VALUES, CUSTOMS AND TRADITIONS OF THE MI'KMAQ NATION

BY

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Introduction

In every nation, tribe or a group of people there is a set of rules which that certain group functions by. These set of rules can come in forms of values, customs and oral traditions. In some nations these are known as code of ethics. Under one or more of these titles, a society recognizes and utilizes these modes to better themselves to function within their own world. It is from these rules that one can become useful and productive as an individual within their own tribal world. It is from these rules that one's perspective on world views are so unique.

In the Mi'kmaq world, these sets of rules are known as oral traditions. It is from these oral traditions that one can view the world through the window of tribal consciousness. It is through this window that our behaviour has been governed, a behaviour which is acceptable within our own tribal world. It is crucial that we are accepted in our world initially. It is vital in order for one to survive in this world, to learn these sets of rules that have been given to us by the Creator.

Since our traditions, our knowledge of Mi'kmaq history and our secrets of life are oral, these sets of rules which govern our daily activities must be taught by our elders. No one acutally learns by verbal knowledge but one learns through observation all during your lifetime. As you grow to adulthood you will have experienced most if not all of them. As you go through life you are exposed to certain situations which calls for a certain rule to monitor one's behaviour and also the behaviours of others.

In the Mi'kmaq world the philosophies of these rules are not considered important during your childhood. As you mature you begin to rationalize the philosophies yourself. Sometimes as an inquisitive child you may feel a certain rule is irrelevant to the positive contribution of your well-being, then you must no doubt ask questions. An elder will take time to listen to you as to why this certain rule seems worthless to you. In all cases you will be listened to and your case will be

aired. The elder will point out all the instances where this particular rule has worked in his lifetime and your case doesn't stand firm with all the positive attributes constituted for thousands of years by the usage of this rule. In all cases, your doubt will be transformed into newly acquired knowledge.

These sets of rules which I believe should be termed "Oral Traditions" are the foundations of our tribal consciousness. It is the feeding ground of tribal epistemology. It is the beginning and the end of Mi'kmaq life. Without these sets of rules we would not be any different from all other human beings and we would lose that uniqueness of being Mi'kmaq. We would lose that ability to perceive the world from a diverse perception.

There are many in numbers than what is listed in this writing. Since the author is Mi'kmaw, there has been much contemplation whether tradition should be broken by recording them on paper or whether they should be left as they have been for generations. The advice of the elders was sought and it is with their wish and blessings that they are to be recorded. Their rationale at the time was to give the teachers in schools the opportunity to relay these sacred messages to our children. There is great appreciation expressed by this author to the wisdom of our elders, without their understanding, this would not have been possible. The general feeling of the elders is that they are pleased to have these sacred messages be recorded by a Mi'kmaw; therefore, the fear of misinterpretation is not present. These are being recorded with the intent of spreading Mi'kmaq wisdom and to preserve and strengthen tribal consciousness in our youth, the Mi'kmaq of the future.

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1. The Spirit is Present in All of Nature

Given the Mikmaq view that all things in the world have their own spirit, and all things must work in harmony with each other, Mikmaqs show respect for the spirit by extending certain rituals to our interaction with nature. Just as we send off the spirit of our dead with proper rituals and ceremony, we extend a certain amount of recognition of the spirit of the tree, animal, plants and elements we disturb for our own use. When we cut a tree for basket weaving or a Christmas tree, take roots from the ground for medicines or our lodges, there are gestures we must follow to keep our minds at ease. We do not apologize for our needs but accept the interdependence of all things.

2. Respect for the human spirit from birth to death

In the Mikmaq world, all things have their own unique spirit. The trees, the water, the birds, the animals, and our children all share equally in the Great Scheme. Having their own individuality, these creations must learn their place in the world through their interaction with it and the guidance of their elders.

In the daily lives of Mikmaqs, children become part of the adult world by being an active listener and participant in it. They are included in all activities of the community, seen at all social functions. Children are encouraged to search, explore and discover their world.

Often we are accused of not disciplining our children, but discipline in Mikmaq society is different than in the dominant society in methods and practice. We use more indirect methods than direct

teaching. We would rather encourage the child to observe, explore, and make judgements using their observations to reach a conclusion. In cases where a wrong has been done to another either another child or a family by a child, restitution must be made by that child. In this way the child is very much aware of this wrong doings and usually will never forget that incident or the events that led up to it.

3. Respect for Elders

Mikmaq society holds this value with the highest esteem and considers it most important of all. Elders not only hold the knowledge of our ancestors, they have the language through which the knowledge must be imparted to the youth. Their years of searching, listening, experiencing, and understanding all that is bodily, emotionally and spiritually possible, grants them the wisdom and strength needed by our youth to become good Mikmaqs. Elders are the keepers of the sacred lessons of tribal and global harmony for all living things within the environment.

4. Mikmaq Language is Sacred

We believe our language is holy and sacred. The Creator gave it to the Mikmaq people for the transmission of all the knowledge our Creator gave to us and for our survival. Our language has its origin in the Maritimes, in the Land of Mi'kmakik, and it is here that it must remain to flourish among the people or we become extinct. The sacred knowledge within our language provides wisdom and understanding. It focuses on the processes of knowledge, the action or verb consciousness, and not on the nouns or material accumulation. It has no curse words, but rather only words to describe all of nature. When one wants to curse or damn anything or anyone, they must use the English language.

5. Sharing

Being Mikmaq gives the unique ability to have an eagle's viewpoint of sharing of yourself, your resources, your time, your knowledge, your wisdom freely without being asked or expecting anything in return. This value is universal among all Native people. The reciprocal giving and sharing enables all people to survive equally. This sharing is expressed in daily life in daily dialogues among Mikmaqs, sharing stories of self and others, reconfirming the spirit of the Mikmaq. Mealtimes are open to all who come and denial of food as polite gestures is discouraged.

6. Death is as natural as birth

The concept of death in the Mikmaq world is as natural as birth and is talked about daily in the home. In the large Mikmaq network of people, death occurs frequently, and most Mikmaqs go to the wakes and funerals no matter how far away they appear to be. If a Mikmaq dies in a distant city, they are sent home to their kin where they will given the proper final rituals for entering the spirit world. Children are encouraged to visit the wakes in the homes of the kin, to ask questions, and to experience the grief and the sociability of the group. Because death is accepted as a part of living, we are frequently reminded that we are here for a short time; therefore, one must make the best impression on others.

7. Individual Non-interference

This is one concept that baffles non-Natives the most. They cannot understand how one can be counselled if there is no verbal direction to take. A Mikmaq counsellor will use the metaphorical approach instead to show another Mikmaq how a situation and the consequences occurred. Making one aware of behaviour and consequences of another enables one to see the patterns of similarity and provides necessary information to make judgements accordingly.

8. Respect for the Unborn

In the Mikmaq language there is no word for fetus or embryo. From the time of conception, a baby is called a Mijuwajij (baby). A mother's behaviour and attitude are important elements during the growth of that child, so certain precautions are taken and certain behaviours are expected of the mother.

9. Aging is a Privilege

The older one gets, the wiser one becomes and the more respect one accrues. When a person receives the title of an Elder s/he is called "Ami" (our grandmother) or "Ami tey" (our grandfather). In this respected position, elders are the teachers of our children in everyday life as well as the spiritual life. They are the orators whose knowledge about Mikmaq life and history are critically important to our present and future.

10. Spiritually

Native Spirituality is rooted in the world view of the Mikmaq people, reinforced by the deep faith and beliefs of our elders. It maintains their vision for this world, and provides hope in the next. It provides security and peace to the person, and is evident in the soft, accepting nature of our elders. While our elders are Catholic, the old traditions and customs associated with our traditional spirituality are now blended. Elders have a special ability to make one become pleased with himself because there is no anger in the way they teach.

11. Belief in the Supernatural

Mikmaqs have learned about the two worlds from their Creator and how one can obtain knowledge, wisdom, or powers from the other world. Supernatural powers are transmitted through special endowed people who can go between the two worlds. One, however, goes for good (Kinap) while the other goes for evil (Npuoin). Both are able to overcome the most difficult feats and are greatly feared, especially the npuoin. Kinaps were males who used their powers for the well-being of that society. Our language tells us that that there were no female Kinaps, since the world "kinape'skw" (female Kinap) does not exist, although there was known to be a "Npuoini'skw".

12. Humility and humour

Mikmaq have their own unique sense of humour. They can withstand any wrongdoings, misgivings, and short comings brought on by another society, or a quarrel among themselves, and be able to laugh about it. We are able to accept our own fallibility by laughing at ourselves and poking fun at others. No human event is so serious that does not include humour, stories, and jokes. Mikmaqs can take a situation which might seem hopeless and transform it into lively piece of conversation complete with the jokes and puns.

13. Labelling: Understanding the Spirit

First impression is important to a Mikmaq. What spirit a person carries will become known immediately to the Mikmaq greeters. Such a spirit in a person may become known through his behaviour, clothing, body language or speech, and immediately the Mikmaq will know this spirit and thus name it, giving a unique name to the person which may stay with him through life or be

short-lived. This labelling is a process common among Mikmaqs, and accounts for the many unique names given to individuals.

14. Sweet Grass Ceremony (Pekitne'man)

Sweet grass is sacred and is kept in all Mikmaq households. Fresh sweet grass incense lingers in the air all the time. In earlier days, Mikmaqs burned braided sweet grass as an offering to the spirits. The elders have had great respect for sweet grass as evidenced by their respect for it and giving it special presence in their homes. They advise us against misuse of the sweet grass other than for baskets or pekitne'man.

15. Indian Time

Time is known in the tribal Mikmaq world as the biological rhythms of nature. It is not clocked in a linear space, but is known as a space with no beginning and no end. Thus, when our people meet, the meeting begins when the people greet each other and begin the long curious explorations of each other and their families and kin. Elders believe that there is a time for everything and that time will be right and known when it approaches, for instance when your body tells you it is hungry or tired.

16. Time for Healing

There is a time set aside for healing all pains, physical and mental. When a misunderstanding develops within a family or group, one of the persons in the dispute will leave the household and seek refuge in the extended family. S/he will be given shelter and will not be pressured to go back and make amends immediately. Instead, ample time is given while s/he makes a mental evaluation

of the situation. Judgements are reserved for those involved. When the anger has subsided on both side, s/he will make the first move and try to be reinstated in the household.

17. Child Care

On a reserve or a village, children are visible everywhere. Each adult had and still has that obligation of keeping an eye on children and warning them of potential danger. That danger may be in the form of an approaching stranger, thin ice, an on-coming car, or an animal. It is one's duty to make an effort to protect all children. It is also appropriate to scold or lecture children other than your own when you see them doing something wrong. Children who speak or understand the Mikmaq language know when a stranger who speaks to them in English is not to be trusted and they will turn away from the stranger.

18. Ritual for Death and Dying

When a person is dying or even dead, Mikmaqs believe that person should not be left alone. One does not come into the world alone, and, therefore, should not be left to die alone. Since light was given at birth, so also at death there is light, signified by a candle that remains lit and lights left on to help you in finding the path to the Spirit World (wasoqnikewi). All the family members are encouraged to go to the hospital and be with that person. Each member of the family must seek peace (apiksiktuaqn) with the dying person even if one feels that there is no ill feelings between them. Elders feel that it is important one enters the Spirit World completely at peace with everyone and everything.

19. Rituals for Mourning

While a person is dying and on threshold of death, elders will tell the people in the room to reserve their tears until the person has passed on to the Spirit World. They feel that the dying person will have an easier time making that transition if tears are not shed. When the person has finally expired then tears flow freely. Everyone, men included, are encouraged to cry. Elders tell us that the only thing that will help will be to cry and to cry until you cannot cry anymore. Once the tears are gone then you will have an easier time coping with death.

20. Richness of Body Language

Mikmaqs and Native people, in general, have the ability to use non-verbal signals to warn of danger, to signal indifference, to ridicule and to give directions. Most people know the signals since they have used them or have seen their parents use them. Some signals are universal among Native people and some are unique to a tribe. Without uttering a word, a Mikmaq facial expression can ridicule or express feelings and laughter will be spontaneous.

21. Honoring Ceremony for Elders (Pestiewa'ltimk)

This ceremony was celebrated in conjunction with the annual Christmas season. In the years gone by, elders were honored during the period from Christmas Day on through to January 6 or the Feast of the Three Kings. Since Noel came from the Christmas day itself, all the Noels would be honored first, followed by second day of honoring all of the Stephens since this day was also the Feast of Saint Stephen. All male members of the village or reserve would be honoured. The honored person's family prepared a feast for the entire community, and the community brought a gift of a cross on which a gift of a tie, shirt, or scarf might wrap around the cross. The food was abundant and it was an ideal time of year to rest from hunting. A different name was honoured

each evening so eventually everyone of these names, regardless of age, had the opportunity to be honored.

22. Ceremony for Individual Accomplishment (Wi'kipaltimk)

This honoring ceremony is intended for people of different ages to honor individual accomplishments or feats. It is performed when a young boy has made his first kill, whether animal or fish. His household prepares a feast, cooking what he has brought home for food. The entire village or neighbourhood is invited. The young boy sits at one end of the table and watches as the elders eat what he has provided. Each elder that comes in brings a small gift for the youth. The young boy does not eat but only enjoys the company and the compliments of his good hunting skills. In the contemporary sense, this ceremony is now used to honor educational accomplishments or acquiring a position.

23. Dreams

Our Creator advised us at our beginnings to listen to our dreams, and thus for ancient millenniums our people have been able to interpret their dreams and understand what knowledge they bring. Some dreams had no meaning while others cautioned or provided guidance. No dreams were taken for granted and each one was carefully analysed for a possible message from the Spirit World. While this is a skill fast disappearing from our Nation, it is still maintained among some of our elders. There are those who have the ability to see the meaning and content of a dream and provide valuable assistance or guidance.

24. Ability to Function in Separate Worlds

In order for Native people to be happy and productive during their lifetime, they must be able to function in what is perceived as the two and sometimes three worlds. One must be productive and happy in his tribal world, but also one must also be able to accept and live harmoniously with all his brothers and sisters on the earth, including those in another society. Thus it is important then for our children to learn of other cultures and peoples, recognizing that they are not forced to be part of those environments but do so from choice. Education offers that realm of knowledge and choice. The Spirit World thus is the other realm that we must come to know, accept, and from which we seek guidance and nurturance.

25. Customs and Beliefs Affecting Women

The female of Mikmaq society is a powerful force, well-recognized among its people. She is a strong force for transmitting the values, culture and language of the people since she is the main agent of the culture. In every Mikmaq unit there is a strong female presence. The power of the woman and the cycles of her body are so strong, they could affect the spirits of the male so as to diminish his ability to hunt or fish. Certain customs are thus followed by women: they must not ever step over a male's legs, or his fishing pole (smkwati), his bow and arrows, his gun, or anything else associated with hunting and fishing.

26. Customs for Visiting

When a male elder visits a home, it is generally understood that the visit is meant for the male of the house; if a female elder visits, it is usually to see the female of the house. If a male elder visits, the wife may leave to give the elder men privacy in their conversations. The same procedure holds for a female visiting the home.

27. Belief in a Forerunner

Elders have the ability to distinguish a forerunner from a coincidence. The message of an impending death is represented by a bird, an animal, or a peculiar incident. Some elders can even name the individual who will die because of the message they received. When the elder is visited with a forerunner, s/he will not become frightened or feel threatened. It is a very spiritual foretelling and is well-respected among our Nation.

28. Feeding of Grandfather (Apuknajit)

The feeding of Apuknajit is a time of giving thanks to the Spirits during the most difficult time of winter. It is a ritual which is performed on January 31. When darkness has settled, food is put out into the night preferably on an old stump or near a tree and offered to the Spirits. In days gone by, eel skins and fish heads were offered. An elder would lead the family to a stump, give thanks for surviving thus far and ask for additional assistance until spring.

29. Behaviour modification of children

Not all children's behaviour was corrected by modelling and metaphors. Children on certain occasions needed something more concrete than words to correct their behaviour. This is a time when the parents will ask the child to go into the bush and select your switch (npisoqnn). The indication at the time is that the child is going to be disciplined with it. The psychological effect in securing your own form of punishment is sometimes greater than the actual beating itself. Most of the time parents would consider your efforts and obedience in going into the bush together with a stiff lecture as sufficient for any misbehaviour, although if you had the misfortune of being switched then you would never forget the misdeed that warranted such punishment.

30. Respect for Food

The rituals for food, food preservation and behaviour while eating that are rigidly reinforced. First, food is sacred and as such we bless ourselves before we eat to give thanks and offer respect to food. Secondly, one is never allowed to play with food or throw food around. One is never permitted to sing, play games, or use any abusive language when referring to food. Food similarly was never put into fire, but always returned to nature. It was also not wasted, and each person took only what they could consume.

Sharon's copy

MICMAC CREATION STORY

This story has been passed down from generation to generation since time immemorial and it explains how Micmac people came into existence in North America. The story tells about the relationship between the Great Spirit Creator and Human Beings and the Environment. It also explains a philosophical view of life which is indigenous to North America. This way of thinking is evident in the Native Languages and Cultures and in the spiritual practices.

The fact that the Micmac people's language, culture and spiritualism has survived for centuries is based on the creation story. Respect for their elders has given them wisdom about life and the world around them. The strength of their youth has given them the will to survive. The love and trust of their motherhood has given them a special understanding of everyday life.

Among the Micmac people, the number seven is very meaningful. There are seven districts for distinct areas which encompasses an area of land stretching from the Gaspe coast of Quebec and includes New Brunswick, Prince Edward Island and Nova Scotia. The most powerful spirit medicine is made from seven barks and roots. Seven men, representatives from each distinct area or Grand Council District sit inside a sweat-lodge, smoke the pipe and burn the sweet grass. Inside the sweat-lodge, the Micmacs will pour water over seven, fourteen and then twenty-one heated rocks to produce hot steam. A cleansing or purification takes place. A symbolic rebirth takes place and the men give thanks to the Spirit Creator, the Sun and the Earth. They also give thanks to the first family, Glooscap, Nogami, Netaoansom, and Neganagonimgoosisgo. Listen to the story.

ONE
GISOOLG

Gisoolg is the Great Spirit Creator who is the one who made everything. The word Gisoolg in Micmac means "you have been created". It also means "the one credited for your existence". The word does not imply gender. Gisoolg is not a He or a She, it is not important whether the Great Spirit is a He or a She.

The Micmac people do not explain how the Great Spirit came into existence only that Gisoolg is responsible for everything being where it is today. Gisoolg made everything.

TWO
NISGAM

Nisgam is the sun which travels in a circle and owes its existence to Gisoolg. Nisgam is the giver of life. It is also a giver of light and heat.

The Micmac people believe that Nisgam is responsible for the creation of the people on earth. Nisgam is Gisoolg's helper. The power of Nisgam is held with much respect among the Micmac and other aboriginal peoples. Nisgam owes its existence to Gisoolg the Great Spirit Creator.

THREE
OOTSITGAMOO

Ootsitgamoo is the earth or area of land upon which the Micmac people walk and share its abundant resources with the animals and plants. In the Micmac language Oetsgitpogooin means "the area of surface upon which one stands". Oetsgitjinoo means "the person or individual who stand upon this surface", or "the one who is given life upon this surface of land". Ootsitgamoo refers to the Micmac world which encompasses all the area where the Micmac people can travel or have travelled upon.

Ootsitgamoo was created by Gisoolg and was placed in the centre of the circular path of Nisgam, the sun. Nisgam was given the responsibility of watching over the Micmac world or Ootsit-gamoo. Nisgam shines bright light upon Ootsitgamoo as it passes around and this brought the days and nights.

FOUR
GLOOSCAP

After the Micmac world was created and after the animals, birds and plants were placed on the surface, Gisoolg caused a bolt of lightning to hit the surface of Ootsitgamoo. This bolt of lightning caused the formation of an image of a human body shaped out of sand. It was Glooscap who was first shaped out of the basic element of the Micmac world, sand.

Gisoolg unleashed another bolt of lightening which gave life to Glooscap but yet he could not move. He was stuck to the ground only to watch the world go by and Nisgam travel across the sky everyday. Glooscap watched the animals, the birds and the plants grow and pass around him. He asked Nisgam to give him freedom to move about the Micmac world.

While Glooscap was still unable to move, he was lying on his back. His head was facing in the direction of the rising sun, east, Oetjgoabaniag or Oetjibanoog. In Micmac these words mean "where the sun comes up" and "where the summer weather comes from" respectively. His feet were in the direction of the setting sun or Oetgatsenoog. Other Micmac words for the west are Oeloesenoog, "where the sun settles into a hallow" or Etgesnoog "where the cold winds come from". Glooscap's right hand was pointed in the direction of the north or Oatnoog. His left hand was in the direction of the south or Opgoetasnoog. So it was with the third big blast of lightening that caused Glooscap to become free and to be able to stand on the surface of the earth.

After Glooscap stood up on his feet, he turned around in a full circle seven times. He then looked toward the sky and gave thanks to Gisoolg for giving him life. He looked down to the earth or the ground and gave thanks to Ootsitgamoo for offering its sand for Glooscap's creation. He looked within himself and gave thanks to Nisgam for giving him his soul and spirit.

Glooscap then gave thanks to the four directions east, north, west and south. In all he gave his heartfelt thanks to the seven directions.

Glooscap then travelled to the direction of the setting sun until he came to the ocean. He then went south until the land narrowed and he could see two oceans on either side. He again travelled back to where he started from and continued towards the north to the land of ice and snow. Later he came back to the east where he decided to stay. It is where he came into existence. He again watched the animals, the birds and the plants. He watched the water and the sky. Gisoolg taught him to watch and learn about his world. Glooscap watched but he could not disturb the world around him. He finally asked Gisoolg and Nisgam, what was the purpose of his existence. He was told that he would meet someone soon.

