

November 24, 1988 - 9:00 a.m.

1 CHIEF JUSTICE HICKMAN

2 Good morning ladies and gentlemen. My name is Alec
3 Hickman, I'm chairman of the Marshall Inquiry. Yesterday
4 evening I had the opportunity to meet some of our panelists
5 and some of our discussion leaders who will participate in
6 the workshops, which is a very meaningful exercise for me,
7 and I do look forward to meeting all of you during the next
8 two or three days.

9 On behalf of the Royal Commission on the Donald
10 Marshall, Jr., Prosecution, I welcome you to Halifax and to
11 what promises to be a most exciting event. Many of you
12 have had direct contact with this Commission either through
13 the lengthy and exhaustive (some might say 'exhausting')
14 public hearing process, or by providing important input to
15 us in our research program. Others among you have had no
16 formal association with the Inquiry, but have followed the
17 excellent and complete news coverage that has been given to
18 our work. The common element drawing all of you here today
19 is your interest and expertise in one or several of the
20 difficult issues which we will discuss over the next few
21 days.

22 The discussions will focus on two major areas: the
23 particular problems of black and native Canadians in the
24 criminal justice system, and different perspectives on the
25 role of the Attorney General in prosecutorial decision-

1 making. These issues have been raised in the public
2 hearings and were also the subject of research studies
3 prepared for consideration by the Commission. In the case
4 of the treatment of natives and blacks in the criminal
5 justice system, it is clear that there are strong feelings
6 in the communities that they have been poorly treated, and
7 that they are not served well by those institutions and
8 individuals who collectively make up the criminal justice
9 system. It is also clear that the native and black
10 communities differ in many respects in their definition of
11 the most appropriate solutions to these deep-seated and
12 disturbing problems. But on one thing they agree: the
13 system of justice as it now exists has failed to recognize
14 and meet the needs of non-majority Canadians.

15 The appropriate role for the Attorney General in
16 prosecutorial decision-making is of central importance in
17 this Inquiry. Issues of ministerial responsibility,
18 accountability and independence, treatment of 'special
19 cases,' and relationship with the police have all been
20 raised publicly, leading to concerns that, maybe, there are
21 two levels of justice in Nova Scotia. The public must have
22 confidence that the Attorney General, who as the first Law
23 Officer of the Crown, is not subject to directions from his
24 Cabinet colleagues in the law enforcement area, exercises
25 his or her decision-making power fairly and impartially.

1 We will undoubtedly be making recommendations to further
2 this objective. On Saturday, we will hear from a panel
3 composed of noted legal academics, defense counsel, crown
4 counsel, and a former deputy Attorney General. The
5 presentation of this range of perspectives will no doubt
6 lead to levelly and thought-provoking discussion.

7 We have invited individuals and representatives of
8 specific groups to assist us in defining problems and
9 solutions. Many initiatives have been taken in other parts
10 of Canada, and in the next few days we will have the
11 opportunity to evaluate critically some of the options that
12 might be appropriate for Nova Scotia. This forum is an
13 attempt not only to define the issues that we must address
14 in our recommendations, but more importantly to receive
15 information and advice on possible solutions. These issues
16 are not specific to Nova Scotia. We have here an
17 opportunity to make recommendations for change which will
18 have a positive impact on justice throughout the country.
19 We, as Commissioners, are well aware of the complexity of
20 the task before us. We ask you to share the burden with us
21 for a few days, so that ultimately our recommendations will
22 come from an awareness of the range of debate that
23 currently exists, and from an informed view of the
24 political, cultural and practical consequences.
25

1 This is a somewhat unique forum. (I say 'somewhat
2 unique' in that a similar event was held in another Inquiry
3 which I chaired.) What distinguishes this forum from other
4 conferences is that this event has been arranged for the
5 benefit of the Commissioners rather than for the
6 participants. While we hope that all of you will learn
7 something in the next few days, it is our primary aim that
8 we learn from you. The Commissioners and Commission staff
9 will be enthusiastic, but primarily silent observers. It
10 is for this reason that the meetings have been structured
11 in the way they have, and why we have invited a limited
12 number of people. We encourage you to be open and frank in
13 the discussions, both in the private and public forums, in
14 the hope that such debate will assist us greatly in the
15 weeks and months ahead.

16 We are fortunate that Mr. Thomas R. Berger has kindly
17 consented to chair all sessions.

18 Mr. Berger is eminently qualified to perform this duty
19 and has had a wealth of experience in dealing with many of
20 the issues which will be discussed during the next three
21 days, particularly as they relate to issues involving
22 minority groups and the Canadian justice system. Mr.
23 Berger was called to the Bar in British Columbia in 1957,
24 practiced law in Vancouver until 1971 and served as a judge
25 in the Supreme Court of British Columbia from 1971 to 1983.

1 He was Chair of the British Columbia Royal Commission on
2 Family and Children's Law from 1973 to 1974, was a
3 Commissioner on the Mackenzie Valley Pipeline Inquiry from
4 1974 to 1977, and served, as well, as a Commissioner on the
5 Indian and Inuit Health Consultation in 1979. He was Chair
6 of the Alaska Native Review Commission which sat from 1983
7 to 1985. Mr. Berger was a Member of Parliament from 1962
8 to 1963, and a member of the British Columbia Legislature
9 from 1966 to 1969. We are indeed grateful for his
10 enthusiastic support and willingness to chair this
11 Conference.

12 It is with the greatest pleasure that I open this
13 consultative conference and invite Mr. Berger to assume the
14 chair.

15 MR. THOMAS R. BERGER

16 Thank you, Chief Justice Hickman. I think I should
17 begin by saying that living as I do in Vancouver, I think I
18 know a little bit about the Marshall Inquiry. We've read a
19 lot about it in Vancouver, and I assume that all of you
20 have across the nation. I think that's a tribute to the
21 willingness of the government of Nova Scotia to set up a
22 broad-ranging inquiry to see what did go wrong with the
23 criminal justice system.

24 May I also say, that it's a tribute to Chief Justice
25 Hickman and his colleagues on the Commission who have shown

1 every determination to get to the bottom of this case and
2 to see what happened. I think that everyone aware of the
3 work of the Commission knows that they have done their
4 level best to dig out the truth. The truth hurts, but in a
5 matter of this consequence, I think that it's absolutely
6 vital to the integrity of the justice system that the
7 people of Nova Scotia should know what happened.

8 Now the Commission has completed its formal hearings,
9 and it is concerned that it should lift its eyes, so to
10 speak, from the specific facts of the case, and give some
11 thought to the recommendations that it intends to make—not
12 just the findings, what went wrong, but to give some
13 consideration, in a constructive and creative way, to the
14 question, "Well, how can we make sure that this doesn't
15 happen again?" And that's why they've invited you and me
16 to come and to give them what assistance we can.

17 The Commission, well publicized as it has been, has
18 raised consciousness, I think, around the country about the
19 issues that the Chief Justice has just referred to. The
20 way in which the justice system treats native people, the
21 way in which the justice system treats blacks, and other
22 minorities, and what is the proper role of the Attorney
23 General's department in determining who to prosecute and
24 who not to prosecute.

25

1 The fact is that, as Chief Justice Hickman says, it
2 isn't just Nova Scotia that is struggling with these
3 questions. We have, from Manitoba, Judge Hamilton and
4 Judge Sinclair, who are in the midst of conducting an
5 inquiry, about which I think we've all read, into questions
6 that are very similar to those that agitated Chief Justice
7 Hickman and his colleagues here.

8 Now we are going to be here for three days. The first
9 day will be to deal with the issues connected with native
10 people and the justice system. The second day, dealing
11 with blacks and the justice system, and the third day,
12 dealing with the question of the role of the Attorney
13 General's department.

14 May I remind you—Chief Justice Hickman has just done
15 so—but may I be permitted to do so as well, that, in a
16 sense, we are speaking to the Commission and its staff.
17 They are the folks who have got to write a report. They
18 have to come up with recommendations, and we're really
19 speaking to them; we want to assist them. And on a
20 personal note, just let me say that I've headed commissions
21 myself, and when you are heading a Royal Commission, or a
22 member of a Royal Commission, you have the distinct feeling
23 as you proceed with your work that you need all the help
24 that you can get. And I can assure you that Chief Justice
25

1 Hickman and his colleagues will be listening very
2 attentively to everything that is said here.

3 By the way, it would have been possible, I suppose,
4 for the Commission to bring all of you here in a piecemeal
5 sort of way, have you sworn and argue with lawyers under
6 cross-examination about questions of policy, but I know
7 Chief Justice Hickman has found, and I have found, if I may
8 say so, in my own work as a Commissioner, that it is
9 better, on these broad questions of policy, to bring people
10 together in this fashion, and have them speak informally,
11 and to have a measure of interaction that you don't get if
12 you're holding a formal hearing that goes on day after day,
13 and somebody on June 7th responds to what somebody said on
14 December 18th of the year before. Here we're all together,
15 and in three days, I think we can have a useful,
16 spontaneous and helpful discussion.

17 Now, the sessions are public sessions, what we intend
18 to do today is to meet here, in public session this
19 morning, to consider the views of our panelists, and then
20 there will be workshops during the first half of the
21 afternoon, and then we will reconvene later this afternoon
22 for a concluding plenary session on the issues that have
23 arisen in connection with today's speeches. Tomorrow we
24 will follow the same pattern, and then on Saturday, because
25 it is only half a day, we will alter the pattern somewhat.

1 Having said that, and so that we don't lose any time,
2 I've asked our first panel to be seated at the table, and I
3 will take the liberty of introducing the subject and then
4 introducing the panel, if I may.

5 We have seen that in the last fifteen years, there has
6 been a real advance in Canada in the cause of native
7 rights. The courts in our country have now acknowledged
8 that aboriginal title is a part of Canadian law. All three
9 of our national political parties acknowledge the
10 importance of settling land claims. All three of our
11 national political parties acknowledge that the principle
12 of native self government should be enshrined in the
13 Constitution. They can't agree on how to do it, or on the
14 details of native self government. Those are important
15 questions, and we don't expect to solve them here today,
16 but it shows that there is a consciousness among political
17 leaders and among the public that didn't exist just a few
18 years ago. One of the questions that concerns native
19 people, so far as self government is concerned, is the
20 justice system. It is one of the features of native self
21 government that may turn out to be vital, one that enables
22 native people to have a greater measure of control over the
23 justice system itself. Over law enforcement, over the
24 courts themselves, and also so far as corrections and
25 custodial arrangements are concerned.

1 The way in which we intend to proceed this morning to
2 address some of these questions is first of all to invite
3 Michael Jackson to make a presentation that will lay out
4 the issues. Professor Jackson is a law professor at the
5 University of British Columbia. He has vast experience in
6 the field of native rights. He is well known, I think, to
7 most of you and, among his many qualifications, he wrote
8 the report for the Canadian Bar Association on the whole
9 subject of native justice that received so much publicity
10 last summer. I'm going to ask Michael Jackson, in a
11 moment, to lead off the discussion.

12 After Michael Jackson's presentation, I'm going to ask
13 for—we'll take a break for coffee—and then I will ask our
14 panel to respond to what Michael Jackson has said, and to
15 offer some insights into their own experience, and any
16 recommendations that they are prepared to make.

17 And our panel, I'll introduce them now, if I may, in
18 the very briefest sort of way: sitting immediately to my
19 right is Judge J.C. Coutu, who is a judge of the Quebec
20 court. That really includes the jurisdiction that
21 provincial courts have in the common law provinces of
22 Canada, the jurisdiction on the criminal side. He has
23 additional jurisdiction as well that is comparable to that
24 which county court judges have and district court judges
25 have in the common law provinces, and his circuit is a

1 remarkable one, and he has put a map up here, and if you
2 look at that area in white, which seems to be about three
3 quarters of the area of the Province of Quebec, that's
4 where he holds court. We're looking forward to hearing
5 from Judge Coutu.

6 Next to Judge Coutu is Sam Stevens who teaches at the
7 law school at the University of British Columbia, and is
8 Director of the Native Law Program there. The University
9 of British Columbia produces just about half of all the
10 native persons who graduate in law each year, and I think
11 we all agree that if we had more native people involved in
12 the justice system as lawyers, that would be greatly to the
13 advantage of native people. Sam Stevens will tell us
14 something about the program that we have at U.B.C.

15 Next to Sam Stevens is Michael Jackson, whom I've
16 already introduced.

17 Next to Michael is Chief Joe Norton, who is Grand
18 Chief of the Mohawks, in Kahnawake, in Quebec. They have
19 their own tribal court, and Chief Norton will tell us
20 something about the way in which the court functions in
21 their community.

22 Next to Chief Norton is Chester Cunningham, who is
23 Executive Director of the Native Counseling Association of
24 Alberta. Some of you know about Chester Cunningham's work.
25

1 It is quite a remarkable venture, and I think we're all
2 looking forward to hearing about it.

3 Finally, next to Chester, is Russell Barsh, who comes
4 to us from the United States, who has an international
5 reputation as an expert in the field of native rights, and
6 will be telling us about the movement, internationally, to
7 establish appropriate standards for native justice. I
8 don't want to say anything more than that at this stage,
9 because I think that we all want to get on with our
10 panelists, and I'll begin by asking Michael Jackson to come
11 to the podium and to make his opening presentation.

12 MR. MICHAEL JACKSON

13 Good morning, Mr. Commissioners, and ladies and
14 gentlemen. I have been asked to give a presentation which
15 sets the stage for change. Setting the stage for change,
16 in relationship to the administration of justice in
17 indigenous peoples requires us to both reflect on the
18 origins of Canadian Confederation, as well as understand a
19 vision of its perfection. In the last seven weeks, that
20 vision has been drawn, debated and disputed in the context
21 of our economic and cultural relationships to the United
22 States. In the last two years, that vision has been drawn,
23 debated and disputed in relation to English Canada's
24 relationship to Quebec. Predating both of our encounters
25

1 with Quebec and the United States is our relationship with
2 the indigenous peoples of North America.

3 I want to take you back some two hundred and twenty
4 years, some two hundred and thirty years, when, in the city
5 of Halifax, a treaty was signed between the agents of the
6 British Crown and the Micmac Nation. The Treaty of Peace
7 and Friendship of 1752 which the Micmac Nation argue is the
8 basis for their continuing sovereignty and the basis for
9 their continuing ownership of their traditional
10 territories. I'm not going to talk about the treaty as
11 such. The Micmac, as I understand, have spoken to the
12 Commissioners about that. It's certainly not my
13 prerogative to gloss the treaty. What I want to do is to
14 read to you a statement made by the then Nova Scotia
15 governor, Jonathan Belcher, who, in 1761, shortly after the
16 fall of the French forces in Quebec renewed the Treaty of
17 Friendship with the Micmac Nation, and in doing so, in
18 addressing the Micmac statesman, he addressed him standing
19 by a monument erected for this specific purpose of
20 commemorating the treaty, and he addressed them thus: "I
21 meet you now, as his Majesty's Graciously Honoured Servant
22 in Government, and in his Royal name, to build a covenant
23 of peace with you, as upon the immovable rock of sincerity
24 and truth, to free you from the chains of bondage, and to
25 place you in the wide and fruitful field of English

1 liberty. The laws will be like a great hedge about your
2 rights and properties. If any break this hedge to hurt and
3 injure you, the heavy weight of the law will fall upon them
4 and furnish their disobedience."

5 A question which I think is posed for you as
6 Commissioners, is what has happened to 'that field of
7 liberty?' What has happened to that 'hedge of protection?'
8 And the answer is that the field has been enclosed by high
9 walls and watch towers. The fence is topped by barb wire.
10 Quite simply put, the field of liberty and the hedge of
11 security has in fact, become the security of the prison.
12 The mirror image of that offer of a just society in 1988
13 for the Micmac and for Indian and native peoples across
14 this country is the promise of prison. It has, in fact,
15 become the promise which, for the rest of us, is reflected
16 in going to high school, going to university.

17 I want, very quickly, just to review with you, those
18 figures. Figures about crime and matters in relation to
19 the criminal justice are often open to all forms of
20 academic, professional, disputation. The figures in
21 relation to imprisonment and native people are so glaring
22 that they permit little glossing away by statistical
23 analysis and correlation curves. The figures, as I drew
24 them for the Canadian Bar Association Report, show that
25 Canada's native peoples, while comprising 2% of the

1 population nationally, represent 12% of its federal
2 penitentiary population. In some provinces, the percentage
3 of native people in the prisons is as high as 60%,
4 particularly in the prairie provinces. What is
5 particularly distressing, is that these figures are not
6 getting better because of the high rate of death amongst
7 native communities, and the fact that crime is a young
8 person's business. Most people go to prison, when they do
9 go to prison, as young people. The disproportionate
10 representation of native people in the prisons of this
11 country is growing. It's not getting better. These
12 figures also are not confined to Canada. Whenever and
13 where ever there are indigenous populations, it seems that
14 the prisons of those countries are filled with native
15 peoples.

16 The question of course, is why is that? What is the
17 explanation? It would be satisfying and easy to think that
18 the explanation is simply that native people are poor. Now
19 it's well known that there is a correlation between
20 economic and cultural deprivation, and crime. Native
21 peoples in this country and I understand native peoples in
22 this province are economically deprived. They live in poor
23 housing situations, they have low incomes, little
24 employment. The explanation would be comforting to know
25 that if we simply turn native people into rich people, we

1 could resolve the problem. We may not be prepared to do
2 that, but it would be a simple solution and one which the
3 criminal justice system really wouldn't have to deal with.
4 Many people have said that the problems really lie outside
5 of the criminal justice system.

6 It is my view, and I think there is now a consensus
7 which has developed in the last fifteen years, in the
8 period Tom Berger has talked about, and in many ways he has
9 charted the development of this consensus. That the over
10 representation of native peoples in the criminal justice
11 system in our prisons is not simply because they are poor.
12 That correlation, that relationship, is the result of a
13 process, a particular and distinctive historical process,
14 which has made them poor beyond poverty. And that process
15 is the process of colonization. The process whereby we, as
16 a dominant society, have come to North America and have
17 sought to make over native people in our image. That
18 process has left native people, in most parts of the
19 country, dispossessed of all but the remnants of what was
20 once their home lands. That process, supervised by Indian
21 agents, implemented by missionaries, armed with the
22 authority of the law, has systematically sought to
23 undermine the very foundations of distinctive native
24 societies. It's a process which is recognized as having
25 the inevitable consequence of causing immense social and

1 personal demoralization everywhere it has happened in the
2 world. We have recognized the consequences of that in
3 Africa. We have embarked and almost completed, with the
4 exception of South Africa, the process of decolonization.
5 In Canada, we haven't yet recognized that we have that
6 problem. And yet, it is, in my estimation, the central
7 problem which links the horrendous figures to the criminal
8 justice system.

9 Once you except that historical process as having
10 those kinds of consequences, the answers seem clear as a
11 matter of principle. It is to undo, to change the way, in
12 fact, we relate to native people. It is, in fact, to give
13 them, to recognize their rights to self determination as
14 distinctive communities and nations within this country.
15 That is the mirror image of colonization. A reversal of
16 that historical process, and, as Tom Berger says,
17 governments say that they are committed to it, but you as
18 Commissioners, as members of the judiciary, who supervise
19 the results of that process in terms of native peoples
20 going to prisons, coming before the courts, have a
21 particular responsibility to alert governments to the
22 implications of not following through on the entrenchment
23 of the right to self determination. Now having said that,
24 of course, entrenching the right to self determination in
25 the constitution, while a matter of immense symbolic and

1 historical importance, will not, in fact, be a panacea.
2 One of the things I want to do is to, very briefly, look at
3 some of the ways, some of the forms in which the right to
4 self determination could take in the context of the
5 administration of justice.

6 Before just doing that, there are a number of things
7 which have to be very clearly borne in mind. The first is
8 that we have to be acutely aware of the stereotypes which
9 we bring to the issues affecting native people. One of
10 those stereotypes, and I make this point because unless we
11 understand those stereotypes and can get over them,
12 reviewing any of the proposals which this panel will be
13 placing before you will founder.

14 Some of those stereotypes are that native people are
15 without institutional frameworks. They are peoples without
16 history. They are unsophisticated societies. Hugh Trevor
17 Roper, Professor of History at Cambridge University only a
18 dozen years ago in writing of Africa described African
19 peoples as people without history. He said history started
20 when the Europeans came to Africa; before that, there was
21 only darkness. And I think that's an assumption which many
22 people hold in relation to native peoples, if you look at
23 school curriculums. In fact, and this applies I think,
24 particularly to the Micmac, particularly to the peoples of
25 Nova Scotia, if you look at the historical record, you find

1 that on the east coast, the Indian Nations, the Six Nations
2 of the Iroquois Confederacy, the Micmac Confederations were
3 in fact, elaborated societies. They were sophisticated
4 societies with a well worked out institutional framework.
5 They had their own modes of government, their own modes of
6 adjudication which had been developed or in place for
7 thousands of years before Europeans even came here. One of
8 the remarkable things we don't know about the historical
9 record as a society in Canada is that in the 18th century,
10 the language, the diplomatic language, was the Iroquois
11 Language. The metaphor of treatymaking in the 18th century
12 was the Iroquoian metaphor. Just recently, Russell Barsh
13 was telling me last night, the American Congress passed a
14 resolution acknowledging the contribution which the
15 Iroquois scheme of confederation played in the formulation
16 of American Confederation. That's an acknowledgment we
17 have yet to make, in any form or shape, in the Canadian
18 context.

19 The second thing we have to be very clear about in
20 terms of stereotypes is that native societies are equals
21 and are contemporaries. We have this way of placing native
22 people in a historic time warp. They are traditional
23 societies. Any modern references are mirror images of our
24 society, not theirs. Its important to understand that
25 native societies are inherently dynamic. They would not

1 have survived in North America for the millenia without
2 that ability to change, to adapt. The history of trading
3 in both the east and the west coast has shown an enormous
4 ability of native people to adapt to accommodate, an
5 accommodation...native people probably have very little
6 fear of free trade, given their historical record of their
7 ability to incorporate new ways of dealing things. It
8 doesn't mean they're in favour of free trade, but the
9 historical experience is one in which they have adapted.
10 It's important to understand that, because in trying to
11 come up with contemporary reference points for justice,
12 it's important to understand that native people have a long
13 tradition of dealing with these matters themselves.

