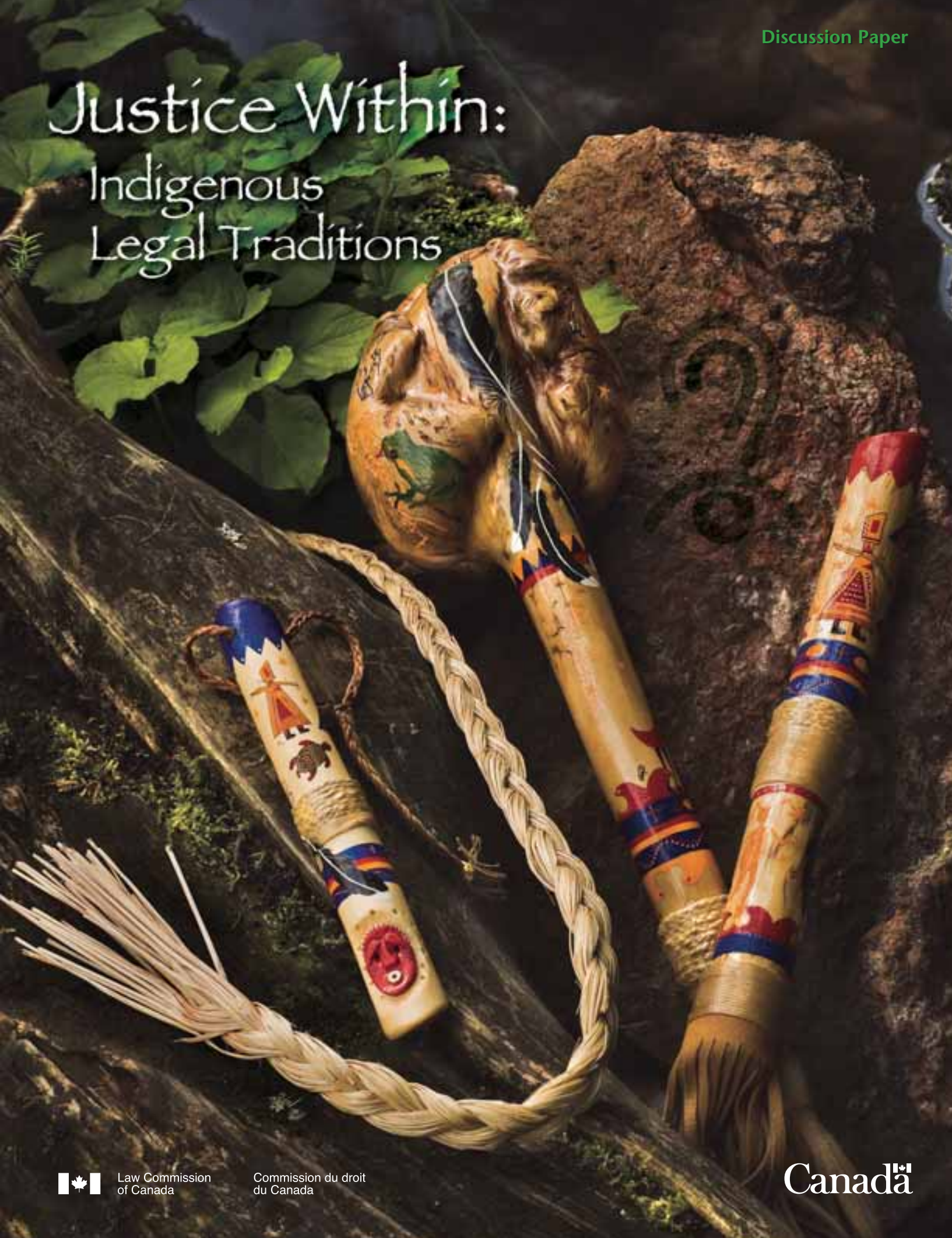
Discussion Paper

Justice Within: Indigenous Legal Traditions



Law Commission of Canada
Commission du droit du Canada
Canada

Cover Design:

The talking stick concept has been used by many Indigenous groups across North America as a means of just and impartial hearing and consensus building. The person holding the stick speaks without interruption allowing everyone participating to be heard.

The talking sticks on the cover of this discussion paper are the artistry of Anna Nibby Woods, a Mi'kmaq from Nova Scotia.

Cover photography by Christian Lalonde, Photolux Studio in Ottawa.

Photography was shot on location at Meech Lake in Gatineau, Quebec.

The Law Commission of Canada would like to thank Barry Parker, Jackie Nibby and Anna Nibby Woods for the use of their talking sticks.

Catalogue Number: JL2-29/2006
ISBN: 0-662-49471-7

August 2006

The discussion paper is available on the Internet at: http://www.lcc.gc.ca

Canada

Preface

Long before Europeans arrived in North America, Indigenous peoples developed social, political and spiritual customs to guide their interactions and relationships. These diverse customs developed into comprehensive systems of law. Across Canada, many Indigenous communities continue to be guided by their traditions in the governance of community, the environment and relationships between people. These traditions are enunciated in the rich stories, ceremonies, and practices within Indigenous communities. Changing and evolving to address the present-day needs of communities, Indigenous legal traditions provide the basis for good community practices, healthy relationship-building and sound decision-making.

Although Indigenous peoples were the earliest practitioners of law in what is now Canada, their laws have often been ignored or overruled by non-Indigenous laws. In the face of colonialism, Indigenous legal traditions lost much of their influence, all but disappearing from some communities. Today, however, many Indigenous communities have begun the often difficult task of reinvigorating their legal traditions. And in recent years Canadian society has begun to recognize the insights of Indigenous legal traditions. Through the exploration of restorative and transformative justice as an alternative to conventional criminal justice programs, for example, the courts have acknowledged the importance of such traditions in a number of circumstances.

Canada is a legally pluralistic state in which the common law and the civil law are recognized, but Indigenous laws are not always valued or given room to grow and develop. This Discussion Paper examines the importance of Indigenous legal traditions for Indigenous peoples and the place of Indigenous laws in Canada.

Our Virtual Scholar in Residence, Professor John Borrows, Law Foundation Chair in Aboriginal Justice and Governance at the Faculty of Law of the University of Victoria, provided much of the essential research for this project. His knowledge of and research on Indigenous legal traditions, his understanding and explanation of the history and workings of Canada's legal system and his insights into the challenges and opportunities respecting the exercise of Indigenous laws in Canada, were vital to the Commission's work. For those interested in

examining some of the issues raised in this Discussion Paper in more depth, a copy of Professor Borrows' paper can be found on the accompanying DVD.

In addition to critically examining Canada's laws and legal policy, the Law Commission is mandated to engage Canadians in the renewal of the law. This Discussion Paper is intended to stimulate debate on the issues surrounding Indigenous legal traditions in Canada. To assist Canadians in understanding Indigenous legal traditions and Aboriginal law-making, the Law Commission is releasing with this Discussion Paper a documentary video that portrays the richness of Indigenous legal traditions in Canada and explores some of the ways Aboriginal communities are working to regenerate and reinvigorate their traditions. The video can be found on the accompanying DVD.

The Law Commission encourages you to share your comments, ideas and suggestions with us by mail, e-mail, fax, telephone or internet:

Address:	**Law Commission of Canada** 222 Queen Street, Ottawa, Ontario Canada, K1A 0H8
Telephone:	(613) 946-8980
Fax:	(613) 946-8988
E-mail:	info@lcc.gc.ca
Internet:	www.lcc.gc.ca

Table of Contents

Introduction

> *Some happening came to the people. The result was good and fortunate. "This is right," said the Wise Men. "This shall be embodied in a new law so that good fortune may be still more assured to our People." And when misfortune came these Wise Men delved deeply to find its cause.*
>
> *At last, satisfied they had learned that which they had sought for, they said, "The action that lies at the root of this difficulty is wrong. Our peoples must be protected in the future that the same error may not be committed again. We make a new law forbidding that action."*
>
> *So grew the Code. So were the children instructed in the ways of Right and Wrong. So generation followed generation, each one more vigorous, more prosperous.*
>
> Will Robinson, as told by Walter Wright, *Men of Medeek*, 2nd ed. (Kitimat: Northern Sentinel Press,1962) at 3.

Aboriginal peoples were the earliest practitioners of law in Canada. Living in communities and nations across the land, they developed norms and practices to govern their social interaction, regulate trade, resolve disputes and govern the relationships between different nations. The diverse traditions of different Aboriginal peoples grew into highly developed systems of law that guided Aboriginal societies for centuries in the governance of community, the environment and relationships between people. Passed down through the generations in stories, songs, ceremonies and practices, these legal traditions reflect the unique experiences of different Aboriginal peoples and communities, embodying their values and beliefs and resonating with their cultures.