FIVE
NOGAMI

One day when Glooscap was travelling in the east he came upon a very old woman. Glooscap asked the old woman how she arrived to the Micmac world. The old woman introduced herself as Nogami. She said to Glooscap, "I am your grandmother". Nogami said that she owes her existence to the rock, the dew and Nisgam, the Sun. She went on to explain that on one chilly morning a rock became covered with dew because it was sitting in a low valley. By midday when the sun was most powerful, the rock got warm and then hot. With the power of Nisgam, the sun, Gisoolg's helper, the rock was given a body of an old woman. This old woman was Nogami, Glooscap's grandmother.

Nogami told Glooscap that she come to the Micmac world as an old woman, already very wise and knowledgeable. She further explained that Glooscap would gain spiritual strength by listening to and having great respect for his grandmother. Glooscap was so glad for his grandmother's arrival to the Micmac world he called upon Abistanooj, a marten swimming in the river, to come ashore. Abistanooj did what Glooscap had asked him to do. Abistanooj came to the shore where Glooscap and Nogami were standing. Glooscap asked Abistanooj to give up his life so that he and his grandmother could live. Abistanooj agreed. Nogami then took Abistanooj and quickly snapped his neck. She placed him on the ground. Glooscap for the first time asked Gisoolg to use his power to give life back to Abistanooj because he did not want to be in disfavor with the animals.

Because of marten's sacrifice, Glooscap referred to all the animal as his brothers and sisters from that point on. Nogami added that the animals will always be in the world to provide food, clothing, tools and shelter. Abistanooj went back to the river and in his place lay another marten. Glooscap and Abistanooj will become friends and brothers forever.

Nogami cleaned the animal to get it ready for eating. She gathered the still hot sparks from the lightening which hit the ground when Glooscap was given life. She placed dry wood over the coals to make a fire. This fire became the Great Spirit Fire and later got to be known as the Great Council Fire.

The first feast of meat was cooked over the Great Fire, or Ekjibuctou. Glooscap relied on his grandmother for her survival, her knowledge and her wisdom. Since Nogami was old and wise, Glooscap learned to respect her for her knowledge. They learned to respect each other for their continued interdependence and continued existence.

SEVEN
NEGANOGONIMGOOSEESGO

While Glooscap was sitting near a fire, Nogami was making clothing out of animal hides and Netaoansom was in the woods getting food. A woman came to the fire and sat beside Glooscap. She put her arms around Glooscap and asked "Are you cold my son?" Glooscap was surprised he stood up and asked the woman who she is and where did she come from. She explained that she was Glooscap's mother. Her name is Neganogonimgooseesgo. Glooscap waited until his grandmother and nephew returned to the fire then he asked his mother to explain how she arrived to the Micmac world.

Neganogonimgooseesgo said that she was a leaf on a tree which fell to the ground. Morning dew formed on the leaf and glistened while the sun, Nisgam, began its journey towards the midday sky. It was at midday when Nisgam gave life and a human form to Glooscap's mother. The spirit and strength of Nisgam entered into Glooscap's mother.

Glooscap's mother said that she brings all the colors of the world to her children. She also brings strength and understanding. Strength to withstand earth's natural forces and understanding of the Micmac world; its animals and her children, the Micmac. She told them that they will need understanding and co-operation so they all can live in peace with one another.

Glooscap was so happy that his mother came into the world and since she came from a leaf, he called upon his nephew to gather nuts, fruits of the plants while Nogami prepared a feast. Glooscap gave thanks to Gisoolg, Nisgam, Ootsitgamoo, Nogami, Netaoansom and Neganogonimgooseesgo. They all had a feast in honor of Glooscap's mother's arrival to the world of Micmacs.

The story goes on to say that Glooscap, the man created from the sand of the earth, continued to live with his family for a very long time. He gained spiritual strength by having respect for each member of the family. He listened to his grandmother's wisdom. He relied on his nephew's strength and spiritual power. His mother's love and understanding gave him dignity and respect. Glooscap's brothers and sisters of the wood and waters gave him the will and the food to survive. Glooscap now learned that mutual respect of his family and the world around him was a key ingredient for basic survival. Glooscap's task was to pass this knowledge to his fellow Micmac people so that they too could survive in the Micmac world. This is why Glooscap became a central figure in Micmac story telling.

One day when Glooscap was talking to Nogami he told her that soon they would leave his mother and nephew. He told her that they should prepare for that occasion. Nogami began to get all the necessary things ready for a long journey to the North. When everyone was sitting around the Great Fire one evening, Glooscap told his mother and nephew that he and Nogami are going to leave the Micmac world. He said that they will travel in the direction of the North only to return if the Micmac people were in danger. Glooscap told his mother and nephew to look after the Great Fire and never to let it go out. After the passing of seven winters, "elwigneg daasiboongeg", seven sparks will fly from the fire and when they land on the ground seven people will come to life. Seven more sparks will land on the ground and seven more people will come into existence. From these sparks

will form seven women and seven men. They will form seven families. These seven families will disperse into seven different directions from the area of the Great Fire. Glooscap said that once the seven families reach their place of destination, they will further divide into seven groups.

Each group will have their own area for their subsistence so they would not disturb the other groups. He instructed his mother that the smaller groups would share the earth's abundance of resources which included animals, plants and fellow humans.

Glooscap told his mother that after the passing of seven winters, each of the seven groups would return to the place of the Great Fire. At the place of the fire all the people will dance, sing and drum in celebration of their continued existence on the Micmac world. Glooscap continued by saying that the Great Fire signified the power of the Great Spirit Creator, Gisoolg. It also signified the power and strength of the light and heat of Nisgam, the sun. The Great Fire held the strength of Ootsitgamoo the earth. Finally the fire represented the bolt of lightening which hit the earth from which Glooscap was created. The fire is very sacred to the Micmacs. It is the most powerful spirit on earth.

Glooscap told his mother and nephew that it is important for the Micmac to give honour, respect and thanks to the seven spiritual elements. The fire signifies the first four stages of creation, Gisoolg, Nisgam, Ootsitgamoo and Glooscap. Fire plays a significant role in the last three stages as it represents the power of the sun, Nisgam.

In honor of Nogami's arrival to the Micmac world, Glooscap instructed his mother that seven, fourteen and twenty-one rocks would have to be heated over the Great Fire. These heated rocks will be placed inside a wigwam covered with hides of moose and caribou or with mud. The door must face the direction of the rising sun. There should be room for seven men to sit comfortably around a pit dug in the centre where up to twenty-one rocks could be placed. Seven alders, seven wild willows and seven beech saplings will be used to make the frame of the lodge. This lodge should be covered with the hides of moose, caribour deer or mud.

Seven men representing the seven original families will enter into the lodge. They will give thanks and honor to the seven directions, the seven stages of creation and to continue to live in good health. The men will pour water over the rocks causing steam to rise in the lodge to become very hot. The men will begin to sweat up to point that it will become almost unbearable. Only those who believe in the spiritual strength will be able to withstand the heat. Then they will all come out of the lodge full of steam and shining like new born babies. This is the way they will clean their spirits and souls honoring Nogami's arrival.

In preparation of the sweat, the seven men will not eat any food for seven days. They will only drink the water of golden roots and bees nectar. Before entering the sweat thè seven men will burn the sweetgrass. They will honor the seven directions and the seven stages of creation but mostly for Netawansom's arrival to the Micmac world. The sweet grass must be lit from the Great Fire.

Glooscap's mother came into the world from the leaf of a tree, so in honor of her arrival tobacco made from bark and leaves will be smoked. The tobacco will be smoked in a pipe made from a branch of a tree and a bowl made from stone.

The pipe will be lit from sweetgrass which was lit from the Great Fire. The tobacco made from bark, leaves and sweetgrass represent Glooscap's grandmother, nephew and mother. The tobacco called "spebaggan" will be smoked and the smoke will be blown in seven directions.

After honoring Nogami's arrival the Micmac shall have a feast of meat. In honor of Netawansom they will eat fish. The fruits and roots of the trees and plants will be eaten to honor Glooscap's mother.

Glooscap's final instructions to his mother told her how to collect and prepare medicine from the barks and roots of seven different kinds of plants. The seven plants together make what is called "ektjimpisun". It will cure mostly every kind of illness in the Micmac world. The ingredients of this medicine are: "wikpe" (alum bark), "Owelikch" (hornbeam), "sooomooseel" (beech), "elemojeechmokse" (wild willow), "waqwonuminokse" (wild black-cherry), "kastuk" (ground hemlock), and "kowotmonokse" (red spruce).

The Micmac people are divided into seven distinct areas which are as follows:

1. Gespegiag
2. Sigenitog
3. Epeggòitg ag Pigtog
4. Gespogoitg
5. Segepenegatig
6. Esgigiag
7. Onamagig

Researched and Compiled by: Stephen J. Augustine, Big Cove, NB 1991

Glooscap was so glad for his nephew's arrival to the Micmac world, he called upon the salmon of the rivers and seas to come to shore and give up their lives. The reason for this is that Glooscap, Netoansom and Nogami did not want to kill all the animals for their survival. So in celebration of his nephew's arrival, they all had a feast of fish. They all gave thanks for their existence. They continued to rely on their brothers and sisters of the woods and waters. They relied on each other for their survival.

INDIAN STATUS AND MEMBERSHIP SYSTEM
FIELD MANUAL

CHAPTER 2 - THE INDIAN ACT

CHAPTER 2 - THE INDIAN ACT

This Chapter provides general information regarding the changes made to the Indian Act in 1985 and sets out the eligibility criteria for entitlement to registration as an Indian in the Indian Register and entitlement to band membership on departmentally administered Band Lists.

2.1 Changes to the Indian Act

2.1.1 Introduction

Important changes were made to Canada's Indian Act on June 28, 1985, when Parliament passed Bill C-31, an Act to Amend the Indian Act. The Act has been brought into accord with provisions of the Canadian Charter of Rights and Freedoms to assure equality of treatment to men and women.

Fundamental changes were also made to the Indian Act to recognize the right of Indian First Nations to control their own membership.

As well, persons who lost their Indian status and band membership because of sexual discrimination (particularly S.12(1)b and 12(1)(a)(iv) are now eligible to have their status under the Act and band membership restored. All persons who enfranchised under S. 109(1) are eligible to have their status restored. Further, children of these persons are now eligible for status within the meaning of the Indian Act.

Bill C-31 also abolished the concept of "enfranchisement", a process whereby an Indian person gave up Indian status and band membership for a variety of reasons. The term originated at a time when termination of Indian status was the only way for Indians to gain the right to vote in federal or provincial elections.

2.1.2 Three Fundamental Principles

In amending the Indian Act the government's objective was to see that three fundamental principles were respected:

- one, that all discrimination be removed from the Indian Act;
- two, that Indian status within the meaning of the Indian Act and band membership rights be restored to persons who lost them;
- and three, that Indian bands have the right to control their own membership.

2.1.3 Removal of Discrimination from the Act

In the past the Indian Act discriminated against Indian women on the basis of sex and marital status. For example, an Indian woman who married a non-Indian automatically lost her status under the Act, and she lost her band membership. She could not pass status under the Act on to her children. (See Figure 2-A p. 2-4) This was not true for Indian men, whose children received status; the Indian Act also conferred status under the Act to their wives. (See Figure 2-B p. 2-4) As well an Indian woman who married an Indian man belonging to another band was required to become a member of her husband's band. (See Figure 2-C p. 2-4)

With the passage of Bill C-31, sexual discrimination has been removed entirely from the Indian Act.

2.1.4 Restoration of Status and Band Membership

Women and any of their children who had status and band membership and who lost status and band membership because of sexual discrimination are now eligible to have their status and band membership restored. The children of those entitled to restoration of rights are eligible for first time registration of status.

2.1.5 Band Control of Membership

The registration of a person's status under the Act by the federal government used to give them band membership automatically, and Indian bands themselves had no statutory role in determining who was recognized as a member of their own band. Amendments to the Indian Act have changed that Indian bands may determine their own membership, if they wish, in accordance with their own membership rules as long as those rules are approved by a majority of band electors.

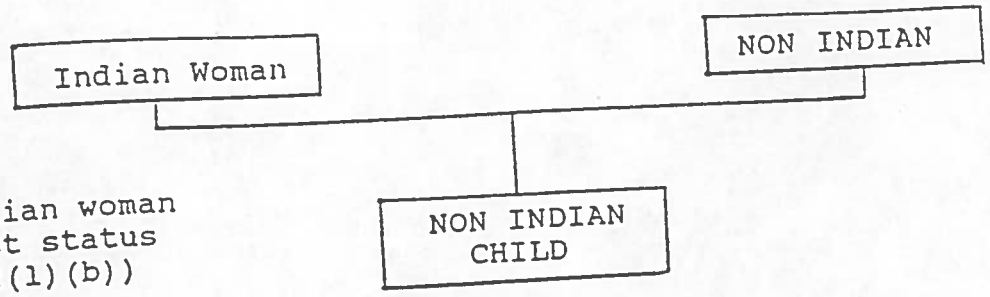
2.1.6 Elimination of Enfranchisement

All forms of enfranchisement have been eliminated from the Indian Act by the passage of Bill C-31. Persons who were enfranchised under S. 109(1) of the Indian Act for any reason - for instance, those who gave up status and their band membership for the right to vote or to join the armed forces, are now eligible to have their status restored. Their children are also eligible to be registered as persons with status within the meaning of the Act.

Figures 2-A, B and C

MARRIAGES UNDER THE INDIAN ACT AS IT READ PRIOR TO APRIL 17, 1985

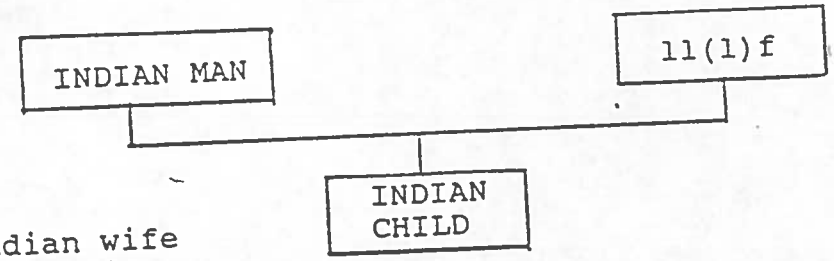
A. MARRIAGES - INDIAN WOMEN WITH NON-INDIAN MAN



Note: Indian woman lost status (12(1)(b))

Note: Children not eligible for registration

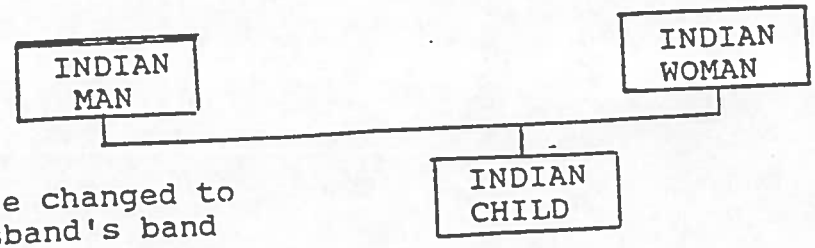
B. MARRIAGES - INDIAN MAN WITH NON-INDIAN WOMAN



Note: non-Indian wife becames Indian

Note: Children eligible for registration

C. MARRIAGES - BETWEEN TWO INDIANS



Note: Wife changed to husband's band

2.2 PERSONS ENTITLED TO BE REGISTERED AS INDIANS
SECTION 6 of the INDIAN ACT (Revised 1985)

6.(1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) the name of that person was omitted or deleted from the Indian register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under sub paragraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951;

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose

parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d) or (e) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that paragraph R.S., c I-6, s.6; c.27, s.4.

Note:

Subsection 6(3) and subsection 11(2)(b) and 11(3) described on pages 2-15 and 2-16 are commonly known as the death rules. Subsection 6(3) and 11(3) can deny Indian status and band membership to persons otherwise eligible for registration under subsections 6(1)(f) and 6(2) of the Act if a parent died before April 17, 1985. Subsection 11(2)(b) could deny band membership to persons who had qualified for Indian status on April 17, 1985 but who could not qualify for band membership until June 29, 1987. Such persons whose eligibility for Indian status was under subsection 6(1)(f) or 6(2) of the Act could be denied band membership if a parent died before June 29, 1987.

Alternatively, those provisions could have the effect of reducing entitlement to registration from subsection 6(1) to subsection 6(2) of the Act.

The technical application of the death rule can be complex. However the following examples should illustrate how they can function:

Example-1

Scenario - The applicant is the child of two persons entitled to registration under subsection 6(1)(c) of the Act or if they had been living on April 17, 1985 would have been entitled. His mother died in April 1984.

Result - The applicant is entitled to registration under subsection 6(1) of the Indian Act and, if the band does not have control of its membership, to entry on the departmentally held band list since children of paragraph 6(1)(c) parents are protected by subsections 6(3) and 11(3) of the Indian Act.

Example 2

Scenario - The applicant is the child of two persons entitled to registration under paragraph 6(1)(f) of the Indian Act or if they had been living on April 17, 1985 would have been entitled. His mother died in April 1984.

Result - The applicant remains entitled but that entitlement is reduced to a subsection 6(2) rather than the normal section 6(1) entitlement because subsection 6(3) omitted any protection for the children of subsection 6(1)(f) parents thereby making it just not possible to obtain any entitlement through his mother.

Example 3

Scenario - The applicant is the child of two parents entitled to registration under paragraph 6(1)(f) of the Indian Act. His parents died in August 1986.

Result - The applicant is entitled to registration as an Indian under subsection 6(1) of the Indian Act since his parents were both living and entitled to be registered as Indians on April 17, 1985. However he is not eligible for band membership pursuant to departmental membership rules since his parents died before they would have become entitled on June 29, 1987 to have their names added to the band list.

2.2.1 - Provisions of the former versions of the Indian Act referred to in Section 6 of the Current Act

Subparagraph 12(1)(a)(iv) of the Indian Act as it read prior to April 17, 1985

12. (1) "The following persons are not entitled to be registered, namely,

(a) a person who

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a),(b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e)."

(See Figure 2-D p. 2-9)

Paragraph 12(1)(b) of the Indian Act as it read prior to April 17, 1985

12. (1) "The following persons are not entitled to be registered, namely,

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11."

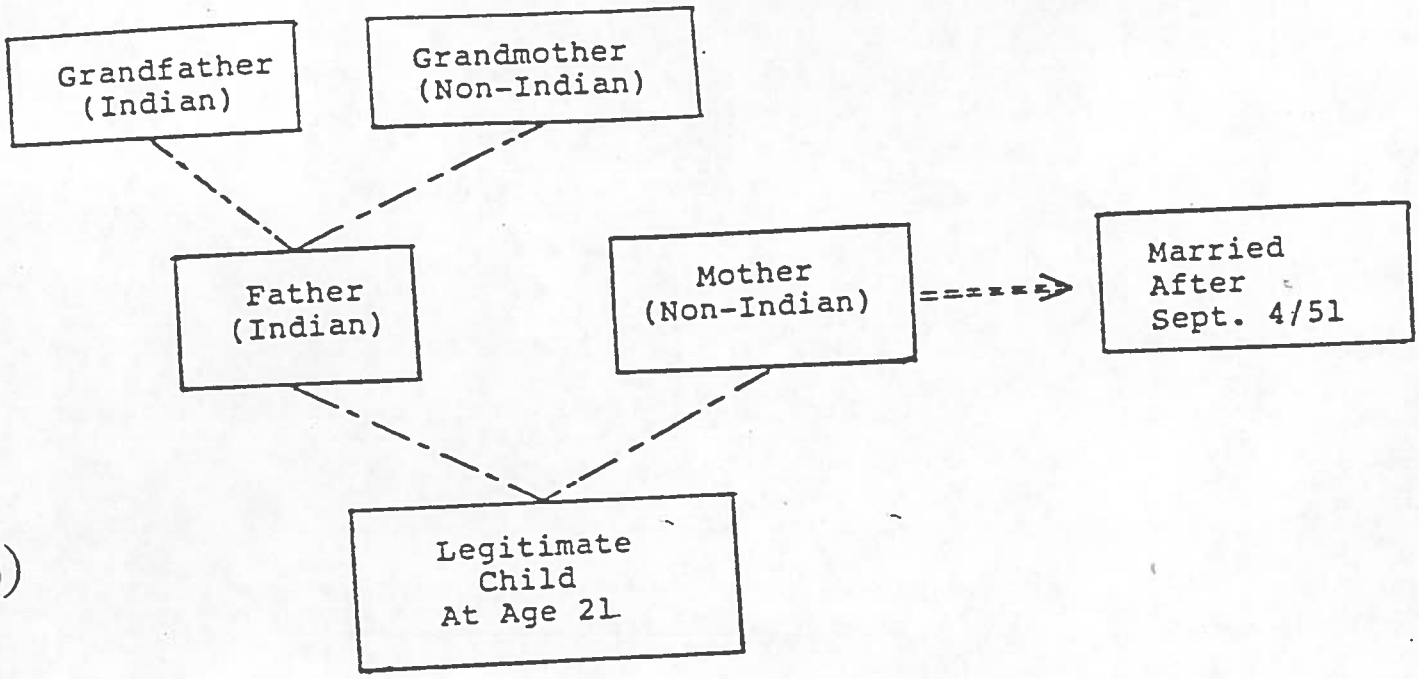
Subsection 12(2) of the Indian Act as it read prior to April 17, 1985

12. (2) "The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph."

11. (1) "Subject to section 12, a person is entitled to be registered if that person

(e) is the illegitimate child of a female person described in paragraph (a),(b) or (d)."

NON-ENTITLEMENT INDIAN ACT
SECTION 12(1)(A)(IV)
"DOUBLE MOTHER CLAUSE"



Subparagraph 12(1)(a)(iii) of the Indian Act as it read prior to April 17, 1985

12. (1) "The following persons are not entitled to be registered, namely,

(a) a person who

(iii) is enfranchised."

Subsection 109(2) of the Indian Act as it read prior to April 17, 1985

109. (2) "On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify."