14 There's another matter of which we have to be very
15 careful about. We have a tendency and you, Mr.
16 Commissioner, would have the common assumption, born of
17 your experience from practice, that the common law, and to
18 some extent, the civil law method of adjudication and
19 resolution of disputes is the only way to do it. It's the
20 only way we have done it for many hundreds of years. That,
21 I think, gives us a very limited vision on what is
22 possible. Native people have, as I've said, for millenia,
23 resolved disputes within their communities. They have done
24 so, not with the use of courts, not through the use of
25 prisons. They've done it through a process of community

1 decision making, they have done it through processes of
2 conciliation, they've done it through processes which
3 attempt to restore harmony within the community. These
4 principles of conciliation, of reconciliation, principles
5 of restoratory justice, rather than principles of
6 retributive justice, are ancient principles in North
7 America. It's somewhat of a paradox, therefore, that in
8 August the report of the standing committee on justice and
9 the Solicitor General, under the chairmanship of David
10 Daubney, in a landmark report on the justice system,
11 pointed out that there was a need to reorientate how we
12 approach sentencing in this country. There was a need, in
13 fact, to incorporate principles of restorative justice into
14 a legal imagination. That is radical in the literal sense.
15 It's radical in returning to the roots of the adjudication
16 and resolution of disputes in North America. It, in fact,
17 reflects the indigenous way.

18 What this also points to, in looking at new solutions,
19 is that the...we have a need in this country, to take
20 seriously the issue of legal pluralism. We have, for the
21 last two hundred years, seen the legal horizon divided
22 between the common law and the civil law. We need to take
23 constitutional legislative cognizance of the fact that
24 there is a legal order of indigenous people. Not only in
25 terms of their customary laws, but also in terms of their

1 method of adjudication, their method of resolution. What
2 we also need to understand is that native peoples are
3 diverse. As Tom Berger, in another context has said, their
4 languages are as diverse, and in many ways, more
5 multitudinous than the languages of Europe. We have a
6 tendency to insist upon a spurious unity of the native
7 people. How come they can't they get their act together?
8 Why can't they come up with one proposal? That is a
9 completely unreasonable and unacceptable demand. It has
10 taken the European community a thousand years to come up
11 with an economic union. The range of possibilities for
12 native people, in making the justice system theirs, a
13 justice system which reflects their view of who they are,
14 and their vision of the future, is not one which has one
15 facet. We have to be prepared to look at a variety of
16 arrangements, a spectrum of possibilities which may look
17 very different from the existing system, which may
18 incorporate aspects of the existing system. All of those
19 have to be looked at and canvassed, not with a view to
20 finding the best one, the panacea to all our problems, to
21 all their problems. But we have to be cognizant of the
22 need to take seriously the diversity, as we take seriously
23 the fact of their rights to chart their own course.

24 Now, in terms of charting that course, and in terms of
25 the diversity of experiences, one of the things I did for

1 the Canadian Bar was to look at the range of possibilities.
2 One of the things which has often attracted attention as
3 one of the possibilities for a new course is a separate
4 system of adjudication for native people. The idea of
5 tribal courts or aboriginal courts. I'm not going to say
6 very much about that. I understand both Russell Barsh and
7 Sam Stevens will talk about both the American and Canadian
8 experience with tribal courts.

9 One of the things which we have to be careful about,
10 and I think there's a unique opportunity in Canada to learn
11 from comparative experience. The American system, while
12 the American courts early on in the history of that country
13 recognized a residual tribal sovereignty, the first tribal
14 courts established in the United States were not an
15 exercise in self determination. They were not a
16 recognition by the American Republic of the Indian
17 Republic. They were, in fact, a concerted effort by the
18 federal government, as part of its detribalization policy,
19 a policy which had its references in Canada as well. They
20 were an attempt to establish a court system through which
21 Indian agents could better administer reservations, could
22 oversee and superintend the dismantling of the
23 reservations, the allotment of the reservations into
24 individual land holdings, could oversee the undermining of
25 the authority of tribal governments. So they do not

1 provide a model for the implementation of a separate system
2 based upon respect for the diversity of native people and
3 their rights to develop their own institutions. Even
4 though in the 1930s, in the second wave of native courts,
5 that was under the rubric of Indian legislation which was
6 designed to return to the tribes a measure of autonomy
7 after the disastrous experience of detribalization. Still,
8 the tribal codes, and these tribal constitutions and the
9 procedures of those courts, were ones shaped by federal
10 bureaucrats, not by Indian people.

11 In the last twenty years, as Russell I'm sure will
12 explain, tribal courts in the United States have sought
13 from those dubious origins to wrest back control of the
14 courts. They have sought to make them over in ways which
15 make sense to Indian people. Indian lawyers have sought to
16 rewrite the tribal codes, upgrade the procedures. But
17 those courts are still bedeviled by many problems, one of
18 which is the complexity of their jurisdiction. The tribal
19 courts have been consistently attacked by those outside of
20 the Indian territory, both by the state and by the federal
21 government, seeking to undermine, to encroach upon their
22 jurisdiction. The courts have been embroiled in litigation
23 throughout their history because of their inadequate
24 resources, and the claims by many that they gave second
25 class justice. The federal government unilaterally imposed

1 upon them the requirement that they abide by certain
2 provisions of the bill of rights which caused enormous
3 problems for understaffed and underresourced courts.

4 In Canada we can learn from that experience, we can
5 learn from that experience in looking towards that as one
6 of the options and anticipating the problems which that
7 causes. There's a plethora of problems and issues which
8 have to be looked at in advance if you are contemplating a
9 separate system of aboriginal justice. What kinds of cases
10 will they adjudicate? Will it be limited only to Indian
11 victims, Indian defendants? What happens if the crime
12 happens off the reservation? There are all kinds of
13 problems which can be explored in advance and should be
14 explored in advance to avoid the quagmire of problems which
15 the American courts have had.

16 The other thing also is, of course, and it's an
17 important issue, the appropriate balance between community
18 and collective and individual rights, the extent to which
19 we can reach an accommodation between aboriginal law ways
20 and the common law, and the Charter. I don't think that
21 accommodation is beyond our imagination. I think it's
22 possible to design processes which incorporate the best of
23 our systems, and that includes incorporating a system of
24 procedural protections with respect for community decision
25 making.

1 The other very important thing in looking at the whole
2 question of tribal courts is that in the United States, and
3 to some extent Australia, tribal courts have been shaped by
4 non-Indian agendas. When we are looking at aboriginal
5 justice systems in the Canadian context, we should not
6 blinker ourselves to looking at courts as we understand
7 them. One of the most exciting things which perhaps is
8 happening in the country, and we have one of the principal
9 anamators of this in the audience, Chief Tom Sampson from
10 British Columbia, who is in the process of designing a
11 system of aboriginal justice, which does not rely upon
12 courts at all. It relies upon the elders; it relies upon
13 traditional mechanisms for adjudication. And the energy
14 which that kind of endeavour is generating in British
15 Columbia is something which I hope Chief Sampson can share
16 with you before the end of the session. So we must not
17 limit ourselves to the idea of a court as we understand it.

18 This becomes much clearer as you move through the
19 spectrum and look at things other than separate systems of
20 tribal courts. If you look at the experiments which are
21 taking place around the country in relation to diversion.
22 If you look at the experiments which are taking place in
23 relation to sentencing, you see that in different parts of
24 the country, judges have sought to reach an accommodation
25 with native communities in a variety of ways. There are

1 | experiences in which some judges have started to sit with
2 | native elders, or native community members, as assessors,
3 | to delegate or defer to them responsibility for coming up
4 | with constructive solutions as alternatives to
5 | incarceration. Trying to restore a measure of ownership to
6 | the community, of the justice system. And some of those, I
7 | think also some of the panels, can talk about...Chester
8 | Cunningham, I think, is someone who is well familiar with
9 | these.

10 | There are also opportunities in the form of court
11 | worker programs. It's very important that we not see court
12 | workers as being the panacea. It's the easiest one to do.
13 | You can do it tomorrow. You can recommend there should be
14 | a court worker system for Nova Scotia. The case to be made
15 | is unanswerable, but to place on the backs of a small
16 | number of court workers the burden of changing the system
17 | would be a burden which will break their backs. It is an
18 | important part of a spectrum of proposals, but it cannot be
19 | the only one. Chester Cunningham, I think, can give you a
20 | good idea of the way in which court worker programs are, in
21 | fact, a leading edge into many other kinds of areas in
22 | which native organizations and communities have sought to
23 | wrestle back control for the lives of their members,
24 | particularly the lives of their young people, back from a
25 | system which, in fact, has discarded them. I think it has

1 to be emphasized, is that, in looking at some of these
2 alternatives, we do in fact face a challenge, and we are at
3 a threshold in this country where I think we can meet that
4 challenge.

5 One of the things which Russell Barsh will share with
6 you is developments in the international law arena.
7 International law, we tend to see as something you take in
8 law school in third year; you've got nothing better to do.
9 Or if you want to be a diplomat. It's not part of the real
10 muscle of being a practitioner, or really being an academic.
11 It's quite interesting that it's native people who have
12 rediscovered the potency of international law. They have
13 realized that international law accorded them an important
14 status in its early development which Canadian law has not
15 yet achieved. They are able to see that, on the
16 international scene, there are ongoing efforts, ongoing
17 discussions, about the recognition of the rights to self
18 determination, and its implementation. That in other parts
19 of the world there is now, on the national agenda, these
20 kind of items we are now discussing. So that you as
21 Commissioners stand at an important threshold, not only
22 nationally, for the fact that these are issues which are
23 being faced in many other parts of the country, but also a
24 threshold in the sense that internationally, the
25 international community is coming to grips with a vision

MR. MICHAEL JACKSON cont'd.

1 of what future the indigenous peoples of the world should
2 occupy in the nations of the world. And that is part, I
3 think, of the vision we have to have of this country.

4 And so, in charting a course, in making
5 recommendations, in looking at the spectrum of
6 alternatives, I think your recommendations have to be put
7 in that larger context. That we stand at a threshold of
8 momentarily more importance, I believe, than the threshold
9 we stand of at in terms of the free trade agreement. I
10 think that this is a threshold which has been three hundred
11 years in the making. That fence and that hedge that I
12 talked about in the beginning has to be dismantled, and I
13 think we have to recognize that, you know, the cultivated
14 fields of liberty, can bear an imprint, other than that of
15 our own, and I believe they have to bear an imprint other
16 than that of our own, if we really are to have a system of
17 justice, and a perfection of a just society in this
18 country. Thank you.

19 CHAIR

20 Thank you, Michael, for that fond introduction to the
21 subject. We are...something that doesn't often happen at
22 this type of gathering, running a little ahead of shedule,
23 and I would like to suggest that in a moment we take a
24 break for coffee and then return earlier than planned, and
25 that we hear from our panel and then carry on right through

1 until 12:30, so as not to break up the contributions of the
2 panelists.

3 Could I just make one additional comment, that the
4 subject today, of course, is native people and the justice
5 system. Tomorrow it will be blacks and the justice system.
6 On the third day the role of the Attorney General's
7 department. Some of you have come from a considerable
8 distance—people like Chief Sampson. We want them to have
9 an opportunity later this morning or this afternoon to tell
10 us about what they are doing in their own communities, and
11 we expect that those with a more intensive experience of
12 the problems that blacks face in the justice system will
13 predominate in the discussion tomorrow. But I hope you
14 will feel free to engage in a measure of cross-
15 fertilization, and if you have a question later on today,
16 or a comment, that you will feel free to make it, even if
17 you weren't invited here on an expert on the subject we're
18 discussing in one particular day as opposed to another.

19 I think we will take a break, it's a bit early for
20 coffee, but some of you have come fair distance, and the
21 disorientation induced by the time difference may mean that
22 you're ready for a bit of a break. So let's try to start
23 again about 25 to 11, that will give us a little more than
24 ten minutes.

25 BREAK [10:25-10:45]

1 CHAIR

2 Could we take our seats again? We're running ahead of
3 shedule. If we can begin within the next thirty seconds,
4 we will still be ahead of schedule, though only by a
5 fraction of a minute, but still it's nice to think that
6 we're sufficiently well organized to know what we're doing
7 here.

8 I was asked, just as we rose, whether the proceedings
9 will be available. The answer is, this whole conference is
10 being held for the benefit for the Commission and its
11 staff, and there is no intention of distributing the
12 proceedings, but if you wish, in particular, to have the
13 speech of, let us say, the speech of Michael Jackson just
14 delivered earlier this morning or of some other member of
15 the panel, or even all of them, if you would get in touch
16 with Susan Ashley, who is the secretary to the commission.
17 Most of you have met her and she has corresponded with you
18 or written to you. She will do her best to help you out.
19 But we are really doing this, as I say, for the commission.

20 Now we'll turn to our panel. Some of them will speak
21 from the table here, and others may go to the podium.
22 We'll leave that up to them. I've already introduced them,
23 they're well known to you, and as they speak, you'll get to
24 know them better, so I don't think I will do anything more
25 than simply ask for each one of them to make his

1 presentation in turn, and Chester Cunningham, we'll start
2 with you.

3 MR. CHESTER CUNNINGHAM

4 Thank you Mr. Berger, Commissioners. I have to share
5 a joke with you to begin with. It's one given to me by the
6 president of the board, and apparently this teacher was to
7 teach sex education in school, so she thought that it was a
8 topic that she was a bit leery...I guess much the same as
9 the topic we're discussing here today, to discuss with her
10 class, so she decided to give them an assignment. So she
11 sent the youngsters home and said "You watch TV tonight,
12 and then you when you come back tomorrow, we'll discuss the
13 movies that you watched, and we're going to be studying the
14 topic of sex education. So the next morning she got up in
15 the class, and she thought, gee, this will be a real
16 interesting day, so she asked the little girl at the front,
17 she says, "What movie did you watch, or what program did
18 you watch?" "I watched Miami Vice." "Well, what's the sex
19 in Miami Vice?" "Oh, the prostitutes working the streets,
20 the topless bars, and all this." And the teacher says,
21 "Yes, I guess that has sex." She asked another little
22 girl, "What did you watch last night?" She says, "Well, I
23 watched St. Elsewhere." And she says, "What was that?"
24 And she says, "Well, all of the babies being born, and
25 that." And she says, "Yeah, that was sex." And she looked

1 at the back, and there was a little Indian boy at the back,
2 and he was waving his hand, and the teacher said, "Okay,
3 what did you watch?" He said, "I watched Custer's last
4 stand." She says, "Custer's last stand." She says, "That
5 was a war story, or an Indian, cowboy and Indian story."
6 She says, "Well, okay, I'll bite. Where was the sex in
7 that, I didn't see it. It was all violence." He says,
8 "Well you know, when Custer coming over the hill into that
9 valley and seen these thousands of Indians," he says, "and
10 the Indians slaughtered him." And she says, "Yeah, that's
11 violence." And he says, "No. The Indians just said, "That
12 will teach Custer to screw around with us Indians!"

13 In 1963 I took a job at the Native Friendship Center
14 in Edmonton. Sometimes at the time I look back and think
15 that it was quite a gamble to take the job because I had
16 just got promoted in my previous position. But I was asked
17 to be the program director at the Native Friendship Center,
18 and when I got to the job I asked the Executive Director,
19 "What programs do I direct?" And he said, "You find the
20 programs that you're going to direct." And I said, "Well,
21 okay, that's okay." Then I asked him where the money was
22 and he said, "Well, you find the money too." So I just
23 about went back to my job.

24 But after working at the Friendship Center for two or
25 three months, we'd looked at programs that we felt were

1 needed in the community. We had a tutoring program, we had
2 a referral program, and we were working with housing,
3 assisting people with employment, and in this few months
4 that I was working there, I kept getting people coming to
5 me and saying they had to go to court. And it seemed that
6 the numbers kept getting larger and larger each day, so I
7 wandered down to the courthouse one day and walked in and
8 sat down in court room number 1, which is the arrests and
9 new cases, and was shocked at the number of native people
10 appearing in front of the judges. I come in late, but I
11 counted 63 native people, and none of them were on bail;
12 they were all in the lock up, coming out. I watched the
13 process. The clerk would ask them to identify themselves.
14 there was no word; there was a nod of the head. The
15 charges would be read; there would be a nod of the head.
16 The judge would ask, "How do you plead?" Nod of the head,
17 and "You got anything to say?" Nothing, and they were
18 sentenced. Most of them were minor charges, they were
19 charges under the old vagrancy act, as well as drunk in a
20 public place, and shoplifting. And so I sat in for two or
21 three days, and then finally decided maybe this is an area
22 that we can get a program going.

23 I asked three of the judges to go for lunch one day,
24 and was quite surprised at their reaction when I said, "I'm
25 concerned with the large number of native people going

1 through the courts, and no communication, they're being
2 sentenced." And all three of them said "We are concerned
3 to, because in dealing fairly with people, we should hear
4 everything, not just what's in the police report. So they
5 told me to sit and observe for another couple of weeks and
6 we'd get together for dinner and see what we could do.

7 Well, it didn't last that long, the next morning there
8 was a young lady, stood up, come out, the first prisoner
9 out in the morning, and she looked at her feet and didn't
10 look at anybody. And I'm one that doesn't sit still, and I
11 stood up and I said, "Your Honour, is there some way that I
12 can talk to her. Maybe I can help her?" And the judge
13 told me that I could. He said, "You go downstairs; there's
14 a sergeant has a cell block. There's a sergeant there.
15 You tell the sergeant that you've been asked to speak to
16 the female prisoner upstairs." So I went down, ran into a
17 bit Irish sergeant down there, and he asked who I was, and
18 I told him. And he said, "Where are you from?" And I
19 said, "the Native Friendship Center." And I said, "I've
20 been asked to interview the female prisoner upstairs." And
21 his comments were, "We have enough damn do gooders around
22 here without having a bloody Indian." I didn't stop to
23 discuss it with him. I come upstairs and I come in the
24 Judge's door, I didn't come in the public door. I come in
25 the Judge's door. Judge Carl Rolf said, "Did you have a

1 problem?" And I said, "Yes, I did, sir." And he said,
2 "What happened?" And I said, "Well, I ran into somebody at
3 the cellblock who didn't exactly like natives." But I
4 said, "we'll discuss that later. How do I get into see the
5 female offender?" So they let me in through the prisoner's
6 docket with the matron present, and it was about half an
7 hour, and I was talking Cree with her, that I found out
8 what the problem was. The charge was obtaining a taxi ride
9 by fraud. And what she did was she had been instructed to
10 come to Edmonton, get off at the bus depot, hire a cab, go
11 down to her sister's place, and her sister would pay the
12 cab. Didn't give a full address, said it was 156th street,
13 but she was from a small reserve, close to a small
14 community, and she thought she could identify somebody on
15 the street, or somebody would see her. And when they ran
16 up a bill of \$39.60, they'd dropped her off at the police
17 station, and she was charged with obtaining a cab ride by
18 fraud. When I got the story from her and confirmed it with
19 her sister, I come upstairs and brought it to the attention
20 of the judge, who called the prosecutor in, and we sat down
21 and they withdrew charges. And I offered to drive her back
22 to Edmonton to her sister's, and she said, "No, I'm going
23 back to Calling Lake," which is 150 miles out of Edmonton.
24 I keep in touch with her, and she hasn't come back to
25 Edmonton. That was her first and only experience.

1 But after the first woman we dealt with in court, the
2 next morning, when anybody hesitated, any of the native
3 people hesitated, the judge would put them over to the end
4 of the list, and it got so that the end of the list was as
5 large as the original list, and we would interview them.
6 And it was a simple process. We didn't tell them how to
7 plead. We interpreted the criminal justice system. We had
8 a crash course from a couple of the judges, what they would
9 expect. We told them what their rights were; they could
10 plead guilty; they could plead not guilty; they could
11 reserve their plea; they could ask for bail. And we'd
12 instruct them on what information the judge would want to
13 grant them bail. And the judge says, "Okay, we'll start
14 dealing with some of the liquor charges, and the lesser
15 charges." And that didn't last very long. About two weeks
16 after, a young native fellow shot a Mountie, and I was
17 called at three o'clock in the morning to go and interview
18 him. The prosecutor phoned and asked me to go interview
19 him before they got to him. So, it really caught on to
20 where we found that we had to go to court at seven o'clock
21 in the morning to the cellblock and interview the people
22 before court started.

23 There was a real reluctance on the part of the
24 Prosecutor and the police when we first started, because,
25 first thing they said, "They're going to jam the courts up,

1 and they're slow down the process." They found out that
2 the process wasn't being slowed down, that the native
3 people...we would encourage them to speak for themselves,
4 and if they didn't speak for themselves, we would speak for
5 them. And it got so that we'd walk into the court and the
6 Prosecutor would say, "Did you interview John Twenty-Toes?"
7 And I'd say, "Yes." And he'd give me the police report,
8 and he'd say, "Well, what did you get?" And then we'd
9 start doing some plea bargaining with him, and he'd say,
10 "Well, I don't think I have enough here for the more
11 serious charge, we'll accept a plea on a lesser charge."
12 And I'd say, "Well, I can't tell you, I'll have to talk to
13 the client." And we'd go back and...there was no legal aid
14 at that time. This was before legal aid came into effect
15 in Alberta. And some of the more serious charges, we would
16 convince the Attorney General to appoint a lawyer for them.
17 We also had a handful of lawyers who were concerned, and
18 who would, on speculation, take some of the cases. And it
19 was surprising, after about ten years, one of the lawyers
20 said, "I finally got paid up. I got paid up. The fellow
21 would come in, give me five dollars." But all the lawyers
22 got paid up that took these cases on speculation.

23 But it really...you know, the presence for the Court
24 Worker, for the first five years I worked out of the Native
25 Friendship Center, and I was...the Friendship Center,

1 they'd, instead of giving you a raise in pay, they gave you
2 more titles, I think I had six when I left.

3 But in 1969 the Alberta government was looking at
4 the native organizations to strengthen the political
5 organizations, to get the native communities doing more for
6 themselves, and they did a need assessment throughout the
7 province of Alberta, and at the top of the list was a Court
8 Worker program. I tried to persuade the Friendship Center
9 to allow me to expand provincially, provincial wide, and
10 train court workers, and they informed me that my
11 boundaries was the City of Edmonton.

12 So, I left the Friendship Center, and with the
13 blessings and the resolutions from the Indian Association
14 of Alberta, the Metis Association, I set up a separate
15 organization. We called it Native Court Worker Services,
16 because that was what we were going to do. We recruited
17 four court workers, and put them into four of the
18 communities, and then looked for a structure to set up, a
19 nonpolitical structure to set up the board. The board at
20 the Friendship Center was an elected board, and I found
21 that, rather than the agenda for the Friendship Center that
22 I brought, each elected member brought their own agenda,
23 and as a result we got very little done. And so I looked
24 for a board that was nonpolitical, one that was not
25 elected, and one that would satisfy the two associations.

1 And we divided the province of Alberta into seven different
2 areas and asked for two names from each area, and when we
3 got the names from the two associations, I sat down with
4 the Vice President of the Indian Association and the Vice
5 President of the Metis Association and selected a seven
6 member board. They are the society; that is the extent of
7 the society. The board has been really an effective board,
8 although we did have our struggles on control. But we sent
9 them to a workshop, and they came back and told me they
10 were a policymaking board, and I said, "Gee, I'm glad to
11 hear that." But we still have the same board. They deal
12 with policy, I do the fundraising, I administer the
13 programs, I hire people, I fire people, and it's worked out
14 really quite well.