The first Europeans to arrive in North America recognized Indigenous legal traditions and often followed Indigenous laws. Aboriginal laws, protocols and procedures provided the framework for the first treaties between Aboriginal peoples and the Dutch, French, and British Crowns. Commercial transactions often were conducted in accordance with Indigenous traditions, with the giving of gifts, the extension of credit and the standards of trade often based on Indigenous legal concepts. In the personal

sphere, many early marriages between Indigenous women and European men were solemnized according to Indigenous legal traditions.

But the influence of Aboriginal laws waned in the face of increased European settlement. Early cooperation was replaced by policies of assimilation and by the 1800s Indigenous legal traditions often were ignored and many customary practices and ceremonies were banned. Aboriginal children were removed from their homes and forced to attend residential schools where the use of their Indigenous languages was prohibited. The impact on Aboriginal laws, cultures and communities has been devastating. In the place of laws and dispute resolution mechanisms that developed in particular cultural contexts and resonated with the values and beliefs of the people governed by them, a legal system reflecting the values and culture of the European settlers was imposed on Aboriginal peoples. Many Aboriginal communities today struggle with extreme poverty, their cultural identity and their communities fractured as a result of decades of assimilationist policies.

Yet Indigenous legal traditions have not disappeared. Many Aboriginal communities have maintained and developed their laws and continue to be guided by them in governance and dispute resolution. Other communities have begun the difficult task of reclaiming and revitalizing their traditions and the values upon which they are based. There is growing recognition of the importance of Indigenous laws and legal traditions to the cultural, economic and social health of Aboriginal peoples and communities. Many identify the reinvigoration of Indigenous legal traditions as vital to the autonomy of Aboriginal peoples. But while Canada is a legally pluralistic state in which the common law and the civil law are recognized and operate alongside each other, Indigenous laws are not always valued or given room to operate, develop and flourish.

Ensuring that Aboriginal peoples have the political space and resources to cultivate and refine Indigenous laws in accordance with their traditions could contribute not only to the health of Aboriginal communities, but also to reconciliation between Canada and Aboriginal peoples. The exercise of Indigenous laws in Canada, their importance to the health and success of Aboriginal communities, governance and cultural identity, the practical steps that might be taken to ensure greater recognition of Indigenous legal traditions and the challenges to doing so are the subject of this Discussion Paper.

PART I — INDIGENOUS LAWS

Long before the arrival of Europeans in North America, Aboriginal nations developed laws to govern such important aspects of communal life as marriage, adoption, the treatment of wrongdoers, trespassing and hunting. To ensure strong clans and to maintain important relationships between clans, for example, laws prohibiting marriage to a member of the same clan were widespread in Aboriginal communities organized into clans. Rules governing adoption, today recognized as custom adoption, were commonplace. To protect the collective and to regulate the buffalo hunt, the Plains Cree had two important rules: no family could separate itself from the group without permission and no individual could begin a buffalo chase until all hunters were ready. It was the custom of many Aboriginal peoples, including the Inuit, the Dene and the Cree, to respond to wrongdoing by a member of the community by counselling, shaming, and in more serious cases, banishing. To regulate the use of natural resources and wildlife, communities commonly allocated hunting and fishing grounds to members and imposed restrictions on hunting outside designated seasons.

Treaties, resettlements, wars and extended periods of peace all predated colonization. The first treaties among First Nations predated European arrival and recorded solemn agreements about how peoples were to share natural resources and relate to members of their own and other nations.

The laws that governed the lives of Aboriginal peoples historically were developed and evolved to meet the needs of the communities and their members. They reflected the principles and values of the particular peoples they governed. Although there is a great diversity amongst the traditions of the different Aboriginal peoples, one can see common elements. Indigenous laws typically are non-prescriptive, non-adversarial and non-punitive. They generally promote values such as respect, restoration and consensus and are closely connected to the land, the Creator and the community.

Speaking at a recent conference, Standing Buffalo First Nation Elder Ken Goodwill illustrated the less retributive, more restorative focus that is a common element of Indigenous laws through an example from the Dakota peoples.[1] Elder Goodwill explained how, faced with the murder of one of its citizens by another citizen, the members of a Dakota community gathered together to determine how to respond. In front of the entire community the

We are told today that Inuit never had laws or *maligait*. Why? They say, 'Because they are not written on paper.' When I think of paper, I think you can tear it up, and the laws are gone. The *maligait* of the Inuit are not on paper.

Mariano Aupilaarjuk from Jarich Oosten, Frederic Laugrand & Wim Rasing eds. *Interviewing Inuit Elders 2: Perspectives on Traditional Law* (Iqaluit: Nunavut Arctic College, 1999) at 14.

Treaty making among Aboriginal peoples dates back to a time long before Europeans arrived. Aboriginal nations treated among themselves to establish peace, regulate trade, share use of lands and resources, and arrange mutual defence. Through pipe smoking and other ceremonies, they gave these agreements the stature of sacred oaths.

Canada, *People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal Peoples*, CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997) at 14.

father of the murderer gave his son to the parents of the victim to assume their son's duties of hunting, chopping wood and otherwise providing for them. By this act, witnessed and approved by the community, the murderer was obliged to restore part of what he had taken away by his wrongful act.

A legal tradition can be understood as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught."[2] Despite inevitable differences between Aboriginal laws and the common law and civil law related to their different cultural origins and contexts, Indigenous legal traditions fit this description. Like the traditions of the common law and civil law, Indigenous legal traditions are cultural phenomena used to organize behaviour and resolve disputes.

Before the court system came into our lives and before the R.C.M.P. we always had rules in our camps. Misbehaviour has always been a part of life, and when there was misbehaviour, the community elders would get together and deal with that individual. The only way to deal with such people was to talk to them face to face.
…
If there was any type of strife in the community, they used to get together and talk to the person or persons causing it. If they listened the first time, then that would be the end of the matter but if they persisted, the second round of counselling would be more severe and unlike the first time, they did not talk about the good in the person or about how the person was loved by the community members. If they still persisted, then the counselling would be even more intimidating. Nothing was written, what was said all came from the minds of the elders.

Elder Imaruittuq from Jarich Oosten, Frederic Laugrand & Wim Rasing eds. *Interviewing Inuit Elders 2: Perspectives on Traditional Law* (Iqaluit: Nunavut Arctic College, 1999) at 43-44.

Common Law
Common law is the legal tradition applied throughout Canada, with the exception of Quebec. Its legal principles are developed through precedents: decisions in earlier cases that guide judges in making decisions in similar cases. Precedents can be overturned by new laws enacted by the appropriate government.

Civil Law
The Civil law, which applies to private law matters in Quebec, is based on a written civil code. The Civil Code of Quebec contains a comprehensive statement of the rules governing relationships among citizens and matters of property.

But despite their role in regulating conduct in Aboriginal communities, Indigenous legal traditions are not always recognized as law. Commonly deriving from an oral tradition, enunciated in songs, stories and ceremonies, often developed through consensus, Indigenous laws have been described by some as custom rather than law. Those supporting such a characterization cite the lack of proclamation by a recognized power capable of enforcing the law as evidence that a norm or custom followed in an Aboriginal community is "merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it."[3] Rejected by legal scholars as a "gross mischaracterization,"[4] such a view ignores the fact that not all Indigenous law was customary and not

all norms and traditions had only moral force. Many Aboriginal communities possessed sophisticated sets of laws which not only dictated acceptable behaviour, but also addressed the consequences of wrongdoing. Canada's Supreme Court also has rejected the idea that Indigenous peoples did not possess law prior to the arrival of Europeans in North America.[5]

There is also considerable evidence that the early European settlers recognized the laws of the Indigenous peoples living here. Many of the more than 500 treaties entered into between Aboriginal peoples and European Crowns followed Indigenous laws, even in periods when Aboriginal peoples enjoyed less political influence. The Covenant Chain is an important example. Originating in the early 17th century as an agreement between the Anglo-American colonies and the Iroquois, the alliance was joined by the Seven Nations of Canada in 1760. In keeping with Iroquois traditions, this complex system of alliances with the British Crown was framed in terms of continuing relations and was frequently renewed, a process known as polishing the silver chain. Indigenous traditions were also followed in other matters. Beginning in the 1500s, many Europeans adhered to Indigenous legal orders. In the fur trade, for example, recognizing that the idea of freezing the terms of trade through a written contract was an alien concept to Aboriginal people, traders conducted their business in accordance with Indigenous laws. Recognition of Indigenous laws also was evident in more personal spheres with many early marriages between Indigenous women and European men being entered into pursuant to the laws of Indigenous nations.