Subsection 109(1) of the Indian Act as it read prior to April 17, 1985

109. (1) "On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

(a) is the full age of twenty-one years,
(b) is capable of assuming the duties and responsibilities of citizenship, and
(c) when enfranchised, will be capable of supporting himself and his dependants,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised."

Section 13 of the Indian Act as it read prior to September 4, 1951

13. "Any Indian who has for five years continuously resided in a foreign country without the consent, in writing, of the Superintendent General or his agent, shall cease to be a member of the band of which he was formerly a member and he shall not again become a member of that band, or of any other band, unless the consent of such Band, with the approval of the Superintendent General or his agent, is first obtained."

Section 111 of the
Indian Act as it read prior to July 1, 1920

111. "Every Indian who is admitted to the degree of doctor of medicine, or to any other degree, by any university of learning, or who is admitted, in any province of Canada, to practise law, either as an advocate, a barrister, solicitor or attorney, or a notary public, or who enters holy orders, or who is licensed by any denomination of christians as a minister of the gospel, may, upon petition to the Superintendent General, ipso facto become and be enfranchised under this Part, and he shall then be entitled to all the rights and privileges to which any other member of the band to which he belongs would be entitled if he was enfranchised under the provisions of this Part.

2. The Superintendent General may give him a suitable allotment of land from the lands belonging to the band of which he is a member:
Provided that, if he is not the recognized holder of a location on the reserve by ticket or otherwise, he shall first obtain the consent of the band and the approval of the Superintendent General to such allotment."

2.2.2 REGISTRATION (STATUS) UNDER THE CURRENT INDIAN ACT

SECTION 6(1) a) - Those Registered prior to April 17, 1985

b) - Members of New Bands

c) - Those Who Lost Status Through

* 12 (1) B (Marriage To Non-Indian)
* 12 (1) (A) (IV) (Double Mother)
* 109 (2) (Mother Married Non-Indian)
* 12 (2) (Non-Indian Paternity)

d) - Those Enfranchised By Application
* 109 (1) ("Voluntary")

e) - Those Removed As A Result Of
* Section 13 Before 1951 (Five Years Outside Country)
* Section 111 Before 1920 (University Degree Or Profession)

f) - Those With Both Parents In 6(1) or 6(2)

SECTION 6(2) - Those With One Parent In 6(1)

2.2.3 EXEMPTIONS UNDER SECTION 4(2) of the Indian Act as it read prior to April 17, 1985

Section 4(2) of the Indian Act read as follows:

"The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or
(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration."

SUSPENSION OF SECTION 12(1)(a)(iv)

In the spring of 1980, upon request by Indian bands, Section 4(2) of the Indian Act was applied by the Governor-in-Council to suspend Section 12(1)(a)(iv) from applying to these Indians bands.

Since then, the suspension had been requested by and granted to a large number of Indian bands.

The procedure followed in obtaining this suspension was to submit a Band Council Resolution to the registrar.

Upon receipt of an acceptable Band Council Resolution, a submission to the Governor-in-Council was prepared recommending that the Governor-in-Council order the issuance of a proclamation declaring that Section 12(1)(a)(iv) should not apply to that Band.

SUSPENSION OF SECTION 12(1)(b)

On July 24, 1980, the Minister of Indian Affairs and Northern Development announced that when requested by a Band Council he would recommend that the Governor-in-Council invoke Section 4(2) of the Indian Act to suspend Section 12(1)(b) and other related sections on the grounds that they discriminate against Indian women who marry non-Indians and against their children.

This had been requested by and granted to a number of Indian bands and the procedure followed was to submit a Band Council Resolution to the Registrar.

Upon receipt of an acceptable Band Council Resolution a submission to the Governor-in-Council was prepared recommending that the Governor-in-Council order the issuance of a proclamation declaring that Section 12(1)(b) should not apply to that Band.

Please note that the suspension was only effective from the date of the proclamation by the Governor-in-Council. From that date on, any female member of the band affected retained her Indian status on marriage to a non-Indian man. Also, all children born to her after the marriage were also entitled to be registered in the mother's band.

However, the Indian Act could not be used to restore status therefore the suspension could not be made retroactive.

2.3 PERSONS NOT ENTITLED TO BE REGISTERED AS INDIANS SECTION 7 of the INDIAN ACT (Revised 1985)

7. (1) The following persons are not entitled to be registered:

(a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or (see Note)

(b) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered. (see Note)

(2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

(3) Paragraph (1)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act, R.S., c. I-6, s 7; 1985; c. 27, s. 4.

2.3.1 PROVISION OF THE FORMER VERSION OF THE INDIAN ACT REFERRED TO IN SECTION 7 OF THE CURRENT ACT

Paragraph 11(1)(f) of the Indian Act as it read prior to April 17, 1985

11. (1) "Subject to section 12, a person is entitled to be registered if that person

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e)."

Note:

SECTION 7: APPLICATIONS AND PROCEDURES

Women Who Gained Status on Marriage and Subsequently Lost it

Paragraph 7(1)(a) and subsection 7(2) of the Indian Act stipulate that a non-Indian woman who gained status upon her marriage to an Indian man and who subsequently lost her entitlement to registration is not now entitled unless she was entitled to registration at some time prior to her marriage.

When considering an application for registration from a woman who gained status in accordance with paragraph 11(1)(f), it must be determined whether she has an entitlement to registration in her own right. An investigation into her entitlement and/or her parents' entitlement will be conducted. If she has no prior entitlement, paragraph 7(1)(a) will apply and she will not be entitled to be registered as an Indian.

Children of Women Who Acquired Status

Paragraph 7(1)(b) stipulates that the child of a woman who acquired status under the former paragraph 11(1)(f) is not entitled to registration as an Indian if that child is also the child of a man who is not entitled. This requires an investigation into paternity in every case where paragraph 7(1)(b) applies or might apply to ascertain the entitlement of the father. This research must be done in addition to that into the mother's prior entitlement as required by subsection 7(3).

If an application is received from a person whose mother acquired status on marriage with no other basis for entitlement and whose father is not entitled, the applicant's entitlement is subject to paragraph 7(1)(b) and the person is not entitled.

This discussion of Section 7 does not pertain to those women and children as described above who were registered and were entitled to be registered immediately prior to April 17, 1985. These women and their children are entitled to registration and band membership. They remain on the Indian Register and on their band lists unless removed as a result of a protest or an investigation where Section 7 applies. A protest to the addition, omission or deletion of an individual within three years is provided for in the amended Indian Act.

2.4 MEMBERSHIP RULES FOR DEPARTMENTALLY ADMINISTERED BAND LISTS SECTION 11 of the INDIAN ACT (Revised 1985)

11.(1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that Band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

(2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

(3) For the purposes of paragraph (1)(d) and subsection (2), a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d), or (e) who was no longer living on the first day on

which he would otherwise be entitled to have his name entered in the Band list of the band of which he ceased to be a member shall be deemed to be entitled to have his name so entered.

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which he has the closest family ties, as the case may be. R.S., c. I-6, s 11; 1985, c.27, s.4.

2.4.1 Membership rules for Band Administered Band Lists Section 12 of the Indian Act (Revised 1985)

12. Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

b) is a member of another band

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents. R.S., c. 1-6, S.12; 1985, c. 27, S.4

NATIVE STUDIES

Native Studies this term will be covering causes and effects of *what was*, and *how it is* affecting us as Natives today. The course outline listed below is some of the topics we will be covering. Classes will consists of class discussion, lectures, essays, research paper, class presentation, end of term exam.

Students will be marked as follows:

Class Participation - 10%
Attendance - 15%
Essays - 15%
Paper - 20%
Class Presentation - 20%
End of term Exam - 20%

*** COURSE OUTLINE IS SUBJECT TO CHANGE**

Course Outline: #1 Thursday January 6th, 1994

Discussions, lecture, essay paper.

DEFINING CULTURE:

RATIONALE: Culture must not be treated as relics of the past, or something that is simple and primitive. Instead, the idea must be presented and acted upon, that culture is something that shapes people's everyday lives.

NATIVE ETHICS:

RATIONAL: The traditional native perception of the universe was one of wholeness, of belonging. Native people developed rituals and principles to show respect. Native Ethics and Principles are still applied today, some in the fashion of our ancestors others shift to fit in todays society.

Do we need to alter our Native Ethics and Principles of yesterday to fit into todays society?

THE INDIAN CONCEPT OF TIME:

RATIONAL: Having learned to live in harmony with nature and relevance to all these things, the concept of "doing things when the time is right" came into play .. which is still in play today. We have to ask ourselves if the Native concept of time, a principle that govern our ancestors can work for us in todays society.

Will defining our culture, understanding our ethics, principles and concepts, of why we do the things that we do, and live the way that we live, help Aboriginal and non-Aboriginal people rethink options and approaches that will contribute to the understanding of self-determination, self-sufficiency, and healing.

Course Outline: #2

Discussions, lecture, notes, class presentation.

SELF DETERMINATION: - What does it mean?

RATIONALE: For more than 20 years, Our Native nations insisted that we want our communities to be self-determining. There have been a number of explanations as to what this means exactly, but one thing is agreed upon. Self-determination must be defined by ourselves, not the non-Native bureaucracy. In the traditional way, all our voices must be heard for it to happen.

RESERVES:

RATIONALE: The reserves scattered across Canada are the embodiment of the native drive for self-government. During the past twenty years, changes on reserves have reflected the successes and failures of the ongoing attempts of Native bands to gain control over their lives. Some reserves have found themselves taking bold steps forward, only to slip back momentarily before struggling forward again. Some don't go forward, Others have moved forward with steady strides.

URBAN NATIVES:

RATIONALE: What impact will self-government have on Native people who choose to live in urban areas, will they have the option to take advantage of housing, education and tax benefits. The issue of who should be responsible for Natives who live in urban settings have been debated for decades.

Course Outline: #3

Discussions, lectures, notes, research paper, exam.

TREATIES AND LAND CLAIMS:

RATIONALE: Let no one forget it... we are a people with special rights guaranteed to us by promises and treaties. We do no beg for these rights, nor do we thank you...because we paid for them with our culture, our dignity and self-respect. We paid and paid and paid until we became a beaten race. (Chief Dan George, Squamish tribe).

We must all be equal under the laws...We can't recognize aboriginal rights because no society can be build on historical "might-have-beens". (Pierre Trudeau, then Prime Minister, 1969).

Not only do we want self-government, we still have to deal with the issues of existing treaties and land claims.

- Nishga of northern British Columbia land claim.
- James Bay Agreement.
- Naskapi of Schefferville.
- Inuvialuit of Western Arctic.

51 FIRST PEOPLES LANGUAGES IN CANADA

Abenaki
Blackfoot
Cree
Delaware
Malecite
Micmac
Montagnais
Ojibwa
Potawatomi
Beaver
Carrier
Chilcotin
Chipewyan
Dogrib
Han
Hare
Kaska
Kutchin
Sarcee
Sekani
Slave
Tagish
Tahitan
Tutchone
Haida
Cayuga
Mohawk
Oneida
Onondaga
Seneca
Tuscarora
Kutenai
Bella Coola
Comox Halkomelem
Lillooet
Okanagan
Sechelt
Shuswap
Squamish
Straits
Thompson
Dakota
Tlingit
Tsimshian
Nass-Gitksan
Haisla
Heiltsuk
Kwakiuti
Nootka
Inuktitut
2 Extinct

The Chronicle - Herald Saturday, Oct. 29 194 (Front-page)

Brian Rau/Truro Bureau

Const. Lawrence Doucette, left, of Eskasoni is one 15 native officers who will soon be patrolling reserves on Cape Breton Island as part of the newly formed Unama'ki Tribal Police. With him is Const. Daryl Roach of the RCMP detachment in Enfield, where Const. Doucette is completing six months of on-the-job training.

In Marshall's wake

Justice system evolving slowly 5 years after royal commission

By DEAN JOBB
Staff Reporter

It's been five years since the Marshall royal commission lambasted Nova Scotia's justice system for wrongfully convicting a Micmac youth of murder.

But the most visible change brought about by the commission won't be found among its recommendations.

By the end of the year the Unama'ki Tribal Police Force — 15 native officers trained by the RCMP — will be responsible for upholding the law on Cape Breton Island's five reserves.

Micmacs have been lobbying for control over policing on reserves since the 1970s, but "until Marshall, it was never taken seriously," says native leader Dan Christmas.

And while the commission stopped short of advocating native policing, Mr. Christmas calls Unama'ki "the first major change that's going to happen on reserves as a result of Marshall."

Micmac History Month

INSIDE: Changes five years after Marshall report / **A2**

That's typical of the way the federal and provincial governments are tackling Marshall commission suggestions for revamping how the courts and police deal with the province's 22,000 natives.

The commission's 1990 report has become a guide for reform rather than a blueprint, reworked as the native community sees fit and implemented as tight government budgets allow.

The catalyst for change was the infamous case of Donald Marshall Jr., who served 11 years in prison before he was cleared of a 1971 Sydney murder.

Reviewing that prosecution almost two decades later, the royal commission concluded Mr. Marshall had been railroaded. Nova Scotia's justice system, it said, was guilty of racism against natives and blacks.

But the commission's sweeping plan for reforming native justice has slammed head-on with harsh economic realities of the 1990s.

The federal and provincial governments, which cost-share native programs, are cutting services across the board. But Micmac leaders say penny-pinching is no excuse for stinting on new native programs.

"We're in a situation where aboriginal people do not have a lot of the services ordinary Nova Scotians take for granted," says Mr. Christmas, executive director of the Union of Nova Scotia Indians.

■ **See Marshall / A2**

Marshall report catalyst for change

■ continued from / A1

Even when money is not an issue, change does not come easily. For instance, the Nova Scotia government has appointed two native justices of the peace, but the federal government refuses to give them power under the Indian Act to handle minor criminal cases on reserves.

And it's one thing to set up a program to help Micmacs get law degrees — as has been done at Dalhousie Law School in Halifax — and another to find them work in a tight job market.

None of Dal's 10 Micmac law graduates since 1989 has been able to find a permanent position at a Nova Scotia law firm.

The vehicle for putting the Marshall recommendations into action is something called the "tripartite forum," made up of federal and provincial officials and leaders of Nova Scotia's three native groups.

While the forum has been laying the groundwork for implementing the Marshall report since 1991, it recently got a shot in the arm.

Ministers for federal and provincial departments that deal with native programs have been brought into the process. Natives, frustrated with the slow-moving bureaucracy, welcome the move.

"Now both levels of government have a political stake in this," notes Mr. Christmas, who chairs the forum's justice sub-committee. "Before, it was basically left to bureaucrats to try to resolve issues on their own."

The forum's profile received a further boost this month with the appointment of a permanent chairman — former Prince Edward Island premier Joe Ghiz, the dean of Dalhousie Law School.

And the forum's mandate is expected to go beyond the justice reforms advocated by the Marshall commission.

"Eventually it can get into whatever the aboriginal want," says Allan Clark, Nova Scotia's director of Aboriginal Affairs, a co-ordinating office the Liberal government created last year.

"If it's health issues, social services, economic development, whatever. It just depends on the resources available to do some of these things."

The ultimate goal is native self-government.

"We want to have a place in this society on our own terms, and on our terms means self-government, that we manage these things ourselves," says Mr. Christmas.

"I think we're making progress. It's not moving as fast as we'd hoped, but we're moving and things are starting to happen."

CHANGES FIVE YEARS AFTER MARSHALL REPORT

A checklist of programs under way — or in the works — as the Marshall report nears its fifth birthday:

Unama'ki Tribal Police: Named after the Micmac word for Cape Breton Island (the literal translation is "foggy place"), this force will replace RCMP patrols in the communities of Eskasoni, Whycocomagh, Chapel Island and Wagmatcook, and take over policing of the Membertou reserve from Sydney police.

The force has been approved for five years, with an annual budget of about $800,000 provided by the federal and Nova Scotia governments. It operates under a police commission comprised largely of natives.

Police: Rather than recommending a separate force for reserves, the Marshall commission called for the hiring of more native officers.

The RCMP is actively recruiting natives — 19 are now stationed around the province — and has pitched in to train Unama'ki officers. None of the Nova Scotia's municipal forces has a native officer. The Halifax Police Department, however, has a native person on its civilian staff as a liaison officer.

Community Legal Issues Facilitators: A three-year experimental project with an annual budget of $190,000, CLIF is designed to break down barriers between native people and players in the justice system — police, lawyers and judges. CLIF "facilitators" are based in three areas — Halifax-Dartmouth, Sydney and Bridgewater.

Native Justice Institute: This month the Nova Scotia government announced the establishment of the institute, which the Marshall commission envisioned as a way of administering justice-related programs. The first task of the institute, which will receive $500,000 in 1995, is to hire five court workers to help natives facing criminal charges.

Diversion programs: On the Indian Brook reserve, near Shubenacadie, people charged with minor crimes have the option of being tried and sentenced by a committee of Micmac elders. The pilot project, with an annual budget of about $100,000, has been in operation since 1992 and should serve as a model for other reserves.

Court sittings on reserves: The chief judge of the provincial court has been asked to consider holding court at Indian Brook as early as next year. The court has also been asked to consider input on sentences from the reserve's diversion committee.

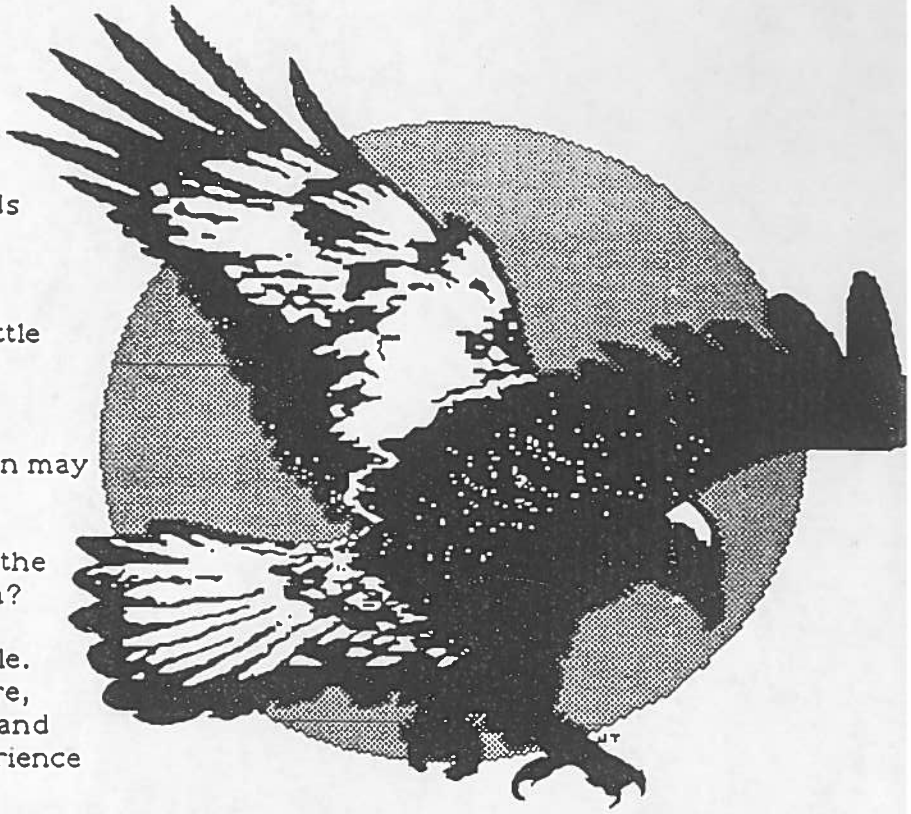
Indigenous Blacks and Micmacs program: Ten Micmacs have graduated from Dal Law School under this program, set up in 1989. So far none has been able to find a permanent job with a Nova Scotia law firm.

Interpreters: The province is considering a proposal from Eskasoni to train 16 Micmac legal translators. Since studies show more than 90 per cent of natives living on reserves use English at home — the highest level in Canada — this Marshall recommendation has not been a priority.

Probation services: Native groups are lobbying for a parole office, staffed by Micmacs, to be established at Eskasoni on a trial basis.

Dean Jobb, Staff Reporter

These are the words of Seattle, Dwamish Indian Chief, upon surrendering his land to Washington State Governor Issac Stevens in 1854.



The Great Chief in Washington sends words that he wishes to buy our land. The Great Chief also sends us words of friendship and goodwill. This is kind of him, since we know he has little need of our friendship in return. But we will consider the offer.

For we know that if we do not sell, the white man may come with guns and take our land. The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing, and humming insect is holy in the memory and experience of my people.

The sap which courses through the trees carries the memories of the red man. So, when the Great Chief in Washington sends word that he wishes to buy our land, he asks much of us. The Great Chief sends word that he will reserve us a place so that we can live comfortably by ourselves. He will be our father and we will be his children. So we will consider your offer to buy our land, but it will not be easy. For this land is sacred to us.

This shining water that lives in the streams and rivers is not just water but the blood of our ancestors. If we sell you our land, you must remember that it is sacred, and you must teach your children that it is sacred and that each ghostly reflection in the clear water of the lakes tells events and memories in the life of my people.

The water's murmur is the voice of my father's father. The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land, you must remember, and teach your children that the rivers are our brothers, and yours, and henceforth give the rivers the kindness you would give any brother.

The white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth, and it is part of us. The perfumed flowers are our sisters, the deer, the horse, the great eagle, these are our brothers. The rocky crests, the juices of the meadows, the body heat of the pony, and man - all belong to the same family.

The red man has always retreated before the advancing white man, as the mist of the mountain runs before the morning sun.

This we know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood which unites one family. Whatever befalls the earth befalls the sons of the earth. Man did not create the web of life. He is merely a strand in it. Whatever he does to the web he does to himself.

The white man too shall pass; perhaps sooner than all other tribes. Continue to contaminate your beds, and you will one night suffocate in your own waste.