15 But in 1970 when we started branching out from
16 Edmonton, we found that going out into the areas, that the
17 native people knew nothing about the criminal justice
18 system and in fact, it was something that came up in
19 Edmonton as well a few times. When you'd ask a person why
20 he pleaded guilty and they would say, "Well, what chance
21 would I have when I go into court and I'm out numbered
22 seven to one?" And they didn't know that the judge had a
23 particular role, prosecutor had a role, the clerk, the
24 turnkey, and everybody else, the crown prosecutor. But the
25

1 way they seen it is the same group came in the same
2 vehicle, and they'd already decided his fate.

3 So we decided to start holding workshops. In 1971 we
4 held 280 workshops throughout the province of Alberta, and
5 this was going into every reserve, every native community.
6 The province sent a directive out that the judges had to
7 attend, the prosecutors had to attend, the police. In
8 fact, in one area, they wanted the undertaker because they
9 thought they were getting shafted by the undertaker.
10 Another area they wanted the priest. They said the priest
11 has more responsibility in this community than just saying
12 mass. But the workshops developed into a real interesting
13 process. The first process, the resources people did all
14 the talking. About three weeks after you'd get a letter or
15 a phone call, "We want them people back; we now have
16 questions." And we'd bring the people back, and they'd
17 start asking the judges some questions, and the third time
18 we'd come back, the native people would say, "Bring them
19 back; we want some answers now." And we'd bring them back,
20 and I know that one of the judges said that he was tired of
21 issuing warrants all the time for non-appearance in court.
22 And the native people said, "Well, you know, the police
23 tells us we have to appear in court, we appear in court. We
24 figured we've made our commitment. And the police say,
25 'No, when you're name is called, you're supposed to stand

1 up.' Well, nobody told us that, they just said appear in
2 court." So it got so that once this was explained, they
3 also informed the police, that "You know, in Western Canada
4 the RCMP were set up to protect the native. The only time
5 we see you is when you come to arrest us. Why don't you
6 come and get to know us. We'd like to get to know you."
7 In earlier time the police played an active part in
8 recreation in the communities, and their policing wasn't as
9 much. Also the judges would say, "Well, how come you don't
10 appear in court?" And I remember little Alice Mustus,
11 about oh, four foot ten or so, stood up and said, "Hey, Mr.
12 Judge, when you drive by here in your green lincoln on
13 Wednesday morning, and we're hitchhiking, you don't pick us
14 up; we don't go to court." But they didn't realize that
15 transportation was an issue for them to get to court. So
16 when the judge found out it was a problem, we worked with
17 the judge; we ended up getting court on the reserve.
18 Because it was costing a dollar a mile at that time, to get
19 to Marethorpe. A dollar one way, and sometimes to pay a
20 fifty dollar fine.

21 But it really got the people to know the communities.
22 They also worked with the RCMP and said, "When you get a
23 new constable, introduce him to the community. Come out
24 and see us; don't start arresting." It made quite a
25 difference in attitude of the correctional personal. They

MR. CHESTER CUNNINGHAM cont'd.

1 started to realize some of the problems that the native
2 people were having.

3 Then it seemed that when the two associations created
4 us, in fact, just the other day, I heard that there were
5 seventeen different organizations and groups that said they
6 created the Native Court Worker Program. They kept adding
7 things to our mandate. They wanted us to go into
8 employment, into housing, education, but we decided as an
9 organization to stay within the criminal justice system and
10 child welfare. And with our court workers out in the field
11 and people being remanded to institutions, we were spending
12 a lot of time in the institutions, talking to some of the
13 inmates that were there on remand, and we ended up getting
14 a native liaison program for the Drumheller Penitentiary in
15 1972, where the person worked for us inside the institution
16 and was to act as a liaison between the native people and
17 outside organizations. Well, the role slowly developed to
18 where they were also a liaison to the correctional
19 facility. We started assisting them with their release
20 plans, appearing with them in front of the parole board.

21 A year after the province, it seemed that if we get
22 something going with the federal government, the province
23 want it. So the province asked us to put liaison people in
24 their provincial prisons. And we hired five to go into the
25 native prisons. It seemed as we got going with the

1 province as well and establishing credibility, that we
2 weren't a fly-by-night organization, that we were there to
3 stay, they kept asking more of our court workers. I
4 remember the family court, chief provincial family court
5 judge, asked us, "You provide a service to criminal court.
6 Why can't you provide it to us? We have the same problems."
7 So we went out and got funding to put the juvenile, family
8 and court worker program together. I now have 32 criminal
9 court workers throughout the province. We cover the area.
10 I have 28 family court workers, family and juvenile court
11 workers which also handle young offenders. And I have two
12 separate contracts for young offender court workers in the
13 cities.

14 And we attend courts every morning in areas where
15 there is a large native population. With the workshops as
16 well, the RCMP started to phone me and say, "Why don't you
17 get your court worker down here to the cells every day."
18 And I said, "Well, you know, what would the purpose of that
19 be?" And they said, "Well, some of these people, we don't
20 want to charge. Some of these people, we feel, if somebody
21 will steer them to a treatment center, counselling program,
22 we don't have to charge. And we would sooner work that
23 way." So we started attending, going to the cells and
24 talking to the people and making a commitment to the system
25 that we would look after the people.

1 The novelty of running the workshops in the
2 communities seem to have run out. But I think it was that
3 Indian Affairs started paying people to attend and it took
4 away the impact. So we developed a training and media
5 package. We started producing media productions on
6 problems that were coming up in the reserves. I know we
7 had a glue sniffing problem with one reserve, so we went
8 there. We try to find a media, a package on drugs and glue
9 sniffing, and we couldn't, so we done a video on glue
10 sniffing. And then we found there was the attitude of the
11 parents on it, so we done another video, and we started
12 using these in our workshops, and we continue to hold
13 workshops throughout the province on different topics. We
14 held 108 when the Young Offenders legislation came.

15 We try to get into diversion, and I think we had an
16 excellent diversion project up in the high level area. We
17 thought we'd try it in an area that up to fifteen years ago
18 we couldn't get somebody to speak Slavian English,
19 interpret. We had to interpret from Slava to Cree to
20 English and then back. We tried a high level project out
21 there, and we felt it was working, but money talks. The
22 Crown, the Attorney General said there isn't enough numbers
23 to warrant the program, so they cut off the funding. And
24 we felt that the project was working.
25

1 But like I indicated, the Solicitor General's and the
2 criminal justice system are starting to depend on us. We'd
3 get up and speak the sentence, and the judge would say,
4 well, you supervise this person on probation. So we
5 negotiated a contract with the provincial correction,
6 community corrections, to do probation supervision. And we
7 now do most of the probation supervision in the province of
8 Alberta. We also do most of the parole. But when the
9 native people were still going to the bush camps or going
10 to jail and not getting benefit of the programs, I
11 approached the Deputy Attorney General, and said, "Can we
12 look at setting up a bush camp, a minimum security bush
13 camp, and offer some programming?" And we have an
14 excellent Deputy Solicitor General, and he doesn't say,
15 "No", he just says, "Why not?" So I have to prove to him
16 that we can do it. So we went into a project at Beaver
17 Lake. We set up a bush camp and we didn't take prisoners
18 directly from the courts. And that was deliberate, because
19 as soon as I mentioned to the judges that we had a bush
20 camp, they wanted to fill it. And I said, "No. Let's go
21 through the normal process. If you're going to give
22 somebody probation, let him try probation. Don't send him
23 directly to our camp." So, now we get fed by sort of a
24 parent institution, and we still have the Beaver Lake
25 security camp. We had to wheel and deal. We do a lot of

1 wheeling and dealing with the provincial government. But
2 we set up a second bush camp, up in Blackfoot country, up
3 west of West Castle, and we operate it the same way.

4 But later on, when we took over a jail from the
5 province, we took over Grierson Center in May of this year,
6 and they were talking of numbers, and this baffles me, with
7 the large number of native people in prison. They said we
8 didn't have enough numbers to keep your forty man jail open
9 as well as your bush camp. So we wheeled and dealed. We
10 wheeled out of our bush camp at Beaver Lake and took the
11 Grierson Center. And we now have a forty bed prison
12 operating in the City of Edmonton that's staffed and
13 operated by my staff.

14 We started to do some support programs. We developed
15 our own Life Skills Program. We call it Family Life
16 Improvement. We started it with some of the mothers that
17 were going to family court, and trying to build up...it was
18 a last ditch attempt to keep their children. And we
19 started working with them and discussing the family
20 problems. But it has since expanded to...we discuss
21 everything in the sessions. We conduct them four days a
22 week in Edmonton, and we get clients, from not only our
23 workers, but from social workers, from corrections people.
24 But we've expanded that program. We're taking it into
25 jails now, into the federal corrections, provincial

1 corrections, and it's an excellent program. And we're
2 hoping to get money to expand it throughout the province
3 because it seems to be quite effective as a treatment
4 module for people in difficulty.

5 We have also got into young offenders probation and
6 started to do supervision on young offenders. We started
7 with a project in Edmonton, and slowly moved out. e had a
8 halfway house for adults, but when we took over the jail,
9 we gave up the halfway house for adults, and turned it into
10 a juvenile halfway house. It's an independent living
11 skills program, and we take young offenders between the
12 ages of sixteen and eighteen, rent an apartment for them.
13 This is another case where we learn the white man's ways
14 and get away with it. If we'd have went and said half way
15 house, we'd a had to go through zoning by laws, so I bought
16 an apartment building and, on paper, I'm renting to the
17 young offenders, so we didn't have to go through zoning
18 bylaws, and now have our halfway house anyways.

19 But we also started to run native awareness training,
20 and we run the native awareness training for correctional
21 officers, police forces, social workers. We're now going
22 into the university and running it for teachers that go out
23 into the community. And we feel that native awareness is
24 not a one-shot thing. We encourage our staff to work with
25 the police who attend the training, the correctional

1 people, on an on-going basis. We
2 also have an elders program that goes into the jail. We
3 tried an elders program, our first one I guess was in 1974,
4 where we had a sweat lodge in the Drumheller Institution
5 and we kept bringing elders in, and we found out that the
6 elders were reluctant to go into the prisons to begin with,
7 but now they're saying they want to go. So we have an
8 elders program for all of the federal correctional
9 institutions and the provincial institutions, both young
10 offender and adult.

11 And we have two exciting programs that we just started
12 within the last year that we're quite excited about, and
13 Michael didn't mention it, but a for awhile I was against
14 traditional justice programs run by the native people. And
15 I think my reason for that was I didn't think a lot of the
16 native communities were ready for it. We've since went
17 into Denetah Youth Project up in Assumption, the same place
18 we ran the high level diversion project. I guess the work
19 up there wasn't lost because they were still interested in
20 doing something for their own people. And they asked us to
21 meet with them, and they wanted a group home. And when we
22 sat with them and discussed the group home, it wasn't a
23 group home they wanted. They were concerned about the
24 large number of youth from that reserve being placed off
25 the reserve, either through child welfare or child

MR. CHESTER CUNNINGHAM cont'd.

1 offenders. And they wanted to keep the youth there. So we
2 got money. And this was a real accomplishment too, if you
3 can convince provincial departments to put money into a pot
4 and give it to one group and report to one group. But that
5 doesn't happen. We convinced five different provincial
6 departments and two federal departments to put money into
7 this project at Assumption, and that we would be answerable
8 only to the Solicitor General's on the project. And it's
9 really had some positive results. We ran a bush camp, a
10 summer camp, the first two months, and we paid for two
11 adults, two elders to come in, and before the two weeks was
12 up at the bush camp, we had fourteen elders had come in.
13 Twelve of them come in on their own. They call it the
14 talking drum project because when the elders sit down and
15 talk to the youth, they start playing the drum and singing.
16 But it set up a format for the elders to talk with the
17 youth, and the crime in that community has went down,
18 because the elders are saying we have finally been allowed,
19 or we're finally coming back to raising the youngsters.
20 That's our responsibility, to teach the youngsters, and
21 we're finally getting back to doing that.

22 I got a call just about two months ago, no, not two
23 months ago, about six months ago, from the band council
24 saying that I was interfering in band council matters, and
25 I couldn't figure out how in the hell I was doing that. I

1 hadn't been up there. I knew my workers were told to stay
2 out of band politics, but what it was was I was summonsed
3 to appear in front of the band council the next day. So I
4 had to grab an early morning flight and got up there. But
5 what the concern was that the band council were now being
6 approached by the elders, and the elders were saying "You
7 guys are spending far too much time negotiating out there,
8 talking about things, and you're ignoring things back
9 here." So they were telling them that they should be
10 spending more time working with the youth, more time
11 working with the family, and I said, "Hey, that's not
12 my...I'm not creating the problem. It's your own elders
13 that are directing you guys, and they're rocking the boat
14 and you don't like it." So now they're staying fairly
15 close and working with the youth group.

16 But the RCMP at one time had moved off the reserve
17 because the reserve was too rough. They couldn't stay
18 there, they were being bombarded, shot at, and now, they're
19 asking to get involved in crime prevention on that same
20 reserve.

21 With the results, the early results of the project in
22 the Denetah group, we moved to another area. I think most
23 of you have heard about the Peerless Lake Tragedy where the
24 six young people drank the copying fluid. Well, there's
25 three communities in that area, there's Peerless Lake,

1 Trout Lake, and Loon Lake. And we've moved there with the
2 youth group and it's having the same effect. In fact, the
3 isolated communities are asking us to get involved with
4 them in getting some community development going. We're
5 currently...they're wanting us to employ people to get into
6 the area of recreation.

7 We're trying to convince the oil companies now that
8 they're all talking of economic development, and I think
9 before you get into economic development, you have to have
10 social development. And so we're expanding the program.

11 CHAIR

12 Excuse me, Chester. We're running just a little over
13 time. I know everyone's very interested to hear more, and
14 they will have that opportunity in the workshop this
15 afternoon, but we want to reach the other panelists.

16 MR. C. CUNNINGHAM

17 Okay. Just another project that we just tried is a
18 crime prevention tour. And when crime prevention first
19 came up, I went into the isolated communities and ask them
20 what their version of crime prevention is. They said
21 "Shoot the judges and the police." I chuckled when they
22 told me that until they told me that one of the
23 communities, Red Earth, didn't have a telephone, and
24 whenever something happened on a Friday night, and most of
25 the crime in the native community happens on weekends, that

1 by the time they had access to a phone, they had solved the
2 problem themselves. Now with access to a phone, the police
3 come in, have to justify their visit, they lay charges, a
4 party of foreigners come in and hear the charge, take the
5 fellow out, and he serves his time out in the community.
6 They said, "We have no ownership." The only way we're
7 going to get anywhere, if we start getting ownership in the
8 programs that are dealing with us. Thank you.

9 CHAIR

10 Well, we can learn a great deal from each of our
11 panelist, I'd like Sam Stevens to go next.

12 PROF. SAM STEVENS

13 Thank you very much, Mr. Chairman, Mr. Commissioners,
14 good morning. It's a unique opportunity I have this
15 morning to share some thoughts with you, and the kind of
16 thoughts I'd like to share with you are related, I guess,
17 to three areas. To basically talk about the root cause of
18 the Donald Marshall case, in my opinion. To then talk
19 about what, very briefly, about what Chester was talking
20 about. How do you accommodate aboriginal peoples within
21 the present system? And then finally, deal very quickly
22 with the development of a parallel justice system.

23 To begin with then, I'd just like to succinctly put
24 place the problem which I feel we're talking about and
25 which is, I think, at the root of the cause in the Donald

1 Marshall case. During the past two hundred years,
2 aboriginal peoples have tried to maintain their distinct
3 culture. This has been a very, very difficult process.
4 Because the dominant system has not seen the need, in my
5 opinion, to recognize aboriginal peoples' own institutions
6 of law, politics, land tenure, et cetera. For the most
7 part, this has been premised on this notion that 'they
8 should be like us.' That is, the Indians. In other words,
9 the dominant society has felt that its institutions of law,
10 education, politics, were the benchmarks, or the standard
11 that should be emulated by aboriginal peoples. And
12 aboriginal peoples, as you know, more specifically in the
13 Donald Marshall case, have had a very tough time to adjust
14 to the imposition of the dominant societies' laws, cultural
15 values, etc.

16 It's not been an easy adjustment, and for the most
17 part what I see is still that basic problem has not been
18 addressed. That is, how are the aboriginal peoples and
19 their institutions to fit in with the dominant societies'
20 laws, politic, institution, etc? They have maintained,
21 that is, the aboriginal people, that their values, their
22 institutions, their philosophies, are markedly different
23 from the present dominant societies' values and
24 institutions. They say that if they are to survive as a
25 culturally distinct group of people, they must have the

1 option of being able to practice their cultural laws, their
2 traditional laws, be able to utilize their traditional
3 institutions.

4 Further, they say, that there must be recognition
5 within the dominant society, that their institutions have
6 validity within the dominant system's institutions. At the
7 very minimum, they say, they must have protection within
8 the dominant system's, in this case, criminal justice
9 system if they are to survive as a culturally distinct
10 group of people.

11 Assuming for the moment that this is the fundamental
12 problem at the heart of the Donald Marshall Inquiry, what
13 then can be done to begin to resolve this dilemma that
14 aboriginal people find themselves in with the dominant
15 system, and with their own cultural laws and institutions?

16 I'd like to very briefly talk about what can be done
17 with the present system in order to protect them within the
18 criminal justice system. Well, one of the things that the
19 dominant system prides itself on is legal representation.
20 In fact, the dominant system says that it guarantees to
21 every accused, to every offender, legal representation.
22 But not always, in my opinion, is that legal representation
23 fair. And Chester talked about some of the problems that
24 he has seen, within the dominant system, of fair
25 representation. In fact, in 1973, when the landmark case,

1 | *Calder vs Attorney General of British Columbia* was decided
2 | by the Supreme Court of Canada, we had three lawyers in the
3 | whole of Canada. So, there are very few aboriginal
4 | lawyers, even yet, in Canada. Approximately one hundred,
5 | out of a population of 34,000 other lawyers. In the
6 | Maritimes here, you have even less. My understanding is
7 | that you have one. Now, as I say, you may say that the
8 | legal profession, legal representation, will always, as
9 | professionals, give fair and good representation to
10 | aboriginal peoples. Well, I'm reminded of, in fact, a
11 | case, when I articulated with the Department of Justice, and
12 | in a conversation with another defence lawyer, I told him
13 | that maybe one day I wanted to practice law as a defence
14 | lawyer, and he said to me, that you could have all the
15 | Indians you wanted. Intimated to me that there were two
16 | classes of criminals. The Indians, and the rest. And from
17 | that time on, I've often wondered how many other defense
18 | lawyers there are within our criminal justice system who
19 | have a difficult time, because of their cultural
20 | background, of empathizing with aboriginal peoples.

21 | At the University of British Columbia, we've attempted
22 | to ameliorate this problem, as have a lot of other law
23 | schools across Canada. We have the native law program, and
24 | since I've been there, since 1984, we've tried to do our
25 | best to access law school for aboriginal applicants, and to

1 graduate them. We've done it in a number of ways. We
2 actively go out and seek people, aboriginal people, who are
3 interested in working with their people in a legal
4 profession. That is, working at the high school level,
5 encouraging these people as role models, to begin to
6 develop their academic skills so that eventually they will
7 come to law school.

8 At the present time, most of our aboriginal peoples do
9 not have the academic background to access law schools.
10 That's not to say that they can't complete law school, but
11 they don't have, in fact, the academic background to get
12 over that first barrier which is access to law school.
13 What we find, in fact, is the same with any law school
14 across Canada and that is, in order to get into law school,
15 you have to be the cream of the crop, better than B plus
16 average, and LSAT score of no less than 36 out of 48. And
17 most of our aboriginal peoples are just not there. So we
18 have accepted them in the discretionary category, basically
19 on the premise that as long as they have their skills
20 developed to the point in time where they can handle the
21 law school workload, then we will accept them into law
22 school. Practically speaking, it means two years of
23 university, and an LSAT score of no less than 25 out of 48.

24 But just to do that, if you are a law school, you're
25 not going to succeed, in my opinion. You need to put in

1 place a support program, and at the University of British
2 Columbia, I think we've done a very good job of that. It's
3 not something which we make mandatory for all law school
4 students, that is, native law students, but it's something
5 which is more along the lines of a coaching experience,
6 that is, helping them to develop the arguments so that, in
7 fact, they can make those arguments on the law school
8 exams. Helping them to understand the methodology of
9 studying law, helping them to solve their personal problems
10 as they're going through law school, helping them to access
11 funds so that they can stay in law school.

12 We have gone further at the University of British
13 Columbia in adding lost aboriginal courses, and I think, in
14 so far as the non-aboriginal person is concerned, and more
15 particularly the lawyers and judges, it's a must, if we are
16 to begin to solve the problems that aboriginal peoples
17 have, insofar as non-aboriginal peoples understanding of
18 their problems.

19 The report of the Canadian Bar Association Committee
20 on aboriginal rights in Canada, in fact, recommended that
21 studies in aboriginal law be actively promoted in Canadian
22 law schools, and further, that law societies undertake the
23 professional seminars and workshops on aboriginal legal
24 issues.

1 Some of you would be familiar with the special
2 committee report by the Canadian Bar Association that over
3 the past two years have been meeting. That report was
4 tabled at the annual meeting of the Canadian Bar
5 Association this past August. A number of recommendations
6 come out of it, one of which was the one that I read to
7 you.

8 So, it is my recommendation, Commissioners, that the
9 law schools at Dalhousie University, and the University of
10 British Columbia...or at least, New Brunswick, be provided
11 with the funds to put in place an adequate, affirmative
12 action plan to graduate aboriginal people with law degrees.
13 And that both law schools and the law societies undertake
14 the development of relevant aboriginal law courses and
15 seminars for all students and lawyers.

16 It's also, I think, fair to say, that aboriginal
17 people, as was very well put by Chester Cunningham,
18 throughout Canada, have little or no knowledge of their
19 rights within the criminal justice system. Or for that
20 matter, how the courts work. There have been various and
21 many attempts to help aboriginal peoples understand their
22 rights. Most of these attempts have not been successful.
23 There needs to be, in my opinion, a concerted effort made
24 on the part of the law societies across Canada, more
25 particularly here in the Maritimes, to provide this kind of

1 information in an appropriate manner to aboriginal peoples.
2 This could be done by providing education funding to
3 sensitize aboriginal peoples of what their basic rights are
4 and how the court system operates.

5 I've been involved, over the last year, in teaching
6 courses, law courses, to aboriginal peoples at the reserve
7 level. Most recently, and in fact, still going on, with
8 the Canim Lake Band in northern British Columbia around
9 Williams Lake. And the courses deal with a number of areas
10 that help them to understand what their rights are within
11 this dominant system. I think it's a minimum that we must
12 do as Canadians, if aboriginal peoples are to adjust to the
13 dominant system.