In addition, there was early judicial recognition of the existence and continued relevance of the laws of Aboriginal peoples. In 1867 the Quebec Superior Court upheld the claim of the son of a European man and a Cree mother to part of his father's estate on the basis that his parents' marriage, conducted in accordance with the laws of the Cree peoples, was a valid marriage. In considering the question, the Court held:

> Now, as I said before, even admitting, for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France and that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they

> trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.[6]

In spite of the importance of Indigenous laws in regulating the lives and affairs of Aboriginal peoples, their influence was greatly eroded following the enactment of the *Enfranchisement Act of 1869* and the *Indian Act* in 1876, embodying a policy of assimilation and imposing a foreign system of governance and laws. Driven by huge increases in the numbers of European settlers, whose economic interests in establishing permanent settlements, clearing land for agricultural purposes and exploiting the country's natural resources, were increasingly incompatible with the interests and lifestyles of the Indigenous population, the early cooperation that existed between Indigenous peoples and European settlers came to an end. Recognition of Indigenous laws ceased, Indigenous legal traditions were ignored or suppressed and many ceremonies and practices were banned.

Beginning in the 1870s Aboriginal children were forcibly removed from their homes and sent to residential schools in furtherance of the policy of assimilation. Forbidden to speak their Aboriginal languages or to practice their customs or traditions, generations of Aboriginal children lost touch with their culture, their language and their traditions. In Aboriginal communities, laws and dispute resolution mechanisms based on the unique values, principles and culture of the community were replaced with a legal system embodying foreign legal traditions. Under the *Enfranchisement Act* and the *Indian Acts* of 1876 and 1880 traditional systems of governance were replaced by the band council system and control over Aboriginal peoples and communities was placed in the hands of the federal government.

The impact on Aboriginal communities has been devastating. There is wide support for the proposition that the social, economic and political problems plaguing Aboriginal communities today are in large measure the legacy of past policies of assimilation and displacement.[7]

Indigenous legal traditions, however, have survived and continue to be followed by many Aboriginal peoples. These legal traditions are not ancient artefacts, frozen in time, but living systems of beliefs and practices, revised over time to respond to contemporary needs and challenges. There are past

practices in all legal traditions that are no longer acceptable in light of present-day values. Indigenous legal traditions are no different. Many Aboriginal communities today are actively revitalizing their legal traditions and developing contemporary laws based on the values that informed and shaped their traditional approaches to the governance of human relationships and dispute resolution.

The Nisga'a Nation in north-western British Columbia is a prominent example of an Aboriginal community that continues to be guided by its legal traditions in contemporary governance and law-making. The *Ayuuk*, the ancient legal code of the Nisga'a, is recognized in the *Nisga'a Final Agreement* as a source of Nisga'a law and has guided the Nisga'a in the enactment of dozens of pieces of modern legislation. The Constitution of the Nisga'a Nation expressly states, for example, that the resolution of disputes in the Nation is to be based upon the principles of the *Ayuuk*, including acknowledging wrongdoing and providing restitution, achieving reconciliation and restoring harmony. Many other Aboriginal communities across Canada are developing and enacting constitutions in which the fundamental values and principles that informed their legal traditions are articulated for the guidance of governance and law-making.

The strength of a tradition is not how closely it adheres to its original form but how well it develops and remains relevant under changing circumstances.

Katherine T. Bartlett, "Tradition, Change and the Idea of Progress in Feminist Legal Thought" (1995) *Wisconsin Law Review* 303 at 331.

PART II — WHY SUPPORT THE REVITALIZATION OF INDIGENOUS LEGAL TRADITIONS?

Support for revitalization of Indigenous legal traditions has its roots in the protection of Indigenous cultures, in the unique historical and political status of Indigenous peoples in Canada, and in the link to the development of healthy Aboriginal communities.[8]

There is overwhelming evidence that the development of successful Aboriginal communities is directly linked to real control by Aboriginal peoples over decision-making, including decisions on the enactment and enforcement of laws. Practical autonomy accompanied by capable, effective governance based on culturally appropriate institutions, has been recognized as essential to the success — economic, social and political — of Aboriginal communities. The power to make culturally appropriate laws and the establishment of fair, independent and culturally appropriate mechanisms for the resolution of disputes are essential elements of good governance.[9] This has been amply demonstrated by the research conducted by The Harvard Project on American Indian Economic Development (the "Harvard Project").[10]

Cultural match is vital to the acceptability and thus the legitimacy of legal systems and governance structures. A high degree of cultural match promotes a high degree of support from the members of the community. Culturally appropriate laws command allegiance and respect.[11] Conversely, laws and governance structures that do not resonate with a community's culture and values lack legitimacy. Put simply, a legal system that does not have to justify its existence or defend its worth is less vulnerable to challenges. Laws based on a community's own traditions and principles would be more relevant and meaningful to its members and could thus strengthen the rule of law in the community.

As Indigenous legal traditions are rooted in the unique cultures of Aboriginal communities and nations, their revitalization could play an important role in the regeneration of Indigenous cultures, promoting Indigenous ways of thinking and acting.[12] Despite the impact of colonialism, Indigenous cultures remain distinct. The expression and evolution of Indigenous cultures are seen as vital to the health of Aboriginal communities.

The inherent right of Aboriginal peoples to self-governance provides an additional justification for greater recognition of Indigenous legal traditions

…Aboriginal cultures were vibrant and distinctive not only in the beginning but remain so today. Though bruised and distorted as a result of the colonial experience, inevitably changed by time and new circumstances, even in danger of extinction in some important dimensions such as language, nevertheless a fundamentally different world view continues to exist and struggles for expression whenever Aboriginal people come together.

Among the most important aspects of cultural difference is the emphasis still placed on the collectivity in Aboriginal society — that is, the importance of family, clan, community and nation; the importance of the collective to an individual's sense of health and self-worth; the conception of the individual's responsibility to the collective and of the collective's responsibility to care for and protect its more vulnerable members; the importance of collective rights and collective action.

Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996), CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997) at chapter 14.

in Canada.[13] There is broad agreement among scholars that the right of Aboriginal peoples to govern themselves includes the right to make laws based on traditions and values intrinsic to Aboriginal communities.

The inherent right to self-governance has been widely recognized, including by the federal government, as being included in the Aboriginal and treaty rights protected under section 35(1) of *The Constitution Act, 1982*. Across Canada, many Aboriginal communities are in negotiations with federal, provincial and territorial governments for self-government agreements that address, amongst other things, jurisdiction over law-making and dispute resolution. Many others have already entered into such agreements. But the inherent right to self-governance is the source of, rather than the result of, such negotiations and many Aboriginal communities have moved to establish governance structures and dispute resolution mechanisms that reflect the values and traditions of the community whether or not they have negotiated a self-government agreement.

Canadian courts have affirmed that section 35(1) of the Constitution elevated existing Aboriginal rights to constitutional status. The common law, which came into force in Canada upon the Crown's assertion of sovereignty, recognized the continuity of Aboriginal customs, laws and traditions. Since these traditions and laws were neither surrendered by treaties nor extinguished by clear and plain government legislation, they presumably remained part of the common law until they were formally recognized and affirmed in s. 35(1).[14] Despite this constitutional protection and the link to the inherent right to self-governance, Aboriginal laws are often not valued as law when they collide with the laws of Canada's dominant legal orders. It may be that formal legislative recognition is required to remove any ambiguity about the continued role of Indigenous legal traditions in Canada.

For the inherent right of self-government to be effectively exercised, Aboriginal governments need to have jurisdiction over the administration of justice within their territories that will enable them to reclaim Aboriginal traditions in relation to resolution of disputes within their communities…. As long as disputes arising in Aboriginal communities continue to be resolved in Canadian courts … real self-government will remain elusive.

Kent McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research" (2004) [unpublished, Research Report prepared for the National Centre for First Nations Governance], online: <http://www.fngovernance.org/pdf/KentMcNeilInherent0105.pdf> at 29.