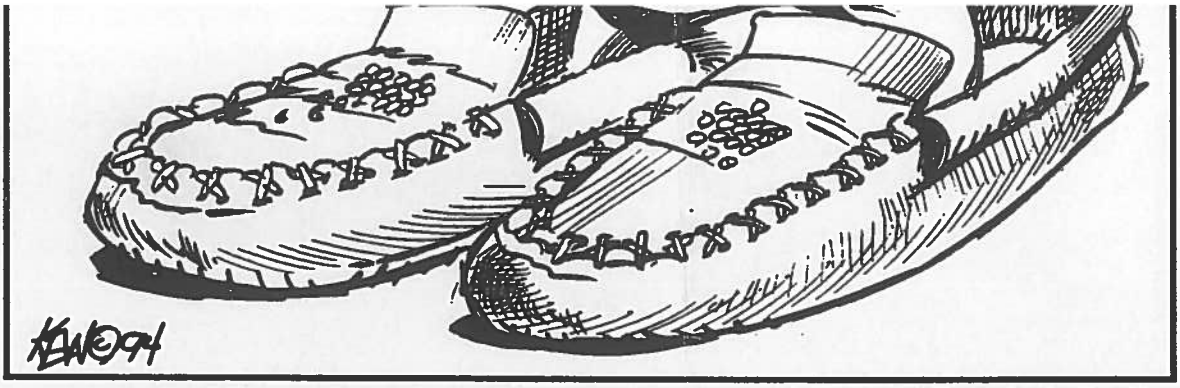


Illustration by Don Kew

Indian Time a worn-out excuse

By Gilbert Oskaboose

It's 11 a.m. in Anywhere, Indian Country. The meeting was supposed to have started two hours ago. Half of the people expected haven't even bothered to show up yet. Someone titters nervously about "being on Indian Time again, I guess."

Nobody laughs. Jokes about Indian Time are wearing thin. An annoyed band administrator and two Tribal Council types announce "they have more important things to do with their time" — and leave for appointments elsewhere.

So what exactly is Indian Time?

According to the romantics, it's a natural time, the Creator's time, a spiritual time in tune with the ancient rhythms of Mother Earth — and in perfect synchronization with harmonies of the Universe....

Opponents dismiss it as bullshit, our very limited time and meagre resources wasted again, a lackadaisical inability to maintain a simple timetable, an appalling disrespect for the schedules of others, thinly disguised as some kind of noble cultural trait.

Does "accountability to the people" refer only to the cash box in Indian Country or can it include the use — or abuse — of time as well? Is there a balance, somewhere between living life by the clock and being "out to lunch" when you should be hard at work?

Speaking of waste, how about some of these big "chieves" (one of them actually pluralizes the noun chief in this manner) getting flown into Toronto, Winnipeg or Vancouver for yet another two or three-day "high-level meeting."

Since everybody is on Indian Time the majority arrive late. Agendas are often hours or even days behind. Often the agenda is abandoned and a new one made up on the spot, to the dismay of organizers who may have worked months to set the bash up.

The meeting is opened by a "highly respected Elder" who is dragged in to say the opening prayer in some obscure dialect few understand. He or she is then shuffled off into Elder limbo, to await the closing prayer. This is one way Indian Country demonstrates its great "respeck" for its Elders.

Some chiefs don't utter a single word during the entire meeting, other than gossiping and bragging about the one they tied on the night before. Others, mesmerized by the sound of their own voices, can't be shut up. Speakers are often drowned out by tables of delegates more at home in a bingo hall than they are at national meetings. Frequently the chair has to ask for "some silence and a little respect." Rarely do they get it.

National, provincial or regional visions, if there are any, are discarded in favor of individual chiefs grabbing the opportunity to whine about their own individual community problems. Every little coffee or lunch break becomes a major task for organizers to get delegates back into their chairs.

Around the second last day, when important resolutions are being put together and votes are required, the chiefs start vanishing, leaving to catch a plane, get in a few rounds of golf, head for the mall, or to do some heavy decision-making at the local casino.

A good time was had by all — except for the "grassroots people" back home. Do the people deserve more from their so-called "leadership," or do they deserve exactly what they accept?

(Gilbert Oskaboose is a 53-year-old Ojibway from the Serpent River First Nation in Ontario. He's a retired journalist and former communications director for the North Shore Tribal Council.)

Sharon Culbertson

CANADIAN

FAMILY LAW QUARTERLY

Cahier trimestriel de droit de la famille Canada

CARSWELL

Where Cultures Clash: Native Peoples and a Fair Trial

*Timothy T. Daley**

> So an Indian person who's not as knowledgeable let's say in the English language, if he were asked if he were guilty or not, he would take that to mean, are you being blamed or not, and that's one of the reasons I found that native people were pleading guilty because they suspect that the question was, "Is it true that you're being blamed?", and the Native person, of course, would say, "Yes".[1]

There is a right at law to be presumed innocent until proven guilty.[2] There is also a legal presumption that ignorance of the law is no defence to a charge under the criminal law.[3] The rule applies not merely to simple ignorance of the law but to mistaken knowledge, where the general law is known but the specific details of the law are

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* B.A., B.Ed., M.S.W., LL.B., Family and Youth Court Judge, Nova Scotia.

1 Bernard Francis, former Native Court Worker, teacher of Applied Linguistics, University College of Cape Breton, testifying before the Royal Commission on the Donald Marshall Jr. Prosecution. Transcript of the testimony of Mr. Francis at 3931.

2 Section 11(d) of the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985 [Appendix II, No. 44], Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11; *Canadian Bill of Rights*, R.S.C. 1985, Appendix III; *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(1)(a); and *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321.

3 G. Williams, *Criminal Law*, 2d ed. (London: Stevens & Sons, 1961) 288; *Criminal Code*, R.S.C. 1985, c. C-46, s. 19.

misunderstood.[4]

This article explores the difficulties Native peoples[5] experience in coping with the right and presumption as the Native appears before the Canadian courts, and identifies legislative solutions[6] available to the trial Judge to ensure a fair trial. It must be recognized that some Native persons have adopted non-native ways. The emphasis of this article is toward those Natives who have not moved away from their culture and who find it difficult, if not impossible, to participate in the non-native justice system.

The Evidence of Special Difficulties

It is tempting to suggest that the current questioning of how Natives in Canada are treated by the justice system is the result of the high-profile Marshall[7] and Manitoba[8] inquiries and ongoing land claim, hunting and fishing trials.[9] Fair trial issues have been raised in

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4 Williams, above, note 3.

5 The term "Native" is used throughout this article and refers to the First Peoples to inhabit what is called Canada. The First Peoples are frequently referred to as "aboriginals" as seen, for example, in M.E. Turpel, "The Judged and the Judging: Locating Innocence in a Fallen World" 40 U.N.B.L.J. 281. *The Report of the Aboriginal Justice Inquiry of Manitoba* at 7 refers to "the Indian, Metis and Inuit people. That . . . leads us inevitably to a consideration of what or who are Indians, Metis or Inuit. . . . [W]hen we refer to Indians, we will be talking about the Aboriginal people who are entitled to be registered as Indians pursuant to the *Indian Act* of Canada. . . . Metis people are those Aboriginal people of mixed blood, Aboriginal-white ancestry who are, and who consider themselves as being, neither Indian nor Inuit, or who regard themselves as Metis. . . . Inuit people are those Aboriginal people who were known formerly as Eskimos." *Webster's Encyclopedic Dictionary*, Cdn. ed. (1988), defines "aboriginal" as "existing from the earliest times, from the beginning – a native inhabitant of a country before colonization."

6 The *Charter*; the *Bill of Rights*; *Young Offenders Act*, R.S.C. 1985, c. Y-1.

7 Royal Commission on the Donald Marshall Jr. Prosecution.

8 Public Inquiry into the Administration of Justice and Aboriginal People of Manitoba.

9 For example, the Inquiry into Policing on the Blood Reserve in Alberta; the trial of the Innu people in Labrador for obstructing the use of the Goose Bay air base by N.A.T.O. forces; *R. v. Simon*, [1985] 2 S.C.R. 387; and *R. v. Denny* (1990), 94 N.S.R. (2d) 253, 247 A.P.R. 253.

Canada long before these latest incidents surfaced,[10] are not unique to Canada.[11]

The root of the difficulty is believed to be discrimination and is systemic in nature.[12] Some suggest it is the result of the powerful or the majority imposing its will on the minority,[13] a lack of understanding of cultural differences and their institutions,[14] or that the real issue is not about cultural clashes but about politics and big business and who will control the wealth of the land.[15] It is of more than passing interest that Canada has a history of cultural clashes not involving Native peoples.[16]

Historically, colonial governments attempted to control Native populations by absorbing the local populace into the colonial culture.

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10 For example, *Indians and the Law* (Ottawa: Canadian Corrections Association, 1967); *Proceedings of Conference on Northern Justice*, Manitoba Society of Criminology (Winnipeg, 1973); *The Native Offender and the Law* (Ottawa: Law Reform Commission, 1974); *Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System* (Ottawa: Solicitor General of Canada, 1975); *Report of the Metis and Non-Status Indian Crime and Justice Commission* (October 1977); J.T.L. James, "Toward a Cultural Understanding of the Native Offender" (1979) 21 Can. J. Crim. 453; D. Skoog, L.W. Roberts & E.D. Boldt, "Native Attitudes Toward the Police" (1980) 22 Can. J. Crim. 354.

11 See above, note 7, vol. 7, *The Consultative Conference Report*, comments of R. Barsh at 35-40; vol. 3, *The Mi'kmaq and Criminal Justice in Nova Scotia*; M. Jackson, *Locking Up Indians in Canada – A Report of the Special Committee of the Canadian Bar Association on Imprisonment*; S. Stevens, "Access to Civil Justice of Aboriginal Peoples," paper presented to the Conference on Access to Civil Justice (Toronto, 1988); *Correctional Law Review*, Working Paper No. 7, Correctional Issues Affecting Native Peoples, Canada, 1988 at 21-22; *R. v. Ananga*, [1976] 11 A.L.R. 412 (N.T. S.C.).

12 See above, note 7, vol. 3 at 69, and *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536. Systematic discrimination happens when a specific act, policy or structural factor – intended or unintended – results in adverse effects for members of certain specific groups, (above, note 7, vol. 1 at 151), and is sometimes referred to as "institutional racism." See below, note 13.

Three centuries of attempted assimilation, acculturation,[17] and abolition[18] of the Native culture in Canada have failed to a large degree. The evidence of the failure, to those who promote assimilation, can be found in the persistent demands by Native peoples for self-government, a Native justice system, aboriginal land settlements, recognition of treaty rights, and special status, now found to some degree in the *Charter of Rights and Freedoms*.[19]

Regardless of why the assimilation did not meet the expectations of the colonial policy, the reality is that until the political issues, including the administration of justice, between the Native and non-native Canadians are resolved and in place, Native peoples will continue to appear before the courts and be subjected to a non-native justice system:

> Statistics are very clear. Aboriginal people are over-represented in the jails and prisons of this country to the tune of five or six times their presence in the population nationally, and in some areas of the country, are incarcerated over ten times their presence.
>
> Frankly there is every possibility that the problems faced by the justice system in so far as aboriginal accused are concerned will increase in the near future rather than decrease.[20]

It is essential, therefore, that every effort be made to ensure fair treatment for Native persons within the justice system. At the

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17 Random House Dictionary defines acculturation as "the process of adopting the cultural traits or social patterns of another group." For discussion on this process, see H.F. McGee, *The Native Peoples of Atlantic Canada: A History of Indian-European Relations* (Don Mills: Carleton University Press, 1983) cs. 6 & 13; K.J. Brooks, "The Effect of the Catholic Missionaries on the Micmac Indians of Nova Scotia, 1610-1986" (1986) 6 The Nova Scotia Historical Society Review, no. 1 at 107. For an analysis of the historical development and the courts' response to Native rights, see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 C.B.R. 727.

18 *The Report of the Aboriginal Justice Inquiry of Manitoba*, (12 August 1991), authored by Associate Chief Judges A.C. Hamilton & C.M. Sinclair, is in two volumes. Volume 1 is titled "The Justice System and Aboriginal Peoples," and Volume 2 "The Deaths of Helen Betty Osborne and John Joseph Harper." See Volume 1 for an historical overview and a description of the attempts of the English and Canadian governments to abolish the Native culture by the imposition of "Christianity and civilization" through control over their education, economy, development, quality of life, movement, religion and justice (at 49-83).

19 See the *Charter*, ss. 25, 27.

20 Judge C.M. Sinclair, "Sentencing Disparity: Dealing with the Aboriginal Offender" Nova Scotia Judges Educational Seminar (7-9 June 1990) at 2.

arraignment and trial levels, the duty to ensure a fair hearing rests with the trial judge: "A fair judiciary is the cornerstone of our legal system."[21]

There is clear evidence that Natives face special difficulties throughout the entire spectrum of the justice system, difficulties which flow in large part from differences between the Native and non-native cultures.[22]

Culture[23] comprises a variety of activity. It includes how and why things are, and have been, done within a community. Language is the common thread within a culture – its way of expressing feelings, concepts, understanding and aspirations. Language is a reflection of a way of thinking – it expresses the thoughts emanating from the mind:

> [L]anguage fulfils several absolutely crucial functions. In addition to providing a means for acquiring culture, it is the indispensable means for using it: to communicate to elicit responses from others, to respond appropriately in turn, and, what is most important for ongoing evolution of culture, to accumulate, store, transmit, and speculate on the past and present experiences of others.[24]

> So close is this relation that neither language nor culture could have evolved alone, and neither could survive without the other. The role of language in abstract, symbolic thinking and as a means of communication and cooperation – of acquiring, storing, and passing on knowledge – is patently fundamental to the function of culture.[25]

It is the problem of language assimilation and understanding, or lack thereof,[26] that is a significant factor when a Native appears

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21 See above, note 7, vol. 1 at 157.

22 See above, note 12.

23 Webster's Dictionary defines culture "as the customary beliefs, social forms, and material traits of a racial, religious or social group." In its broadest sense, culture "is everything, material and nonmaterial, learned and shared by people as they come to terms with their environment. It includes the totality of a group's shared procedures, belief systems, worldview, values, attitudes, and perceptions of life." *Indian Education*, vol. 2: The Challenge (Vancouver: University of British Columbia Press, 1986) at 156.

24 P.B. Hammond, *An Introduction to Cultural and Social Anthropology*, 2d ed. (London: Macmillan, 1978) at 410.

25 Ibid. at 422.

26 Status (46.6%), non-status (9.5%), Metis (13.9%) and Inuit (73.8%) persons in Canada spoke the Native language as a mother tongue; only 26% of those over 15 years of age had attended high school, compared to 52% of the non-native population, and more had not gone past Grade 5 than had completed university.

before the court, and it may explain, in part, the abnormally high percentage[27] of Natives found throughout the criminal justice system.

There is substantial evidence supporting this assertion. In 1975, the federal and provincial governments reported,

> [T]he crucial question . . . was whether courts realize there is a native culture, a different value system, philosophy, religion and perspective toward life.[28]

> [N]ative and non-native peoples perceive justice differently and . . . the present language of the law and language barriers tend to strengthen the differences.[29]

At the same conference, the Inuit pointed out that language and the appropriateness of the law are two main barriers to them living within the justice system, and stated,

> Inuit rarely understand fully and frequently understand not at all what is happening in their dealings with the law. . . . The result of this ignorance is that we are at a disadvantage in every stage of the system.[30]

Rupert Ross, whose territory as Assistant Crown Prosecutor covers 22 remote reserves in Ontario, points out that

> We interpret what we see and hear through our own cultural eyes and ears. When we deal with people from another culture, our *interpretations* of their

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It should be noted that this data, from the 1981 census, has been disputed by Native groups. See *First Ministers' Conference: Aboriginal Constitutional Matter* (Ottawa, 1987), "Basic Information on Aboriginal Peoples." The Manitoba Justice Inquiry, above, note 18 at 94, stated that "according to the 1986 census, 34.2% of Manitoba's Indian population over the age of 15 had less than grade nine education, compared to 18.2% of the total provincial population."

27 Native peoples are over-represented in Canadian prisons and jails. Although the Native population is 2% of the total Canadian population, in 1987, 24.7% of the inmates in federal and provincial prisons were Natives who had committed federal offences only. See *Task Force on Aboriginal Peoples in Federal Corrections – Final Report* (Ottawa, 1988); and M. Coyle, "Traditional Indian Justice in Ontario: A Role for the Present" (1986) 24 Osgoode Hall L.J. 605. For a comprehensive discussion on the Native population in the Canadian justice system, see L. Samuelson & B. Marshall, "The Canadian Criminal Justice System: Inequalities of Class, Race, and Gender" in B.S. Bollaria, ed., *Social Issues and Contradiction in Canadian Society* (Toronto: Harcourt Brace Jovanovich, 1990), c. 20. See above, note 18, c. 4, "Aboriginal Over-Representation" at 85-114, for a comprehensive analysis of the impact of systemic discrimination on Native peoples in Canada.

28 *Reports on the National Conference and Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, Solicitor General of Canada (1975) at 15.

29 Ibid.

30 Ibid. at 29.

> acts and words will very frequently be wrong. It follows that when we *respond* to their acts and words, relying upon our interpretations of them, we will respond by doing and saying things which we would never consider appropriate had we known the truth.
>
> . . .
>
> [W]e have not understood the degree to which the rules of their culture . . . differ from ours. We must learn to *expect* such difference, to be ever wary of using our own cultural assumptions in interpreting their acts and words, and to do our best to discover their realities and their truths.[31]

The paper analyzing the hearings where the Alberta Lubicon Band attempted to prevent oil exploration on their traditional lands observed:

> The language barriers were considerable since not only was English used extensively but it was used in a legalistic way. The Cree elders spoke no English and it fell to the chiefs to interpret not only what was said but what it meant. The differential views of justice, of truth, of morality were painfully clear in this cross-cultural situation. While the Cree sat with their pictures of bulldozed traplines, the companies argued that they had no policy to bulldoze lines and were therefore not responsible for such damage.[32]

J.T.L. James, writing about Native pride, time orientation, and the concepts of sharing and non-interference, says about communication:

> Lack of verbal skills in what is probably a second language may make the native offender seem hostile or uncooperative and affect the treatment he receives. Natives frequently "clam up" in the face of our verbiage. Our very tone of voice, or volume, may prove unduly intimidating, being so different to that used by natives who lower their voice in serious matters.
>
> Non-verbal communication is important in any culture but perhaps more so amongst people who, in their close relationship with nature, read signs invisible to us. Our body language displays our impatience, frustration and rejection of their shrugs, downcast eyes and shuffling. The non-verbal impasse can be as damaging as the verbal one in achieving the ends of justice.[33]

The complexity of the criminal justice system, its concepts and words, creates problems for any person not familiar with its subtleties. Judge J.-C. Coutu, Provincial Court of Quebec, District of Abitibi, has held court in northern Quebec, including Cree and Inuit territories, since 1974, as part of Quebec's answer to bringing the

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31 R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 2.

32 See above, note 13 at 357.

33 J.T.L. James, "Toward a Cultural Understanding of the Native Offender" (1979) 21 Can. J. Crim. 453 at 456.

justice system to Native peoples. He is one of a handful of non-natives with extensive experience in this area, and he concluded before the Marshall Commission:

> Our system is very complex and Native people often have difficulty understanding the logic of our judicial system and its laws. When a person pleads "not guilty", for us this means that we want the prosecution to prove beyond a reasonable doubt that the crime has been committed, or that the accused person wants more time to make a final decision as to the plea to offer. But for a Native person to plead "not guilty" is often synonymous with telling a lie. Natives admit easily to their crimes; they are honest and frank.[34]

Clearly the Native in the justice system has major communication difficulties. These difficulties are at a basic level of understanding, and stem, in part, from a culture based on survival in a harsh environment developed over thousands of years, attempting to meet the requirements of an alien judicial system based on substantially different concepts.[35] The difficulties are both conceptual and linguistic. Conceptual in the sense that Native ideas of morality, dispute resolution and justice based on survival and mediation are different from that found in the English legal tradition based on the adversarial system and confrontation.[36] Linguistic in the sense that the spoken word and body language carry different meanings in different cultures.

Native peoples exhibit behaviours different from those of non-natives when coping with the unfamiliar justice system. These behaviours contribute to the relatively high percentage of Natives incarcerated,[37] and support the argument that the traditional justice system does not understand the cultural influences and its impact on Native people. For example, two common coping mechanisms and culture-based behaviours of many Natives are:

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34 See above, note 7, vol. 7 at 24; and, J.P. Little (Judge), "Special Types of Offenders: Indian Young Offenders," paper given at Advanced Judicial Seminar, Montreal (2 December 1988).

35 See above, note 7, vol. 1 at 163: "Native Canadians have a right to a justice system . . . which dispenses justice in a manner consistent with and sensitive to their history, culture and language . . . the criminal justice system . . . is not relevant to their experience, not only in terms of its language and concepts but also in terms of essential values. . . . Those traditional values frequently clash with our adversarial system."

36 See above, note 1 at 4101-4102.

37 See above, note 27.

1. "the main concern for many Native accused, especially young people and first offenders, is to get away from the unfamiliar and disconcerting courthouse – to 'plead guilty' to get it over with";[38] and,

2. "Europeans . . . have an expectation that someone who will not look you straight in the eye is demonstrating an evasiveness . . . in reserve communities looking another straight in the eye is taken as a deliberate sign of disrespect . . . their rule is that you only look inferiors straight in the eye."[39]

Given the disbursement and diversity of Native populations in Canada, local language and behaviours add to the communication difficulties.[40]

The Native person is perceived by the justice system as a silent person. He says little or nothing and is frequently described as unresponsive, uncommunicative, lacking in insight, and unwilling to expose his feeling. The result is a negative reaction from the uninformed justice system – if a person cannot or will not help himself, how can anyone else help? Rupert Ross[41] describes the silence, for example, as an ethical issue that forbids Native people from doing what non-natives do within their culture. For example, grief, anger and sorrow are to be buried quickly, and are not to be expressed because to do so only burdens the listener, what's past is past. It is not proper to indulge in your private emotions. Unwill- ingness to enter counselling while on probation, for example, is the result of a cultural prohibition against reliving the past and burdening others with private woes. For the Native to confront his accuser would likewise, be unethical: "giving testimony face to face . . . is simply considered wrong. It [is] not part of the traditional processes . . . where in fact every effort [is] made to *avoid* such direct confrontation."[42] The reason for avoiding direct confrontation is a cultural behaviour pattern where confrontation is dangerous to the welfare of the community.