14 Another example, was a course which was offered by the
15 University of British Columbia at remote areas to band
16 social workers on Vancouver Island. These social workers
17 met for a period of three months, and I taught them the
18 course which covered a number of areas—Charter of Rights
19 and Freedoms, Young Offenders legislation, family law
20 legislation, child welfare legislation, federal and
21 provincial human rights legislation. As a result, each one
22 of the workers was equipped to understand what aboriginal
23 peoples rights are in the areas that they work in, for
24 their people at the community level. And the hope is that
25 these social workers will be paralegals in helping their

1 | aboriginal peoples at the reserve level understand what
2 | their rights are.

3 | So it is my recommendation, Mr. Commissioners, that
4 | monies be set aside to assist aboriginal communities to
5 | better understand the present justice system, and to
6 | understand their legal rights in key areas. Chester talked
7 | about meaningful participation within a dominant system. I
8 | think it is a must, if we are to begin to resolve the
9 | terrible dilemma that we see in the Donald Marshall case.

10 | A good example of this, and I hope that Chief Sampson
11 | will talk to you people about this, at some point in the
12 | three days, two and a half days, is the young offender
13 | diversion program that the First Nations of South Island
14 | Tribal Council have proposed. Their proposal is to accept
15 | responsibility from the present criminal justice system, to
16 | develop a plan in conjunction with the young offender on
17 | how to rehabilitate the young offender, to rehabilitate the
18 | young offender using their traditional family law, and then
19 | report back to the criminal justice system once
20 | rehabilitation has been attempted or accomplished. It's a
21 | good example, I think, of what can be accomplished with the
22 | present justice system in bringing a meaningful
23 | participation to aboriginal people with the criminal
24 | justice system.

1 So, it would be my recommendation, Mr. Commissioners,
2 that a task force, composed of a fair representation of
3 non-aboriginal and aboriginal people be set up to explore
4 how aboriginal communities can be involved in a meaningful
5 way in the present criminal justice system.

6 I finally want to touch on, very briefly, the
7 development of a native justice system. There has been
8 much written on the reasons why aboriginal people should be
9 given the opportunity to develop and operate a justice
10 system which meets their needs. The all party special
11 committee report on self government, in fact, recommended
12 that aboriginal people, their first nations be given the
13 right to govern themselves. Included within the powers
14 given to first nations, they said, should be the power to
15 legislate on justice and law enforcement. We all know that
16 the four First Ministers Conferences dealing with the
17 constitutionalization of the self government, the right to
18 self government, that is, came very close to accomplishing
19 this purpose for first nations. That process, I think,
20 faltered in part, because some of the provinces were not at
21 all sure what these first nation, self government
22 institutions would look like. It's my view that part of
23 the hesitation with supporting aboriginal justice systems
24 is that the present Attorneys General, are not clear as to
25 how an aboriginal justice system would work.

1 The range of possibilities, and I'm sure Russell Barsh
2 will talk a little bit about that, it's not my purpose here
3 to go into the range of possibilities except to note that
4 at the one end is the possibility of administering part of
5 the present justice system, for example, a justice of the
6 peace, model. But at the other end is the parallel justice
7 system that I think aboriginal peoples are looking for.
8 For the most part the Attorneys General would have less
9 problems with implementing the aboriginal courts patterned
10 after the present justice system for the reasons that I
11 earlier enunciated. They would, however, in my opinion,
12 have great difficulty, in accepting aboriginal courts which
13 applied traditional customary law. Leaving aside the many
14 issues such as jurisdiction, whether an individual ought to
15 have the ability of opting out into the dominant system,
16 the main stumbling block seems to be the issue of
17 recognition and application of traditional law within the
18 aboriginal court system, and secondly, the recognition of
19 traditional law within the present justice system.

20 The justification for the recognition is quite simply,
21 that for aboriginal societies to survive, they must be
22 allowed to use and enforce their traditional laws. And
23 secondly, in order for them to get justice within our
24 present justice system, the system must recognize the
25 traditional laws, and apply them.

1 So the starting point, I think, insofar as addressing
2 how these traditional courts could operate, the problem
3 with traditional law, is to try to determine, what effect
4 the recognition and application of traditional law would
5 have.

6 And part of the major problem with that is to begin to
7 understand what this customary traditional law is. That
8 means writing it down so that it can be analyzed from the
9 standpoint of fairness, Charter of Rights, etc. This, in
10 my opinion, will be a major undertaking as much of the
11 traditional customary law has not been used in some time in
12 many communities. It will mean researching it from elders,
13 from anthropologists, et cetera, and then validating the
14 law with the aboriginal communities, to make sure that it
15 is the customary law of that first nation. Having said
16 that, I'd like to make two recommendations.

17 The first is that task force be set up to review the
18 effect of the recognition and application of traditional
19 law in an aboriginal court, and in the present justice
20 system.

21 And my second recommendation is that at least two
22 aboriginal communities within the Maritimes be funded to
23 research and write down their customary law.

24 Thank you, ladies and gentlemen.
25

CHAIR

1 Well, thank you, Sam. I think I should say that the
2 law school at the University of Saskatchewan in Saskatoon
3 has a Native Law Center to which prelaw students, native
4 students, go every summer to take a two-month course to
5 prepare them for the rigors of law school. It is UBC,
6 where Sam Stevens runs the Native Law Program that has, in
7 a sense, taken greatest advantage of what they have done at
8 Saskatchewan, and it is to UBC that more students go than
9 to any other law school in the country, and I think we can
10 learn much from what Sam has accomplished there. May I now
11 ask Judge Coutu to make his presentation.

HIS HONOUR JUDGE COUTU

12 Mr. Chairman, Commissioners, distinguished guests,
13 ladies and gentlemen. When I have received a phone call
14 from Mrs. Ashley, the executive secretary of your
15 Commission, I have immediately accepted to participate to
16 the consultation carried out by your commission. Having
17 been involved with natives since a long time, I am always
18 interested to have discussion on the subject. From what I
19 had understood in the beginning, I thought that we had only
20 to meet and discuss on an informal manner of the concern we
21 have on the day-to-day administration of justice in native
22 communities. Afterwards, and certainly, too late, I
23 realized that I had to make a presentation of fifteen to
24
25

1 twenty minutes before this commission, and perusing the
2 list of persons involved, invited, and seeing their titles
3 and qualities, I began to regret the decision I had taken
4 all the more as since that time, I have been obliged to be
5 on the bench continuously. Nevertheless, with my
6 Quebecquois accent, I'll try to share with you, my hopes
7 and views, which are the hopes and views of, I can say an
8 old private soldier who is on the first line of fire, that
9 is, hearing cases in first instance in the northern
10 community during fourteen years.

11 Actually, I'm what is called the co-ordinating judge
12 for the itinerant court of the district of Abitibi.
13 There's three other judges involved in this community and
14 we hear cases, civil cases, but I can tell you that civil
15 matters are very...there's not many civil cases in the
16 north. But we hear criminal cases, and also we're acting
17 as Youth Court Judge. I have brought with me a map in
18 order to show you what is this circuit. See I have
19 prepared myself, I have this stick with me, it's only to
20 show you what is the territory we're covering. So the main
21 office of the court, what we call the Schefferville is in
22 Amos, right here. And the district we're covering, the
23 district of Abitibi is covering all this part north of
24 Schefferville, and all the D'Ungava Bay , the Hudson Bay
25

1 and the James Bay area, and also some community,
2 Hinterland, we call the Hinterland Cree's Community.

3 So there is in this area, eight of these villages are
4 Cree villages and all the others are Inuit territory. So
5 this since 1974, I have been traveling in all the area, and
6 of course, during the years, judges have been added to the
7 circuit because from about eight trips per year, we are now
8 sitting 27 different weeks in the North. So, we have a
9 circuit in the James Bay, one on the Hudson Bay, another
10 one on Ungava Bay, and a fourth one we just began last
11 year, with the Cree Hinterland Community, Cree Communities.

12 So, in terms of traveling, you must, you certainly see
13 by the map there, that there's a lot of traveling, and from
14 Amos to the last, let's see, from Kuujjuaraapik to Salluit,
15 which are the village that are the more northerner
16 villages, there's about sixteen hundred miles. So usually
17 it's not in miles, we usually talks in knots. And also in
18 hours, so you know from Salluit to Kuujjuaraapik which is
19 Great Whale River, there is a three hour and a half trip in
20 Twin Otter. And if there is a lot of wind, it's four and a
21 half hours instead of three and a half. So, that's the way
22 we usually we count the distance.

23 So my remarks to you will be divided in three parts.
24 First, for a better understanding of the orientation we
25 want to give to the administration of justice in Quebec's

1 native communities, it is important to make a short
2 historical survey of our implication in the northern Quebec
3 native communities. In the second part of my remarks I
4 will describe the different proposals made by some of the
5 parties involved in order to reach a greater participation
6 of the natives in the administration of justice. Finally,
7 I will give you some of my personal views on the subject
8 and some guidelines that I think should be taken into
9 consideration, by all those who are involved in the
10 delivery of justice to the native people, be it in native
11 communities, or elsewhere in the country.

12 As far as the historical survey, before 1972, it does
13 not seem that the government of the province of Quebec was
14 very much concerned with the administration of justice
15 among native people. When there was some cases involving
16 native individuals, they were heard by the ordinary court,
17 and where the court were sitting, usually what is called
18 the Schefferville of the different judicial district of the
19 province. This was also true for these cases originating
20 from the northern part of the province, all this part
21 called the New Quebec, the Nouveau Quebec, north of the 50th
22 parallel. These cases were heard in Montreal, Quebec, or
23 Sept-Iles. May I tell you that at that time, a place like
24 Fort George, the old Fort George, was in the district of
25 Mingan with the Schefferville in Sept-Iles. So Fort George

1 is here, right here, and the Schefferville was Sept-Iles,
2 right here. So you understand that there was not very good
3 communication between the people.

4 The first time that the Department of Justice was made
5 fully aware of the problems encountered by its northern
6 native population was probably at the issue of a case,
7 *Regina vs. Ittoshat*, reported at page 385, *Criminal Report*,
8 new series, volume 10. This judgment was rendered on
9 January 14, 1970 by Judge Malouf of the Quebec session of
10 the peace. Defendant Ittoshat of Inuit descent had been
11 arrested and brought down in Montreal. One thousand miles
12 from his home, Great Whale River, on a charge of causing a
13 disturbance. If we'll look at the map again, it's from
14 here to Montreal. So that was the usual way to do it. On
15 the completion of his judgement, the judge was saying,
16 "Under these circumstances, how can a defendant exercise
17 the rights granted to him by the criminal code; namely, the
18 right to call and interrogate witnesses and the right to
19 make full answer in defence. Such procedure amounts to
20 harsh and unfair treatment, and is tantamount to a denial
21 of justice." The judge was saying that "I am of the
22 opinion that it would be unfair to the defendant and
23 contrary to our concept of fair play to allow this process
24 to continue. Consequently, I grant the motion to stay
25

1 | proceedings, and hereby order that these proceedings be
2 | stayed."

3 | So secondly, immediately after that there was a report
4 | called the Administration of Justice Beyond the 50th
5 | Parallel. So after the case of *Ittoshat*, a study committee
6 | on the administration of justice in northern Quebec was
7 | created and in December 1972, this committee produced a
8 | report called the Administration of Justice Beyond the 50th
9 | Parallel. This is the report I'm referring to. The main
10 | recommendation of this report was the establishment of a
11 | circuit court whose duty will be to bring justice in each
12 | community, so that a native will no longer be required to
13 | move out of his environment whenever he has to stand trial
14 | in Montreal or Quebec city. That native policeman be
15 | properly trained in order to eventually to relieve the
16 | Quebec provincial officers in the north, etc., etc.

17 | So in 1974, when I was named judge of the provincial
18 | court, I began with the administration to organize this
19 | circuit court and we first began to visit, regularly, the
20 | villages situated on the James Bay, Hudson Bay laterals,
21 | afterwards the Ungava Bay villages, and recently, as I was
22 | telling you, the Cree villages situated inner land.

23 | We must not forget that in the meantime the James Bay
24 | Agreement was being negotiated and finally signed on
25 | November 11, 1975. This agreement was repeating, in a more

1 extensive way, the recommendation of the report I have
2 mentioned to you, previously. I have this agreement; this
3 is a huge document called the James Bay Northern Quebec
4 Agreement. In this agreement, Section 8, 18, 19, 20, and 21,
5 these are dealing with the administration of justice, and
6 also the police, both in the Inuit and the Cree communities.

7 So we have been experiencing the administration of
8 justice since 14 years as my first visit in the north was
9 on October 22, 1974. So before the signing of the
10 agreement. That's why I can say, when I go to Povungnituk,
11 this is a community which has, don't want to be involved
12 with the James Bay Agreement, that we are there because of
13 the report on the administration of justice, and it has
14 nothing to do with that. While in the other community,
15 we're there to apply the James Bay Agreement. From the
16 experience we have now, we may conclude that first, that in
17 signing the James Bay Agreement the Inuit and Cree peoples
18 have signified their formal acceptance of the Canadian and
19 Quebecquois justice system. However, we must also conclude
20 from our experience, that this system does not correspond
21 to the mentality of native people.

22 Secondly, our system is very much complex and native
23 people have often difficulty to understand the logic of our
24 judicial system and its laws. When a person pleads "not
25 guilty," for us this means that we want the prosecution to

1 prove without reasonable doubt that the crime has been
2 committed, or that the accused person wants more time to
3 make a final decision as to the plea to offer. But very
4 often, for a native person to plead "not guilty" is
5 synonymous with saying a lie. Natives admit easily their
6 crime; they are honest and frank. I have often teased
7 legal aid lawyers in telling them that they were teaching
8 natives how to lie and to cheat. I'm now convinced that
9 there is a great deal of truth in this statement. We are
10 showing them, a game, and I say a game, that do not
11 coincide with their mentality.

12 There is too much legality in our system. Is an
13 example, may I refer you to an experience we are actually
14 living in our Cree villages situated in the James Bay area.
15 This is the village of East Main. Since two years, the
16 lawyers are discussing before the judge, if a curfew by law
17 enacted by the band council to prevent vandalism, breaking
18 and entering and other crimes committed by kids below
19 sixteen years old, usually after 9:00 p.m. There is
20 actually more than 50 cases actually pending in this
21 village. While the lawyers are discussing, the local
22 constables are losing their authority because they cannot
23 enforce any more the bylaw. So are we helping this
24 community in discussing with piles of documents and
25 arguments the constitutionality of this bylaw, or if this

1 by law is against the Charter of Rights. What are we doing
2 with the right of this community to try to face and control
3 its social problems? Aren't we a social nuisance to this
4 community? What are we doing there?

5 Generally speaking, the native population is not
6 satisfied with the way we are administering justice in
7 their community, and more and more, I am not, and the
8 judges are not satisfied of the work they are doing in the
9 north, because they feel there is no consequence of the
10 work they are doing. The fly-in, fly-out system, which we
11 find in every part of Canada, is suspect and is losing more
12 and more of its credibility with natives. Generally, court
13 delays and the length of time required to settle a problem
14 is not understood. Natives would like that the problem be
15 settled more promptly.

16 Also, many problems cannot be dealt with by the actual
17 system. If possession of drugs or narcotics is a criminal
18 matter, sniffing glue, gas or other intoxicants is not a
19 criminal matter, and is not considered by our judicial
20 system, while for some communities it is more serious and
21 harmful than theft or breaking and entering. I could
22 continue and give you many examples of the inadequacy of
23 our system of law. But I think it would be repetition of
24 what has already be said and written on this subject.
25

1 May I refer you to the studies of Professor Jackson,
2 made on behalf of the Canadian Bar, and called "Locking Up
3 Natives in Canada," and also, the recent report of the
4 Canadian Bar Association called the "Aboriginal Right in
5 Canada."

6 So I think we have to stand for new proposal and what
7 can they be? Confronted with this dissatisfaction of
8 native people towards our system, the increase of the
9 criminality both with adults and juveniles, the persons
10 involved in the delivery of justice in northern communities
11 want to correct the situation, and I propose some
12 solutions. One solution is a proposal made by us on
13 February 9, 1985, and called "Proposal for a More Active
14 Participation of Native People in the Administration of
15 Justice." This proposal was first discussed with officials
16 of the Department of Justice in order to receive an
17 official approval before beginning negotiation with native
18 communities. The model we have proposed is similar to the
19 alternatives measure found in the *Young Offenders Act*. And
20 the system would be administered by a justice committee
21 composed of elders, women, young persons, or others and
22 appointed by the members of the community. In his report,
23 "Locking up Natives in Canada," Professor Michael Jackson,
24 has given a very good description of the system we have
25 proposed. Because I don't want to go through all the

1 details of that; it would be too long. But what Professor
2 Jackson...I think you have made a better reason I could
3 have made myself, so...these committees would have
4 jurisdiction over a wide range of offence dealt with by the
5 circuit court. This jurisdiction would be significantly
6 greater than that which is exercised by native justice of
7 the peace. The jurisdiction would, however, be condition
8 upon the consent of the accused, and an admission of
9 responsibility for the offence, and the consent of the
10 Crown Prosecutor. In these respects, the proposal bears
11 many of the hallmarks of a diversion program, although it
12 would significantly extend the useful definition of
13 diversional offences. Under this proposal, the justice
14 committees would be able to develop their own procedures,
15 and be innovative as to the kinds of dispositions they
16 might make in order to take into account the customs and
17 social values prevailing in the communities.

18 From the discussion with all those who have
19 collaborated to put out this proposal, I have realized how
20 it is difficult for us, people with legal background, to
21 let to others some control over their own affairs. I can
22 give you some examples. Like the difficulty to lose the
23 control over the choice of the justice committee members.
24 In our discussion, everybody wanted to control the
25

1 nomination of the choice of the members, instead of leaving
2 it to the band council or the community council.

3 Another example, the difficulty to take off the hand
4 of the Crown Attorney. The decision to refer a case to the
5 justice committee or not. Crown Attorneys are very fond of
6 their authority, and they don't want to let anything to
7 others.

8 Thirdly, another example, the difficulty to accept the
9 absence of legal trained person in the decisionmaking
10 process within the committee, when very often it's just
11 good sense that is needed to give a good decision.

12 I think that our behaviour shows our lack of
13 confidence on the ability of native people to look after
14 their own affairs. Nevertheless, may I say that the actual
15 policy of the Department of Justice of the province of
16 Quebec is to give back to the native communities as much
17 control as possible over their judicial affairs within the
18 actual and Quebecquois law system. Over a period of five
19 years, we hope that much of this objective will be
20 achieved, and that we may foresee that some amendments to
21 our law, federal or provincial, may be required eventually,
22 to improve the social control of natives over their
23 communities.

24 Now on the third part of my remarks, I will like to
25 give you now my personal views and some guidelines. My

1 personal views is that immediately and without amending any
2 law, natives are able to take care of themselves of the
3 majority of the crimes committed in their communities if we
4 offer them support and permanent training. And may I just
5 point out to you that very recently we have succeeded in
6 obtaining huge funds for this purpose, and we will have a
7 lawyer, more personnel, and a person in charge of all our
8 district for the court. An information agent, which will
9 be a lawyer, will give information to all the native
10 communities which will deal with the formation of the
11 training of justice of the peace, and so on. Right now, we
12 have succeeded in having four fulltime legal aid lawyers
13 which are attached to the circuit, and we also have
14 three...how can you say it in this technocratic
15 language...three and a half probation officer, and two of
16 them are natives.

17 So I foresee a system in which we could find, in each
18 community, a group of people devoted to the administration
19 of justice which I would call more than...I think that a
20 better name than a "justice committee" would be "The Local
21 Judiciary Authority." This local judiciary authority would
22 be composed of at least five person chosen by the community
23 and some of these persons, one or two, would be appointed
24 justice of the peace. This system would be very flexible.

25 And I think we have to learn a lot from the experience

1 from Denmark and Greenland with their local district courts
2 where three lay men in every village are acting as judges
3 with the full jurisdiction over everything, and I think
4 before these local justice, judiciary authority, there
5 should be no lawyers appearing in front, except
6 exceptionally. Court workers would be asked to act, either
7 as councillors to people appearing before these local
8 judiciary authorities. The legal jurisdiction of the
9 committee through their GP's member could be from time to
10 time revised according to their will, training experience,
11 and other factors. This jurisdiction could be annulled by
12 a bylaw, municipal regulation, provincial summary
13 conviction acts, and also Section 24 of the *Criminal Code*.
14 They could at first, hear only a plea of guilt and
15 eventually hear trials and preliminary hearings. And the
16 local authority could always transfer to the ordinary court
17 the cases they feel they cannot or do not want to hear. So
18 the burden of taking decision against one's own peers would
19 be supported by a group and not only by one person. This
20 way of doing would correct most of the disadvantages of the
21 GP system existing in some provinces and in the
22 territories. The decision would be taken by a group, and
23 the GP's would be there, in fact, only to legalize
24 according to our wide laws the decision of the whole group.
25 The member of this local judiciary authority would also

1 receive training, and that is very important, I think, in
2 mediation and conciliation, and would always decide
3 themselves if a case submitted to them could be
4 judicialized or not. A list of indictable offence could
5 also be considered to be submitted to the local authority
6 for mediation and conciliation.

7 In the report we have made there, the first proposal,
8 and you can see that what I'm saying now there has been
9 kind of an evolution of what we are thinking about, what we
10 should do, we have identified 52 different crimes, and many
11 of them were indictable offence with which this local
12 authority could deal with and not the ordinary court.

13 I'll give you an example. Let's say that in
14 Povungnituk, a young man of 20 years old break and enter
15 the Hudson Bay store to steal 10 bottle of catsup to make
16 home brew. This is a case we have had before. Why should
17 I fly one thousand mile to settle this? I mean, people
18 there, I'm sure they can settle this problem in their
19 community. They don't need a judge, they don't need a
20 lawyer to settle that. Why always stick to that code and
21 those rules we have made? I mean, there's other things
22 that we should consider.

23 In fact, okay, what I was saying was that the member
24 of the local judiciary authority would also receive
25 training in mediation and conciliation and would always

1 decide themselves, and not the Crown attorney, if the case
2 submitted to them would be judicialized or not. In fact,
3 the local judiciary authority would be in a position to
4 imagine also, and find solutions, which could be more
5 adapted to native values. And on this, I think, this
6 proposal made that some research should be made in order to
7 find what are the native values and the traditional law is
8 important also to be done at the same time as where these
9 committee would work.

10 So I look forward to day when Quebec court judges
11 traveling in the North will be exchanging ideas and ways of
12 doing with native local judiciary authority and act as
13 coach on legal issue. Now a days nobody's further from
14 another person than the distance of his telephone, or his
15 telecopier. Some may say that such a system is too close
16 of the white system, and not taking enough into
17 consideration the native values, but I do not think that we
18 should start from scratch. An adaptation should work on
19 both sides.