DISCUSSION POINTS:

- *What impact would the revival of Indigenous legal traditions have on the health and development of Indigenous communities?*

- *What impact would greater self-government powers have on the revitalization of Indigenous legal traditions?*

PART III — ISSUES AND CHALLENGES

The revitalization of Indigenous legal traditions faces many challenges. Indigenous communities must reclaim, define and understand their traditions. The loss of culture and traditions caused by the historic treatment of Aboriginal peoples and the state of many Aboriginal communities make this a formidable challenge for some communities. Equally significant is the challenge for the Canadian state to create the political and legal space to accommodate revitalized Indigenous legal traditions and Aboriginal law-making. Alongside these issues are questions about the scope of the applicability of Indigenous legal traditions, the application of the *Canadian Charter of Rights and Freedoms*, the ways in which Indigenous legal institutions will be held accountable to the people they serve, and the ability of Canadians to understand the implications of the unique historical and political position occupied by Aboriginal peoples in Canada.

More generally, it has been suggested that one of the largest challenges to ensuring greater recognition of Indigenous legal traditions is the state of the relationship between Canada and Aboriginal peoples. Marred by mistrust, the relationship could make essential dialogue on the issues difficult.

While not insignificant, these challenges must be considered against the backdrop of the benefits of overcoming them.

A. Identifying and interpreting Indigenous legal traditions

For Indigenous legal traditions to regain their influence in guiding the lives of Aboriginal peoples, Aboriginal communities must first identify and define their traditions and in some cases revise them for application in modern Aboriginal communities. While many Aboriginal communities have preserved their traditions, in others the legacy of Canada's policies of assimilation has been the loss of much of their guiding values and principles. This erosion of Indigenous legal traditions presents particular challenges for Aboriginal communities. To be effective and to have influence and authority, law must be accessible to and accepted by the people governed by and administering it. For those Aboriginal communities that have lost touch with their traditions, reclaiming and regenerating their traditions for contemporary application is therefore vital. Such a process inevitably

involves gathering and sharing knowledge about traditions, customs and values and may also involve reconstructing the traditions. Some communities have tackled this challenge by reaching into the stories of their Elders to identify the essential values that guided their people historically and then using these values to guide their contemporary law-making. Other communities have drafted charters or constitutions based on the knowledge of their Elders, setting out the community's principles, values and customs for the guidance of its citizens, government and law-making. Still others are turning to communities with which they have close ties to explore the traditions of those communities and use the information gathered to reconstruct their legal traditions.

But this process is not necessarily an easy one. Many Aboriginal communities, suffering from the effects of colonialism and its impact on their cultural identity, are divided. The removal of children from their communities and their forced attendance at residential schools in many cases broke the traditional links between generations, undermining the social structures in scores of communities. In some cases this has led to a weakening of the roles of Elders and the consequent loss of much knowledge traditionally passed down from Elders to younger generations. Even in more cohesive communities there are inevitable differences about the content of those traditions, about their meaning and about how they should be changed for application today.

Aboriginal women have expressed particular concerns about how Indigenous legal traditions are understood and interpreted. Central to their concerns is recognition of the profound impact of the policies of assimilation on Indigenous communities, culture and legal traditions.

The traditional roles of men and women in Aboriginal communities, while differentiated, were generally egalitarian. Women held highly valued roles: they served as leaders and advisors, they were teachers and they were respected as the givers of life. Some Aboriginal societies were matrilineal with the family line and important ceremonies and symbols passing through women.[15] By contrast, at the time of European arrival in North America, European women were not permitted to own property or hold positions of power and their legal status was akin to that of minors. These views were imposed on Aboriginal societies through the operation of the *Indian Act*, which took away women's powers, permitting only men to hold

[T]he notion of 'tradition' in contemporary Indigenous societies is contestable and contested. …
Different groups within any particular Indigenous community will have different ideas about how 'traditions' should be understood, identified, and re-created….

Gordon Christie, "Space for Indigenous Legal Traditions" (2006) [unpublished, paper prepared for the Law Commission of Canada and the Indigenous Bar Association] at 38 and 40.

My ability to reclaim my position in the world as Haudenosaunee woman is preconditioned on the ability of our men to remember the traditions that we have lost.

Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 179.

office in band councils, emphasizing male lineage, and stripping women of their status as Indians upon marriage to non-Aboriginal men. Aboriginal women have voiced concern that Aboriginal men (and women) have internalized the notions of gender imposed by the *Indian Act* and that this may lead to distorted interpretations of traditions.

The project of revitalizing Indigenous legal traditions, identifying, defining and interpreting those traditions and achieving consensus among the members of each Aboriginal community requires the commitment of resources sufficient for the task. This presents an additional challenge as Aboriginal communities actively engaged in the renewal of their legal traditions struggle to find funding for their projects.

DISCUSSION POINTS:

- *What are some of the steps that can be taken to reclaim, reconstruct, and revitalize Indigenous legal traditions?*
- *How can disagreements within Aboriginal communities over traditions, their content and their interpretation be resolved?*
- *Resources are important to assist Aboriginal peoples in revitalizing their legal traditions. What kind of support might this entail?*

B. Is Canada receptive to reinvigorated Indigenous legal traditions?

Another significant challenge arises not within Aboriginal communities, but in Canadian society. To open up the necessary political, legal and constitutional space for revitalized Indigenous legal traditions and Aboriginal law-making, the Canadian state must accept a strong measure of autonomy for Indigenous peoples in Canada. The historic treatment of Aboriginal peoples in Canada has not respected their autonomy, but in the past decade government policies have begun to reflect a growing recognition of the importance of autonomy for Aboriginal peoples and communities. The federal government has committed itself to working with Aboriginal peoples to improve the economic, social and physical health of their communities. As discussed above, there are sound reasons for believing that the revitalization

and flourishing of Indigenous legal traditions and law-making would contribute to the overall health of Aboriginal communities.

Greater recognition of legal traditions would also require acceptance of the fact that Aboriginal communities may rely on an approach to regulating social interaction and adopt dispute resolution rules and procedures based not on the Western liberal culture of Canadian society, but on the legal traditions and values of Aboriginal communities, as defined and interpreted by those communities. Although sharing the concern for individual rights and security that is of central importance in our liberal democracy, Aboriginal communities historically placed greater importance on the collectivity and the responsibilities of its members to each other, to the community, to the land and to the Creator. Canadian society and the Canadian state would have to accept that renewed Indigenous legal traditions may reflect this different emphasis.

DISCUSSION POINTS:

- *What should be the role of the Canadian state in response to efforts by Aboriginal communities to revive and regenerate their legal traditions?*

- *Greater understanding of Indigenous legal traditions and the cultures and values of Aboriginal peoples might make Canadians more receptive to greater recognition of Indigenous legal traditions. What are some of the ways to promote such understanding amongst Canadians?*

C. Intelligibility and accessibility

Concerns have been raised that Indigenous legal traditions may not be sufficiently precise or intelligible to be accessible and to be relied upon as laws. Because these traditions tend to be recorded and conveyed through stories, songs, rituals and ceremonies, they may be perceived as less legitimate than Euro-Canadian legal traditions, which rely more on formal proclamations and written records. Although it is tempting to make such sweeping distinctions between non-Indigenous and Indigenous legal traditions, especially given their different histories, values and social organization, the distinctions are more apparent than real.

As a lad I sat at my Grandfather's feet. Many times he told me the story. It is long. In the Native tongue it takes eight hours to tell.

So, several times each year, I sat at his feet and listened to our records. I drank in the words. In time I became word perfect. I knew all the story. I could repeat it without missing any of its parts. So I became the historian of Medeek. So I took my place in a long line that had gone before me.

…

The life of my People has left its accustomed ways. There is little time to learn the history on our People. Many things have drawn the minds of our young men from the habit of peacefully listening to their elders.

So, lest the record be lost, I tell it that it may be written down and preserved.

Thus may the Men of Medeek, now scattered in many places, read. Thus may they learn of the deeds that are recorded on their Totem Poles. Thus may they come to have an honest pride in their lineage, and the deeds performed by their ancestors.

Will Robinson, as told by Walter Wright, *Men of Medeek*, 2 ed. (Kitimat: Northern Sentinel Press, 1962) at 1.

Like all legal traditions, Indigenous legal traditions are cultural phenomena that must be interpreted in their proper cultural context. Indeed, no system of law has meaning outside of its cultural context. Since every culture has its own notions of space, time, historical truth and causality, and since a shared understanding of such concepts is taken for granted when drawing inferences or conclusions about a given set of facts, there is much scope for misinterpretation when people unfamiliar with Indigenous cultures interpret Indigenous laws.

To make their legal traditions more accessible some Aboriginal communities have written them down in codes, law books, statutes or constitutions. Indigenous legal traditions might also be transmitted through videos, the media, workshops, apprenticeships, classroom learning, textbooks, published judgments, and even public performances. Broader understanding of Indigenous legal traditions would contribute to their accessibility, and would also help to demystify Indigenous laws and promote understanding of the role of Indigenous laws in the Canadian legal landscape. Greater understanding of Indigenous legal traditions might also have the ancillary benefit of enriching Canadian society by providing alternatives for dealing with issues and problems that often end up in the mainstream justice system.