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38 See above, note 7, vol. 3 at 44.

39 See above, note 31 at 2 and following.

40 See above, note 7, vol. 3, reports that Native peoples in Canada are made up of eleven major language groups, seven cultural areas; and, see above, note 26, 58 dialects within the language groups.

41 See above, note 31 at 4 and following.

42 Ibid. at 5.

The testimony of Bernard Francis[43] is replete with illustrations of misunderstandings, language intimidation and manipulation of the Native before the court. Much of the communication problem is the result of how Natives see the environment, how they respond and how they conceptualize language. For example:

> Q. Were there some situations where precise answers were not really capable of being given in – Micmac?
>
> A. Yes, how Micmac people perceive time. Now the time is equally divided in the Micmac world according to the position of the sun. Now if you have a Micmac person being examined or cross-examined on the witness stand, the lawyer might say "Well, did you see this – this incident happen at – at seven o'clock in the morning?" And the Native person would answer to me "wejkwapniaq" which means the sun has just risen. And so I would turn around and give the answer . . . the Prosecutor would not being satisfied with this, would say "but was it seven o'clock in the morning?" And the native person would say ". . . the sun had just risen." And simply because seven o'clock . . . in the summer and seven o'clock . . . in the winter are different in the sense that the sun rises at different times. So he would have difficulty in answering.[44]

There is no doubt that the Natives referred to by Rupert Ross, Judge Little and Judge Coutu[45] reside in relatively remote areas of Canada and have limited contact with non-native Canadians or opportunities for non-native education. However, the lack of fluency in either of the official languages is not unique to these areas or persons. Mr. Francis, 39 years of age, grew up and attended early school on a reserve, and later a school off the reserve, on the outskirts of a larger industrial urban area. He described the quality of his education this way:

> [W]e spoke Micmac but the lady who was the instructor spoke English . . . they (other native students) started dropping off after the first grade . . . some got left behind because of the language problem . . . couldn't ask for help at home because their parents weren't also speakers of English . . . we didn't seem to have difficulty with mathematics or sciences, but when it came to writing essays or paragraphs . . . we always had difficulty because they came

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43 See above, note 1. Mr. Francis was thoroughly examined by the Inquiry counsel, counsel for the Nova Scotia Attorney General and all the parties concerning his experiences as a Native court worker in the Province. Mr. Francis is an educational specialist and teaches language fluency credit courses at the beginning, intermediate and advanced levels. The transcript covers more than 200 pages.

44 Ibid. at 3937. See above, note 33 for further references to conceptual difficulties between the native and non-native language.

45 See above, note 31 and 34.

> out so funny. . . . It's just the way that Micmac is structured. . . . You're able to make a complete statement and a complete sentence which would have your subject, your predicate, and your object in one word. So the English language we always found cumbersome because it had to use a half a dozen words to express a complete thought. And those half a dozen words sometimes would be jumbled . . . which would make perfect sense to us but would make no sense or would make funny sense . . . to a non-native. The sentence structure of the Micmac language is so different that when you're learning the English language, you tend to carry over your syntax on to the English language.[46]

On the face of it, the Native who speaks some English likely has little understanding of the court process and what he or she should do in court. Again, Mr. Francis addressed what happens to the Native attempting to respond to the court process:

> It was my experience that Native people were just pleading guilty to things they just didn't understand.
>
> I noticed that . . . they were very shy in a courtroom and they felt like this was a spotlight and they didn't like to be there. And they wanted to get out of there as quick as they possibly could and . . . they would plead guilty to charges they simply didn't understand. . . . [T]hey found it difficult to understand that there was a big difference between common assault and assault causing bodily harm. . . . [T]hey thought they would get a small fine or even a short term of imprisonment and they would settle for that just to get away from that.
>
> [The judge sentenced her] to ten or fifteen dollar fine or in default, ten days in gaol. . . . [S]he didn't understand what that meant . . . she thought that she was being fined . . . plus ten days in gaol because she didn't understand what "default" meant and before I could say anything to her she had already jumped up and called the Judge a knuckle-head and she ended up in gaol for ten days [for contempt].[47]

Mr. Francis testified to other misunderstandings. The use of simple words may be misleading to Natives. For example, in the Micmac language, "we" has two meanings – inclusive when you include the person you are talking to, but exclusive when you exclude the person you are talking to. If the Judge uses "we" in the sense that "we'll have to do something about this," the Native interprets that to mean that the Judge will include the accused in the decision-making. The Native talks more than he or she may normally do, or should. As a result, the Native tells what happened, pleads guilty and is sentenced, a result that the accused did not anticipate when holding the conversation with the Judge.[48] A second problem arises when the

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46 See above, note 1 at 3897-3915.

47 Ibid. at 3921, 3926, 3929.

48 Ibid. at 3932-3933.

prosecutor, being dissatisfied with an answer from a Native witness, would continue to ask the question, changing a word here or there. The witness, realizing that the answer was not what the prosecutor wanted, would change the answer until the prosecutor heard the desired response.[49] The result would be conflicting statements or answers from the witness, and following the usual method of examination, when the desired answer came forth, the implication would be that this was the correct answer.

It is important for the Micmac, and presumably for other Native persons, to be perceived as being able to speak English. If a person can answer simple, informal questions in English, he or she is presumed to understand the language. And, when asked by the Commission if the lack of understanding of the English language caused embarrassment or contributed to the discomfort of the Native before the Court, Mr. Francis responded:

> [I]t was embarrassing for them because a lot of people . . . would try to come across as people who spoke the English language well. – I've noticed this attitude over the years that Native people who speak English somewhat or speak it well, are very – and also speak Micmac well, are very proud of the fact that they . . . speak the English language because we've been made to believe over the years that in order to be educated and intelligent you have to be facilitated in the English language. And so that made them proud. It's like saying "yes, I speak English well as a Micmac person, therefore, I must be smart."[50]

There are further examples associated with dialects and the use of objects. It should not be presumed that there are no local linguistic variations within a Native language any more than within any other language. Some variations depend, for example, on the purpose for which certain objects are used. Mr. Francis points out that when the federal government began their centralization program in the 1940s, they brought together Native groups of common culture but whose individual groups had developed their own variations of the language. He used a bus to illustrate. On one reserve close to an urban area, the bus is an inanimate object because of the lack of importance it plays in their everyday life – they can walk to town so the bus is inanimate. Whereas on another reserve, the bus is animate because it is used

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49 Ibid. at 3934.

50 Ibid. at 3941-3942, 4004, 4082-4085.

regularly to carry people 30 miles to town. This creates a problem in the courtroom for the Native with marginal knowledge of the English language.[51]

The issue of understanding and a fair defence was brought sharply into focus in the 1991 murder trial of a Micmac woman. Defence counsel expressed shock when it became known that she did not understand many of the things counsel said, as counsel had "extensive conversation with Ms. Clair, and he believed she understood every word he said." At the voir dire hearing to deal with the communication problems, counsel explained that "the Micmac language has no prepositions, just suffixes. So, phrases like 'in the bed' and 'on the bed' can be indistinguishable." The result was that during cross-examination, questions were asked of Mr. Francis, who translated them into Micmac, and Ms. Clair answered in English.[52]

The Legislative Authority to Overcome the Difficulty

> [I]t is fundamental for the exercise of justice that the accused knows exactly all of the parts of the evidence presented against him, whether it is French, English, or even a native tongue. . . . Language was cited as a barrier to understanding at every turn of the justice system. . . . [I]t is recommended that . . . accused persons be informed that they may use their mother tongues in addressing a court and that interpreters will be provided.[53]

The Parliament of Canada has formally recognized the special historic status of Native peoples and has, within its laws, provided the direction and opportunity for the Native to be granted the opportunity for a fair hearing. The authority for the judiciary to ensure that the Native person, both young and adult, before the court, is heard and understood in a fair and judicious manner, exists in law.

Among other freedoms and rights, the *Charter* gives all Canadians the fundamental freedom of thought, belief, opinion, expression and association,[54] and the right to life, liberty, security of the

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51 Ibid. at 3960-3962.

52 "Ruling allows Micmac interpreter" *Halifax Mail-Star* (17 October 1991). Defence counsel Mr. Joel Pink conceded that the interpreter hampered the free flow of testimony during cross-examination, but without the interpreter, there would have been a danger that Ms. Clair would not have received a fair trial.

53 See above, note 10, *Reports on the National Conference* at 26, 29 and 47.

54 See above, note 6, the *Charter*, section 2.

person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[55] Of note are sections 10 and 11:

> 10. Everyone has the right on arrest or detention
> (a) to be informed promptly of the reasons therefore;
> (b) to retain and instruct counsel without delay and to be informed of that right;
>
> 11. Any person charged with an offence has the right
> (a) to be informed without reasonable delay of the specific offence;
> (b) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

From the point of view of understanding the law, section 14 of the *Charter* unequivocally states that any person "in any proceeding who does not understand or speak the language in which the proceedings are conducted . . . has the right to the assistance of an interpreter." Section 15 emphasizes the need for a linguistically fair trial:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Charter* has ensured the preservation of the two official languages in Canada. It has also addressed the linguistic rights of all Canadians including Native peoples. For example, in addition to section 14, section 25 prevents the application of certain rights and freedoms from abrogating or derogating any aboriginal, treaty or other rights or freedoms of Native peoples including those recognized by Royal Proclamation of 1763. Land claims settlements, currently a major area of activity, are only one issue recognized under this section. The importance of maintaining the mosaic of Canadian culture, including the recognition that Native persons stand on equal cultural footing with other Canadians, is emphasized by section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

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55 Ibid., section 7. The principles of fundamental justice include the right to be heard before a fair and impartial tribunal. The right to be heard implies that the accused is reasonably conversant with the language being used, that he or she knows the words and what they mean, so that he or she may fairly respond or give an answer. Inherent in the principle is the requirement for the court or tribunal to make sure that the person is given a fair hearing with all that that implies.

The principles espoused in the *Charter* are not new to Canada. The *Canadian Bill of Rights*[56] also addresses discrimination,[57] the courts[58] and interpreters.[59] Although the *Bill of Rights* continues to be good law, where there is a dispute with respect to a similarly drafted provision of the *Charter*, the courts may overrule the *Bill of Rights* and apply the *Charter* provision.[60]

The *Young Offenders Act*[61] regulates the criminal justice procedures for persons between 12 and 18 years of age. It has a significant role to play in assisting the young Native before the court. It espouses a policy of personal accountability and specific legal protections and has been described as a rights-oriented statute modelled on the criminal justice system.[62] Particularly significant is the role of the youth court judiciary. It puts the judiciary in the position of protector, directly or indirectly, of the procedures affecting the "rights" of the young person, from the pre-trial investigation to the completion of any disposition imposed by the court. The youth court judge has a special role to play, in addition to the statutory duties, where the alleged young offender is a Native. There is a disproportionate percentage of young Natives in the justice system, and if the trend continues, this means a continuing abnormally high percentage of young persons coming before the court whose special needs must be recognized and protected.[63] Secondly, given the cultural and linguistic difficulties noted earlier, the provisions of the *Young Offenders Act* related to rights and a fair hearing take on added significance.

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56 See above, note 2.
57 Ibid., s. 1.
58 Ibid., s. 2.
59 Ibid.
60 See, for example, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *R. v. Therens*, [1985] 1 S.C.R. 613.
61 See above, note 6.
62 P. Platt, *Young Offenders Law in Canada* (Toronto: Butterworths, 1989).
63 See above, note 27, and note 18, c. 15 entitled "Young Offenders." The Inquiry points out that the proportion of young persons in the justice system is even higher than that of adults (at 549), and that the *Young Offenders Act*, as it is being implemented, is not serving Aboriginal youths well, and that a more punitive approach has been adopted toward young offenders in Manitoba. As a result, more Aboriginal youths are being incarcerated than under the repealed *Juvenile Delinquents Act* (at 557). There is no reason to believe that the situation is different in other provinces.

What are these provisions? The Declaration of Principles[64] sets the tone for the application of the Act. It establishes that young persons have special needs and require guidance and assistance because of their level of development and maturity,[65] and that the young person has special guarantees[66] of their rights. The Act states that the *Charter of Rights and Freedoms* and the *Bill of Rights* apply to young persons, specifically the right to be heard in the processes that lead to decisions affecting them, and the right to be informed of their rights and freedoms.[67] The Act requires the Principles to be liberally construed in their application.[68]

The young person has the right to be represented at any stage of proceedings against him or her,[69] and this may be by counsel[70] or a suitable adult when the youth does not have counsel.[71] Counsel is considered so essential to the young person that if the young person is unable to obtain his own counsel, the youth court can direct the Attorney General to provide counsel.[72] When the young person first appears, the court is charged with making certain that the youth understands what is being asked of him and the procedures:

> 12. (1) Where a young person against whom an information is laid first appears before a youth court judge or a justice, *the judge or justice shall*
> (a) *cause the information to be read to him*; and
> (b) where the young person is not represented by counsel, inform him of his right to be so represented.

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64 See the *Bill of Rights*, above, note 2, s. 3.

65 *Young Offenders Act*, above, note 6, s. 3(1)(c).

66 Ibid., s. 3(1)(e).

67 Ibid., s. 3(1)(g).

68 Ibid., s. 3(2).

69 Ibid., s. 11(1). See above, note 18. The Manitoba Inquiry Report recommends that s. 54(4) of the *Young Offenders Act* be amended to remove the provision which allows young offenders to waive their right to have a parent or guardian present during questioning by the police. In *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, [1990] 6 W.W.R. 152, Supreme Court of Canada Chief Justice Dickson rejected the admissibility of a statement made to the police without parental or guardian supervision.

70 *Young Offenders Act*, above, note 6, s. 11(2).

71 Ibid., s. 11(2) and (7). If the court believes that there is a conflict between the adult and the child or it is in the best interests of the young person to have his or her own counsel, the court is to ensure that the person has his or her own counsel – s. 11(8).

72 Ibid., s. 11(4) and (5).

. . .

(3) Where a young person is not represented in youth court by counsel, the youth court shall, before accepting a plea,

(a) *satisfy itself that the young person understands the charge against him*; and

(b) *explain to the young person that he may plead guilty or not guilty to the charge*.

(4) *Where the youth court is not satisfied that a young person understands the charge against him* . . . the court shall enter a plea of not guilty on behalf of the young person and shall proceed with the trial. [Emphasis added.]

There are other procedures during the attendance of the youth where the court has the opportunity to ensure that the young person is given the opportunity to understand and make his or her circumstance known to the court. For example, section 19(1) of the *Young Offenders Act* requires the court, on a guilty plea, to decide if the "facts" of the offence support the guilty plea: "Where a young person pleads guilty . . . and the youth court is satisfied the facts support the charge, the court shall find . . .", but "*where a court judge is not satisfied that the facts support the charge to which the young person has pled guilty*, the matter is to be set over for trial."[73] [Emphasis added.] And, section 20(6) has some application, in the sense that the youth court is required, when sentencing the young offender, to state reasons for the disposition. Because the disposition is based on the facts of the offence, the Declaration of Principles,[74] and the principles of sentencing, the court, of necessity, is obligated to consider the cultural background of the young offender if the disposition is to be tailored towards the needs of the particular young person as the Principles state.

Taken together, these statutes[75] are intended and should clear the way for the young Native to obtain a fair hearing before the court:

1. to have his special needs considered in any action taken against him;

2. not to be deprived of life, liberty or security except by due process based on the principles of fundamental justice;

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73 See *R. v. C. (G.E.G.)* (1986), 72 N.S.R. (2d) 267, 173 A.P.R. 267 at 268 (C.A.).

74 See above, note 2, and *R. v. G. (K.)* (1986), 48 Alta. L.R. (2d) 1 (C.A.).

75 See above, note 2.

3. to equal protection from discrimination when before the law or under the law;

4. if detained or arrested, to be informed promptly of the reason for the detention or the arrest, to be advised of and given the opportunity, to retain counsel;

5. to be presumed innocent until proven otherwise in a fair, public and impartial trial;

6. to be recognized as part of the multicultural heritage of Canada and to have his cultural heritage preserved and enhanced;[76]

7. to any rights or freedoms recognized in 1763 with the signing of the Royal Proclamation;[77]

8. to have interpreters where the accused does not understand nor speak the language of the court.

A Solution – At Least Partially

> It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system.[78]

The intention of Parliament, supported by the courts, is to provide for equality before the court. Where equality is not possible at any stage of the process because of language difficulties, the oppor-

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76 This idea is not new to Canadian courts. Evidence of the recognition, preservation and enhancement of Native culture is found in *R. (A.N.) v. W. (L.J.)* (1984), 36 R.F.L. (2d) 1 (S.C.C.); *Children's Aid Society of Huron (County) v. Bunn* (1975), 24 R.F.L. 187 (Ont. H.C.); N.K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law: Selected Marriage and Adoption Cases" [1984] 4 C.N.L.R. 1 (Paper presented to the XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, August 1983).

77 The *Charter*, s. 25, points out that land claims are not the only issue to be protected by the Proclamation. The other point to remember concerning treaties and the Proclamation is that not all treaties with the Native peoples were the same: see *R. v. Denny*, above, note 9, and note 18, vol. 1 at 56-63.

78 *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 at 499. See also *Assn. of Parents for Fairness in Education, Grand Falls Dist. 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549.

tunity is there through interpreters, for the accused to participate in and understand the process. There can be no other conclusion because to view the statutes and the legal precedents in any other way would be discriminatory in itself, if not in fact, at least in principle.[79]

Interpreters are not alien to the trial courts.[80] They are used to accommodate the official languages, the deaf and the unsighted. They are used where an accused speaks another language. They are permitted by law and provided for as a fundamental right. The use of interpreters for Natives in court has been the subject of longstanding debate and recommendation at the highest political level, as noted throughout this article. The Reports on the National and Federal – Provincial conferences on Native Peoples and the Criminal Justice System[81] stated:

> As a general rule we [the study group] insist that people must be provided with interpretation and translation facilities from properly qualified personnel in all dealings with legal agencies where it is essential the person understand what is happening.

These conferences were attended by Native groups and provincial and federal senior government justice officials, generally the Attorney Generals or Solicitor Generals. They recommended that adequate interpretative services be provided where necessary, and significantly recorded:

> [I]t frequently happens that natives are not familiar with one or the other of the two official languages before the court.
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> . . .

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79 Slattery, above, note 17, suggests that the Supreme Court of Canada has tended to look at the *Charter* cases from a legal interpretation point of view and not necessarily from a sociological perspective, but in *R. v. Simon*, above, note 9 at 402, Chief Justice Dickson, although speaking to a possession of firearms appeal involving hunting and treaty issues, observed that "Such an interpretation accords with the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians." Given the trend in the Supreme Court decisions such as *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Tremblay c. Daigle*, [1989] 2 S.C.R. 530; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; and above, note 78, toward meeting current sociological and legal issues, it is likely that appeals based on breaches of fundamental justice will be treated in a like manner.

80 See *Phipson on Evidence*, 12th ed. (London: Sweet & Maxwell, 1976) at 618-619.

81 See above, note 10.

> There is little doubt . . . that a fair number, a substantial number, of native Canadians have been convicted of offences because of the inability of the interpreter to communicate to them protections that are presently provided under the criminal laws of Canada and we won't get these interpreters unless we are prepared to educate them, to train them and to pay them.[82]

Interpreters, at least when translating Native languages, require special expertise because of the construction and use of the language relative to non-native language, as discussed earlier. Her Honour Judge J.P. Little, the presiding Youth Court Judge in northwestern Ontario, observed:

> I consider it essential that an interpreter be scheduled to attend every northern court. If possible, we use an interpreter from the community, who will be familiar with the local dialect. The interpreter is the pivot upon which a successful court trip depends. If the interpreter is not fluent in both languages (English and Ojibwa or English and Oji-Cree, or English and Cree depending on location) the court cannot function. Fluency is difficult because there are not translations for many English concepts e.g. innocent and guilty. Children who do not attend school regularly have very limited English language skills.[83]

The court must, as a preliminary step, be satisfied with how the interpreter will function: a word by word translation or something else. Verbatim translations are the standard practice, but where a witness is known to use different words, or have multiple understandings for the same word or concept, or there is the possibility of misunderstanding, the interpreter may need to enter into a discussion with the witness in order to ferret out what the witness understands of the question or comment, and to ensure that the response is in relation to the inquiry.[84]

> A qualified interpreter should be in attendance at every sitting of the court in an Aboriginal community. It is important to allow the interpreter to discuss a question and answer with a witness, as it is often not possible to literally translate a question or answer from English to an Aboriginal language, or to give a simple "yes" or "no" answer.[85]

The purpose of the interpreting is twofold: to ensure that the accused is given the opportunity to be understood, to make his case known, and, for the court to clearly understand the position and

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82 Ibid. at 31 and 47.

83 See above, note 34 at 2-3.

84 The inherent jurisdiction of the court allows for this course to be taken: *Re Trepca Mines Ltd.*, [1960] 1 W.L.R. 24 and *In the Estate of Fuld, Hartley v. Fuld*, [1965] 2 All E.R. 653.

85 See above, note 18 at 371.

evidence of the accused and to make its own processes clear. It is in the interest of the court and basic justice, as well as its duty, to ensure that the law is properly understood and applied. Without clarity and understanding by the prosecution and the defence, this interest is not met. It matters little if the accused is an adult or young person, or if the accused communicates in an official language or some other language. The principle is the same.