20 What is important is not the system we will adopt, but
21 to assure to native communities that the native communities
22 will regain the social control they have lost, due to the
23 changes they have known and suffered since the coming of
24 Europeans in America. Actually, there is a vast
25 consultation among the Cree people in my area in all their

1 communities, and we are expecting to receive their proposal
2 next month. Also we have obtained from government the
3 necessary funds to implement immediately three or four
4 pilot projects of local judicial authority or justice
5 committee in the community that will be ready to implement
6 this. So depending on the success of this experiment, we
7 hope that throughout the province of Quebec the native
8 communities will take in their hands a great part of the
9 administration of justice. The Department of Justice is
10 actually preparing an intervention program in all native
11 communities of Quebec, and may I say that in the province
12 of Quebec there is 10 different nations, found in 53
13 different communities, totalising approximately 45,000
14 people.

15 I would like to conclude this address by giving some
16 guidelines we have already heard this morning or principles
17 we should bear in mind when trying to find new ways of
18 delivering justice in native communities and towards
19 individuals living in the cities. These principles may
20 appear evident, but I think they are too often forgotten.
21 First, the laws or system of laws of a group or society,
22 reflects the values of this society, and these values
23 usually assure the social control over the individual
24 living in this community.

1 Secondly, our rural Canadian system, even if we think
2 it is the best one, is not necessarily the one adapted to
3 the different native communities.

4 Thirdly, we would be prepared, and especially the
5 administrator, and may I say the judges, especially appeal
6 court judges, if you're certainly aware of the case of the
7 *Nagitarvik* case in the Northwest Territory, where a judge
8 have tried to cope with native values and have been
9 rejected by the court of appeal, with judges who have never
10 been traveling in the North. And I think they should have
11 gone there before rendering their judgment. It would have
12 been, I think, a better judgment at the end. So we should
13 be prepared to depart from too rigid principles, mainly in
14 sentencing, and accept that some values may be different
15 for different peoples.

16 Fourth, we should always be careful that the persons
17 involved in the delivery in justice in native communities
18 be well aware of the usages, customs, and history of
19 natives in order to understand more their ways of doing and
20 thinking, and also understand all the frustration they have
21 went through during the years.

22 I can tell you of an experience made since 1983 by the
23 Quebec provincial police. They have organized for the
24 members working in or near native communities what is
25 called sensitization course on native usages and custom.

1 Up to now 750 agents have followed these courses, and I am
2 told that due to the personal rotation, a new series of
3 courses will begin in 1989. Also, agents working in the
4 Northern Quebec have to follow a one-week course given each
5 year, and may I add, that some natives are participating to
6 these courses to give their point of view and dialogue with
7 the agents. When an Indian guy comes to white cops and
8 says, "You goddamn white officer or cops" I think it's a
9 good thing that if the cops or the officers know the
10 backgrounds of all the frustration that this guy has
11 suffered and probably this will help, that there will be no
12 blow on his part, and he will understand what's going on
13 when things like that are said.

14 Finally, may I say that within our own district, we
15 have obtained also, funding in order that any person
16 working in Northern communities will have to go through a
17 course like that in order to understand the history, usages
18 and the custom of native people. Finally, may I say that
19 those who have to work with natives should care and be
20 dedicated to what they are doing. I think that our native
21 brothers are very sensible and sensitive to this aspect of
22 our behaviour and can easily detect if we are honest and
23 sincere in dealing with them. So these are all the remarks
24 that I wanted to make, and we're hoping for discussion this
25 afternoon, I understand.

1 CHAIR

2 Thank you, Judge. Well, I'll call on Chief Joe
3 Norton, of Kahnawake, next.

4 CHIEF JOE NORTON

5 Good morning, I too will use my Mohawk, Quebecquois
6 accent, when I speak. I would like to thank the organizers
7 of this session for the opportunity to sit with such a
8 distinguished group of people, not only up here, but in the
9 audience itself. And I'm hoping that through presentation,
10 through common sense, through the humanness, that each and
11 everyone of us has inside of us, we will be able to
12 understand what is being put forth over here. I'm not
13 about to attempt to outdo the previous speakers. I can only
14 try to complement what they have said, and perhaps give
15 another point of view in some areas. And it's not
16 contradictory or contrary to what they are saying. Maybe
17 it's in addition to. Because there are a great deal, many,
18 many aboriginal people across this country, and in North
19 America, because I look at from a point of view that I'm
20 North American by birth, by history, by culture, in every
21 sense, and not just simply Canadian or Quebecquois, or
22 Ontarioian or Maritimer or whatever region or area that we
23 come from.

24 I think we have to look at in in sort of a historical
25 context, and I will attempt and I will have to go

1 historically to the present day to the future and work my
2 way in and out of that sort of system, and hopefully, I
3 make some sense in what I'm going to explain. But, we have
4 to look at it in a historical context, and what has
5 happened, I guess, in the ways of originally how the
6 relationship of how our ancestors and your ancestors was
7 developed.

8 There are various things that took place, treaties
9 that pre-date Confederation, both recorded and un-recorded,
10 that have created a co-existing relationship. And that's a
11 very important word in this day and age, co-existence.
12 Alongside of Canadian society. And that's another
13 important word, alongside of, because there are many
14 people, many first nations across this country, who do not
15 say 'within the framework' but 'alongside of' or 'with.'
16 It's important for us to realize and understand that there
17 are people who talk about nationhood, talk about
18 sovereignty, not necessarily saying that they practice it
19 today, but saying that they have never given that up. The
20 original people of this continent. The various boundaries
21 that have been put up by Europeans in a sense have no
22 meaning for us, if you look at it in the historical
23 context, if you look at it in the traditional sense, and
24 the customary understanding. American boundary, provincial
25 boundaries, constituents boundaries, municipal boundaries,

1 that's why you have situations right across this country
2 especially in the areas where people have subsisted from
3 hunting, fishing and trapping, right up until this day, and
4 with to continue to do so. Who don't understand how and
5 why they are breaking laws. How could I possibly break a
6 law when I'm simply trying to make a living the way my
7 ancestors have always done. When you talk to them about
8 breaking laws, they'll look and they'll say, "Yeah, people
9 who rob banks, people who kill, people who rape, people who
10 sell drugs, that's crimes." But to simply live and exist
11 as one has traditionally lived, and as your ancestors have
12 traditionally lived, is not a crime. It's not a crime. To
13 believe that one is independent and can raise a family
14 through that type of subsistence, through that type of
15 economy, is not a crime. And there are no barriers and
16 there are no boundaries except those that are placed there
17 imposed on by others. Maybe for us, when I say us, the
18 Mohawks of Kahnawake, where I come from, those things are
19 no longer tangible in our area because of occupation,
20 because of use of land, because of pollution and other
21 things, destruction of our traditional territories. But
22 there are others, there are others right across this
23 country, right across this continent who believe in that
24 very dearly, and that's the very, very essence of their
25

1 lives. Nothing else matters to them. And that's all they
2 look at. And that's all they care about.

3 Look at the situation up in Labrador, the Inuit. What
4 do you think they're fighting about? Why do you think
5 they're protesting? Why do you think they're trying to
6 stop these low level flying situations from taking place?
7 What is is doing to them? To their economy? To the very
8 laws, and these aren't laws that are written down for them.
9 These are pure, simple common sense laws, and that's the
10 laws of nature. That's what they're dealing with. And yet
11 they have the whole government of Canada, its structure,
12 and the government in that particular region that's against
13 them. And in a sense the laws, shall we say, of the
14 countries who wish to partake in these low level flying, in
15 this particular region. I'm using that as an example,
16 because it's very important to understand what we're
17 dealing with. They've got all that against them and
18 they're being arrested. They are being arrested. They are
19 being put in jail, and they're being told that it's wrong,
20 "You cannot stop us." That's the mentality and that's the
21 state that we are at.

22 I don't want to take away from anything the previous
23 gentlemen spoke about. But there's another side to this
24 issue too. The territorial integrity of our peoples. From
25 the earth, from the land comes our strength, our

1 spiritualism, our beliefs, our governments, everything. In
2 each one of our nations, right across this country, and
3 across North America, we all have a story of our birth.
4 Where we came from, who we are, and what we are, and why
5 we're placed here. The kind of governments that we had, the
6 kind of structures that we had, and some of us still have
7 to this day. And that's all tied to territorial integrity.
8 Take away the territory, you take away our integrity. You
9 limit our traditional capacity. To prevent the problems
10 that we're having today, we didn't invent alcohol, we
11 didn't invent drugs, we didn't invent crime. Our peoples
12 had respect for one another, and out of traditions, out of
13 culture, that's what comes from that-respect. Through our
14 systems, through our families, our extended families, we
15 had clans, maybe not in all nations across these country,
16 but we had clans. We had setups in which preventative
17 measures were always taken from the time a child was born
18 to the time it became mature, took a spouse, had their own
19 family. There was no need for police. There was no need
20 for jails. There was no need for judges, as judges go
21 these days. There was no need for that stuff. Because
22 there was a code, and the laws were very simple, because
23 they were based on nature. And there was respect.

24 Today, unfortunately, because of the disruption of our
25 lives, of our traditions, our customs, over the centuries,

1 since the arrival of European over here, we now have to
2 deal with something that is foreign to us. And people
3 wonder, as was pointed out by the examples that were given
4 over here by Mr. Cunningham, judicial systems, lawyers,
5 judges, sociologists, psychiatrists, police officers,
6 social workers, they all wonder, "What the hell is the
7 matter with these native people? How come they can't
8 understand? Why can't they grasp what we're trying to give
9 them that's so good?" Yet you turn around, and I've heard
10 criticism up and down from...every since I can remember
11 about the system out there. About how terrible it is, how
12 archaic it is, how it needs to be amended, how it need to
13 be changed, how it must meet the needs of the people, and
14 not just to feed on itself, to grow, and grow, and not even
15 care how it must...there must be equality, how justice must
16 be fair and equal, and that's the system they want to
17 impose on us. That's the system we're forced to accept.
18 When we turn around and we look at our history, at our
19 culture, at our traditions and our customs, and it's all
20 there for us. Yet when we try to practice it, immediately
21 we're told that we're wrong. Some system out there,
22 whether its a provincial or federal system, says no, we
23 can't recognize that. Maybe we can recognize it if we
24 rubber stamp it. And if you recognize certain components
25

1 of our law that need to be reflected in your law. And it's
2 true.

3 It's true what some of the previous speakers talked
4 about, that there's no confidence, or we can't be trusted,
5 we native people, or aboriginal people, to develop our own
6 system. Well, damn it, look at your own system. Is it any
7 better? Has it developed to a stage where...anywhere in
8 the world, where it's the greatest? Is there such a thing
9 as equality? Is there such a thing as democracy? Is
10 everybody truly represented, and I'm talking both in the
11 political as well as the legal field. I say to you that
12 everybody is evolving in one way or another, You look at
13 Canada. It's in its infant stages really. As
14 sophisticated as we think we are, or as sophisticated as
15 you think you are, you're actually in the infant stages,
16 because we're talking about moral human issues rather than
17 political and legal technicalities. We're talking about
18 moral issues. We're talking about a human approach. And
19 in our languages, our peoples, we call ourselves that,
20 'human beings.' When we see another aboriginal person, we
21 call then Rahtsinehrahkon, the other human beings. We call
22 ourselves, Ohkwehonwe, meaning that we are human beings.
23 Why don't we call the non-Indians human beings? We don't
24 call them that. We call them Rahtsinehrahkon, or whatever
25 color they are, because they have never acted as we have.

CHIEF JOE NORTON cont'd.

1 And that has puzzled us since time began, when we first met
2 up with your ancestors.

3 In our community, we have on or about five thousand,
4 six thousand people, and there is a great deal of turmoil,
5 because that community is going through a very fast,
6 radical change. You may have read, you may have heard
7 about various things that have happened over there; we
8 won't go into any details about that. We've been branded
9 smugglers, we've been branded criminals. According to the
10 RCMP, we are supposed to be an armed encampment of wild
11 people ready to shoot to kill. I have documentation here
12 that...wanted posters that have been distributed right
13 across Canada, of good up standing Mohawk people, citizens,
14 who are considered armed and dangerous, approach with
15 caution, violent. These include women, eleven people. To
16 me that's a license to kill for any police officer across
17 this country. For any given reason, and it's justifiable.
18 And I'm not over reacting; this is true. Anybody want
19 copies of that, I have that.

20 I'm not hear to plead on behalf of our community
21 either, but I'm here to point out the other side of the
22 coin, that there is this type of on going racism, if you
23 will. It's not just here in Nova Scotia, it's right across
24 the country. There have been inroads, and there will
25 continue to be inroads. There will be growth as far as

1 understanding about the relationship between the first
2 nations of this country, and the non-Indians in this
3 country, and the judiciary system, and the political
4 systems that are there. There will be. But in the
5 meantime, we will fall between the cracks in these kinds of
6 situations. There will be more Donald Marshalls, there's
7 be more J.J. Harpers, because there's no way that we can
8 get away from that. That's the gloomy side of the
9 situation. But that's the real situation.

10 The system in the United States is no better. You
11 have Lenoard Pelletier who's in jail with no concrete
12 evidence of the supposed horrendous crime that he
13 committed. This country co-operated in sending him back to
14 the United States, knowing full well that the evidence that
15 was presented was not sufficient, was not true. Yet you
16 have criminals who come from the United States, who are
17 here right now, who are fighting like hell extradition, and
18 this country is defending them. In one way or another the
19 laws are being used to allow them to stay in this country.
20 These are whites.

21 I can't understand what goes on. Or maybe I could. I
22 don't mean to take a shot at society in general, but
23 somebody has to say something about those kinds of things
24 that are going on. Until society, and this is reflective
25 in all areas, until society in general begins to change its

1 attitude as being dominant, as Professor Stevens pointed
2 out, dominant society because you are more in number. Not
3 more understanding, not more sophisticated, not smarter
4 than us, just dominant in numbers, and you have the power,
5 you have the money. Until all your institutions begin to
6 reflect what this country is about, what the kind, the type
7 of relationship that was established many centuries ago
8 between our ancestors, until that's reflected in every
9 institution, educational, health, policing, laws, until
10 that is reflected in those institutions, we are going to
11 continue on with the same problems that we have.

12 My father once told me, he said, "For as long as there
13 are going to be people such as you," he was talking to me,
14 "who think and feel as you do, and if there are people on
15 the other side who think and feel as they do," he says,
16 "then you'll always have problems." He says, "And that
17 seems to be what our lot will be." I'm hoping he's wrong.
18 I'm hoping for your children and for our children that he
19 was wrong in that statement. Beause that's a hell of a
20 terrible legacy to leave for our future generation.

21 And we are in a time period right now where there are,
22 I don't know how many different volotile situations that
23 can errupt right across the country both in Canada and the
24 United States. And this government and the provincial
25 governments and all the authorities involved can look at it

1 as being a threat to the security of Canada. But damn it,
2 this is our country too. Maybe even more so that the
3 visitors to our territory. People have to understand that.
4 We went through that whole process recently, in recent
5 times...the process that was there of the first ministers
6 conference, the Constitutional discussions. Went through
7 all of that. People have to go through that to understand
8 what we're up against. And we reached a point where all of
9 a sudden, an arrangement, or agreement, was made amongst
10 the provinces, Meech Lake. Where the hell does that leave
11 the aboriginal people of this country after that? What
12 those first ministers couldn't attain at our table, they
13 attained in their table themselves. Because that's what we
14 were talking about. Not the rights of aboriginal people,
15 the rights of everybody in this country is what we were
16 talking about at that table, aboriginal and non-aboriginal.
17 That's what was at stake, and that's still what's at stake,
18 and make no mistake about it.

19 So when we get into this area about the criminal
20 justice, when we get into this area about the cures that
21 we're looking for, the band aid approaches, in some
22 instances, that are being offered, I'm not saying in this
23 particular hall this morning. You've got to look at the
24 whole spectrum. You've got to look at where we came from,
25 where we are today, and where we're going to be in the

1 future. That's what you've got to look at. There are many
2 experts across this country, or so-called experts who claim
3 to know what's going on, who only want to deal with what
4 happened after 1867, and I've knocked heads with those
5 people, and explained to them that you've got to look at
6 the historical context. You've got to look at where you
7 came from, and what your rights are here.

8 Because basically native people know what their rights
9 are. They do. They really do, and they translate it in so
10 many different ways. The person who's up above the 50th
11 parallel, who only wants to hunt, fish and trap, and live
12 by those means, he doesn't have to worry about the same
13 worries that I have in an urban city, in a semi-municipal
14 setting, if you will. I don't like to use that term, but
15 that's the situation that I find myself in, in the
16 community that I come from. Where we have to provide all
17 those services, where we have to deal with over a hundred
18 thousand native people passing through our community...non-
19 native people, excuse me, passing through our community
20 every day. We have to deal with that, we have to police
21 that. We have to develop our own laws in those areas. And
22 we've done that, and yet we run into a Department of Indian
23 Affairs, we run into a government who looks at us and says,
24 "Well, we're not prepared to allow you or to give you that
25 authority, or we don't have programs in place. We're not

1 that far advanced in our policies and our guidelines. The
2 constitution prevents us. Or we don't want to step on
3 provincial toes. Or we don't want to step on municipal
4 toes. That is beyond our capacity." And we say, "Bull."
5 We say bull, and we take the initiative. And there are a
6 lot of people across this country, a lot of different
7 communities and nations who are doing those things. They
8 take the initiative, and they are considered wrong. The
9 answers lie with us, and they're inside of us. But they
10 need to come out some way, somehow, and many times they
11 have, but are you listening? Do you understand? Or do you
12 immediately run behind all your laws, and start looking in
13 there, and saying, "Well, geez, you can't do that under
14 section whatever, whatever, whatever."

15 I heard a darn good suggestion over here from Judge
16 Coutu, about immediately taking steps and measures to do
17 certain things. I don't like the word 'to allow' native
18 people, but in this instance it's acceptable. But, you
19 know, we need free-thinking people. We need people who are
20 willing to go and take the risks of expressing themselves
21 such as the CBA did. We need those people to get out
22 there, even though in social circles at times they may not
23 be acceptable, or aboriginal issues, aren't the types of
24 things that you talk about. The peer pressure that you may
25 feel. But we need people to get out there and start

1 talking about those things. We need to create the basis
2 and the framework for people to begin to realize that this
3 is a serious matter. It's not something that's relegated
4 to a ministry of Canada.

5 We are alive, we are here, and we are well. And a lot
6 of us are still thinking and feeling and practicing what
7 our forefathers and our ancestors have done, have instilled
8 in us, and given to us. I'm not a relic. My culture, my
9 language, my traditions, are not frozen in time. If they
10 were, then I wouldn't talk the way I talk, I wouldn't feel
11 the way I feel. Maybe that doesn't answer how to set up a
12 police system, how to develop a judicial system, how to
13 deal with native people in the courts, but it begins and it
14 sets the basis for understanding, and there's such
15 diversity across this country that you cannot impose a
16 system that is a blanket policy. You can't do that. Even
17 from community to community. That's why I am in agreement
18 with a lot of the recommendations that have been made over
19 here about developing committees, justice committees, and
20 looking at how these communities function, what their
21 interests are, and allowing them to develop their own
22 justice systems, if you will. As simple as they be, as
23 general as they may be, as informal as they may be, because
24 that's what are ways are anyway--very simple, very
25 straightforward, very general, very informal. They are not

1 complicated, and no one can come in there and start
2 punching all kinds of holes in our systems, if they
3 understand what our systems is. Not like the system that's
4 out there now, where you can have a hundred and one
5 interpretations from different lawyers and whatever else,
6 as to what the law means.

7 Yes, we've done a lot in our community, in
8 establishing criminal justice, to a certain degree,
9 traditional justice, but now we're at a point where, again,
10 we've got to expand. People just aren't satisfied with
11 what we have. They say it's not enough, and we've got to
12 go beyond what's there now. One of the things that we're
13 looking at is preventative...I guess, counselling, if you
14 want to call it that. Starting with the young people and
15 working our way up right to the elders.

16 The only reason why I would accept that we would have
17 a policing unit in our community is because of the fact
18 that we have non-Indians coming through our community, and
19 they have to be dealt with. I don't see why we need police
20 for our own people. Why should our officers have to carry
21 guns for our own people? There's no need for that. We're
22 brothers, we're sisters, we're aunts, we're uncles, we're
23 friends. Actually, I'd like to see police disappear one of
24 these days from our communities. Why do we need them? We
25

1 never needed them in the past. That would be the ultimate
2 goal, to do away with policing in our communities.

3 Whereas some may be saying, well, we want to take it
4 over. And that goes to the root of the matter about our
5 responsibilities in our own communities, about how we deal
6 with each other, how we raise our families, what kind of
7 values do we place, and I say that to the native people, to
8 the aboriginal people more than to the non-Indian. We need
9 to get back to those basics, so that we prevent the crime
10 before it happens and not deal with it after. We prevent
11 the alcoholism, we prevent the drug abuse, we prevent the
12 child abuse, so that we don't have to have child welfare
13 situations, so that we don't have provincial authorities
14 coming in and seizing our children. That's the best system
15 that you can find anywhere. Where you don't have to run
16 around looking for all kinds of monies to set up these
17 institutions. That are caused by somebody else.

18 Think about it, look back historically, look back
19 historically, and then bring it forward again to today's
20 situation. Why are we in that situation? Because somebody
21 else brought those things here, and we did not have that
22 within our traditional customary systems before. Right now
23 we're trying to catch and we're trying to stop, as much as
24 possible, these things from happening to us. So we do need
25 these various services and institutions, there's no

1 question about it. But what we do not need is to
2 perpetuate them and create a dependence on these
3 institutions. I have to be very honest about it, in our
4 community and other communities I've seen it. They say,
5 "Geez, you know, we got social service, we got drug and
6 alcohol, dump it on them. Send them there, let them take
7 care of it. Send them to the treatment centre. I can't
8 handle him any more, he's only fourteen, but he's out of my
9 hands." That's not our ways. That is not our ways.
10 That's only happened in a very short time period. In a
11 very, very short time period, because I grew up in a very
12 loving atmosphere, and we never did those kinds of things
13 that are happening today. So we as native people also have
14 to look at ourselves and what we are doing. We have to
15 stop pointing the fingers too and saying it's everybody
16 else's fault. Because we're at the root of the problem
17 too, and we have to take the initiative to start changing
18 the things around that are problems.

19 CHAIR

20 Chief Norton, I wonder, we're well past time. We'll
21 be talking further in the workshops. I thought we might
22 give Russell Barsh a chance to say something, and carry on,
23 perhaps until 1:00 or 1:05.