Based on their experience, however, Aboriginal peoples may be reluctant to share their legal traditions with society at large. Misapprehension and misunderstanding have resulted in the stereotyping and marginalization of Indigenous peoples, militating against intimacy with other cultures.

For most of Canada's history, Indigenous knowledge was thought to be static and dying. Lawmakers, historians and others took pains both to eradicate and to catalogue Indigenous cultural expression, objects and ideas. Ceremonial masks, totem poles, wampum belts and other cultural objects were confiscated and appropriated by private collectors and public institutions. Many anthropologists, archaeologists, and academics made careers from these appropriations and studies. Non-Aboriginal musicians, literary guilds and the film industry also misappropriated Aboriginal songs, stories and performances. In the circumstances, it is not surprising that Indigenous peoples may be wary of subjecting their legal traditions to public scrutiny and possible derision or appropriation.

Another concern with codifying Indigenous legal traditions relates to their largely oral nature. Many Aboriginal people express concern that the process of translating the oral into the written, even when intended to help preserve and disseminate Indigenous laws, changes the traditions and laws. It has been suggested that one way of preserving the integrity of the oral tradition and guarding against overly rigid interpretations of the written version would be for codes of Indigenous legal traditions to contain preambles specifying that the oral tradition is to prevail and vesting interpretive authority in local, Indigenous institutions.

DISCUSSION POINTS:

- *How might oral transmission of Indigenous laws work in the context of the current Canadian legal system? Are oral and written forms of legal knowledge mutually exclusive or compatible?*

- *What steps can be taken to prevent the misinterpretation, misapplication, misappropriation and stereotyping of Indigenous legal traditions?*

D. Equality

Would enhancing recognition of Indigenous legal traditions and Aboriginal law-making create unfairness, either for Aboriginal peoples or for others in Canadian society? For some there is concern that it would lead to the creation of separate and unequal systems of justice for Aboriginal peoples. Others question why there should be greater recognition of Indigenous legal traditions but not the legal traditions of different minority groups.

In considering these concerns it is critical to bear in mind both Canada's approach to equality and the unique historical and legal position occupied by Aboriginal peoples in Canada. It is also important to realize that the precise ways in which Indigenous legal traditions might operate in the Canadian legal landscape is something that will require considerable discussion. A range of possibilities exist. While Aboriginal justice systems running parallel to the civil and common law system is one vision, another is of recognition of Indigenous legal traditions within the existing legal framework, with

We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream system. This is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can be better described as getting away from the colonialism and domination... Resisting colonialism means a reclaiming by Aboriginal people of control over the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages…and perhaps phased jurisdiction.

Mary Ellen Turpel, "Reflections on Thinking About Criminal Justice Reform" in R. Gosse, J. Henderson & R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994).

The Supreme Court of Canada observed in the case of *Law v. Canada* (*Minister of Employment and Immigration*) that "true equality does not necessarily result from identical treatment."

The Court went on to say that sometimes it is necessary to treat people differently precisely to accommodate differences, compensate for pre-existing disadvantages and produce equal results. By extension, a law that applies uniformly to all can still violate equality rights. This concept, called "substantive equality," is a well-accepted principle of Canadian human rights law.

Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497.

provisions for people unhappy with decisions rendered by Aboriginal dispute resolution bodies to appeal to the superior courts of the province or territory. Still another possibility would see Indigenous legal traditions valued and taken into account in the existing civil and common law system.[16] It is possible that different Aboriginal communities would want to proceed differently, depending on the capacity of the communities and their priorities.

It must be acknowledged, however, that greater recognition of Indigenous legal traditions in whatever form would involve differential treatment of Aboriginal peoples. But such differential treatment would not necessarily offend rules of fairness or guarantees of equality as they are understood and applied in Canada. Aboriginal peoples in Canada have a different historical, legal and political status than do other Canadians. As the original occupants of this land and one of the founding political and legal groups in the country, they occupy a unique position in Canada's constitutional framework. This distinguishes them from members of other distinct cultures now living in Canada. The special position of Aboriginal peoples is recognized by section 35(1) of the Constitution which protects the existing culture, practices and traditions of Aboriginal peoples in Canada. It is also important to note that section 25 of the *Canadian Charter of Rights and Freedoms* specifically provides that the rights and freedoms contained in the *Charter* are not to be interpreted in a way that diminishes or interferes with any Aboriginal or treaty rights.

Canada's federal system, in which legal pluralism is the norm, also recognizes that different laws may apply to different people. The Canadian legal system provides for the creation and enforcement of a variety of laws by the ten provinces, three territories and one central government. As a result, significant rights, benefits and responsibilities of residents of Canada vary depending upon where they live. Where necessary, these laws are balanced and harmonized and this would likely be necessary in the case of Indigenous laws. But the existence of a mosaic of laws covering the people of Canada is a reality in the federal system. Far from bringing its legal system into disrepute, Canada's agility in accommodating regional and cultural differences is applauded both at home and abroad.

The Supreme Court of Canada has recognized that it is at times necessary to treat differently situated people differently in order to eliminate inequity. Similarly, international law has long recognized that

the accommodation of differences between groups can be essential for the achievement of substantive equality. Canada has embraced the notion that the principle of non-discrimination requires *both* the equal treatment of equals *and* the consideration and accommodation of difference.

The applicability of the *Charter* to Aboriginal governments is another important issue requiring consideration. While some argue that it would be inappropriate to apply the *Charter* — the development of which Aboriginal peoples had little opportunity to participate in — to Aboriginal governments[17] others, including representatives of Aboriginal women, contend that to ensure the protection of individual rights, it is imperative that the *Charter* apply. Groups such as the Native Women's Association of Canada stress the importance of *Charter* protections to Aboriginal women whose traditional roles in Aboriginal society were undermined by the impact of colonialism.[18] Proponents of the applicability of the *Charter* also note that far from reflecting only Euro-Canadian values, the *Charter* reflects values and principles embraced by a broad international community of nations.[19]

Recognizing the need to balance protection of individual rights with respect for the cultures of individual Aboriginal nations and communities, some have suggested the development and enactment of Aboriginal charters of rights. This approach has found some favour with Aboriginal women, who have suggested that an Aboriginal Charter of Rights might be an appropriate vehicle through which to ensure respect for the rights of individual Aboriginal citizens by Aboriginal governments.[20]

DISCUSSION POINTS:

- *What approaches might be taken to increase understanding of the link between greater recognition of Indigenous legal traditions and the unique historical and constitutional position of Aboriginal peoples in Canada?*
- *How can the rights of individuals be protected in Indigenous legal systems?*
- *To what extent should the* Charter *apply to Aboriginal law-making and legal systems? Should Aboriginal charters of rights be enacted?*

While a dialogue continues on the application of the Charter, many Aboriginal people see the application of the Charter as simply inappropriate, because it does not reflect Aboriginal values or approaches to resolving disputes. This is not to say that Aboriginal peoples have no concern about individual rights and individual security under Aboriginal governments. The concern rests more with the Charter's elevation of the guaranteed legal rights over unguaranteed social and economic rights, the emphasis on rights rather than responsibilities, the failure to emphasize collective rights, and the litigation model of enforcement. These are among the features of the Charter that are alien to many Aboriginal communities.

Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997) at 24.

While guarantees of individual rights are necessary, they have to be balanced against the need for Aboriginal nations to maintain their distinctive cultures, which traditionally have been at least as respectful of individual liberty as Anglo/French Canadian cultures. One way of addressing this would be through the development of model Aboriginal charter provisions that do take account of differences between Aboriginal cultures and the liberal values upon which the *Charter* is based.

Kent McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research" (2004) [unpublished, Research Report prepared for the National Centre for First Nations Governance] online: <http://www.fngovernance.org/pdf/Kent McNeilInherent0105.pdf> at 28.

E. Applicability

Another key issue relating to the operation of Indigenous legal traditions is the question of application. To whom would Indigenous laws apply? To Indigenous people only? To any person living in an Indigenous community? Should the scope of Indigenous laws extend to Aboriginal people living outside of their community? Should the scope of application depend on the nature of the law in question?