The Commissioners at the Marshall Inquiry recommended that all courts have the services of an on-call Native interpreter for use at the request of the accused or witnesses (and presumably the court) where needed. Their final report perhaps best sums up the essence of the needs of the accused and the inherent value of a fair hearing:

> Several Micmac witnesses . . . testified before us, so we were able to observe their reaction to the court-like process of the Inquiry.
>
> When he appeared before this Royal Commission, Marshall gave his evidence in the Micmac language with the assistance of an interpreter. It is obvious the interpreter helped him speak more freely and eased some of the tensions associated with the examination and cross-examination by lawyers, and the questioning of the judges. Since he understands English, the questions were asked in English and Marshall responded to the interpreter in Micmac. In a subtle way, what appeared to be a conversation between the witness and the translator replaced the direct and potentially antagonistic interchange between lawyer and witness. Marshall's ability to express himself freely in his native language introduced a comfort level to the proceedings we sense was absent in his other court appearances. This had a positive effect in obtaining the best evidence possible from the witness.[86]

86 See above, note 7, vol. 1 at 171-172.

Sharon Culbertson

LEGITIMATION AND RELATIVE AUTONOMY: THE DONALD MARSHALL, JR., CASE IN RETROSPECT*

by
H. Archibald Kaiser

The author analyzes the response of the Canadian justice system to the wrongful imprisonment of Donald Marshall, Jr., jailed for eleven years for a murder he did not commit. The author adopts a structuralist conflict model of law, under which the legal system generally operates to support the dominant group but can occasionally function in an autonomous fashion against the interests of the ruling class. Using this model, he reviews the various commissions and inquiries surrounding the Marshall case for signs of autonomy. He sees some hope in the Royal Commission report of January 1990, which found that Donald Marshall's wrongful conviction and incarceration were influenced by the fact that he is a Micmac and that a two-tier system of justice exists in Nova Scotia. The report of the Commission inquiring into the adequacy of compensation was less promising since it rejected a derivative claim on behalf of the Micmac nation. Similarly disappointing was the Supreme Court of Canada judgement which determined the appellate judges who had made disparaging comments concerning Marshall should not be compelled to testify. Finally, the Inquiry Committee of the Canadian Judicial Council criticized but did not recommend removal from office of these judges who, while allowing his appeal, had blamed Marshall for the miscarriage of justice. Throughout, the reports are a mixture of criticism and legitimation. The author concludes that, although systemic biases remain in place, the reports contain some useful tools for emancipation.

La légitimation et l'autonomie relative: retour à l'affaire Donald Marshall, Jr.

Le présent article analyse la réaction du système judiciaire canadien à l'emprisonnement illégal de Donald Marshall, Jr.,

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qui a été incarcéré pendant onze ans pour un meurtre qu'il n'avait pas commis. L'auteur voit le droit selon un modèle conflictuel et structuraliste, où le système juridique fonctionne généralement pour soutenir le groupe dominant mais agit parfois de façon autonome contre les intérêts de la classe dirigeante. C'est à la lumière de ce modèle qu'il examine l'histoire des diverses commissions et enquêtes sur l'affaire Marshall, dans une tentative d'y trouver des signes d'autonomie. Il voit une lueur d'espoir dans le rapport de la Commission royale d'enquête de janvier 1990, qui a établi que la condamnation injustifiée et l'emprisonnement illégal de Marshall ont été dus en partie au fait que celui-ci est Micmac. Le rapport de la Commission enquêtant sur la suffisance de la compensation, par contre, a été moins prometteur, car il a rejeté une demande dérivée au nom de la nation micmac. On peut trouver tout aussi décevant le jugement de la Cour suprême du Canada, qui a décidé que les juges à la Cour d'appel qui avaient fait des remarques désobligeantes à l'endroit de Marshall n'étaient pas obligés de témoigner. Dernier Acte: le Comité d'enquête du Conseil canadien de la magistrature n'a pas recommandé la destitution de ces juges pour avoir, tout en faisant droit à son appel, trouvé Marshall lui-même responsable de l'erreur judiciaire. Tous ces rapports offrent un mélange de critiques et de légitimation. Le présent auteur conclut que, malgré la persistance de préjugés systémiques, les rapports contiennent des outils pouvant servir à l'émancipation.

You never can tell how close you are,
It might be never, when it seems afar.
I pray and cry every nite. I still love you Mom,
No matter what.
I'll stick to the fight, when I'm hardest hit,
So I could show this world, I didn't quit.
Jr. Marshall No. 1977[1]

I. Introduction to an Unconventional Examination of an Unprecedented Case

These moving lines end a poem ("I Won't Quit") written by prisoner Donald Marshall, Jr., inmate No. 1977 in Dorchester Penitentiary. They evince the heroic struggle of a wrongfully convicted man against the obstinacy, blindness and self-righteousness of a criminal justice system that had imprisoned him for nearly eleven years. Mr. Marshall was obviously feeling the weight of his quest for justice. What he could not have known at the time is the extent and intensity of juridical activity which his case would unleash. This article attempts to make some sense of the deluge which would begin to fall on the Canadian criminal justice system within months of the release of this then relatively obscure man who stood convicted of second degree murder.

In such a brief essay, it is necessary to be selective concerning the events which will be analyzed. In the longer run, the most meaningful research on the Marshall case will probably involve

an assessment of the actual changes in the foundations of Canadian criminal justice as experienced by accused persons. These projects will comprise a critique of the declarations of judicial and non-judicial actors[2] and a dissection of what follows to see if any real achievements have been wrought. However, this paper will focus on the relative firmament of four major products of judicial attention, as either starting points or mileposts in what may ultimately be decades of efforts generated by the mistreatment of one person: *The Royal Commission on the Donald Marshall, Jr., Prosecution*[3], *The Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr.*[4], the decision of the Supreme Court of Canada in *MacKeigan* v. *Hickman*[5] and the *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia, August, 1990.*[6]

Following a condensed review of the major events of the case, the paper will discuss the problem of finding a satisfactory analytical perspective for such complicated proceedings and will explain why the author has chosen a particular outlook. Next, some general commentary will be presented concerning the history and typical use of Royal Commissions, with critical attention then focusing on the first two Commissions noted above. Using *MacKeigan*, judicial independence and immunity will be commented upon. The discussion will continue with a critique of the Canadian Judicial Council decision.

It should be stated now that although conventional judicial foci have been selected, this article does not proceed from the usual assumptions about the role of law in Canadian society. Instead, a variety of conflict theory is employed which posits that even in a class-biased legal system generally dedicated to preserving the control of the ruling elite, the state and its criminal justice apparatus are

[2] The author has previously commented upon some of the earliest responses to the Report of the Marshall Commission by the Government of Nova Scotia, the Barristers' Society, the R.C.M.P., the Nova Scotia Legislature, the Micmac Nation, the Black Community and Donald Marshall, Jr. and his family. See H. Archibald Kaiser, "The Aftermath of the Marshall Commission: A Preliminary Opinion" (1990), 13(1) *Dalhousie L.J.* 364-375.

[3] T. A. Hickman, L. A. Poitras and G. T. Evans, *Royal Commission on the Donald Marshall, Jr., Prosecution*, (Province of Nova Scotia, 1989). Volume 1 contains the *Commissioners' Report, Findings and Recommendations*. The six other volumes include five *Research Studies* and the *Edited Transcript of Proceedings* of a *Consultative Conference, November 24-26, 1988* (Volume 7).

[4] G. T. Evans, *Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr., Report of the Commissioner, June, 1990* (Province of Nova Scotia, 1990).

[5] *MacKeigan* v. *Hickman* (1989), 61 *D.L.R.* (4th) 688.

able to act somewhat autonomously of hegemonic interests. Each of the four decisions is surveyed with a view to establishing its democratic and egalitarian potential. The paper thus has a subversive intention. The author is determined to find the weak spots in the strong armour of legitimation which these judges have been busy both creating and perhaps unintentionally dismantling in the face of a case which shakes the trust and complacency of liberal ideology.

II. 1971-1990: Nineteen Years in an Epochal Case

For many who followed the Marshall case closely most of the following events will be familiar, although some memory refreshment may be facilitated. For the foreign or other uninitiated reader, it will be obvious that a short summary does not adequately explain such a complex and protracted story, in which case resort should be had to the principal source of this account, the "Factual Findings" of the Royal Commission on the Donald Marshall, Jr. Prosecution.[7]

Near midnight on May 28, 1971, Donald Marshall, Jr., a 17-year old Micmac, and his companion Sandy Seale, a 17-year old Black, were walking through a park ironically adjacent to the court house in Sydney, Nova Scotia. There they met two other men, Roy Ebsary, who was intoxicated and had a reputation for violence, and James MacNeil. After a brief conversation in which the Commission found that Marshall or Seale requested money[8], Seale was stabbed by Ebsary in the stomach and died within 24 hours. Marshall was also attacked by Ebsary, but he escaped with a superficial wound. Following an incompetent investigation, then Sergeant of Detectives John MacIntyre determined that Marshall had stabbed Seale and Marshall was charged with murder on June 4, 1971. Two supposed eyewitnesses, both teenagers, gave evidence at Marshall's trial which seemed to confirm MacIntyre's suspicion. The Commission found that their perjured testimony came about as a result of suggestions and oppressive tactics by MacIntyre.[9] Other actors were held responsible by the Commission for Marshall's eventual conviction on November 5, 1971: Crown and defence counsel failed to discharge their obligations and the Trial Judge made several serious errors of law.

Ten days after the conviction was entered, Ebsary's companion recanted his trial testimony and confirmed that Ebsary killed Seale. An early and inept reinvestigation by the R.C.M.P. following this development merely confirmed the result of the trial. At Marshall's first appeal in 1971, neither Crown nor defence were advised of MacNeil's volte-face. Nor was the Court of Appeal aware of the erroneous rulings by the trial judge. In the result Marshall's conviction was upheld.

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[7] *Supra* note 3, Volume 1, *Commissioner's Report*, 15-141. See also the *Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations 1989*, 2-8 or *supra* note 4, 9-14.

[8] *Supra* note 3, Volume 1, 25.

[9] *Supra* note 4, 10.

The case periodically reappeared in the ensuing years, such as in 1974 when Ebsary's daughter revealed that she had seen her father clean a bloody knife on the night of the killing, but no real action was taken on this or any other information until 1981. By then, Marshall had heard of Ebsary's confession to a friend and at his new lawyer's urging another reinvestigation was commenced, this time painstakingly and mainly professionally.

As a result of this fresh look at the case, the Justice Minister referred the matter to the Nova Scotia Court of Appeal for hearing and determination. At the Court of Appeal, Marshall faced a panel which included a justice who had been Attorney-General at the time of his conviction and first appeal. The Court was confined by the Minister's Reference to the narrow question of whether Marshall was guilty or innocent. In its decision[10] overturning Marshall's conviction, the Court harshly criticized Marshall while absolving the criminal justice system from blame, a position which was forcefully condemned by the Commission.

Marshall was meagrely compensated in 1984 in a process that was unfair and critically influenced by the stinging obiter comments of the Court of Appeal.[11] Ebsary, after three trials, was finally convicted in 1985 of the Seale killing and eventually sentenced to one year in prison. One month after the Supreme Court of Canada turned down Ebsary's leave application in September, 1986, the Government of Nova Scotia appointed the Royal Commission on the Donald Marshall, Jr., Prosecution.

The Commission thoroughly inquired into the events surrounding the death of Seale and conviction of Marshall, followed the case through the Court of Appeal Reference in 1982 and assessed the compensation debacle of 1984. Indeed, the Commission was so troubled by the language of the Court of Appeal that it took the unprecedented step of issuing Orders to Attend to the five Justices on the panel in an effort to comprehend this controversial decision. The Supreme Court of Canada in *MacKeigan* v. *Hickman* (discussed *infra*) eventually sustained the judges' refusal to testify. The Commission also examined the Marshall case against the handling of other investigations involving prominent politicians, convened a forum on Native rights, racism and the role of the Crown prosecutor and commissioned five separate research projects on specific issues including racial discrimination in the criminal justice system. Overall, 17,000 pages of transcript were accumulated over 89 days of public hearings and several millions of dollars were spent.

The final Report of the Commissioners released in January, 1990 was a ringing indictment of the whole criminal justice system, concluding that it had "failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to — and even beyond — his acquittal. . . . in 1983" and that "the fact that Marshall was a Native was a factor in his wrongful conviction and impri-

[10] *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286.

[11] *Supra*, note 3, Volume 1, 40.

sonment."[12] The Commission also offered 82 Recommendations for . . . "changes we believe will make such a miscarriage far less likely to occur in the future",[13] and which were intended "to remedy the shortcomings [in the system of administration of criminal justice in Nova Scotia] and to promote a system . . . which responds appropriately and fairly to all cases."[14]

The 1982 Reference Decision was particularly denounced by the Commission. Among other things the Court was found to have made a "serious and fundamental error" in blaming Marshall, to have "selectively used the evidence" to reach its conclusion and to have defended "the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary."[15]

By March 22, 1990, one of the former Marshall Commissioners (The Honourable Gregory T. Evans, Q.C.) was appointed to a new Commission of Inquiry, this time to determine the adequacy of compensation paid to Donald Marshall, Jr. After another ground-breaking and thorough inquiry the Commissioner reported in June, 1990, recommending increased compensation for Marshall and his parents, who had previously been largely ignored despite their experience of their son's wrongful conviction.

After a complaint to the Canadian Judicial Council by the Attorney General of Nova Scotia in February, 1990 which cited the condemnatory Royal Commission findings concerning the 1982 Reference Court, another unusual chapter of the Marshall epic was opened. A five person Inquiry Committee was directed "to inquire, and to recommend to Council, whether the judges named by the Attorney-General should be removed from office."[16] After public hearings and submissions, the Inquiry Committee finally decided that, although the judges need not be removed from office, their decision could not be condoned or excused for its denunciation of Marshall[17] and that the Court committed legal error when it "so seriously mischaracterized the evidence before it."[18]

After so many untraditional proceedings, the volume of material which has been generated for jurists and the general public has become mountainous and will no doubt prove influential, to one degree or another, for decades. What follows now is an analysis and critique of these at times quite bewildering events. One hopes that the doors of perception will be opened or at least jarred.

III. Trying to Make Sense of It All

It would be relatively easy and not wholly unprofitable to examine the Marshall case, or the major judicial events which are the subject

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[12] *Id.*, 15.
[13] *Id.*, XIV.
[14] *Supra* note 7, *Digest*, 18.
[15] *Supra* note 3, Volume 1, 116.
[16] *Supra* note 6, 2.
[17] *Id.*, 136.
[18] *Id.*, 35.

of this review, from a very narrow perspective. Many serious issues spring to mind. Are the views of the Royal Commission on Crown disclosure sound in light of the volume of cases confronted by the criminal courts? Should the Commission have advocated the establishment of a Director of Public Prosecutions? And on it goes. Such specific questions should certainly be addressed, although little effort will be made to deal with them herein. It is probably a fair prediction that other discussions in the academic and professional law journals will proceed in this fashion, but missing from many will be an explicit statement of the concept of the nature of law and society which the writer is employing. To adopt Barber's observation more fittingly to the lawyer's stage, each lawyer carries in his or her head one or more "models" of society and humanity which greatly influences what is looked for, what is seen and what is done with observations by way of fitting them along with other facts, into a larger scheme of exploration.[19] "Only when such models are made explicit can the assumptions they contain be examined."[20]

In this author's view, most of the legal profession (including the judiciary) still approaches analysis from a consensus or functionalist perspective. That is, law is seen as adjusting and reconciling conflicting interests, an instrument which controls according to the requirements of the social order, in societies which are largely homogeneous, static and cohesive.[21] Law then promotes societal harmony and performs this vital function in a way which is independent of the interests of any particular or dominant group, given that society rests on the consensus of its members. Although this outlook is attractive in its separation of law from politics, a stance upon which the profession is usually keen to insist, it leaves lawyers in rather isolated territory compared to their would-be brothers and sisters in the sociology of law.

> The consensus model long held the stage. Today, however, it may be said that most writing in the sociology of law embraces a conflict perspective.[22]

The conflict model makes other assumptions, that society is constantly and ubiquitously subjected to changes and conflict, that every element in a society contributes to its change and that every society rests on constraints of some of its members by others.[23] Under the conflict umbrella are as many theorists as one would expect with such an ideologically charged notion of society and

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[19] Bernard Barber, "Resistance by Scientists to Scientific Discovery", in Robert B. Seidman, "Law and Development in Africa". Unpublished manuscript, University of Wisconsin, 1971, cited in William J. Chambliss, ed., "Introduction" in *Sociological Readings in the Conflict Perspective* (1973), 2.

[20] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984), 73.

[21] See Lloyd and Freeman, *Lloyd's Introduction to Jurisprudence*, (5th ed.), (1985), 570; or Lynn McDonald, *The Sociology of Law and Order* (1976), esp. Ch. 4, 91-137.

[22] *Id.*, *Lloyd's*, 570-71.

law. Wall has usefully provided some further specification of this broad category, citing three main positions in the field of critical criminology about the way in which the state functions: pluralist, instrumentalist and structuralist.[24]

For the pluralist, the state arbitrates disputes among competing groups, although power is dispersed and no one group is hegemonic. Indeed, conflict exists among these groups as they seek greater control, with the state using its strong popular base and its ability to express a common value system to ensure that a sense of societal balance is maintained. This school represents only a minor deviation from the basic consensus line.

Instrumentalists see a small ruling elite thoroughly controlling the use of state power, to the point where any appearance of state autonomy is just a mask to hide this ruling class domination. The key holders of positions in the justice system would be directly chosen from the dominant class and would apply the law in a way which crudely favours their ongoing supremacy, ensuring that the functions of the state in capital accumulation, legitimation and coercion are always discharged to sustain the status quo.

Structuralists concur that the legal system on balance works on behalf of the dominant group, but observe that it is able to function in a relatively autonomous fashion, not so neutrally as the pluralists would have it, but neither so obediently as in the stricter version of instrumentalism. There can be class conflict acted out in the state and the state also develops its own interests. While ensuring that the basic structure of capitalism is sustained, the state seems autonomous from the interests of those who are actually at the top. Indeed it requires this degree of autonomy as it basically provides a socio-political environment favouring the perpetuation of control by the elite. As Cotterrell has argued, one of the principal functions of the judiciary is to provide legitimation of government and political processes as an aspect of the wider function of legitimation of the social order.

> It can be said that as part of the state apparatus the judiciary must "earn" its privileged position in the hierarchy of state power including its relative independence from direct control by other arms of the state. It does so by making its contribution to maintenance of the stability of the social and political order, first, by providing legal frameworks and legal legitimacy for *government* and government acts and, secondly, by maintaining the integrity of the *legal order* itself — the ideological conditions upon which legal domination depends.[25]

In the sustaining of this legitimacy, groups can appropriate political debate and interfere somewhat with what would otherwise be the

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[24] Bob Wall, *The State, Criminal Justice Politics and the Nova Scotia Royal Commission on the Donald Marshall Jr. Prosecution*, unpublished M.A. Thesis, Saint Mary's University (1990), 166-170.

unalloyed ascendancy of the ruling class. The various judicial activities commented upon herein can be best elucidated within the structuralist variant of critical or conflict-based criminology. It is here that whatever progressive potential these events have can be harnessed.

Ratner, McMullan and Burtch[26] have developed the basic theory of relative autonomy as it relates to criminal justice in the Canadian state, providing that there are concentric circles of autonomy becoming more finely differentiated as one approaches the centre. At the outer ring, the criminal justice sector is generally oriented to protect capital, but it is not merely responsive to the interests of the bourgeoisie. It provides some outer limits to any intrusion upon capital, but the criminal justice system also facilitates or permits challenges to state power and provides an area of controversy over legal aid, prison and the security services, among other issues. Thereafter, one can examine the autonomy of state regions, for example the criminal justice sector and the revenue collection and allocation divisions. Other state agencies need the criminal justice system to enforce their rules, hence establishing its comparative autonomy.

Organizational components within the criminal justice system, such as the police, courts and corrections sections display varying and shifting degrees of relative autonomy from the simple class/state hegemony. While predominantly reinforcing state power and class dominance, one can find examples within each component where pressures from below moderate the movement toward capital legitimation, coercion and accumulation. Similarly, even within these organizational components, there may be displays of autonomous behaviour, for example, when police authorities claim certain spheres of investigation exclusively or when appeal courts establish a higher tariff for sentencing white-collar criminals. Finally, the inner ring of assertions of autonomy represents the organizational division of labour within specialized components, where there are opportunities for friction between, for example, members of the judiciary or corrections personnel.

It is contended that the umbrella of conflict theory and more particularly of relative autonomy has great explanatory potential *vis-a-vis* the Marshall-related decisions discussed herein. Ruling class interests have not been unequivocally supported by these events. Indeed, there is at times substantial divergence from such unhesitant buttressing of bourgeois hegemony. Through the Marshall case, the Canadian state has become "an arena in which its very autonomy can serve to promote democratization and reverse the class bias still evident throughout criminal justice."[27] Using this paradigm,

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[26] R.S. Ratner, John L. McMullan and Brian Burtch, "The Problems of Relative Autonomy and Criminal Justice in the Canadian State", in Ratner and McMullan, eds., *State Control: Criminal Justice Politics in Canada* (1987), 85-125.

[27] *Id.* 118.

four mile-posts in this long saga will be analyzed, with a special eye toward the potential for exploiting the democratic and egalitarian potential of each of the processes and results.

IV. Two Royal Commissions Later: A Few Signs of Hope

Commissions of inquiry are by now familiar creatures in most liberal democratic states. Their importance to Canadian government is evidenced by there having been so many over the years: in 1979, the Law Reform Commission of Canada noted that there had been over 400 since 1867.[28] Their roles typically include policy stimulation and advice (the advisory function) and investigation of the facts of a particular alleged problem or special event, usually regarding the functioning of government and often the executive specifically (the investigative function). Obviously many inquiries are called upon to discharge both functions and the two Commissions discussed in this paper are examples of this blending.

