life was nothing short of a miracle. He had changed because the elders running the justice project were committed to healthy families and rebuilding their community. They viewed his healing as his children's healing.

These people have taken on big responsibilities with their justice circle—enormous tasks that require patience, caring and great wisdom, all of which they've demonstrated. They have been subject to public criticism because some of the elders have previous convictions. How this could be criticized is beyond me—can you blame someone for interacting with a criminal justice system that has been demonstrated to discriminate against Aboriginal Peoples? They are above reproach on one point: they took on responsibility for change. We must move beyond the phase of criticism of systemic discrimination and government injustice into intercultural dialogue on change and implementation of reform. It is important to point out that the development of this particular justice project happened because the elders and others in the community initiated an intercultural dialogue on the criminal justice system with local judges, prosecutors and police. It was from that dialogue that the project took shape and achievable plans for reform were introduced. Unfortunately, the funding for their project has since ended and official political support has not been forthcoming to keep it going. In my view, this is tragic and I can only hope that the project can get going again very soon.

Clearly, a discussion process needs to be initiated on a national basis with full political and fiscal support to ensure that these successes can be reinforced and expanded. Reforms to the mainstream system, and working out the fit or interaction between Aboriginal justice circles and projects and the mainstream system will take lengthy discussions and a commitment to a new relationship. This new relationship cannot be defined in the abstract or with preconceived ideas of what Aboriginal Peoples have to agree to before moving ahead on reform. It has to be defined together by thinking concretely and sympathetically about criminal justice reform.

NOTES

1 Address of Mr. Robertson, Counsel for Big Bear at his trial in 1886, (1886) 49 Victoria, Sessional Papers, No. 52, 221.

2 I admit that I know shamefully little about Aboriginal legal traditions, although I have been actively studying the subject for the past five years. This is undoubtedly a reflection of the fact that you cannot study this subject at a university law school because only the common law and civil law are recognized legal traditions in Canada. My training on this front has been more difficult and is ongoing.

3 Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus, 1992), 12.

4 Address of Mr. Robertson, Counsel for Big Bear, 1886, 230.

5 Ibid.

6 For example, see the recent case of *Re B.C. Family and Child Service Act and Clarissa Thomas et al.* [1994] 1 C.N.L.R. 89 in which an Indian grandmother was determined to have no special status when the protective custody of her grandchildren is at issue.

7 *Indians and the Law,* Canadian Corrections Association, 1967; *Native Peoples and Justice: Reports on the National Conference and the Federal/Provincial Conference on Native Peoples and the Criminal Justice System,* Solicitor General, 1975; *Report on Aboriginal Peoples and Criminal Justice,* Law Reform Commission of Canada, 1990; *Aboriginal People and Justice Administration,* Justice Canada, 1991; *Final Report: Task Force on Aboriginal Peoples in Federal Corrections,* Solicitor General, 1988; *Creating Choices: Report of the Task Force on Federally Sentenced Women,* 1990; *Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*; Assembly of First Nations, "Reclaiming Our Nationhood, Strengthening Our Heritage."

8 Edward Said, *Culture and Imperialism* (New York: Knopf, 1993), 336.

9 Aspects of those differences were described by Professor James Dumont, an Ojibway and member of the Medewin Society in his paper "Justice and Aboriginal People." In Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System,* (Ottawa: Canada Communications Group, 1993).

10 I am aware of the Treaty First Nations perspective on maintaining the historic relationship with the federal Crown. This position would not preclude discussions with others on what the problems are, as opposed to discussions leading to agreements with parties other than the federal Crown.

11 The Honourable Robert W. Mitchell, Q.C., minister of Justice and attorney general for Saskatchewan, acknowledges justice system failure in "Cultivating Change: Submission by the Honourable Robert W. Mitchell, Q.C., Minister of Justice and Attorney General for Saskatchewan, to the Royal Commission on Aboriginal Peoples Regarding Aboriginal Peoples and the Justice System, February 24, 1994."

12 "Cultivating Change," 9.

13 *Report on Aboriginal Peoples,* Law Reform Commission, 52–53.
14 Ibid., xxv.
15 These are taken from a submission by the Honourable Robert W. Mitchell, attorney general of Saskatchewan, to the Royal Commission. His statistics are based, in part, on Statistics Canada, *Aboriginal Population* and *Saskatchewan 1991 Census Population Count* (Ottawa: 1993).
16 Based on discussions with project coordinators and Department of Justice personnel.
17 *Aboriginal Peoples of Canada,* Liberal Policy paper, September 1993, 5.
18 I cannot get access to this data, but my own estimates from discussions with project personnel and officials are that of the approximately $26 million federal Department of Justice fund, only $1.5 million has gone directly to Aboriginal Peoples for justice projects. The balance of the fund has been dedicated instead to non-Aboriginal consultants, conferences, studies, or has lapsed.
19 This is available through Supply and Services Canada, entitled *Umbrella Final Agreement: Council for Yukon Indians,* (Ottawa: Supply and Services Canada, 1993).
20 Ibid., 262.