Some people have suggested that the application of Indigenous laws should be based on political rather than racial criteria, with Indigenous laws applying to all citizens of the Aboriginal community or nation. This could include both those born into and those adopted by the community. The conferring of citizenship is a basic element of self-governance and the authority of Indigenous governments to make decisions about who is and is not a citizen has been recognized in a number of treaties and self-government agreements including the recent Dogrib and Innu treaties, the self-government agreements in the Yukon and the Final Agreement of the Nisga'a Nation. Many other Indigenous groups also have criteria for conferring citizenship on "outsiders."

Leaving aside questions relating to the applicability of Indigenous laws *within* communities, should the applicability of Indigenous laws be territorial or personal, or some combination of the two? In the first case, Indigenous laws would apply to anyone on Indigenous land. In the second, Indigenous laws would apply only to citizens of the Indigenous community whether living on or off Indigenous land. It seems realistic to imagine that the operation of Indigenous laws would have both a personal and a territorial aspect. Accomplishing the goals of land or environmental protection laws, for example, would require territorial application with all persons living on or using the Aboriginal land subject to the laws. Conversely, laws that are important to the protection and promotion of Aboriginal cultures, identity and traditions, such as those involving child welfare and adoption or cultural education might require personal application to be effective, applying to all citizens of the community regardless of where they are living.[21]

Issues of applicability are complex and are made all the more so by the fact that more than two thirds of Aboriginal people live off Aboriginal lands.

With some 51% of Aboriginal people living in urban areas and a further 20% living in rural areas off Aboriginal lands, the personal application of Aboriginal laws faces obvious challenges including insuring access to the law and effective enforcement. It is interesting to note, however, that in the context of Aboriginal self-government it has been suggested that personal jurisdiction could be essential to self-government in urban areas and could be assisted by coordination of services among Aboriginal governments.[22]

> In the United States, Indian nations have the jurisdiction to prosecute all Indians, whether members of the nation or not, for crimes committed on their territory. Tribal courts have no jurisdiction to enforce their criminal laws against non-Indians.

The issue of applicability also raises questions about the interplay of Aboriginal laws and federal, provincial or territorial laws of general application. In addressing this issue, the Royal Commission on Aboriginal Peoples reached the following conclusions:

> 13. When an Aboriginal government passes legislation dealing with a subject-matter falling within the core, any inconsistent federal or provincial legislation is automatically displaced. An Aboriginal government can thus expand, contract or vary its exclusive range of operations in an organic manner, in keeping with its needs and circumstances. Where there is no inconsistent Aboriginal legislation occupying the field in a core area of jurisdiction, federal and provincial laws continue to apply in accordance with standard constitutional rules.
>
> 14. By way of exception, in certain cases a federal law may take precedence over an Aboriginal law where they conflict. However, for this to happen, the federal law has to meet the strict standard laid down by the Supreme Court of Canada in the Sparrow decision. Under this standard, the federal law has to serve a compelling and substantial need and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.[23]

The self-government agreements between the Yukon territorial government and Yukon First Nations all provide that any territorial law of general application "shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the [First Nation]." Federal laws of general application also continue to apply, subject to any negotiated agreements specifically providing that certain First Nation laws

shall prevail in the event of any conflict. In the case of the Nisga'a Final Agreement federal and provincial laws continue to apply to the Nisga'a Nation and its citizens, except where there is a conflict with the Final Agreement or the settlement legislation, in which case the agreement and settlement legislation prevail. From these examples it is evident that there are different possible approaches to the issue of conflict between Indigenous laws and laws of general application.

DISCUSSION POINTS:

- *To whom should Aboriginal laws and legal traditions apply? Should they apply only to Aboriginal citizens? If so, should they apply only while on Aboriginal lands or no matter where an Aboriginal citizen is? Should Aboriginal laws (or some Aboriginal laws) apply to non-Aboriginal peoples while on Aboriginal lands?*

- *Should the scope of applicability vary depending on the nature of the law?*

- *How could conflicts between laws — Indigenous, common law, civil, statutory — be resolved? Should it depend on the circumstances, for example the parties involved or the location of the dispute?*

F. Accountability

Accountability mechanisms are important in all legal and governance systems, and systems administered by Indigenous peoples are no exception. A system of checks and balances is important to guard against potential abuse of power.

The work of the Harvard Project has demonstrated that non-politicized, fair dispute resolution is vital to effective governance and that Aboriginal communities with strong, independent judicial systems typically outperform other communities economically.[24] The research has also highlighted the importance of cultural match.[25] This suggests that the most effective oversight mechanisms would be those developed by Aboriginal peoples themselves to be reflective of their particular culture and values.

Accountability of Aboriginal governments was the subject of much discussion following the introduction by the former federal government of the *First Nations Governance Act*[26] and that discussion has been revived by the current government. While there is considerable opposition to the imposition of an accountability model based on non-Aboriginal standards, there is broad support for, and recognition of, the importance of the principle of accountability. It is often argued that the *Indian Act* system of band governance, by conflating the legislative, executive and judicial functions, lacks sufficient accountability mechanisms and creates the potential for abuse of power. While refining their legal systems, Indigenous communities are experimenting with new governance structures that are more consistent with their traditions, beliefs and values. The structure of the Iroquois Confederacy of Nations, providing for the separation of powers, ratification of decisions, and public review provides an example of a culturally relevant system of checks and balances and there are many contemporary models as well.

> In 1988 the U.S. Senate passed a resolution acknowledging the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution. The resolution made particular note of the influence of the Iroquois political system on the structure of the U.S. republic and the democratic principles incorporated into the U.S. Constitution.

The Métis living on settlement lands in Alberta have made their dispute resolution processes accountable by establishing the Métis Settlements Appeal Tribunal. The Carcross Tagish First Nation's Constitution provides for a clan system of government with four distinct governing bodies — the Elders Council, the Assembly, the Council and the Justice Council. In fact, all the self-government agreements reached in the Yukon include a provision requiring the drafting of a Constitution that not only recognizes and protects the rights of citizens, but also provides a mechanism for challenging and overturning invalid laws. In Northern Ontario the Fort Severn First Nation is adding an Elders Council to its governance structure to enhance accountability. The Council will be responsible for general oversight of law-making and dispute resolution, serving as an appeal court, an auditor general and a senate.

DISCUSSION POINTS:

- *What are some culturally appropriate models for oversight and review of Indigenous legal systems?*

- *Should appeal mechanisms be available for Indigenous community members who are not pleased with the legal outcomes in their communities? If so, should it be possible to seek a remedy from the Canadian state? Should an appeal mechanism to the provincial or territorial courts be required?*

PART IV — ENHANCING THE PLACE OF INDIGENOUS LEGAL TRADITIONS IN CANADA

The first step towards enhancing the place of Indigenous legal traditions in Canada is the rekindling of those traditions. It seems clear that the work of identifying, defining and interpreting Indigenous legal traditions is a process for which Aboriginal peoples have responsibility and over which they must have control. By revitalizing and practising their traditions, by enacting laws consistent with these traditions and by ensuring that members of their communities understand the traditions and the values they embody, Indigenous peoples will nurture and preserve their traditions.

Many Aboriginal communities in Canada already are engaged in such work with community members and Elders working together to identify their traditions and the values and principles at their core. To facilitate access to their legal traditions, some communities have chosen to make the values and principles contained within the traditions explicit in constitutions and contemporary legislation. The work of the Teslin Tlingit Nation of the Yukon on a Declaration and Charter is an example of one First Nation's efforts to do this. The Charter, called *Ha Kus Teyea*, is intended to provide guidance to legislators and drafters to ensure that Tlingit laws are premised on Tlingit values, principles and customs. The draft document encapsulates the identity and values of the Teslin Tlingit, chronicling the history of the Nation, articulating its values, and setting out the responsibilities of the people and the leaders to the Creator, the community and one another. The *Investment Act* of the Carcross Tagish First Nation is another example. This draft legislation uses traditional stories of the Carcross Tagish people to articulate the values guiding investment by the First Nation of its financial resources.

Some Aboriginal governments, policymakers and others have chosen to help entrench Aboriginal legal traditions by acting to make explicit reference to the traditions as the basis for contemporary dispute resolution. Other communities have resurrected potlatches, feasts and Elders Councils and are practicing methods for resolving disputes and maintaining social order that are based on their traditional practices. Healing circles and peacemaker initiatives, which are among the many recent Aboriginal justice projects intended to reintroduce holistic methods of restoring community cohesion when a crime is committed, are amongst the ways in which this is being done.