That the Marshall case demanded such careful attention was always obvious, at least to those not somehow implicated in the affair, as such miscarriages of justice are among "the gravest matters which can occupy the attention of a civilized society."[29] In cases of wrongful conviction, as issues "arousing intense public controversy, it is essential that the evil, if it exists, be exposed so that it may be rooted out"[30] (the investigative aspect) and recommendations made which will "prevent such tragedies from occurring again"[31] (the advisory responsibility).

To be effective, the inquiry must have guaranties of impartiality, sufficient funds, the ability to gather evidence widely and be publicly accessible.[32] The inquiry must also be starkly independent, especially where "the government that appoints a commission is also widely believed to be responsible for the very problems which the commission seeks to investigate."[33] There must be the ability "to reach beyond the superficial inquiry instituted by the government in response to public and international pressure"[34] and consequently the inquiry must be evaluated in terms of both process and the substance of the ensuing report.

Governments will always be fearful of the consequences of commission independence and will "seek ways for control to be

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[28] Law Reform Commission of Canada, Report 13, *Advisory and Investigatory Commissions* (1979), 1.

[29] Peter Ashman, "Compensation for Wrongful Imprisonment" (1986), 136 *New Law Journal* 497(2), 597, 498 (paraphrasing Cecil Clothier, Q.C.).

[30] Zeev Segal, "The Power to Probe into Matters of Vital Public Importance" (1984), 58 *Tulane L.Rev.*, 941, 942.

[31] *Supra* note 3, Volume 1, XII.

[32] See Kaoru Umino, "Investigating the Assassination of Benigno S. Aquino: Lessons form the Agrava Commission" (1986), 18 *Columbia Human Rights L.Rev.*, 169, 173.

[33] *Id.*, 172.

[34] *Id.*

exerted . . . through the granting of very limited powers . . . through very narrow terms of reference . . . through strict budgetary control. . . ."[35] Although the Law Reform Commission maintained in 1977 that these fears appeared to be ill-founded, the Commission may have been too reassuring, particularly as they observe that "such Commissions may, of course, generate political pressure of various kinds."[36] From the perspective of the relative autonomy that the state may be permitted to enjoy, it is clear that there is the potential for such pressures to reverberate rather too forcefully against bourgeois interests.

> The very subject of the controversy, as one of vital public importance, creates a demand for thorough investigation in order that the purity of public life may be preserved, confidence restored, and acceptable standards of public administration maintained.[37]

Although in the restoration of public confidence, the inquiry may be merely performing the vital legitimation function which capital requires, it may also be unleashing an unexpected torrent of criticism and political activity against a state which has behaved not only badly but worse and in a more unbridled way than its elite masters would have permitted. Out of this pushing of the boundaries of autonomy some genuinely progressive seeds may be planted. Can this be said to have occurred here?

A. The Royal Commission on the Donald Marshall, Jr., Prosecution

This Commission deserves to be considered effective, measured against conventional standards: it established the cause of the wrongful conviction, it fixed responsibility for the miscarriage of justice and it may be said to have reduced the potential for a recurrence.[38] Further, it accomplished these goals using a process which strikes one as being searching, well-funded, fair and reasonably accessible to the public.[39] Of course, both the process and the Report will have their detractors,[40] but the achievements and

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[35] Law Reform Commission of Canada, Working Paper 17, Administrative Law, *Commissions of Inquiry* (1977), 20.

[36] *Id.*

[37] *Supra* note 30, 943.

[38] Carl E. Sigley, "The Move Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and Other Matters of Vital Public Concern" (1986), 59 *Temple Law Quarterly*, 303, 307.

[39] 114 witnesses and 89 days of public hearings generated 16,390 pages of transcript evidence. A forum was held on native rights, racism and the role of Crown Prosecutor. Five separate research projects were commissioned on subjects such as discrimination against Blacks and Natives in the criminal justice system and the roles of the police, Crown Prosecutor and Attorney general. Many parties had publicly funded legal counsel. The proceedings were generally open to the public. *Supra* note 3, Volume 1, XII and XIII.

[40] For example, see Kaiser, *supra* note 2, or M.E. Turpel, "Further Travails of Canada's Human Rights Record: The Marshall Case", to be published in (1991), 2 *International J. of Canadian Studies*; or Bruce H. Wildsmith, "Getting at Racism: The Marshall Inquiry", to be published in (1991), 55 *Sask. L. Rev.*

potential of this Commission should be recognized in their political context.

A number of the findings and recommendations of the Commission demonstrate the thesis that the state, or better this organizational component, a Royal Commission composed of judges, has necessarily been accorded some autonomy by the ruling interest group. Indeed, the Commission in many ways has bitten the hand that fed it, even if it has not inflicted mortal wounds on the status quo. The Canadian economic and political structure has not been fundamentally altered which should give one pause before extolling the virtues of the Commissioners' Report overmuch. As was earlier argued by this author:

> . . . the Report largely avoids any confrontation with the dilemmas presented by a highly stratified society. Substantive equality and real social justice, outside the formalistic and ideologically bound world of the courts, are thereby early casualties.[41]

Further, as Professor Turpel has urged, the Report fails to forcefully come to grips with the full context of the case in its efforts to deal with the impact of Marshall's being Native on the manner in which the criminal justice system treated him:

> The political, ideological and cultural context of Mi'kmaq — Canadian relations and how they have been affected by the case was not considered by the Commissioners. Relatedly, the reasons for racism in the criminal justice system, especially from an historical perspective in Canada, were not explored in the Report.[42]

Nonetheless, the Report does contain factual findings and recommendations which have some "emancipatory potential"[43] and it is these cracks in the wall of legitimation which will be briefly commented upon herein.

Even if they fail to explore the issues fully, the Report acknowledges in its section on "Visible Minorities and the Criminal Justice System" that they are only dealing with part of the problem. The disappointment one feels with the Report is in the failure to extend the Commissioners' observation.

> We recognize that the root cause of much of the discrimination that Blacks and Natives complain about can be traced to social, political and economic structures, institutions and values that are not specifically part of the criminal justice system . . . the criminal justice system is simply one part of the broader social order.[44]

This explicit recognition of the systemic nature of the problems which Blacks and Natives face in their confrontations with the criminal justice system is tantalizingly echoed in other parts of the Report, dealing with "Administration of Criminal Justice", and why

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[41] Kaiser, *supra* note 2, 374.

[42] Turpel, *supra* note 40, 21-22 (of the author's manuscript).

[43] See Ratner, et al, *supra* note 26, 158.

[44] *Supra* note 3, Volume 1, 150.

"the justice system broke down."[45] The Commissioners conclude "the system does not work fairly or equally. Justice is not blind to color or status."[46]

In reaching this condemnatory verdict, the Commissioners had occasion to make a number of further statements which clearly support a denunciation of the usual liberal premises of the rule of law in a democratic society. Their words also give credence to the view that the Commissioners were evincing some of the autonomy which has been accorded this component of the criminal justice system in the Canadian state.

> Both cases [investigations of high profile politicians], however, show there is a two tier system of justice — that the system does respond differently, depending on the status of the person investigated . . . . These are indications of serious weaknesses in the justice system. They are all the more serious because they are not simply overt interference. They exhibit a deep-rooted and unwritten code that status is important, and that one is not blind to influence in enforcing the law. Such an attitude makes the ideal of justice for all meaningless, and renders the goal of complete confidence in the system of administration of justice impossible.[47]

These systemic indictments, of which only a sampling is presented, demonstrate the extent to which even criminal justice insiders, like the three superior court justices of the Marshall Commission, are forced to denounce the system when confronted with the repulsive facts of a case such as this. Obviously, if one wishes to be thoroughly pessimistic, one can maintain that even in their strident critique the Commissioners were still performing the essential legitimation function which is demanded of the legal profession. After all, what better way of holding on to the status quo than to criticize the way in which an investigation and prosecution was handled and to follow with narrow recommendations as to how to improve the system "to make sure that what happened to Donald Marshall, Jr., does not happen to someone else in the future?"[48] On the other hand, the denunciation of the justice system by the Commissioners contains the nucleus of more thorough and contextualized critiques. Their outlook does not, on balance, support the interests of capital and surely may be used for progressive purposes, a strong exemplar of the relative autonomy thesis.

B. The Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr.

This second major Commission was entrusted with a more focused duty, basically to "recanvass the adequacy of the compensation paid to Donald Marshall, Jr., in light of what the Royal

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[45] *Id.*, 193.

[46] *Id.*

[47] *Id.*, 220-221.

[48] *Id.*, XI

Commission . . . found to be factors contributing to his wrongful conviction and continued incarceration".[49] Again, it would appear to have approached its work in a reasonably satisfactory manner, with credit certainly being due for its process. The Report itself has some serious shortcomings, which may be usefully examined from the point of view espoused in this paper.

Three claims were presented to the Commissioner on behalf of Donald Marshall, Jr., his parents and the Micmac Nation, with only the first two being accepted. The process was usually public (except where matters of an obviously private nature were being explored, the revelation of which could unnecessarily hurt Donald Marshall, Jr.) and the procedure was fair and principled. In this sense, some of the harm which had been done to Marshall by the previous (1984) compensation debacle was redressed: ". . . the Marshall case was not handled with the care and respect for fairness that is demanded."[50] Thus, relatively high standards were set for the process which will be used for future claims by wrongfully convicted people.

The actual amounts which were recommended by the Commissioner to be paid (which obligations were promptly discharged by the Government of Nova Scotia) were significant, compared to the paltry $173,000 previously awarded to Marshall only. Donald Marshall, Jr., received an additional sum of about $200,000 for his non-pecuniary losses, an annuity generating a 3% indexed payment of $1,875 monthly (non-taxable in this case), and the right to claim expenses from a $50,000 fund for treatment and rehabilitation. His parents were given a lump sum of $95,000 and an indexed annuity providing $600 monthly.[51] Given the extent of the suffering of Marshall and his family, and the nature of the wrongs done to them, such payments can hardly be considered generous, despite their being a major improvement over the previous settlement.

This Commission, in its handling of the claims of the Marshalls, is by no means devoid of critical comments, but it does not offer much beyond the conventional discourse in terms of its analysis of the nature of the harms inflicted and the correlative obligations of the state. Therefore, the Report does acknowledge that:

> As a victim of wrongful imprisonment, Donald Marshall, Jr., suffered at the hands of the judicial system itself. This very institution in which *we pride ourselves* so greatly, failed him grievously.[52]
>
> [emphasis added]

The Report similarly accepts that:

> the wrongdoer may be the Government itself, or those associated with the judicial system — *the very people in whom we must*

[49] *Supra* note 4, 5.

[50] *Id.*, 14.

[51] *Id.*, 25. (For both awards.)

[52] *Id.*, 21.

> *all place our trust* in order for our democratic society to function fairly.[53]
>
> [emphasis added]

However, outside these references, there are few statements which connote the same level of disapprobation that one saw in the Commissioners' Report. The document is sympathetic (*e.g.*, ". . . he should be provided with an income which will allow him to live his life with dignity.")[54], but on the whole deferential toward the commonplace notion that "we" must trust a system and that this same system deserves "our" pride. There is little for which to remember this Report, compared to its immediate ancestor. Its exposition of the principles of compensation for the wrongfully convicted is a disappointment.[55] In this sense, the Report does not push the limits of autonomy and is therefore more notable for its effects on systemic legitimation than anything else. Perhaps the introduction to the Report presages its real predisposition:

> The award must be fair, reasonable and realistic showing care and concern for the victim, *as well as a proper regard for the rights of the judicial system* under which this miscarriage of justice occurred.[56]
>
> [emphasis added]

Particularly in the context of a wrongful conviction, this strikes one as a most curious passage, which may unfortunately have guided the Commissioner in his assignment. What rights does the judicial system have in the first place, where it has so miserably failed an individual and societal expectations? This passage becomes all the more problematic in its saying that "proper regard" should be had for these supposed rights.

It is with respect to the "Derivative Claim" that the Commissioner had a genuine opportunity to break new ground and to use the level of autonomy available to him as a judge acting as a commission of inquiry. The Report, in its discussion of Marshall's non-pecuniary losses, at least notes that the claimant "suffered these indignities as a Native person", including loss of his ability to use his language and the likely loss of the opportunity to become Grand Chief of the Micmac Nation.[57] However, in the derivative claim it was argued that as part of Marshall's compensation, an award should be made to the Grand Council of the Micmac Nation in trust "to establish and operate a Native Survival Camp for Micmac Children, the idea being that the Camp would seek to retain and strengthen Native culture in Micmac children . . . and that Donald Marshall, Jr. would

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[53] *Id.*, 16.

[54] *Id.*, 20.

[55] For a more extensive discussion of the compensatory issue in general, see H. A. Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989), 9 *Windsor Yearb. Access Justice*, 96.

[56] *Supra* note 4, 14.

[57] *Id.*, 22.

like to work at such a camp."[58] Although the Commissioner expressed his support for such an idea, he rejected the claim as falling outside the terms of the authority conferred on him by the Order-in-Council. In so doing, the Report notes that "the Government of Nova Scotia is sensitive to the fragile position of the Micmac culture" and ". . . seems well disposed to responding to these concerns of the Micmacs", but that "This Compensation Inquiry cannot be used as a means to solve issues other than the provision of proper compensation to Donald Marshall, Jr."[59]

The Commissioner by his supportive comments may have been intending to provide leverage to the Micmac Nation in their future negotiations with government on related issues, but these ascribed good intentions aside, it is obvious that the narrow interpretation given to the Order-in-Council was not the only possible one. Indeed, it may not be the most supportable explanation, as the Order directed the Commissioner to recanvass the compensation paid "in light of what the Royal Commission . . . found to be factors contributing to his wrongful conviction."[60] Given that prominent among the principal findings of the previous Commission was a determination "that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment"[61], it is a readily derivable proposition that Marshall's Nation should be compensated as well for an egregious and protracted display of racism directed at a member of a "very close knit"[62] community. Such a determination would not have been so adventuresome or unconventional in the context of this unprecedented case that the Commissioner would have unduly strained the bounds of the autonomy extended to him in the Canadian state. Indeed, from most perspectives, this sentiment summarizes this author's outlook on the Report. It represents a great improvement over the past handling of Marshall's compensation and it is surely of some value as a precedent, but given the historic significance of Donald Marshall, Jr.'s wrongful conviction and imprisonment, it is relatively unmemorable.

V. MacKeigan v. Hickman: Extending Judicial Immunity . . . to the Breaking Point

The Supreme Court had previously articulated the essential dimensions of judicial independence in a forceful manner in *Valente* v. *The Queen*[63] and *R.* v. *Beauregard.*[64] Further, it is fair to say that the legal system has been well imbued with the necessity of the

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[58] *Id.*
[59] *Id.*, 23.
[60] *Id.*, 5.
[61] *Supra* note 3, Volume 1, 15.
[62] *Supra* note 4, 23.
[63] [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161.
[64] [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481.

principle.[65] Indeed, if anything, judicial independence at times has become an extravagant symbol, carrying more weight than it can reasonably bear, *a fortiori* judical immunity, particularly in its *MacKeigan* v. *Hickman* guise.

Although it is not possible to fully develop the many issues emerging from this Supreme Court decision in a piece of this length, it is also difficult to pass by such a judicial spectacle. Three senior superior court justices functioning as Royal Commissioners investigating a wrongful conviction sought to compel five members of a Court of Appeal to testify concerning a decision in which they acquitted the victim of a miscarriage of justice. Finally, the Supreme Court determined that the principle of judicial independence is so crucial that it requires judges to be immune from testifying with respect to the grounds for their decision and the reasons for the composition of a given panel of the court. Basically, in the judgment of McLachlin, J., judicial independence was described as "a constitutional principle fundamental to the Canadian system of government"[66], wherein "Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution".[67] A demand by the legislature or executive to testify "on how or why he or she made his or her decision would be to strike at the moot sacrosanct core of judicial independence".[68] Similarly, this great principle "would be threatened by the possibility of public inquiries as to the reason for the assignment of particular judges to particular cases".[69]

Fortunately, this vigorous assertion was tempered by two dissenting judgments, which acknowledge that in exceptional circumstances some intrusion upon an almost fetishistic extension of judicial independence should be permitted. Therefore, Cory, J., states that a qualified privilege or immunity "should not and cannot prevail" in this case.[70] Given that the aim of judicial independence is to preserve and foster public confidence,

> Where as here the public confidence in the administration of justice has been called into question then in the interest of that public confidence which is essential to the functioning of the courts the qualified privilege should give way.[71]

Wilson, J., observed that "the public interest requires that this question [of why the former Attorney-General was assigned to the

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[65] For examples of contemporary expositions of judicial independence, see W. R. Lederman, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 1139; or Hailsham, "Democracy and Judicial Independence" (1979), 28 *U. New Brunswick L.J.* 7; or C. A. Kosowan, "The Independence of the Judiciary" (1987), 11 *Provincial Judges J.* 1, 15.

[66] *Supra* note 5, 719.

[67] *Id.*

[68] *Id.*, 721.

[69] *Id.*, 723.

[70] *Supra* note 5, 706.

[71] *Id.*, 707.

panel] be asked and answered."[72] She is also realistic in her concern that ". . . judicial immunity may be perceived by the public as being advanced for the protection of the judiciary rather than for the protection of the justice system."[73]

Ratner, *et al*, posit that there is certainly the prospect of "dissent within particular sub-components"[74] or fractions of personnel within the criminal justice system. The principle of relative autonomy contemplates the tolerability of such disputes, given that the criminal justice sector can retain its general orientation toward social order and capital. Surely, the Canadian public rarely sees such rifts among judges, but even in the interstices of *MacKeigan*, there is little of comfort for one who is searching for egalitarian levers. Perhaps the best that can be said for the case is that the idea of judicial accountability was raised, if dismissed by the majority, and that even in the act of requesting the judges to answer questions, there is a lurking levelling device. Judges may now be somewhat more careful as to what they say in their decisions. Although the judiciary will be more keenly aware of their special status as a result of *MacKeigan*, the case may nonetheless begin to implant additional controls and responsibility for those few judges who may be tempted to stray outside the norms of accepted judicial behaviour. On the other hand, an uncritical acceptance of the majority judgment will not as surely guarantee that norms of moderation and respect will prevail and the democratic potential of the case will have been lost or diluted.

Indeed, one is left doubting whether the Canadian system of government would have been at all disturbed, let alone shaken to its core, had the Supreme Court permitted some inquiries by the Royal Commission concerning the basis for the most troubling aspects of the decision by the Nova Scotia Court of Appeal or regarding the composition of the panel. Such horrendous miscarriages of justice must remain rare or the Canadian public will justifiably lose all confidence in the criminal justice system. Even rarer will be decisions like that of the Nova Scotia court which, although acquitting an accused, go on to the lengths of this decision to disparage a wrongfully convicted person. Despite the obvious need for a certain degree of immunity it is difficult to accept that some questioning of a court, given the exceptional facts of the Marshall case, would have been as dangerous as was feared by the Supreme Court.

Feldthusen reached a similar conclusion in his consideration of the virtual total immunity from tortious liability enjoyed by judges. He maintained the public's interest "in having a highly respected judicial system, staffed by competent persons, free to exercise their

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[72] *Id.*, 695.

[73] *Id.*, 696.

[74] *Supra* note 26, 16.

judicial functions without fear of private liability"[75] was protected by a limited rule of judicial immunity.

> It is, however, symbolically undesirable to confer absolute immunity upon a social group, and especially undesirable for that group to confer absolute immunity upon itself. Moreover, in cases of gross judicial misconduct, the general rationales of tort liability may be more important than the rationales which support judicial immunity.[76]

In *MacKeigan*, the Supreme Court set such an uncompromising standard for judicial immunity that it is difficult to envisage any circumstances where the public interest in understanding the judicial process, particularly in cases of wrongful conviction, would outweigh the Court's assertion of the sacrosanct nature of the judicial right to remain silent. Perhaps the Canadian Judicial Council could have become the forum for scrutinizing judicial behaviour.

VI. The Canadian Judicial Council: A Little is Better Than Nothing

In a case marked by improbable events having to be absorbed as part of an uncomfortable new judicial agenda, the *Report to the Canadian Judicial Council of the Inquiry Committee* is very much in character. Within days of the release of the Commissioners' Report, the then Attorney-General of Nova Scotia asked that an inquiry be commenced pursuant to the subsection 63(1) of the *Judges Act* to determine whether any of the judges of the 1982 Reference case should be removed from office. The five Justices of the Nova Scotia Court of Appeal had been nothing short of savaged by the Commissioners' Report and the Attorney General requested that their conduct be examined in light of these findings. As he stated in correspondence with counsel to the Inquiry Committee:

> I believe public confidence in the Appeal Division of the Supreme Court of Nova Scotia was shaken by the findings of the Royal Commission. That confidence can be restored by the knowledge that there is a forum for review of judicial conduct, and by the completion of that review by distinguished jurists.[77]

The Inquiry Committee, composed of three Chief Justices and two members of the Bar, convened publicly to conduct its investigation, where representations were received from counsel to the Committee and from counsel representing the Justices and Donald Marshall, Jr., as Intervenor. Their Report did not recommend removal from office, although it did criticize the conduct of the Justices. MacEachern, C.J., the Chair of the Committee, concurred in the conclusion that the Justices should not lose their appointments, but disagreed with the characterization of the language of the Court of Appeal by the majority.

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[75] Bruce Feldthusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980), 29 *U. New Brunswick L.J.* 73, 106.

[76] *Id.*, 106-107.

[77] *Supra* note 1, 19.