24

25

1 CHIEF JOE NORTON

2 Okay. I'll conclude over here, as I said, I drifted
3 somewhat, but I felt it was necessary to look at the
4 historical, spiritual, cultural reasons why we have these
5 problems. Maybe I didn't touch on exactly what some of you
6 were hoping to hear, but I think the causes are what we
7 have to look at in order for us to get a general
8 understanding of how we can take the causes of our problems
9 and translate them into how we deal with them today. And
10 that's for both, that's for all parties, that's for all
11 societies in this country. So I thank you very much for
12 this opportunity and I guess we'll be doing some more
13 speaking this afternoon in workshops and what have you.

14 CHAIR

15 Thank you very much, Chief Norton. We were to stop at
16 12:30, but I think that we should try to stay on some sort
17 of schedule, so we'll hear from Professor Barsh, and we'll
18 adjourn about 1:05, and lunch will wait, I'm told, in the
19 lower lobby. So, if you can survive for another ten or
20 fifteen minutes, nobody said it would be easy when you were
21 invited here...we've had a lot of food for thought, and
22 I'll turn the food..or not the food, but the floor, over to
23 Russell Barsh.

1 MR. RUSSELL BARSH

2 Speaking of food, today is Thanksgiving Day in the
3 United States, and I recall that Peter Finally Dunn, one of
4 the humorists of the turn of the century, said that "The
5 Puritans had made Thanksgiving to be thankful for having
6 been saved from the Indians," and we keep it today to be
7 thankful for having been saved from the Puritans. Now I'm
8 not entirely sure that that's happened yet in the United
9 States. I think there are some Puritans still around, and
10 certainly from an Indian perspective, the Puritans are
11 still a problem.

12 We're talking about conflict of norms and culture, and
13 I think it deserves to be repeated if it hasn't been said
14 explicitly enough already that nothing is as frightening,
15 or as emotionally charged, or culturally charged, or as
16 much an expression of the character and culture of the
17 state, than a criminal prosecution. It's the most
18 significant form of intrusion into private life, I think,
19 that anyone experiences, or that most people experience in
20 their lives, and it really tells you who's in charge when
21 you're in a courtroom on trial for your freedom or your
22 life.

23 The idea of decentralized, or plural legal systems has
24 emerged in a number of the statements that have already
25 been made this morning, and I would like to briefly address

1 that, from three points of view. The first, the Anglo
2 Saxon legal systems traditions, the experience of the
3 United States with a plural legal system, in which tribal
4 courts have been functioning in one form or another for
5 nearly a hundred years, and finally some evolving standards
6 and proposals in the United Nations system, in discussions
7 which Canada and the United States and many other countries
8 have taken part in the last few years.

9 Plural legal systems have very respectable Anglo Saxon
10 legal roots. The Anglo Saxon legal system, the common law
11 system, in fact, evolved from a highly decentralized,
12 highly pluralistic system, which had such things as
13 baronial courts, fair courts, courts held at fairs, various
14 kinds of canon courts, municipal corporation courts, the
15 City of London...but also purely business corporations had
16 their own courts. The Virginia Company started out, in
17 fact, when it settled people in what is now the state of
18 Virginia in the United States, with company courts,
19 corporate company courts. And there was even, for example,
20 a Jewish exchequer, which handled cases among Jewish
21 merchants, according to Talmudic Law, and was recognized by
22 the English legal system in the Middle Ages and early
23 Renaissance. This was also reflected in the preservation
24 of the system of local juries well into the early
25 eighteenth and nineteenth centuries, even after the system

1 of formal administration of justice had centered in London,
2 and judges no longer traveled on air, visiting on circuit,
3 all the different towns, shires and villages in the
4 country. Judgement was taken in London, but the jury was
5 selected locally and there was this process, this *nisi*
6 *prius* process, of sending the judgement, the rule of law,
7 out to a local jury. The sheriff would impanel a jury of
8 people who lived right in the area where the thing had
9 happened. They took the final decision on what the facts
10 had been and what should be done with the offender, and
11 that was recorded and taken care of. And that was well
12 into the period of the Industrial Revolution. So that
13 centralized adjudication, in what I might refer to as our
14 own mainstream legal tradition, centralized adjudication is
15 relatively modern. It's a creature of the last 150 years
16 really, and it reflects not only the conglomeration or
17 let's say the blending of European cultures and local
18 cultures within European states, within the British Isles,
19 within North America that has occurred, but also, very
20 importantly, the assertion of central state power, central
21 government power, over property and economic relations, and
22 a reconception of law as a system of maintaining formal
23 order, as opposed to a system of simply resolving disputes,
24 and dealing with the different forms of cultures and
25 property in different parts of the country.

1 But there are, of course, also holdovers of this. We
2 have, of course, and very obviously, a dual system in
3 respect of the special treatment of Quebec and Quebecquois
4 law in Canada, under the Constitution. There is a parallel
5 arrangement in the United States with Louisiana, which is
6 also a civil law system. We see in the United Kingdom the
7 retention and the continued controversy over Scots Law,
8 which is still a recognized legal system, and I think that
9 we might validly observe that the differences between Scots
10 Law and English Law, or between the civil code, in respect
11 of the development of law in Quebec and the development of
12 the common law in the other provinces of Canada, are not
13 that far apart compared to the gulf that often separates
14 conceptions of justice and appropriate intervention in
15 problems between native communities and non-native
16 communities.

17 In the United States, there has been a century of
18 evolution of different forms of local jurisdiction and
19 adjudication in Indian communities. Separate legal systems
20 were contemplated in most treaties made with Indian tribes
21 in the States in the form of extradition arrangements,
22 which presumed that only certain people would be
23 extradited, and others would be handled locally and
24 internally. And similar provisions, I should note, are not
25 quite uniquely, but almost uniquely found in the 1752

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1 treaty between the Micmac Grand Council and the United
2 Kingdom, the Crown.

3 In the 1880's the federal courts in the United States
4 basically recognized and entrenched two rules: one was
5 that in the first instance, Indian communities should
6 handle their own internal problems, their own offenders by
7 themselves, under their own laws, and that only if that
8 failed, should an offender be extradited or removed from
9 the community and dealt with according to external law,
10 Anglo-American Law. And then the second principle was:
11 and in that case, the individual should be subject to
12 federal prosecution, under federal norms and procedures,
13 rather than state norms or procedures, because it was
14 viewed that the states were too close to the frontier, to
15 the conflict over land and resources, and were less likely
16 to be fair to native people than the national courts. So
17 the two principles of, in the first instance, leaving it to
18 internal tribal procedures, whatever they might be, and if
19 that failed, removing the matter to a federal forum, on the
20 basis that, and the phrase was used by the Supreme Court of
21 the United States, "the States are their worst enemies."
22 Those became entrenched principles a century ago.

23 Now what that led to was a gradual formalization of
24 procedures. First, the appointment of judges and Indian
25 police in the 1880s. Then in the 1930s tribal

1 constitutions under the Indian Re-Organization Act, part of
2 the American New Deal program, were specifically reserved
3 judicial power to tribal governments. Funding for
4 modernizing tribal courts, developing facilities, police
5 training, codification of law, became available in the late
6 60s and early to mid 1970s. And that in turn, triggered
7 both a tremendous...what shall I say, Anglo-Americanization
8 of tribal courts, and a reaction in Indian communities to
9 decolonize the courts and seize more community control and
10 make the courts more Indian, make them more native, more
11 indigenous. Leading to things like the formation of tribal
12 bar associations, which now exist, tribal judges
13 associations, institutes and programs for the development
14 of Indian Indian Law, not federal Indian law, but Indian's
15 own law, and a return, in the last few years in a number of
16 tribal courts systems to models of mediation, conciliation
17 or so called 'peacemaker' systems, based on Six Nation's
18 models.

19 So the trend has really been, if one looks at this
20 long century, first of a kind of a colonial effort to
21 establish judicial systems in Indian communities as a way
22 of gradually introducing them to European systems of law,
23 but leaving it in their own terms. It was even seen
24 sometimes as kind of practice at being civilized, to tribes
25 gradually taking over these systems, formalizing them,

1 modernizing them, and now, in fact, in the 80s, trying to
2 make them Indian again.

3 I should note, that under the current regime, the only
4 real limitations on tribal jurisdiction are a *habeas corpus*
5 provision in the Indian civil rights act for federal review
6 in the case of someone held in custody in violation of
7 constitutional principles of fair adjudication; optional
8 removal of some serious kinds of criminal cases to federal
9 courts. And also, we've had a kind of strange kind of
10 indecisive evolution in the last ten years, where the
11 conception of the nature of tribal jurisdiction has been
12 evolving from essentially a territorial one, everyone
13 within the boundaries of an incorporated or chartered
14 Indian community, to more of in a personal jurisdiction
15 notion, where the federal courts have now told US Indian
16 tribal courts they don't have jurisdiction over non-
17 Indians, who pass through their communities, which frankly
18 has been a monster. It's resulted in increased non-Indian
19 crime on reservations, and at the same time, some
20 legislative efforts, most recently in both the Indian Child
21 Welfare Act in the States, and proposed amendments to the
22 Act in the last 100th Congress, to extend at least optional
23 tribal jurisdiction off reservation to urban Indian
24 communities, in cooperation with state courts, so that
25 certain kinds of sensitive cases involving children, for

1 example, juvenile justice, could be transferred back to
2 Indian courts on the reservation, as a way of the community
3 extending positive efforts and control to families that
4 were temporarily living away.

5 If you had to sum up the positive and negative side of
6 all of this, I think the balance sheet would look something
7 like this. Now this is from my own experience for about
8 twenty years with 15 or 20 of the 150 tribal courts systems
9 which are now independently operating in the States.

10 On the good side, it's clear that it has made
11 adjudication more accessible, on the whole more informal,
12 more understandable. There's been more linguistic
13 flexibility. A number of court systems routinely are
14 working bilingually. Judges tend to be, in the best of
15 these systems, far more sensitive to, familiar with, and
16 responsive to this community situation and cultural
17 standards of what is just, and in the best cases, they tend
18 to be highly mediatory and conciliatory. People go away
19 feeling better, instead of just being mad at the judge, and
20 the result. Community confidence and support, in the best
21 tribal court systems has been buoyed. And in some systems,
22 and the one I am most familiar with in this regard is the
23 Navajo System, the largest, one that handles a large
24 geographical area and about a quarter of a million people,
25 there has been the positive development of a common law

1 system of standards in fields like property and tort, which
2 are totally independent, which are new, which work, which
3 people think are fair, and which have evolved as new
4 systems of common law from the ground up, that are
5 appropriate to the economic and social relations in that
6 community. The bad side, well, there's been a lot of
7 federal meddling with the development of this system. A
8 lot of residual colonialism, and restrictions tied to
9 federal funding and administrative approval of arrangements
10 at the community level. There's been a lot of uncritical
11 imitation of non-Indian courts' formality, and in some
12 tribal courts, unfortunately, a lot of stress on applying
13 rules, rather than restoring order and cooperation in the
14 community, importing what I think is a bad idea of law.
15 Some slavish copying of state codes of law, leading to a
16 lot of valueless duplication of existing rules and a lot of
17 rigidity. Bringing in non-Indian or outside judges in some
18 systems, on the argument that they're more objective, has
19 been a problem. Some tribal courts have experienced tribal
20 council manipulation of judges, political influence, and
21 there have been complaints in many tribal court systems
22 about lack of adequate human rights safe guards. Lack of
23 adequate independent systems for appeal, monitoring and
24 review. So one has to look out for these. But these are
25 technical questions. These are questions of design of the

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1 system. The basis idea of having a plural legal system
2 certainly is well entrenched in the States, at this point.
3 Tribes would fight bitterly against any effort to divest
4 them of the opportunity to have their own legal systems.
5 And while we continue to fight over the design, the best
6 design, and the jurisdictional arrangements with the
7 federal and state governments, the concept that there are
8 three legal systems in the Unites States, is from the
9 tribes' point of view, an absolutely fundamental one at
10 this point and a good one.

11 Now, briefly, what's happening internationally? The
12 US and Canada are not the only places where this stuff is
13 being discussed. There's growing interest all over. For
14 example, reference was made to the district court system in
15 Greenland. Greenland is now in a process of completing a
16 transition of home rule, of autonomy, from Denmark, and has
17 its own judicial system. Inuit Judicial System, highly
18 customary, and from all accounts, highly effective.

19 In the north of Scandinavia, northern Norway and
20 Sweden, efforts are being made now to establish Sami, that
21 is for non-Sami, I guess, Laps, but that's not the right
22 word to use. Sami Parliaments, which would produce Sami
23 Codes for relations among Sami people, and presumably have
24 a justice system in the north of Scandinavia to enforce
25 those codes. Australia, which is currently in the

1 process of a Royal Commission on aboriginal deaths in
2 custody, which I predict will have a similar effect on
3 Australia thinking, as this inquiry does on thinking in the
4 Maritimes, perhaps in Canada as a whole.

5 There has been an experiment for a number of years in
6 the Northern Territory on a separate court system for the
7 Yirrkala People that seems to work. It's highly informal,
8 it's highly customary. When they're asked to explain what
9 the rules are, the rules are things like, 'people shouldn't
10 be bad to each other,' but it works, because it's a system
11 of resolving disputes in a manner the community regards as
12 fair and final.

13 New Zealand is looking at what they call a partnership
14 model with the Maori People that would probably lead to a
15 formalization of jurisdiction in the Iwi or (tribes) over a
16 wide range of internal Maori concerns. And above all,
17 there's been a evolving consensus in the United Nation
18 system about both the importance of recognizing the
19 negative impact of national criminal systems historically
20 on indigenous people and the value of using plural legal
21 systems as a way of addressing it.

22 Pluralism is gradually gaining recognition as an
23 effective way in many countries, in all countries, to
24 ensure justice and public order in indigenous territories
25 while respecting their right to a degree to cultural and

1 linguistic freedom. It's the recognition of a virtually
2 universal problem, that assimilation into an alien criminal
3 justice system simply processes indigenous people into the
4 jails, and it's a form of intimidation and of control.

5 Particularly when the court systems are in the hands of the
6 very communities, the very neighbouring communities, which
7 are simultaneously competing with indigenous peoples for
8 control of land and other economic resources, on a day-to-
9 day basis.

10 The standards currently under discussion, to leave you
11 with something to think of, could be summarized as follows:
12 there are two parallel exercises in the UN now. One is to
13 draft a convention of the international labour organization
14 that would deal with indigenous policy generally and land
15 rights in specific, and the other is a broader policy
16 declaration being prepared by a subcommittee of a
17 subcommittee of the UN Commission on Human Rights. The
18 draft ILO convention, as it now stands, going into a final
19 stage of negotiation next June, provides that indigenous
20 peoples would have the right to retain their own customs
21 and institutions, subject only to international human
22 rights standards and national charters of rights, if any.
23 "The right to deal with crimes or offences according to
24 their own customary methods." That's a quote. The right
25 to have their customary laws taken into account in the

1 application of any national laws, and the right to have
2 their economic, social and cultural characteristics taken
3 account of in sentencing, and diversion.

4 The Draft Declaration is much broader, but it's also
5 at a much earlier stage of development and much less
6 reflective of consensus, but speaks more broadly of
7 autonomy. Reflection of indigenous peoples' cultural and
8 character in national legal institutions, and again, the
9 right to establish and structure indigenous peoples own
10 autonomous institutions which determine the rights and
11 responsibilities of members of the community.

12 Conclusion. At the beginning of our morning session,
13 Professor Michael Jackson referred to the problem being one
14 of colonization. That very concept was very explicitly
15 recognized in a resolution of the UN Economic and Social
16 Council last May. The first UN resolution referring to the
17 problem of indigenous peoples as one of colonization. If
18 the problem is colonization, the answer, it seems fairly
19 clear, is empowerment. It's a decolonization, but it's not
20 just getting the colonial power out. I mean, we're beyond
21 that; we have to talk very practically about empowerment,
22 giving communities control. Giving them an opportunity to
23 do things that they see as fair, that satisfy the sense of
24 justice of their own members, that give them a measure of
25 responsibility and also of determination, self-

1 determination, in regard to the maintenance of order and a
2 fair way of life in their own communities. And I think
3 that in that respect then national law should be, truly, to
4 get back also to Michael's comments about the Micmac Treaty
5 and Belcher's statement, a hedge of protection around
6 indigenous communities, so they can freely develop, rather
7 than a sword of oppression.

8 CHAIR

9 Well, I want to thank Russell Barsh for coming. This
10 is Thanksgiving Day in the United States, and he has given
11 up a statutory holiday to be with us, and we're all
12 grateful to him. I think it's obvious that Professor Barsh
13 has an international reputation that's well justified.

14 I want to thank all of our panelists. It's almost
15 1:15. We will break in a moment for lunch. May I suggest
16 that we reconvene at our workshops at 2:15. You will all
17 have a list of the workshops and you will be able to go to
18 your assigned rooms at 2:15 after lunch. And that will
19 abbreviate lunch slightly, but it will mean that we can
20 stay on track and then break at 3:15 and return here for a
21 plenary session at 3:30. And at the plenary session, I'll
22 ask our panelists to return to the head table here so that
23 they can answer any questions that you may have as well as
24 listen to your own comments. And I think I've covered
25 everything, and we'll adjourn now for lunch.

CHAIR

1 The four rapporteurs, I think, are either here or on
2 their way here, and I think Susan told them that we'd like
3 to hear from them, and while we're waiting for them, could
4 I just mention three things that arose in the workshop of
5 which I was a member, and I take the liberty of repeating
6 them here, while we're just getting ourselves together.
7 One is that Chester Cunningham told me that in the last
8 twenty years, there has been a reduction in the province of
9 Alberta, owing I think, in large measure to the work of
10 Chester's organization. The percentage of Indians as
11 inmates in provincial institutions in the last twenty years
12 has gone from 58% to 28%, which, I think, is a tribute to
13 the work that Chester's organization has done.

14 The second thing I was going to mention that Sam
15 Stevens didn't tell you this morning is that at the Law
16 School of British Columbia, there are twenty-one native
17 persons studying law in the first, second and third years.
18 And that, it seems to me, is an example of what can be
19 done. This is on the assumption that it's a good thing to
20 have more lawyers, native or non-native, but...I think
21 that, Judge Coutu, dissenting, I think we all agree that
22 that's a very good development. And when you consider that
23 ten years ago, I don't suppose there were more than twenty-
24 one native lawyers in the whole country, I think that that
25 is a remarkable record.

MR. THOMAS BERGER cont'd

1 One other thing that emerged in our working group was
2 that there are tribal courts in Canada already established
3 under the authority of Section 107 of the Indian Act. It
4 isn't simply an American phenomenon that has no counterpart
5 in this country.

6 Well, could I ask the rapporteurs, if you'd like to
7 come here, that's fine. If you'd like to go there to one
8 of these microphones, Brad Morse, Carol Montagnes, Bruce
9 Archibald and Graydon Nicholas, who'd like to go first and
10 report? All right. Graydon is on his way. Where's Brad
11 Morse? Where is he? Brad would you come to a microphone,
12 or come to the podium.

13 MR. BRAD MORSE

14 O.K. Let me see...I've got the, I guess, the
15 difficult task of trying to synthesize an hour, hour and a
16 half discussion in about twenty-five words or less, but
17 I'll take a stab at it, and hope that I've covered
18 everything off. If not, I guess we'll probably have some
19 time for questions or debates on what may come up.

20 In the Room 292 workshop of which we had about twenty
21 people, perhaps because there were so many lawyers present,
22 we seemed to have a particular debate about the court
23 system in special terms rather than perhaps about the
24 justice system overall. Although people sometimes talked
25 about the justice system as a whole, their real emphasis

1 was on the court system. Some discussion and appreciation
2 about the long history in the United States and in Canada
3 and in other countries. Especially one participant spoke
4 of an experience in Uganda, of having separate native or
5 aboriginal justice systems alongside a general justice
6 system imported through colonialism.

7 We ended up with a debate, really, I think, between
8 three basic options. One being what I've just alluded to,
9 the concept of a separate justice system that would be
10 geared for aboriginal people. At the other end of the
11 spectrum was the suggestion that what's really necessary
12 is to ensure that aboriginal people are available to
13 intervene in the existing system at appropriate points in
14 time, such as in native court workers, prison liaison
15 officers, native parole officers and the like. And the
16 third version being somewhere in between the two, which was
17 to suggest the need for a major structural change in the
18 existing system. We had advocates in favour of all three.
19 Some people posed them as exclusive alternatives, some
20 suggested that there was, in fact, a need to address them
21 simultaneously. On the aboriginal court system side, some
22 of the strong advocates pointed out that they felt that
23 this was the only truly meaningful way for aboriginal
24 people to gain control over the justice system. They felt
25 that this was the only way to reflect Micmac treaty rights,

1 focusing on Nova Scotia, as the means to support
2 traditional Micmac laws and ways. A means to ensure that
3 the justice system is responsive to community needs, and
4 that this also fit within the general drive towards self-
5 government negotiations that are occurring, not only in
6 this province, but elsewhere in the country. At least
7 there is political endorsement for such self-government
8 negotiations to occur. Whether they're occurring or not is
9 another matter.

10 However, some suggested that was politically not
11 sellable. Some others suggested that is was unnecessary,
12 that the common law system was the best one in the world,
13 if-and I stress, if-it was truly impartial in terms of its
14 investigatory roles, its prosecutory function, and in the
15 trial function itself. And the complaint was to suggest,
16 that that is not the case in the province or elsewhere in
17 Canada. That aboriginal people and visible minorities, in
18 general, in fact I think the suggestion was anyone who is
19 not a white Anglo Saxon Protestant in Canada has serious
20 problems with the justice system, feels that they are
21 getting shafted by the system, and don't feel that it's
22 responsive to their needs or is representative of them, or
23 that they see members of their groups as active
24 participants within the justice system. So this version
25 then suggested that the common law system was workable and

1 was a good system in theory and perhaps worked very well in
2 some jurisdictions but that it was seriously flawed here.

3 Another kind of complaint about the separate court
4 system was the suggestion that it simply would not work
5 outside of aboriginal territories. And we had a lot of
6 debate, as to whether or not it would be possible for
7 courts that perhaps might be reserve based to have any
8 jurisdiction over aboriginal offenders, where they
9 committed their crimes outside of the boundaries of that
10 reserve or where the victims were not aboriginal. Others
11 suggested that it would work, but that we had to spend a
12 lot of time and attention, which we hadn't done
13 sufficiently to delineating the boundaries between a
14 separate justice system and the aboriginal justice system.
15 And one of the participants presented the proposal of the
16 Union of Nova Scotia Indians that they had presented to
17 this commission as to their suggestions to how to draw
18 those precise boundaries and what role the aboriginal
19 courts could play in relation to offences that occurred
20 outside of the reserve with non-Micmac victims. That there
21 would still be a role for the court to play, but not as the
22 trier of the charge, but rather filling more of a
23 preliminary role to ensure that there was adequate evidence
24 to warrant a trial, to ensure that all the evidence was
25 coming forward, that full investigation had occurred.