The Feast and the Functions of the System Today

The feast is at the core of Wet'suwet'en society. Despite the concerted past efforts of missionaries and government agents to displace the feast from the life of the people the feast system remains central to Wet'suwet'en government, law, social structure and world view. Therefore we begin with a synopsis of the Wet'suwet'en feast. It is in the feast that people are given their titles, their robes and their crests and the authority over the territory associated with those titles. This succession is witnessed by the Wet'suwet'en and the neighboring peoples, the Babine, Nutseni and Gitksan…

The Chiefs use this authority invested in them in the feast hall to settle disputes and breaches of Wet'suwet'en law within the forum of the feast as well as outside the feast hall. The feast therefore validates authority according to Wet'suwet'en law and provides a format for the exercise of that authority.

The Office of the Wet'suwet'en, online: <http://www.wetsuweten.com/wetsuweten/traditional-governance/>.

Initiatives by Indigenous educational and other institutions might be undertaken to complement the work of Aboriginal communities. Indigenous educational institutions could work with Aboriginal leaders to develop programs specific to Indigenous communities and their laws and the National Centre for First Nations Governance might assist in disseminating information on Indigenous legal traditions. It has also been suggested that the Indigenous Bar Association might wish to work towards the creation of an Indigenous governance, education and disciplinary body to oversee the accreditation or coordination of those practising Indigenous law.

A. The role of governments and others

While the primary responsibility for revitalizing Indigenous legal traditions rests with Indigenous peoples, all orders of government in Canada have a role to play in recognizing the authority of Indigenous governments to enact and administer laws and to resolve disputes, and in accommodating revitalized Indigenous legal traditions. In addition, other sectors of Canadian society, public and private, could contribute to the general awareness and acceptance of Indigenous legal traditions.

Parliament, provincial and territorial legislatures and Canadian courts could do much to enhance the recognition and understanding of Indigenous laws and to integrate them into their operations and functions. For instance, there could be more judicial appointments of people who are conversant with Aboriginal legal traditions to all levels of the judicial system. The Canadian Bar Association has embraced this idea, recently passing a resolution supporting the appointment of Aboriginal judges to appellate courts, including the Supreme Court of Canada.

BE IT RESOLVED THAT the Canadian Bar Association reaffirm the merit principle in judicial appointments, and urge the federal, provincial and territorial governments:

1. **to reflect better the recognition of Indigenous legal systems in judicial appointments; and**
2. **to give particular focus to the appointment of Aboriginal judges to appellate courts, including the Supreme Court of Canada.**

Excerpt from Council of the Canadian Bar Association, *Resolution 05-01-A: Recognition of Legal Pluralism in Judicial Appointments,* August 2005.

There is general agreement amongst scholars that Indigenous peoples' right to implement and develop laws is inextricably linked to self-governance. The federal government already has recognized that Aboriginal peoples possess the right to self-government. In a 1995 policy statement, the government said:

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right within section 35 of the *Constitution Act, 1982*.…Recognition of the inherent right

> is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[27]

The development and implementation of laws falls within the scope of this policy statement, but it may be that more explicit legislative recognition of Indigenous legal traditions and the law-making authority of Indigenous governments is required. In addition to providing certainty, formal legislative recognition would avoid the years of arduous negotiations currently required to achieve agreement on these issues during self-government negotiations. It would also ensure a consistent approach to the issue of Aboriginal law-making authority across the country.[28] Formal recognition also would both encourage citizens' respect for Indigenous laws and facilitate access to resources that could enhance the operation and development of Indigenous legal systems. Additionally, legislative recognition could serve as a defence against assimilation and would remove any ambiguity in the courts about the status of Indigenous legal traditions.

Many countries have laws recognizing Indigenous legal traditions. In a number of countries including South Africa, and several Pacific island states (such as Fiji, Vanuatu, Samoa, the Marshall Islands and the Solomon Islands), the recognition is enshrined in the national constitution and in some cases, expanded upon in specific legislation. Others, including the Cook Islands, the Republic of Kiribati, Tuvalu, and Papua New Guinea, although providing no specific constitutional recognition or protection of Indigenous laws, have enacted legislation recognizing customary laws and practices. While varying considerably in their approach and the extent of the recognition accorded Indigenous laws, these constitutional and legislative enactments could serve as models for a similar approach in Canada. If Canada were to follow suit, the legislative reforms would have to be undertaken in collaboration with Aboriginal governments and organizations.

Ensuring greater recognition of Indigenous legal traditions and Aboriginal laws would also require that issues such as applicability, conflict of laws, paramountcy, and the application of the *Charter* be addressed by governments in collaboration with Aboriginal peoples.

DISCUSSION POINTS:

- *Is formal legal recognition of Indigenous legal traditions and Aboriginal law-making necessary or desirable? What costs and benefits might be associated with such formal legal recognition?*

- *What should be the relationship between recognition legislation and self-government agreements?*

B. Aboriginal justice initiatives

[The justice system] has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated.

Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry,* (Winnipeg: Queen's Printer, Statutory Publications, 1999) at 1.

Before the arrival of Europeans, Aboriginal communities exercised the power to hold their members accountable for their actions. Recognizing the right of Aboriginal peoples to hold their own people accountable for their actions arguably would strengthen the accountability and authority of Indigenous governance. Recognizing Indigenous peoples' right to create and administer their own dispute resolution mechanisms and institutions might also contribute to a stable, predictable and ordered society. In purely practical terms, Aboriginal institutions are probably better placed than their civil law or common law counterparts to articulate legal principles that will have meaning and legitimacy in Aboriginal communities. There can be little debate that the Canadian justice system has not managed to do this. Judging Indigenous people based on their own legal principles is likely to enhance order and good governance.

Initiatives in both Saskatchewan and Alberta provide examples of steps in this direction. In northern Saskatchewan, Cree-speaking Judge Gerald Morin presides over the Cree Court. Although Canadian law continues to apply, the conduct of the proceedings in the Cree language changes the dynamics of the legal process. Important Cree legal concepts and restorative justice concepts enjoy a greater role than in conventional provincial courts.

Judge L. S. (Tony) Mandamin presides over the Tsuu T'ina First Nations Peacemaker Court on the Tsuu T'ina Nation on the outskirts of Calgary, Alberta. Although operating as part of the provincial court system, the Court combines Canadian law and Tsuu T'ina legal traditions. Peacemakers from the community are directly involved in the settlement of cases that have been referred to the traditional peacemaking talking

circle. They provide knowledge of Indigenous traditions and values and assist in the resolution of selected cases in keeping with restorative justice principles. Other such programs have been established in British Columbia, Manitoba, Ontario, Quebec and the Yukon.

Scholars have suggested that Indigenous peoples would be more inclined to participate in Canadian institutions if their values, knowledge and legal traditions were more visibly part of the Canadian legal fabric. Such participation would increase the visibility of Indigenous peoples' ideas, cultures and values in Canada's institutions.

C. Academic institutions, Law societies

Many Canadian institutions could have a role to play in enhancing the recognition, understanding and implementation of Indigenous laws. Indigenous law schools or specialized programs could further the acquisition of the knowledge needed for the implementation of Indigenous laws. Housing such a school or program within an existing Canadian law school would do much to raise awareness of Indigenous legal traditions among future lawyers, Aboriginal or not. At least two Canadian law schools already offer a curriculum that focuses on both civil law and common law: McGill University's comparative law program and the University of Ottawa's National Program. Using these as models, a curriculum could be developed that would also integrate Indigenous laws. The Faculty of Law at the University of Victoria is considering the establishment of just such a program, exploring the possibility of offering a program of study that would lead to an Indigenous law degree.

In establishing such programs it would be imperative for institutions to treat the knowledge they seek to share respectfully and to guard against the potential for the appropriation of Indigenous knowledge by others. Canada already has many qualified Indigenous legal academics with postgraduate training in common law or civil law who could administer and teach an integrated law school program. The involvement of Elders in the establishment of such programs and in teaching might also help to protect the integrity of the knowledge and to ensure that it is treated respectfully.

Many institutions have already implemented programs to raise awareness of Aboriginal law and legal traditions. The Law Society of Upper

Canada has an Aboriginal Issues Coordinator and an Aboriginal Elders Program. The Continuing Legal Education departments of various law societies have been offering courses on Aboriginal law issues for years. Other Indigenous education initiatives include the Atkisiraq Law School in Nunavut; the Intensive Program in Aboriginal Lands, Resources and Governments at Osgoode Hall Law School; the Aboriginal Rights Moot; the concurrent LLB-Master of Arts in Indigenous Governance Program at the University of Victoria; the First Nations Legal Studies Program at the Faculty of Law of the University of British Columbia; the Indigenous Learning Program at Lakehead University; and the Aboriginal Law and Advocacy Program at Confederation College, to name only a few. With additional resources more such initiatives could be undertaken.

In New Zealand the Te Matahauariki Research Institute has been established with funding from the New Zealand government to research and provide a base of knowledge about Mäori customary law. The institute is committed to compiling and providing this information to Mäori communities and circulating the results of its research broadly to inform the New Zealand public about the values and components of Mäori customary law.

DISCUSSION POINTS:

- *How could educational programs be appropriately designed and initiated to better equip students with knowledge of Indigenous law?*
- *What safeguards should be implemented to protect the integrity of Indigenous knowledge and traditions while teaching about Indigenous legal traditions?*
- *Should there be a certification requirement for lawyers specializing in Aboriginal law and Indigenous legal traditions? If so, how should such programs be set up and administered? What would be the role of the provincial and territorial law societies?*

Conclusion

Greater recognition of Indigenous legal traditions would bring many potential benefits, both for Aboriginal peoples and for the country as a whole. Opening up space for Indigenous legal traditions to develop and flourish would enable Aboriginal peoples to advance their social, economic and political development in a way that resonates with their own traditions and values and would assist in the regeneration of Indigenous cultures. There are also strong arguments that more culturally relevant laws and legal institutions would garner more respect from Aboriginal peoples and would thus enhance the rule of law in their communities. Accepting the autonomy of Aboriginal peoples to practice their legal traditions would also be a significant step on the road of a renewed relationship between Canada and Aboriginal peoples.

Canada is already a legally pluralistic country, adept at handling different systems of legal thought. This dexterity equips us well to accommodate revitalized Indigenous legal traditions.

> *[I]ndigenous laws have a solid future in the Canadian legal system, a future that will be helpful in the reconciliation of the Aboriginal perspective and the non-Aboriginal perspective on the rights and obligations of First Nations and their people. Indigenous laws are recognized as self-standing laws of self-standing cultures. They carry their own protection with them. They are protected and sustained by the common law. They are embodied as Aboriginal rights in the Canadian Constitution, and the cases recognize their paramountcy. In my opinion, their place in the future of the Canadian legal system as an instrument to bring justice to indigenous people is assured.*
>
> Justice Douglas Lambert, "The Future of Indigenous Laws in the Canadian Legal System", in "Honouring a Brave Jurist: The Lambert Tribute," (2006) 64 *The Advocate* 216.

Endnotes

1 Ken Goodwill, "Address" (Story presented at Moving Towards Justice: Legal Traditions and Aboriginal and Canadian Justice, March 2006) [unpublished]. Ken Goodwill is a lecturer with the First Nations University in Saskatchewan.

2 J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2ed. (Stanford, California: Stanford University Press, 1985) at 1.

3 John Austin, *The Province of Jurisprudence Determined*, 2nd ed. by W. Rumble, vol. 1, (Cambridge: Cambridge University Press, 1995) at 176.

4 See for example, Lon Fuller, "The Law's Precarious Hold on Life" (1968-1969) 3 *Ga. Law Review* 530.

5 *Calder v. A.G.B.C.*, [1973] S.C.R. 313 at 346-347.

6 *Connolly v. Woolrich and Johnson et al.*, (1867), 17 R.J.R.Q. 75.

7 See for example, Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services, 1996) CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997), and Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991).

8 Gordon Christie, "Space for Indigenous Legal Traditions" (2006) [unpublished, paper prepared for the Law Commission of Canada and the Indigenous Bar Association] at 33.

9 *Ibid*. See also Stephen Cornell & Joseph Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," online: Joint Occasional Papers on Native Affairs <http://www.jopna.net/pubs/jopna_2003-03_Sovereignty.pdf> at 12-19.

10 The Harvard Project on American Indian Economic Development is part of the John F. Kennedy School of Government at Harvard University. The Harvard Project has conducted hundreds of research studies into the social and economic development of American Indian nations. An overview of the work of the project is available online: <http://www.ksg.harvard.edu/hpaied/overview.htm>. See also Stephen Cornell, Catherine Curtis & Miriam Jorgenson, "The Concept of Governance and Its Implications for First Nations," online: Joint Occasional Papers on Native Affairs <http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf> at 7.

11 Stephen Cornell & Joseph Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," online: Joint Occasional Papers In Native Affairs <http://www.jopna.net/pubs/jopna_2003-03_Sovereignty.pdf> at 19-20.

12 See for example, Christie, *supra* note 8 at 9, where he writes: "Indigenous peoples in Canada today face key decisions, as they find themselves living in a time of transition, with identities partly constituted through generations of living within Canadian society and partly constituted by their ties to 'traditional' Indigenous worlds. Reinvigorating their legal traditions would play a fundamental role in laying out the future paths they would be able to tread, as this has the promise of reweaving threads connecting them to their traditional cultural fabric."

13 *Supra* note 8 at 41 and 60.

14 See for example, *R. v. Mitchell*, [2001] 1 S.C.R. 911, at paras. 8-10; *Haida Nation v. B.C. (Minster of Forests)*, [2004] 3 S.C.R. 511 at para. 5; and *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

15 See for example, Judith F. Sayers & Kelly A. MacDonald, "A Strong and Meaningful Role of First Nations Women in Governance" in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001).

16 Bodies examining Aboriginal justice issues have recommended different models. The Manitoba Aboriginal Justice Implementation Commission, for example, recommended the establishment of Aboriginal-controlled justice systems in Aboriginal communities based upon Aboriginal customs and traditions: see Manitoba, Aboriginal Justice Implementation Commission, *Final Report*, (Winnipeg: Queen's Printer, Statutory Publications, 2001). The Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, which also examined the situation of Aboriginals in the justice system, by contrast, recommended a variety of measures affecting only the existing system of justice, including expanding the Cree court, both linguistically and geographically, the appointment of more First Nations and Métis persons as judges, the extension of traditional justice practices, greater use of community sentences and the establishment of community justice programs to act as alternative measures programs: see Saskatchewan, Commission on First Nations and Métis Peoples and Justice Reform, *Final Report: Legacy of Hope: An Agenda for Change*, vol. 1, online: <http://www.justicereformcomm.sk.ca>.

17 See for example, Kerry Wilkins, ". . . But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 *University of Toronto Law Journal* 53 and Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000).

18 See Native Women's Association of Canada, *Aboriginal Women, Self-Government & The Canadian Charter of Rights and Freedoms*, online: <http://www.nwac-hq.org/AboriginalWomenSelfGovCanadianCharter.pdf>. At page 18, the report states: "We recognize that there is a clash between collective rights of sovereign First Nations governments and individual rights of women. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, First Nations women have had a tremendous struggle to regain their social position. We want the *Canadian Charter of Rights and Freedoms* to apply to Aboriginal governments".

19 Native Women's Association of Canada, *An Aboriginal Charter of Rights and Freedoms*, online: <http://www.nwac-hq.org/AnAboriginalCharterRightsFreedoms.pdf>. It should be noted that the individual rights and freedoms enshrined in the *Charter* largely mirrors those contained in the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations in 1948. The position of the Native Women's Association of Canada appears to be consistent with that reflected in the United Nations *Declaration on the Rights of Indigenous Peoples*, (adopted by the United Nations Human Rights Council on June 29, 2006) Article 1 of which provides, "Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the *Charter of the United Nations*, the *Universal Declaration of Human Rights* and international human rights law".

20 *Ibid*. at 3.

21 The Manitoba Aboriginal Justice Implementation Commission, for example, recommended that all people within the geographic boundaries of an Aboriginal community be subject to the jurisdiction of Aboriginal laws and that Aboriginal courts should have jurisdiction over certain matters arising outside the Aboriginal community, including child welfare cases.

22 See for example, Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997) at 10.

23 Canada, *Report of the Royal Commission on Aboriginal Peoples: Summary of Recommendations* (Ottawa: Supply and Services Canada, 1996) CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997).

24 *Supra* note 11 at 14.

25 *Ibid*. at 18-19.

26 Bill C-7 was introduced by the government of Jean Chrétien, but withdrawn once Paul Martin became Prime Minister. The current government supported the Bill and since coming to power has indicated its intention to pursue a similar approach.

27 Indian and Northern Affairs Canada, *Federal Policy Guide: Aboriginal Self-Government*, online: <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.

28 The difficulties inherent in a case by case negotiation approach were recognized by the Royal Commission on Aboriginal Peoples and the Special Committee on Indian Self-Government (the Penner Report) both of which recommended legislative recognition of the inherent right to self-government as a practical and more appropriate approach than negotiations between individual First nations and the federal government. See, Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) and Canada, House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services Canada, 1983).