1 On the other side, we got the proposal, as I
2 suggested, that was to ensure that aboriginal people be
3 available within the existing justice system. That was
4 generally criticized as being inadequate in terms of its
5 scope, that it would unlikely be funded or treated at the
6 same level as similar roles played by current members
7 within the justice system, and a suggestion that it simply
8 just wouldn't alter the system. It might make it work a
9 little better, but that it would not, on it's own, lead to
10 the justice system being respected by aboriginal people and
11 seen by them as fair.

12 Then the final version was the need for a major
13 structural change of the existing system, and I don't
14 believe we got very far on what those structural changes
15 might be, but some of the advocates for this suggested that
16 what we really needed was a two-prong approach. That
17 establishing separate aboriginal justice systems made a
18 great deal of sense, but that those would likely be
19 territorially limited or limited in some ways such that
20 there would still be aboriginal people running through the
21 general system.

22 The question then was what to do with them. And with
23 these people how to make the system, in fact, more
24 responsive to them. There was some discussion about the
25 necessity to ensure that aboriginal people were actively

1 involved as professionals within the justice system, as
2 police officers, as lawyers, as judges, as members of
3 juries. There was also a suggestion that, clearly, they
4 would not fill all of the roles in the justice system such
5 that all of the other people in the justice system need to
6 be sensitized about the different cultural outlooks, the
7 different historical backgrounds, the different sense of
8 rights and grievances that aboriginal people possess.

9 In this regard, there was some suggestion that there
10 really are a lot of similarities between...in some ways,
11 between the position of aboriginal people and the position
12 of other visible minorities, that they too are
13 underrepresented in the justice system. That they too do
14 not find the general system to be reflective of their
15 needs. The Marshall case, specifically, was isolated as
16 one in which there were no Indian people on the jury, but
17 as well there were no black people on the jury either.
18 Therefore both the victim and the accused, it was suggested,
19 were in some ways unrepresented. That this was a general
20 problem throughout the system as a whole, and until that
21 was changed, it would be unlikely that there would be a
22 sense that people could see the system as being their own,
23 as being a system that in some way they were in control of
24 or represented by. But I think the proposal in this regard
25 was suggesting than going further than just insuring that

1 | there are Indian lawyers and Indian police officer, Indian
2 | crown counsel, and the like, but to suggest that we had to
3 | make a more fundamental change in the system as a whole.

4 | Again I say, this was not explored in great detail,
5 | but some suggestions along the lines of involving community
6 | representatives within the decisionmaking process. At
7 | least one individual was talking about incorporating lay
8 | assessors into the sitting with judges, but finding various
9 | ways in which the aboriginal people in particular, since
10 | that was the subject matter of the workshop, would actively
11 | be involved in the system per se so this general system
12 | where it did apply, either in relation to certain kind of
13 | offences or the location of those offences, that that
14 | system could be seen as being responsive to aboriginal
15 | people as a whole, in the structure of the system, as well
16 | as in the personnel of the system. I don't think we
17 | actually came up with a particular conclusion, we had no
18 | straw vote in reference to these. I think perhaps what we
19 | ended up with was maybe a bit of a tie of those who were
20 | strongly in support of creating a separate justice system
21 | as well as seeing a need to structurally change the
22 | existing system and those who felt that merely changing the
23 | existing system would be sufficient. Thank you.

24 | CHAIR

25 | Carol Montagnes?

1 MS. CAROL MONTAGNES

2 I'll be reporting for workshop number 3. I find it
3 hard to believe that the workshop we just heard about was
4 that well organized in their discussions. I'm afraid that
5 this presentation will be not quite that well organized.

6 We had a very interesting and free-ranging discussion,
7 and the points that were raised, were raised by various
8 individuals, sometimes the same points were reinforced by
9 others in the group, but there was no time to really go
10 around the group and find consensus with regard to specific
11 recommendations. It was felt that what was at stake were
12 points of principle. There were points of principle to be
13 addressed. The authority and control were the main issues.
14 Native people should have the authority and control to
15 decide what changes are necessary with regard to the
16 criminal justice system and what programs will work in
17 bringing about those changes. There was a lot of support
18 shown for the statements made by Professor Sam Stevens in
19 the presentation this morning and for the statements made
20 by Chief Norton. And it was stated that there was indeed
21 that basis in the constitution for the vision presented by
22 Chief Norton.

23 It was stated that many of these questions, the
24 question of authority and control, it was a matter of
25 political will, and the will had to be there to make these

1 communities that merged, the black Loyalists and the black
2 refugees, which became one group, and the whites who were
3 here which were also a group, are now the descendants of
4 the same people. There has been no break in that pattern.
5 No break whatsoever.

6 What was the salvation at that time? The salvation
7 for blacks was to embrace religion. First it was the
8 Anglicans. And the Anglicans through the society of the
9 propagation of the gospel, friends of the late Dr. Gray.
10 They established schools in the black communities and in
11 these schools black people were the preachers, became the
12 teachers. But eventually whites took over the school
13 system. It was still a separate school system but
14 controlled by whites. And the leadership of the black
15 community moved out of the educational system with black
16 teachers and black preachers to strictly into the religious
17 realm with black preachers. And the Baptists religion took
18 over all of the Anglican and Methodist churches and the
19 black church became established as a Baptist. The black
20 Baptist church became established as the dominant church
21 and religion in Nova Scotia for blacks.

22 I think the important thing about this is the black
23 church, the Baptist church, was the only place where blacks
24 could exercise any kind of democracy. It was in the church
25 that all of the ideals that whites could find in the larger

1 changes to the system.

2 There was a comment made that there was a lack of a
3 formal mechanism for provincial and federal governments and
4 aboriginal groups to speak together to address criminal
5 justice issues.

6 It was stated that we have to...there was a need to
7 systematically explore what the nature and scope of the
8 native community needs are. Tom Sampson, from the South
9 Island Tribal Council, gave the group an example of an
10 alternative system to the established system. He gave an
11 example of the use of customary law to solve problems. The
12 instance he gave was with regard to family Indian law, and
13 the example was to show that the customary law can indeed
14 be used today to solve problems.

15 The point was made by one of the participants that
16 there are Indian people in violation of lands and forest
17 game laws, and they are being punished for this while at
18 the same time they see the large corporations, cities and
19 so on, polluting the environment and seemingly getting off
20 scot free. That the government turns a blind eye to this.
21 In the eyes of Indian people, this is not equality of
22 justice.

23 There were several questions raised in our group. One
24 was the questions about the separating of separating the
25 issues of geographic isolation, the issues of socio-

1 economic deprivation, and the issues of aboriginal people.
2 That there needs to be some separation as to where the
3 problems fall. The question was also raised about native
4 people in urban centres, as opposed to native people on
5 reserve.

6 There was the suggestion that we must examine the
7 racism that is built right into the system and that assumes
8 that native people can not handle their own affairs.

9 The question was raised about how much cultural
10 education is given to law students and to lawyers so that
11 they are aware of the cultures of other peoples, and the
12 point was made that there were funds required to do this.

13 The point was made that there's little need for
14 further documentation regarding the fact that there are
15 problems within the criminal justice system, but that what
16 we need to do is to make changes, and to make those changes
17 we have to give recognition that native people can indeed
18 address these problems. And it was felt that once that
19 recognition was given, that the 'how' of doing this, is a
20 question of design.

21 There was a concern expressed about how the good
22 recommendations that are being made to the Commission, can
23 be sustained and addressed after the inquiry is over, and
24 how people in the group could get their points across,
25 their recommendations across to the Commission, other than

1 in this brief report being given to the group here now.

2 The point was raised that with regard to recognizing
3 Quebec as a distinct society that we continually apply to
4 native peoples' aspirations standards that we don't apply
5 to our own aspirations, and that the recognition of Quebec
6 as a distinct society was given as an example. And the
7 point was also made that you don't come up with an
8 accommodation or a parallel system of aboriginal justice
9 without spending a lot of money, without making a major
10 investment.

11 And we finished up, we were talking once again about
12 it was a point of principle that was a stake, and that the
13 important issues were the issues of control, the issues of
14 authority being given to native people. If there are other
15 members of the group who would like to raise points that
16 they raised in the group that I haven't mentioned here, I
17 would certainly welcome them to add to this brief summary.

18 CHAIR

19 Thank you. Bruce Archibald?

20 MR. BRUCE ARCHIBALD

21 I was pressed into service part way through the
22 meeting when it became apparent that there wasn't a
23 rapporteur, and so my report may not be entirely complete,
24 but I'll try to give some flavour of the discussion.

25 We started out by asking the question of whether or

1 not there was agreement or consensus in the group that a
2 parallel system of justice or native self-government
3 insofar as the justice system is concerned was something we
4 could all agree on. And it was quite apparent that nobody
5 really understood or there wasn't a consensus on what it
6 was that we were being asked and so that there was a good
7 deal of discussion about what that might mean exactly. But
8 I think at the end of the day there was agreement in the
9 sense that a native self-government, and native criminal
10 justice system within that might be an appropriate goal
11 that we might all agree to. The difficulty, we found, was
12 how to get there from here. And it seemed to me that there
13 wasn't agreement on what the content of such a system might
14 be, and therefore it was difficult to get there from
15 here, until we could figure out what the content might be.

16 And there were a range of alternatives put forward,
17 such as in Brad Morse's group, from the point of...on the
18 one hand, merely having native administration of existing
19 laws in reserve territories, to a system whereby there
20 would be greater native determination of the content of how
21 police might operate or various actors in a system might
22 operate, to a system which would be entirely based on
23 native legislation, if we can use that kind of a term in
24 this context, which is very difficult. There was no real
25 agreement, I don't think, on whether we were talking about

1 an adjudicative kind of system, or whether we were talking
2 about a system which would be primarily based on mediation
3 and reconciliation and these kinds of native values, and if
4 so, to what extent they would have to be sacrificed to, you
5 know, Western procedural values. And so that there was a
6 lot of good will in our group, I think, and a lot of real
7 effort at communication, but I sensed that we were not
8 always getting through to one another, and that there were
9 certain points when we were probably talking at cross
10 purposes.

11 I was interested though that I think there were a
12 couple of approaches. Those that said, "Well, we
13 really...we know what the problem is, and let's just get on
14 with it," to those who were saying, "Well, hold it now. We
15 all agree that we know what the problem is, but saying
16 let's just get on with it is a difficult proposition, and
17 as soon as we start putting forward any one solution, there
18 are people who have concerns about that."

19 Some of the concerns I found to be personally
20 interesting in the sense that there were, I thought,
21 several native speakers in the group who, while on the one
22 hand, were very committed to the principle of self-
23 government, were reluctant to jump 'holis bolis' into the
24 unknown, and were willing to take what I thought to be an
25 incrementalist approach to achieving native self-government

1 in the context of criminal justice.

2 So I guess we had a really good debate. We probably
3 exchanged a good deal of information, but we didn't come
4 out with any solid recommendations, I don't think, that we
5 can bring forward to the group. Other than I think we're
6 all in agreement that things have to change, that we have a
7 sense, a shared sense of the ultimate goal, which involves
8 vastly greater native government and self determination in
9 relation to criminal justice. How we get there and at what
10 pace is a question which will involve a lot of rangling,
11 but hopefully, I would think, that would be creative
12 rangling. That we would all be committed to nevertheless.
13 It was a pretty summary report and of those who wish to
14 dissent, I would welcome their views.

15 CHAIR

16 Well, could we hear form Graydon Nicholas?

17 MR. GRAYDON NICHOLAS

18 Thank you, Mr. Chairman. Our particular group started
19 out by having our workshop leader, Russell, review some of
20 the concerns that were raised this morning by the many
21 speakers. And he also put on the flip chart sort of three
22 areas for us to concentrate on. And the first one
23 was...and these three points that were raised came out of
24 discussion this morning. One was the plural court system,
25 which eventually changed at the end, but I'll get to that.

1 Second was co-operative arrangements, and thirdly was the
2 current personnel and training procedures within existing
3 institutions. And so these were the three areas we began
4 to explore.

5 But as the discussion emerged from that, at least my
6 impression as recorder, was members of our workshop were
7 not fully familiar with the tribal court system, and so
8 there were many questions on procedures of how tribal
9 courts functioned, what is their authority, what kind of
10 resources are required, how do the police relate with one
11 another, with the non-Indian communities? And do you need
12 a population factor that has to be considered in order to
13 set up these tribal courts in this area. And so Russell
14 attempted to answer many of these concerns, because he was
15 the one who was most familiar with the American experience.
16 And as a result of the a...for example, one person pointed
17 out that, "Well, what's really wrong with the current
18 system is that the system may look good, but Indians don't
19 have proper access to, for example, the best defences, by
20 having available the best criminal lawyers to submit their
21 case to them."

22 And then from there, we proceeded to deal with the
23 change that should be considered, and of course,
24 immediately the two areas that were brought up were
25 incremental change and also, a radical change. And in the

1 incremental approach which was proposed, people said, "
2 Well, you know, some of these recommendations like the
3 one's here today, we've heard these things for the past
4 fifteen to twenty years, and nothing has been done, and
5 this leads to frustration, and makes you wonder the purpose
6 of the recommendations and discussion of concepts." But at
7 the same time people said, "Well, we should be careful and
8 be very cautious in accepting this approach, because even
9 the current system is not good for society in general, let
10 alone for ethnic or minority groups."

11 And then we focused on the miscarriage of justice, so
12 that in the current system, or in the tribal court system,
13 or the traditional system that may be proposed, that is a
14 fundamental thing that should be protected, so that no
15 miscarriage of justice would take place.

16 And then we discussed some of the current things that
17 are taking place across this country, and because one of
18 our participants was Chief Joe Norton from Kahnawake, he
19 explained that communities, in fact, demand their leaders
20 that something has to be done to assume responsibility.
21 Because many of these problems at the community level don't
22 even deal with what we would call criminal activity. They
23 deal with child welfare, social concerns. They deal with
24 property disputes; they deal with family disputes, and it's
25 in the very rare instance that criminal activity should be

1 done, and then, only then, if such activity took place,
2 only then would outside police forces or the investigative
3 arm of of the criminal system be used to help the tribal
4 police to do their job. Because some one asserted that
5 "Well, they need us as much as we need them." So, this kind
6 of a relationship has to be understood.

7 And because of that then we talked about what is the
8 role then of the dominant society. Does the dominant
9 society take a more direct role, in fact, having control of
10 the development among the different communities? And in
11 fact, are these communities ready and prepared across this
12 country? And because the needs vary right across this
13 country, of course, the solutions are different. But one
14 person said, "Well, look, the current system that's there,
15 you know. The patience of aboriginal people have been
16 tested so long, and they're not going to wait much longer.
17 Change has to take place." And as I said, I think the main
18 thing is if an Indian initiative is taken in areas that
19 exist now, the examples have been in the areas of
20 conciliation, reconciliation and restitution, as opposed to
21 incarceration or institutionalizing a problem. Avoiding
22 the problem by putting them behind bars, or having them
23 removed from the community and let somebody else worry
24 about that. And that the concentration at the community is
25 how to get along with one another. And then toward the

1 end, somebody said, "Well, the last resource is the use of
2 force. Or that if there were violent behaviour at the
3 community level, then force would be used at that time."

4 Oh yes, of the original three that I gave, at the end,
5 the first point was changing away from pluralism to, in
6 fact, change to a community justice system. That would be
7 where they would begin to assume and assert their own
8 jurisdiction, and that all the dominant society should do
9 is really not resist or undermine this community
10 initiative. In fact, it should be supported. And also,
11 there should be dollars available to make sure that these
12 systems are implemented. And if there are others in the
13 workshop that I had that want to make comments, they're
14 free to do so, Mr. Chairman. Thank you.

15 CHAIR

16 Thank you, Graydon. Well, on these occasions there's
17 never really enough time for everyone to say everything
18 that they would like to say. Bear in mind that the object,
19 as I stated this morning, is to give Chief Justice Hickman
20 and Judge Poitras and Judge Evans, the three commissioners,
21 some idea of what's happening around the country. The
22 proposals that have worked, and some of the ideas that
23 native people have regarding a parallel system, tribal
24 court, community justice, whatever you want to call it.

25 Now I think we will try to conclude our proceedings

MR. THOMAS BERGER cont'd

1 today at five o'clock. What I suggest is this, that we
2 have perhaps ten for fifteen minutes discussion from the
3 floor. If there are any of you who would like to add some
4 remarks or put any questions to the panel, and then in the
5 last fifteen minutes before five, we will ask our panelists
6 to say a few brief, concluding words. If that suits
7 everyone, I'll throw the floor open for remarks, questions,
8 and ask you, so that the record is complete, if you would
9 go to the microphones to speak and give your name, as well,
10 when you speak

11 MR. HOWARD MCCURDY

12 Howard McCurdy, a biochemist, who was mistaken for a
13 lawyer, in workshop # 2.

14 I'm just a little worried about what's happening
15 here...

16 CHAIR

17 ...this is what's known as a question of privilege, is
18 it?

19 MR. HOWARD MCCURDY

20 No. I just want to reflect on workshop 2. There was
21 indeed a good deal of discussion of aboriginal self-
22 government, and commensurate judicial responsibility going
23 along with it. No real questioning of that as a matter of
24 principle. And even to the extent of violent crime and
25 murder within the geographic limits of a reserve

MR. HOWARD MCCURDY cont'd

1 jurisdiction. But the real question is whether all of this
2 a diversion, this discussion. Since, after all, the Donald
3 Marshall case would not have been dealt with, and it's
4 really quite inconceivable to me that politically you could
5 have a situation where an aboriginal judicial system would
6 be applied to a crime committed off the reserve in Halifax
7 or Toronto or any place else. And so I'm inclined to see
8 the discussion as a diversion because it doesn't deal with
9 the faults that led to Donald Marshall's problem. And
10 that's the criminal justice system from top to bottom. And
11 a political system from top to bottom that is not able to
12 cope with members of various minority groups as has been
13 stated. And when we talk about change, surely the change
14 is of the sort that deals with racism—racism in the legal
15 system. And by not addressing that in specific terms,
16 we're not only failing Donald Marshall, we're failing every
17 other minority group member, who faces a system that is
18 incapable of dealing with such individuals. So that I'm
19 saying aboriginal self-government, yes, but the
20 responsibility still resides with the general criminal
21 justice system that minority members are not properly dealt
22 with. Anybody who's a member of a visible minority who
23 doesn't know that cops pick on minority groups members.
24 Anyone who doesn't know that judges, lawyers, in every part
25 of the system are overcome with all kinds of stereotypes,

MR. HOWARD MCCURDY cont'd

1 doesn't know what it's all about. And it seems to me that
2 we ought to be taking a look at what changes should occur
3 there more than directing our attention to native self-
4 government, in dealing with possible solutions in Nova
5 Scotia, that would avoid a Donald Marshall occurring again.

6 CHAIR

7 Thank you...

8 MR. EDWARD RENNER

9 My name is Ed Renner. I also was in discussion group
10 #2, that was supervised by Professor Morse.

11 One of the comments that Professor Morse made was that
12 one of the points of view in the group was that there was a
13 need for structural, or systemic, was also the word that we
14 used, to address those kinds of issues. And I think our
15 point, those of us who spoke to that issue, our feeling was
16 that all of the comments, or most of the comments that
17 we've been making today miss the main point, the main mark.
18 And that the main issue that we have to be concerned with
19 is racism within the criminal justice system from the top
20 to the bottom. And if we accept, as our premise, that
21 racism is the biggest problem, then we know enough about
22 racism, we know how it operates, we know the consequences
23 of racism, that we can begin to deal directly with racism
24 and how it works, to make immediate kinds of changes that
25 have immediate consequences to begin to reverse how the

MR. EDWARD RENNER cont'd

1 system scoops up marginal people and gets them into the
2 prison system. And that that is the central issue, to stop
3 the flow of Donald Marshalls into the system, and if that
4 is our focus, which is what the systemic structural kind of
5 analysis is saying, than we have to start to look at
6 specifically, what are those, how does it work, and where
7 do we cut off that supply by dealing with those kinds of
8 issues directly as the racist, discrimination part that's
9 in the system. And that that's the issue, and we shouldn't
-0 lose sight of that.

11 CHAIR

12 Anyone else like to add anything from the floor?
13 Before I turn back to our panelists...

14 MR. DAVIES BAGAMBIIRE

15 Thank you, Mr. Chairman. My name is Davis Bagambiire.
16 It seems as though workshop 2 is producing quite a few
17 participants on the floor, but Mr. Chairman, I would want
18 to add a few comments to what the two speakers from the
19 floor have said.

20 I'm one of those that spoke fairly strongly in favour
21 of a native court system for natives in Canada. I still
22 believe that there is room within the present system that
23 would enable the creation of traditional courts that could
24 handle minor criminal offences. Could, in addition, handle
25 preliminary investigation into the evidence that may be

1 presented against accused native persons in serious
2 offences like murder, robbery, aggravated assault, or a
3 traditionally rape, before they are transferred to the
4 superior courts. It's my view that such a system, at the
5 very minimum, may, but need not, involve autonomy for the
6 natives, realizing that that's a much more complicated and
7 political matter. But I also think that such a position is
8 not necessarily incompatible with revamping or reforming
9 the existing system. In fact, I think the two are
10 complementary. I don't propose to disagree with the
11 biochemist who speaks like a lawyer, Mr. Chairman. I
12 certainly can't in any way pretend to be able to do that,
13 but I do suggest that in fact, the two scenarios here are
14 complementary.

15 I think that scenario one, which I advocate, of the
16 creation of a limited court system, the intricacies of
17 which, of course, cannot be ironed out at such a forum as
18 this one, and perhaps require a lot more in-depth study and
19 examination. That such a scenario is indeed complementary
20 to the reformation of the common law criminal judicial
21 system, as we understand it. In fact, we have to revert to
22 the latter, because many minorities in Canada are not
23 natives, and therefore could not be covered by the native
24 courts if they were to be set up. So creation of a native
25 court system cannot in any way be an answer. Rather, in my

1 argument, it should simply be a recognition of the fact
2 that natives in this country, at least to my thinking,
3 stand in a different, and I would hasten, a special
4 position, even though they're minorities. They enjoy
5 certain treaty rights that many of us minorities do not
6 enjoy. They have certain customary and the traditional, if
7 you like, aboriginal, constitutionally enshrined rights
8 that many of us minorities do not enjoy. So I think that
9 that's the perspective that scenario one looks into.

10 And I think that the Commission may be making somewhat
11 of a mistake if they simply focus on prevention of what
12 happened to Donald Marshall. I think that the Commission
13 have to be a lot broader in addressing the issue of
14 reformation, and have to reach out to a scenario one, as I
15 said. Thank you very much, Mr. Chairman.

16 MR. WILSON HEAD

17 Just a couple of points, Mr. Chairman. First is...

18 CHAIR

19 And your name, sir, is...

20 MR. WILSON HEAD

21 Oh, I'm sorry. Wilson Head, Toronto, York University.
22 A couple of points I want to make very quickly. The first
23 is, I think, that we're caught up in the bind of trying to
24 reform the present system without too many changes. Just
25 add a few more people, I'm very cognizance of the fact that

1 in the States, where I came from, we've added quite a few
2 of non-whites to the, shall we say, the criminal justice
3 system, particularly in the level of policeman, and of
4 course, lawyers. It has not changed the system very much
5 however. And I'd like to suggest then that what we need to
6 do is we can try to do some new thinking. I think this
7 opportunity of the Royal Commission gives us another
8 opportunity to bring in some very new ideas which begin to
9 look at the English common law system, period, from the
10 very beginning. In terms of its social value and utility.

11 In the first place, it would have to be a homogeneous
12 society. The society we have today is not a homogeneous
13 society. The idea, I understand, some years ago when I was
14 studying criminology a bit, that there were some 44,000
15 laws on the law books in Canada. And I believe, for
16 example, very strongly in the concern of Thomas Jefferson,
17 in the States who said at that time, "All laws should be
18 sunset laws." That is, they should expire at the end of
19 twenty-five years, unless they were reactivated because
20 there was a need for them. That's one thing, I think.
21 We're looking beyond the criminal, the Donald Marshall
22 case, in terms of the utility of the law as an agent of
23 social control in this day and age.

24 The second point I want to make is that the system
25 itself, of course, is a part of a totality of systems, the

MR. WILSON HEAD cont'd

1 educational system, the employment system, all the rest of
2 them. Now the criminal justice system does not exist in a
3 vacuum bin, it's a part of a wider view. And of course, we
4 all, who have done some study in this field, know is that
5 by in large it grabs the poor. It grabs the minorities and
6 it grabs the uneducated. It grabs the young, and they are
7 disproportionally represented in the system. We need to
8 find out, why is that so? Is it that they have a different
9 law for the poor and for the rich? Just as there is a
10 different law from the minorities and the rich? And the
11 majority population, the dominant group. It just happens
12 that most minority groups are poor. At least, most of them
13 are, with few exceptions, but most of them are poor.
14 Certainly the Indians on the reservations, the black living
15 in the areas of Toronto and Vancouver and Halifax, etc. as
16 well as the rural areas of Nova Scotia, mostly are poor.
17 They get it in the neck because they are poor. They get it
18 in the neck because they are young. They get it in the
19 neck because they are uneducated. They get it in the neck
20 because they are racial minorities.

21 That seems to me to mean then that we have to look at
22 the whole system. And in that sense I invite the
23 Commission to not only look at the system, and we only
24 looked at two aspects of it now. We have not looked at the
25 correctional aspect so far today; we have not looked at the

MR. WILSON HEAD cont'd

1 | prison system or the parole system, and other such systems.
2 | But I think we need to examine the whole three of them in
3 | comparison as a part of a total system of social control in
4 | a modern industrial society. That means a big job. And so
5 | I see this as being simply the beginning. A process that
6 | ought to take place over a number of years, and ought to
7 | try to come up with some real differences that make law and
8 | justice a real meaningful term in modern society.

9 | CHAIR

10 | Thank you.

11 | MR. KEVIN CHRISTMAS

12 | Yeah. Kevin Christmas, Nova Scotia, Union of Nova
13 | Scotia Indians. It's really intriguing to get the comments
14 | on racism, because, I mean, there are laws in this country,
15 | federal laws, that we have to abide by that are racist.
16 | The Indian Act is racist. The laws and regulations that
17 | govern our daily lives every day are just bound with
18 | racism. I mean if the Canadian public had to abide by the
19 | rules, regulations, bureaucratic control and foreign
20 | authority that we have to abide by just to survive, I think
21 | there would be an armed revolution in this country.

22 | The question, I guess, that really bothers me, I
23 | guess, was driven home just a couple of days ago when I was
24 | watching these twenty-five, or twenty fifth anniversary, I
25 | don't know if it's an anniversary or mourning of John F.

1 Kennedy's assassination in the United States. And I don't
2 know who was celebrating or I don't know was crying. But I
3 remember, there's an expression that says, you know,
4 "Everybody remembers what they were doing the day of his
5 assassination." And I remember watching that stuff on TV,
6 and there was a lot of talk after the assassination about
7 his civil rights record, and about what John Kennedy did to
8 bring the vote to the South, and everything. And I was
9 asking a gentlemen that was in my house at the time, I was
10 asking him, "What's all this about anyway?" I was only
11 around eight, nine years old at the time. And he told me.
12 He says, "Well, the civil rights," he said, "down in the
13 South, in the United States, the blacks can't vote. The
14 blacks can't go into restaurants, they can't go into liquor
15 stores, they can't go into government offices, they can't
16 go in all these places. You know, they can't go and get
17 welfare. They're given chits and they have a whole system
18 in place, and they don't have any jobs, they can't get
19 work." And I said, "Oh, geez, that sounds like the
20 reserve." And that's exactly true.

21 I mean, a...it's only twenty-five years ago that we
22 got the right to vote. It's only twenty-five years ago
23 that our people were granted the right, if you want, to go
24 into a liquor store, or to go into a tavern, or to get a
25 hotel room. And many people from Nova Scotia remember

1 those same principles applying to the black community here,
2 too. There are certain spots in this province where black
3 people weren't allowed to come into town after a certain
4 time. I mean, those things, you know, we grew up with
5 them. We understand racism. We know what it's about.

6 I guess the thing that bothered me, I guess, about all
7 this other stuff, this self-government stuff being a
8 diversion, I mean, I have a lot of problems with that.
9 Because what we're talking about is reconciling this whole
10 question of repression with survival. And what we're
11 trying to do is trying to survive as a nation. We trying
12 to survive intact. It's taken, you know, hundreds and
13 hundreds of years to protect our language and protect our
14 way of life and our own way of dealing with each other.
15 You know, these things didn't come easy. I mean, we had
16 every invasion going against us, and we survived. And
17 we're going to survive with or without you. And I think
18 you have to understand that. And if it's with you, then
19 we're prepared to work with you, to help you, but don't
20 think you have something to give us. Because what you've
21 given us has been far short of freedom. And I think the
22 liberty that we're trying to articulate and trying to
23 express is something that every human being in this world
24 is trying to express. And this notion that people are
25 superior or have a better system or they're more

MR. KEVIN CHRISTMAS cont'd

1 articulate, or they're better trained, I think that's days
2 gone by. But I'll tell you, we're going to survive.

3 CHAIR

4 I think that if I may, I'll ask our panelists to give
5 us their concluding thoughts. It's fifteen minutes to
6 five. And might I be permitted just to say that there is a
7 multitude of proposals on the table now for our three
8 besieged Commissioners to consider, but may I be permitted
9 to pay a word of tribute to them. Some of you have said,
10 well, if there is racism in the system, in the justice
11 system from top to bottom as some of alleged, it may be
12 that the work of this commission, the Commission into the
13 trial of Donald Marshall, has done something quite positive
14 to eradicate racism in the system because, you see, there's
15 nothing more salutary than opening these things up to the
16 light of day. And sitting in Vancouver in my easy chair, I
17 saw police officers being questioned, judges being
18 questioned, crown prosecutors being questioned about their
19 handling of this case and their treatment of native people
20 and minorities. And it may be that just the act of
21 exposing all of these things to the light of day, letting
22 the sun shine in, has had some impact on the attitudes of
23 people in the justice system, and I wouldn't discount that
24 altogether. Sometimes it's good to come up with specific
25 proposals and sometimes they can be made to work, but there

1 is an aspect of consciousness raising about Royal
2 Commissions as they are conducted nowadays in this country,
3 and I think that the three commissioners here have perhaps
4 made a contribution there that you can't write it down on a
5 statute book anywhere, but in daily life it may turn out to
6 be important.

7 Might I just offer one other comment on the very
8 helpful things that have been said just now. And that is
9 that if tribal courts were to be thought of as something
10 that communities in Nova Scotia or elsewhere wanted to
11 establish with limited or larger jurisdiction, it is quite
12 true that they would, in the normal course of events, not
13 have jurisdiction over what happened off the reserve, to
14 native people off the reserve. But, of course, that's why
15 we had people like Sam Stevens here, Michael Jackson,
16 Chester Cunningham, to talk about the native participation
17 in the system generally. Diversion counseling, court
18 workers, native lawyers, and so on, because I think
19 everyone recognizes that not all the things that happen to
20 native people happen on the reserve within the jurisdiction
21 of the tribal court, if there happens to be one.

22 Well, with those thoughts, forgive me, but might I
23 just turn to Judge Coutu and see if there's anything you'd
24 like to add before we adjourn, sir?

25

1 JUDGE COUTU

2 Well, right now I have nothing to add except to thank
3 the Commission to have invited me here. I hope you will
4 have learned perhaps something from what I have said. But
5 one thing is sure is that I have learned a lot from what I
6 have heard today. And I thank you very much for that.

7 PROF. SAM STEVENS

8 I do have a couple of comments that I'd like to make.
9 They are more particularly addressed to the speakers who
10 spoke on racism. I think I assumed, in fact, when I spoke
11 earlier that there was this problem. And that's why I
12 spoke of minimum protections. I think it's a very
13 difficult thing to eradicate racism within any system. In
14 fact, at the band level, at reserve level, there is a bias
15 as well. So it isn't something which is particularly
16 something that's exclusive to the non-aboriginal society.
17 There is a bias oftentimes at the band council level as well
18 insofar as family matters. So when I talked earlier about
19 minimum protections, really it was to address that
20 particular issue, that in order to ameliorate part of the
21 problem, what I think we need to have is some minimum
22 protections. And it may not, in fact, as some of the
23 speakers who spoke on racism correctly pointed out, it
24 doesn't improve the situation, but it certainly does
25 provide some protection for aboriginal peoples.

1 At the present time there is not that protection right
2 across the board. Aboriginal peoples don't always have the
3 option of consulting with an aboriginal lawyer or a court
4 worker or a prison liaison worker, that sort of thing,
5 which would make them feel as though someone understood
6 that and would protect their rights no matter.

7 Some of you spoke about the question of how would this
8 aboriginal court system resolve the racism, or resolve the
9 problem within our present system. Well, my view on that
10 is really that the evolution of aboriginal peoples was
11 arrested to a certain extent by the dominant system, the
12 evolution of their culture, the evolution of their laws and
13 their institutions. And along with that, I think, in all
14 fairness, came a loss of respect for their culture, for
15 their aboriginal first nations. And what aboriginal
16 peoples, I think, are asking for is for them to be able to
17 pick up with their cultures, with their laws, advance that
18 to the point where they can select some of the good points
19 about the dominant system, select what, if any or all, of
20 their present aboriginal systems that they would like, and
21 come up with a system which works for them. And through
22 that process, I think once aboriginal people begin to take
23 that kind of control, you will see less of the aboriginal
24 people within your criminal justice system. That just sort
25 of flows from their ability of being able to have more

1 self-respect for their culture.

2 That closes the comments I'd like to make.

3 CHAIR

4 Thank you, Sam. Michael?

5 MR. MICHAEL JACKSON

6 I just wanted to make a comment regarding the issue of
7 racism. And while I think that there truly are some common
8 elements between the situation of blacks and indigenous
9 people, I think there are very important differences. One
10 of them, of course, has already been mentioned by the
11 speaker from the floor, that only in relation to indigenous
12 peoples is there a provision in the Constitution
13 entrenching distinctive rights in terms of treaties and
14 aboriginal rights. They are the original peoples.

15 The other thing also and while I think it's very
16 important that the focus be enlarged from the question of
17 racism to the question of self-government, is that, as I
18 understand it...I may be wrong on this, but as I understand
19 it, when we're dealing with racism, it is our state of
20 mind, it is our attitude towards other people. And, in a
21 sense, it's something for us to correct. And it is
22 something for us to correct. There is no question about
23 that. In relation to native people the issue, however, is
24 not what we have to correct about ourselves. The issue is
25 returning to them their rightful responsibility to govern

1 their own lives, to shape their future, to ensure that
2 their children have an understanding of who they are, where
3 they come from, their distinctive place in North America.
4 And I think that puts the allocation of authority in a
5 different kind of way. It's not something which we, as the
6 dominant society, simply have to do to ourselves to
7 cleanse, as it were, an evil in our midst in terms of how
8 we have superior assumptions to native people. We have to
9 go further and give native people the ability...to return
-0 to them the ability to chart their own destiny. And I
-1 think it's a different perspective.

-2 In relation to that latter course, one of the things I
-3 wanted to just leave the Commissioners with is that we
-4 have, I think, as the dominant society, as European
-5 cultures, always had the assumption that our culture, our
-6 way of life, our consciousness, was the future of North
-7 America. And I think what you can do as Commissioners is
-8 if you can take cognizance of where that has led us in
-9 terms of how we have treated and undermined native people
20 and how we have taken that wonderful promise of Jonathan
21 Belcher about the hedge and the field of liberty, and
22 unintentionally, or perhaps intentionally, but however,
23 have created, in fact, a prison out of it, if we can see
24 there is an evolution which now is taking place...we are,
25 in fact, going back to a recognition we once had of native

1 peoples as being our equals, as being our contemporaries.
2 And I think many of the suggestions which are coming to you
3 are ways of perfecting a view of Canada which gives native
4 people the ability to shape the future of this country in
5 ways which enrich it. And I think the Commission has an
6 important role in playing, in a variety of ways, in
7 identifying where we have come to, as Chief Norton so
8 eloquently described, and also some of the routes we can
9 take, which are not routes we have trodden for a long time,
10 but routes which we have to tread again if we, in fact, are
11 to have a system which truly treats native people as our
12 equals and as our contemporaries.

13 CHAIR

14 Thank you, Michael. Joe?

15 CHIEF JOE NORTON

16 [ADDRESSED COMMISSION IN MOHAWK]

17 What I simply said was that there is a general
18 understanding about our relationship. And the way I have
19 been taught, and the way I understand, is that there are
20 two paths. And I translate that into two realities. One
21 is the aboriginal reality, and there is the other, the
22 European reality, or the present North American reality, of
23 how you feel, how you think. In our path, in our boat, in
24 our vessel, is all our laws, all our customs and all our
25 religions and all our understanding of who we are and what

1 we are. In your path, in your boats, in your vessels,
2 similarly, is everything else. And we travel the river of
3 life together. We are joined together, but we are
4 separate. That's a real...it's not even a treaty. It's a
5 way of expressing how our people felt when they first made
6 any kind of agreements or arrangements with your ancestors.
7 And that's called a two-row-wampum. It's real. It's
8 alive. And our people still practice that and still
9 believe in that. And that's something that we always turn
10 back to and look at. Our people believe in that concept,
11 of sharing, of giving of one's self. In return, asking
12 that you simply respect what we have given to you, what we
13 have allowed you to partake in. I guess, unfortunately,
14 that gets kind of messed up as time goes on. And in
15 today's terms we find ourselves in a situation where it's
16 no longer equal, it's no longer sharing. It's ownership.
17 It's mine. I have it. It belongs to me. And, therefore,
18 I can do what I want with it. We don't even own land.
19 It's a total foreign concept. We can't own it. It's
20 vested in the generations that are to come. It doesn't
21 belong to us. We are caretakers of it. We are caretakers
22 of our languages. We are caretakers of our cultures, of
23 our traditions, of our customs. It doesn't belong to us
24 solely. And we can't destroy it. We cannot disregard it
25 either. We must uphold very strongly what we believe in.

1 And that's where we come into opposites with people who
2 have a different point of view about how they live in North
3 America.

4 This morning, and again now, all I am trying to point
5 out is the situation that Mr. Marshall and others across
6 this country found themselves in, and what they find
7 themselves in now, is a result of that different point of
8 view. We call it racism. We call it so many other
9 different things. And a lot of it is also based on fear,
10 fear of native people. If we are minorities, as you would
11 term it, if we are so small in number, why do you fear us?
12 Why do you impose these things on us, when you know full
13 well, and when we know full well, or at least we do anyway,
14 that there's these two realities. There's these two roads.
15 There's these two rivers of life. There's these two ways.
16 And that's our path. And that's your path. Yet we share
17 the land. You have nothing to fear from us. And if we
18 begin to deal with our people in a proper fashion, and our
19 people are comfortable with how they are being dealt with,
20 if they are satisfied that they are being judged by a jury
21 of their peers, if they feel that all the mechanisms are
22 there that they can turn to in order to make appeals or to
23 do whatever is necessary to take justice to its final stage
24 and settle for what is being done in these communities, in
25 our communities, then there is nothing wrong with that. I

1 find it hard to understand, maybe because...maybe I am
2 naive to think that the solution is so simple. But for me
3 it is. It's very straightforward. There is nothing
4 complicated about it. For us it's not complicated. For
5 you it's complicated. Because of the type of belief you
6 have, because of the law, the kind of law that you
7 practice, and the kind of society, the kind of thinking,
8 that you have, it's very complicated. And I have to say
9 that it doesn't address the human factors. And yet we are
10 all victims of that. It doesn't deal with the human
11 factors. Or if there are any human factors that are in
12 that system, then they are disregarded. And what becomes
13 more important is the money, the industries, employment and
14 those kinds of things. Those things become more important
15 other than the human factor.

16 There are three basic things in our lives that we
17 can't survive without: air, water and land. That's what
18 native people think about all the time: air, water and
19 land. And that seems to be what's being disrupted at this
20 point in time. What does that have to do with Donald
21 Marshall? It's very simple. At one time we lived by that.
22 Somebody came in and disrupted all of that and caused our
23 lives to change, caused our ways to be changed. And all of
24 a sudden we get into crime. We get into these other areas
25 that your people are involved in equally also, if not more

1 so than our people. And to disrupt a way of life so that
2 people turn to negative things is a crime in itself. So
3 you have to ask who are the criminals in these situations,
4 if there are any criminals.

5 And, again, as I mentioned this morning, there has to
6 be, I guess, a change in thinking, in how we relate to one
7 another, in how we are going to survive, because you have
8 situations right now all over the world for the potential
9 of destruction. Yet, people are talking about building
10 more bombs, building more things that will destroy, instead
11 of looking at replenishing or trying to correct what is
12 natural and what is being disrupted as far as our natural
13 ways of living.

14 I think my message is very simple, about respect for
15 one another. And that gets lost somewhere along the way.
16 Thank you.

17 CHAIR

18 Mr. Cunningham, any final words?

19 MR. CHESTER CUNNINGHAM

20 You know, I don't know if the message I left here was
21 that the court work is the complete answer. I don't think
22 the court worker program is the complete answer, but I
23 think it's the beginning. And I look back at the history
24 of the court worker program. And, just reminiscing here,
25 the awareness we created, not only with the judicial

1 system, but it was with the native people themselves. When
2 I first started to go looking for funding and would go to
3 the press and announce the large number of native people
4 incarcerated, the native leaders were telling me that I am
5 calling all the Indians criminals. That wasn't what I
6 wanted to do. What I wanted to do was to bring it to the
7 front so that we could discuss it and do something about
8 it. I think the court work has also sensitized not only
9 the criminal justice system but the native people. I think,
10 you know, we sensitized the native people that...you know,
11 when they go to court, they have a saying. The Cree and
12 most of the native people I dealt with are quite laid back.
13 And they trusted the system. They would say "Keiam." And
14 "keiam" means, "Oh, that's okay, let it go." And we'd say,
15 "Yeah, your 'keiam' will get you two years." We have to
16 start looking at it. And you can do something. And I
17 think we sensitized them into doing it.

18 But the other thing, I think, is the results I am
19 seeing is the educating and training that is being provided
20 and the role models. I think I have six former employees
21 who are now lawyers, who wouldn't have been if they didn't
22 have the court worker program to introduce them to the
23 criminal justice system. I think...you know, you talk
24 about money being cut off. As long as you are proving to
25 the government that you are saving them money, the money

MR. CHESTER CUNNINGHAM cont'd

1 will continue to come. Thank you.

2 CHAIR

3 Thank you, Chester. Russell?

4 MR. RUSSELL BARSH

5 Okay. I'll continue the tradition here and say
6 something. I guess I had a reaction a few minutes ago to
7 the intimation that if we could just stand up and point the
8 finger at the courts and say, "You racists!" that somehow
9 we would have made a tremendous breakthrough. I work with
10 now not only indigenous issues here in North America but
11 also on aspects of a U.N. program to combat racism. And
12 one of the most fundamental principles of international
13 discussions on the problem of racism in South Africa and
14 elsewhere is that racism is a symptom and a tool of power,
15 and that it can't be eliminated without addressing the
16 question of power. You don't educate it away. There is
17 too much of a danger that when you try to get everyone to
18 be polite about racism that people just learn to
19 discriminate more subtly. They learn what not to say.
20 They learn when not to say certain things or when not to do
21 certain things. It's too easy for the problem to seem to
22 disappear that way.

23 Recruitment of people into the existing state
24 institutions can gradually change things, depending upon
25 how it's done. But there is also a tremendous danger...if

1 that's all that's done, just recruitment...that what you do
2 is simply make the visible agents of the problem, the
3 visible agents of the existing injustice, brown or black
4 instead of white. In turn, brown against brown and black
5 against black instead of having it out on who has really
6 got the power.

7 Also, I am afraid...and I have seen this in the
8 affirmative action programs in the United States, there is
9 a message to native people in recruitment into so-called
10 dominant institutions as a path to change that, "Now you
11 can be one of us. If you join our club, then we'll treat
12 you well, with respect, but only if you join our club and
13 wear our uniforms." Now, I am not saying that there isn't
14 a role for public education, for anti-racism campaigns in
15 public information for recruitment into the Bar, into every
16 aspect of the judicial corrections and police system. But
17 by itself it's too easy for that strategy to create only
18 the appearance of change, and, in fact, to send the wrong
19 message to people. "If you join our system, and we're
20 being very gracious to allow you to, then we'll treat you
21 with respect. But we don't respect you enough to trust you
22 to look after your own problems or to share power with you
23 in the disposition of what's happening in your own
24 communities." So I would agree emphatically with the
25 earlier speaker who referred to the complementarity of the

1 kinds of approaches that we're looking at. Yes, by all
2 means, let's try to humanize and to remove the racism that
3 may be in parts of the criminal justice system. Let's try
4 to make it truly everybody's system. But for native people
5 at least, I think that there is not going to be much of a
6 change in people's sense of where they stand in relation to
7 the rest of Canadian society unless they are also given a
8 little bit of power.

9 CHAIR

10 Well, thank you, Russell. And thank you all. My
11 apologies to those of you who wished to say something from
12 the floor but whom we couldn't reach. We will adjourn in a
13 moment until 9:30 tomorrow morning, when we will
14 recommence. But before we formally adjourn, let me just
15 say that though these issues seem difficult, I think we can
16 rely on the Marshall Commission to sort them all out in
17 their report. Might I just conclude by thanking all the
18 members of the panel on your behalf. And I think they have
19 done a first rate job. And I certainly learned a great
20 deal from them all.

21 [ADJOURNED TO 9:30 a.m. NOVEMBER 25, 1988]
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