The Royal Commission's findings were a severe and comprehensive critique of the Court of Appeal. Among other things, the Commissioners had determined that the Court had "made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction", that Pace, J. A., Attorney-General at the time of original trial in 1971, "should not have sat as a member of the panel", that the decision "created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and in terms of public acceptance of his acquittal" and that the "decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary."[78] Before the Canadian Judicial Council, these comments seemed to prolong the internecine judicial skirmishes which had characterized the Royal Commission and *MacKeigan* v. *Hickman.*

Prior to the commencement of the hearings, two of the former Justices, MacKeigan, C. J. and Pace, J. A., retired from the Bench, the former due to his having reached the mandatory retirement age, and the latter due to ill health. Unfortunately, the Inquiry Committee determined that as they had no jurisdiction over ex-Justices,[79] nothing should be said about their conduct. This determination left some important criticisms in limbo at the Judicial Council level. Perhaps they may be considered as having been settled by the Commissioners' Report. The Committee was no doubt correct in its conclusion that it could not recommend removal of former justices, which is the major decision to be made under the *Judges Act*, ss. 65(2)(a) to (d). Yet, there would have been no serious impediment to their at least commenting upon the conduct of the retired Justices. Thus, the Committee did not make full use of the latitude available to them either under the statute or according to the relative autonomy thesis.

The Committee elected not to review the findings of the Royal Commission in detail. Instead, they discussed some of the evidence in the case, the conduct of the Reference hearings and the controversial display of judicial vitriol contained in the final paragraphs of the decision by the Court of Appeal, wherein the Court made the incredible statement that "Any miscarriage of justice is, however, more apparent than real."[80]

The Committee further entrenched the sacredness of judicial independence and more particularly, judicial immunity, in rejecting the request by counsel for Donald Marshall, Jr. to question the Justices on aspects of their decision.

> . . . it would be entirely inappropriate to submit judges to such interrogation. In our view such questions strike at the very heart of judicial independence.[81]

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[78] *Supra* note 3, Volume 1, 116.
[79] *Supra* note 6, 1.
[80] *Id.*, 14.
[81] *Id.*, 23.

This wall was not proclaimed to be absolute by the Committee, ("We see no compelling reason to depart from it in this case . . .")[82] but after the Judicial Council decision it is even more improbable, outside allegations of actual corruption or "improper motivation",[83] to imagine circumstances where there is any likelihood of there being a thorough exploration of objectionable judicial behaviour. This result is all the more regrettable in light of the many statements at the Supreme Court in *MacKeigan* apparently still opening the door to trenching upon judicial immunity in an appropriate forum, the Canadian Judicial Council.[84]

The test for removal from office used by the Committee is an amalgam of several considerations. Indeed, it is so catholic that it is inherently very manipulable and it may also be too obscure to be useful.

> Is the conduct so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[85]

At any rate, the decision of the Committee was that the comments of the Court of Appeal do not "lead to the conclusion that the judges cannot execute their office".[86] In reaching this determination, the Inquiry Committee disapproved of some of the language used by the Reference Court, especially the appalling characterization of Marshall's conviction as being a "more apparent than real" miscarriage of justice ("it constitutes a *real* miscarriage of justice; it cannot be termed 'more apparent than real.'"[87]). The Committee went on to observe that the offensive closing paragraphs "give the impression that the Court was ignoring the grossly incorrect conduct of other persons and concentrating on the victim of the tragedy"[88] and they "created the strong impression that it was not responsive to the injustice of an innocent person spending more than ten years in jail."[89] They conclude, after making these criticisms, that on balance "confidence would more severely be impaired by our failure to criticize inappropriate comment than it would by our failure to acknowledge it".[90]

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[82] *Id.*

[83] *Id.*, 22.

[84] See the reasons of Lamer, J., 694; Wilson, J., 697; LaForest, J., 699 and McLachlin, J., 723, *supra* note 5.

[85] *Supra* note 6, 27.

[86] *Id.*, 36. It was noted earlier in the decision (at 30) that counsel for Mr. Marshall had argued that "the *obiter* statements in the judgement of the Reference Court warranted their formal censure, though, on Mr. Marshall's instructions, she did not argue that the judges should be removed from office."

[87] *Id.*, 32.

[88] *Id.*, 34.

[89] *Id.*

Even if the language of the Inquiry Committee is mild compared to that of the Reference decision, the Report is to be commended for justly criticizing a decision which, in its closing paragraphs, brought discredit to the Canadian judiciary . On the other hand, the Report does not go far enough in its handling of some issues, particularly concerning the conduct of the retired Justices and judicial immunity. The Report is another example, from the relative autonomy perspective, of fractions of personnel within the criminal justice system sub-components being able to express dissent. The Report probably could have been more condemnatory in the circumstances without risking either retaliation or obstruction from other parts of the system, whether from other sub-components (*eg.*, the full Canadian Judicial Council which receives and considers an Inquiry Committee Report) or from other more generalized representatives or sectors of the criminal justice system (*eg.*, the Minister of Justice in Parliament). None the less, does the Report provide any real terrain of class conflict or have any emancipatory or egalitarian potential? Likely, the answer is precious little, but this is better than nothing. To the extent that superior court judges are taken to task at all, it may have some salutary effects on the way in which judges deal with accused persons or the willingness of people treated poorly by the judiciary to complain. In the final analysis, the Report still serves the legitimation function in its stated consciousness of the need to keep or restore public confidence. At least some little price is exacted from the Canadian judiciary, but it is a paltry sum compared to that paid by Donald Marshall, Jr.

VII. Conclusion

This article proceeded on the assumption that the four judicial events presented herein could be usefully analyzed as examples of the principle of the relative autonomy of the criminal justice sector at work. Each decision does seem to be able to be fitted in with this perspective, with greater or lesser claims being made on the reserves of autonomy. Thus, they may be seen as instances of a relatively autonomous sector of state activity demonstrating its ability to act or consider acting contrary to the interests of the status quo. Varying levels of democratic potential are presented, with the principal Royal Commission offering the most promise.

The complete reversal of the class bias of the criminal justice system was never on the horizon. Griffith has argued that one cannot expect such radical changes.

> In both capitalist and communist societies, the judiciary has naturally served the prevailing political and economic forces. Politically, judges are parasitic.
>
> That this is so is not a matter of recrimination. It is idle to criticize institutions for performing the task they were created to perform and have performed for centuries.[91]

[91] J.A.G. Griffith, *The Politics of the Judiciary* (3rd ed.) (1985), 235.

On the other hand, judges do not need to march in lock-step with ruling interests from swearing in to retirement. In Canadian society, they have enough latitude to speak out, even if only occasionally and in unfamiliar voices, against entrenched practices and structures. If nothing else, some emancipating tools have been exposed by these extraordinary judicial activities.

To what extent and by whom they will be exploited, is another question. One would hate to see clever representatives of the ideological state apparatus turn all these hopeful signs on their heads, merely to legitimate and continue the patterns of domination extant in the criminal justice system. The horrors of the Marshall case will likely militate against such a hijacking of the opportunities for change represented by these four decisions.

Just as Inmate No. 1977 wrote prior to his release that he "could show this world, [he] didn't quit" so must those who have witnessed the Marshall saga not let its prospects for good be diluted or diverted.

Sharon Culbertson

Aftermath of the Marshall Commission

by H. Archibald Kaiser

A. Prolegomena to the Cure, or the Beginning of the Epitaph

"Look, Doctor, try to see things my way. All the diagnoses have been made and the treatment has been prescribed, but somehow ... I just don't feel quite right. Sometimes I think I'll never get well. Is there something you haven't told me?"

The doctor's skeptical but still deferential patient echoes the sentiments of many who have keenly observed the saga of Donald Marshall, Jr. A monstrous injustice was perpetrated and then sustained over 15 years, in the conviction and ongoing persecution of an innocent person. Finally, by October 1986, even a government that had been blind to the need for reform in the criminal justice system could no longer resist the pent-up provincial and national demand for a full inquiry into the circumstances of Marshall's conviction. The Nova Scotia Government also asked its inquiry to make recommendations "to help such tragedies from happening in the future." (Royal Commission on the Donald Marshall, Jr., *Prosecution, Digest of Findings and Recommendations*, p.1).

Donald Marshall, Sr., and Caroline Marshall, parents of Donald Jr., play themselves in the National Film Board movie Justice Denied., which premiered last autumn.

On January 26, 1990, after extensive public hearings, several separate research projects and a forum on Native rights, racism, and the role of the Attorney General, the Commission published its seven-volume report. Much of the document was startling to a community that had been extraordinarily complacent when dealing with criminal justice issues. Within days of the release of the report, the news media were deluged with apparently sincere apologies and promises from institutions that had previously been either somnolent or hostile. The appalling state of criminal justice in Nova Scotia as exemplified by the Marshall case had been explored and exposed. Things were now, according to the new breed of confessor, on the mend.

However, the body and soul of justice may not be cured. At best, the symptoms may be treated. At worst the whole exercise may be an illustration of the limits and false promises of an ostensible treatment process that is merely palliative.

B. The Principal Findings and Recommendations: Has a Silk Purse Been Fashioned?

To comprehensively address such a massive report, the reader is probably best advised to read the Digest referred to above for an introduction. However, some issues should be mentioned.

Basically, the Commission found that the criminal justice system consistently failed Donald Marshall, Jr. In the Commission's view, Marshall told the truth to the police originally and had not been engaged in a robbery. Rather, Sandy Seale was slain as a result of Roy Ebsary's violent and unpredictable behaviour. The police response to the stabbing was inadequate, incompetent and unprofessional and Marshall became a suspect in part because he was a Native.

The Commission determined that the trial judge, Crown and defence counsel all failed to discharge their obligations, effectively denying Marshall a fair trial. A 1971 review by the RCMP was incompetent, and the basis for this reinvestigation was never properly revealed to the accused's lawyers. The first appeal was a further example of neglect by the Crown, defence and Court. A mid-1970s review

Marshall Commission: a preliminary assessment

— *continued from page 7*

of the case foundered again.

The 1982 reinvestigation, while flawed, did finally lead to a decision by the Minister of Justice to refer the case to the Supreme Court of Nova Scotia, Appeal Division. The Commission excoriated the Court in this second appeal for, among other things, blaming Marshall for his wrongful conviction, its unfounded accusations of robbery and perjury, its defence of a faulty criminal justice system and its refusal to admit a miscarriage of justice had occurred. According to the Commission, the Attorney General's Department did not treat Marshall properly during the 1982 appeal or subsequently, in its mean and unprincipled handling of his compensation claim.

The Commission's 82 recommendations intended to prevent future judicial nightmares cover several major fields. They begin with a section on how to better handle alleged cases of wrongful conviction and applications for compensation. Next, there is extensive advice on how to sensitize the criminal justice system to the discrimination faced by visible minorities, by engaging everyone from the Attorney General and Solicitor General (who would become members of a cabinet committee on race relations) to lawyers and police (who should be more appropriately trained concerning minorities) to correctional workers (who should be disciplined for discriminatory conduct and tutored on the needs of Natives and Black inmates).

Nova Scotia Micmacs would, according to the report, benefit from establishment of a Native Criminal Court (with limited powers), a Native Justice Institute (to research, train court workers and liaise with Government and the bar, among other things) and a tripartite forum on outstanding issues between Natives and the federal and provincial government. Blacks should see changes in the Human Rights Act, better funding for the Human Rights Commission and more legal aid resources.

The Commission suggests changes to the criminal justice system at many levels. A Director of Public Prosecutions (DPP) should be added. Policy guidelines for laying charges and staying prosecutions should be improved. Crown disclosure standards should be more liberal and the policy governing plea and sentence bargaining should be revised.

The final 36 recommendations deal broadly with policing. Police departments are encouraged to be inde-pendent, to recruit minorities, to develop policies on interviewing vulnerable people, to establish codes of ethics, to set standards for policing and to plan and manage better at the departmental level.

JUSTIC DENIED: Actors playing police and Donald Marshall, Jr., in the 1989 NFB film. After a television broadcast last fall, the film is now available on video.

C. The Responses to Date: Do They Deserve the Benefit of the Doubt?

A vigil must be maintained over offending institutions that have responded to the Royal Commission. Given their years of recalcitrance and insensitivity, it was hard to take seriously the sincere apologies and the promises of a new dawn that peppered the evening news. Why should it have required three justices, millions of dollars (much of the money, of course, received by lawyers), 16,390 pages of transcript, 93 days of hearings and so on to say that Donald Marshall, Jr., was wrongfully convicted by an uncaring, racist, incompetent and self-satisfied criminal justice system? Surely anyone whose critical faculties had not been totally deadened by the bludgeoning of mass culture would have been able to say the same thing. Such arguments had previously been advanced, but was anyone listening?

As it stands, Nova Scotians in particular and Canadians in general did follow the Royal Commission and were subjected to the outpouring following the report. The individuals who responded for their constituencies must be given some credence. Perhaps they were so moved by the thoroughness and legitimacy of the Commission's critique that they really have become born-again devotees of justice.

Let's put aside skepticism and take them at their word for the time being. What did they say? From the other, more

credible side of the fence, what was the reaction of Marshall and his community and of Black representatives?

1. The Government of Nova Scotia

The Attorney General's press conference, about 10 days after the release of the report (and following that of the Bar Society), was the stuff of electoral dreams: a young minister offering "a sincere and heartfelt apology," commending the "excellence" of the recommendations of the report, recognizing that the justice system was being presented with "an opportunity to lift itself up" and accepting "all the recommendations within [the government's] mandate."

Most intriguing was the determination to request the Canadian Judicial Council "to consider the conduct of the five judges" in the 1982 Reference to the Court of Appeal, on the foundation that "it is absolutely essential that Nova Scotians have faith and confidence in this, the highest court in the Province." After that little bombshell, the Attorney General went on

to pronounce the end of "a two-tiered justice system in Nova Scotia," supported by an immediate letter to all police chiefs "stressing the critical principle of fair and equal treatment before the law."

The minister closed with a declaration that the report is "the blueprint for the future of justice," which "excited" him and the Bar Society. "The change has begun. The old ways have been thrown out." The Attorney General made it all seem so easy.

Contemporaneously, the Nova Scotia Government released a 58-page report indicating acceptance of "all recommendations, that are the responsibility of the Government" (p. 1 of the *Summary*) and endorsement of every other recommendation. The Government said it had already taken action on many aspects of "the massive job of renewing the portions of the justice system within its jurisdiction" (p. 2) and later credits itself for having "initiated change, not resisted it." (p. 3).

The Government accepted the need to discuss an independent review mechanism for purported wrongful convictions and for new structures to compensate the wrongfully convicted. It committed itself to the several anti-racist programs discussed in the report. It recognized the Commission's point that many of the difficulties Micmacs encounter with the justice system "are rooted in social, political and economic structures outside the justice system" (p. 5), and that the dominant culture has harmed Micmac community life.

The Government also reassured the citizenry that it recognized the "widespread public perception that there is a separate system of justice" (p. 228 of Volume 1 of the report) for the influential, and noted its appointment of a DPP as a step in the right direction. It highlighted its acceptance of the police right to lay charges and trumpeted its leading role on the matter of disclosure (p. 6). Finally, it reviewed its strategy for asserting "greater leadership in law enforcement," particularly in "ensuring that an appropriate standard of law enforcement is provided to all Nova Scotians."

The Government statement looked on the surface to be wholly receptive to the report.

2. The Nova Scotia Barrister's Society

The Bar Society presented its response only five days after the release of the report, upstaging the Government and perhaps making more inevitable the tenor of the Government's reply. The President of the Bar Society announced that it would "comprehensively review those members of the Society who were found wanting by the report." It "wholeheartedly" agreed with suggestions for improved disclosure being entrenched in the Criminal Code. It encouraged the Judicial Council examination of the judges of the Court of Appeal and it expressed confidence that the new DPP would review the report.

The Bar Society too, reviewed its previous and anticipated achievements, which amounted to acceptance of every recommendation touching upon the Bar. It cited its new outreach program into the high schools of the Black and Micmac communities, its support of the Indigenous Black and Micmac program at Dalhousie Law School, its bar admissions course innovations in respect of systemic discrimination and steps taken in other areas (continuing education, Crown disclosure, judicial appointments and minority representation).

The Bar Society, mainly inert previously, appeared to want to start off on the right foot in the post-Marshall era.

3. The Royal Canadian Mounted Police

About six weeks after the publication of the report the RCMP issued a news release expressing "sincere regrets for what has happened to Donald Marshall, Jr." and accepting "unreservedly any criticism of those members of the RCMP who may have contributed to this injustice."

The RCMP offered to share its expertise in developing policies on aboriginal or minority policing, and indicated endorsement of police control of laying charges.

The communique also reiterated the Commissioner's recent policy statement on aboriginal and Canadian visible minorities, which noted the need for affirmative action, special needs recognition, introspection and multiculturalism.

The local RCMP division stated its intention to establish community advisory groups, special training programs, and a native advisory committee. It also said the lack of responsiveness of the criminal justice system wasn't "a policing problem alone," declaring that the RCMP "must be part of the solution."

Marshall Commission

— *continued from page 9*

The Force was not about to be left at the starting gate in the apology and promise stakes.

4. The Nova Scotia Legislature

On February 23, 1990, Nova Scotia's House of Assembly ended its long institutional silence on the Marshall affair. It too was obviously trying to make up for lost ground by passing the following motion:

Whereas the public institutions Nova Scotians must trust to find truth and dispense justice equally failed Donald Marshall Jr. at every turn; and

Whereas the tragic injustice originally dealt Donald Marshall Jr. in 1971 was compounded and prolonged for almost two decades by a system bent on exonerating itself, rather than righting its wrong; and

Whereas Donald Marshall Jr. and his family were victims of public institutions mindlessly engaged by racism and blinded by self interest;

Therefore be it resolved that this Legislature, representing every Nova Scotian, does, on behalf of every Nova Scotian, offer to Donald Marshall Jr., to his mother, his father and every member of his family, our most sincere apology for the grievous injustice dealt him by every public institution he encountered during that tragic 19 year period.

5. The Micmac Response

The response of the Micmacs (February 21, 1990) was addressed "to general principles."(p.1) The Micmacs are at pains to assert immediately that Micmac "participation by itself will not fully address the aspirations of our communities."(p.2) They want to harness their own concepts of justice and develop an acceptable and effective justice system "that will grow and expand with the community it serves."(p.5) They say their socio-economic conditions "must dramatically improve"(p.4) and call for immediate progress on developing a community-based justice system. The Micmacs urge the same approach with respect to policing, and say police services must be Micmac-controlled.

They end their report by reiterating their desire to work as partners with the two governments, "in building a society that knows no barriers because of inequality and injustice" (p.8). The Micmacs want all to be inspired "to search for new ways to promote the dignity of man - be it black, white or Mi'kmaq." The restraint of the Micmac response is remarkable, given that they could have gloated. The Micmacs, at least, had urged the same themes before and after the Commission report.

Further Micmac reaction can be gleaned from the February, 1990, special edition of the *Micmac News*, a fine publication ironically threatened by the recent federal budget cuts. In a realistic lead editorial (p.2), considerable irritation is expressed at the Commission's silence on whether charges should be laid. The Commission is also impugned for not having set guidelines for increasing compensation and for having criticized senior civil servants rather than ministers.

"Not making recommendations in these specific areas is the major failure of the Marshall report. The sad reality is that action may never be taken."

6. The Black Community

The Afro-Canadian Caucus of Nova Scotia reacted to the Commission report within a week of its release, advocating an inquiry into racism in the education system "because that's where it all began." A leader of the Caucus also maintained that the report was "the first time that those who represent power and influence have acknowledged the extent of racism in this province."

The group called for creation of a special committee of Blacks and Micmacs to monitor the government's efforts to implement the recommendations. They supported the strengthening of the Human Rights Commission and made additional suggestions for creating new rights for victims of discrimination. Finally, the Caucus called on the government to compensate the family of Sandy Seale, who was stabbed by Ebsary. No statutory compensation scheme was in force at the time of the incident.

7. Donald Marshall, Jr., and His Family

The man who spent 11 years in the penitentiary and thereafter was further stigmatized by the criminal justice system, in spite of being found not guilty, issued a press release on the day of the publication of the report. Through his lawyer,

1990 Conference:

The Steering Committee is *still* looking for people interested in helping organize the always-successful Law Union Conference for fall, 1990.

Two themes have been proposed: the environment, and racism and sexism in the legal profession.

If you're interested, please call Paul Copeland (964-8126), Lionel Clark (674-6400) or Leanne McMillan (964-1115).

Law Union Collective Contacts

Cultural Paul Sanderson (w) 971-6616

Labour: Ian Anderson (w) 598-0103

Security: Paul Copeland (w) 964-8126

Socialist Feminist: Felicity Stairs (w) 531-2411

Newsletter: Murray Klippenstein (w) 598-0103

Anne Derrick, Marshall said it was of "monumental consequence that the Royal Commission found that he was not engaged in a robbery" and "that, as he has maintained, he told the truth ... when he was first interviewed by the police." Marshall believed the Commission's findings "mean that the tables have turned and that blame is now being laid at the feet of those to whom it properly belongs."

Marshall thought it significant that racism was identified as a factor in his conviction, and was further heartened by the condemnation of the Court of Appeal. He asked for re-examination of the compensation issue and thanked "all those people who have written to him, supported him and cared about him through this dreadful ordeal."

A later extensive interview in the February, 1990, edition of the *Micmac News* indicated Marshall pitied the discredited former police chief, John MacIntyre, although he still wanted him charged. He said the report "took a load off [his] back."

"I am trying to straighten out my life in some way or another. My battle is over ... Nature is my style, my style is in the woods, hunting and fishing. I will travel a bit, here and there. Sitting in prison all my life, you have the urge to travel."

Marshall's parents, in the same edition of the *Micmac News*, also blamed former Chief MacIntyre, but felt "all the judges, politicians, crown prosecutor and even the jury" were also to blame. In discriminating against Indians, "Junior didn't have a chance because all these people thought he was guilty."

Donald Marshall, Sr., maintained: "From the first morning I knew his day would come, and we always knew he was innocent."

A further public inquiry is currently re-examining compensation for Donald Marshall, Jr.

D. Will it all be worth it?

Is there any real potential for progressive change in all this well-intentioned reformist activity? Or, to return to the medical metaphor, has the patient been unknowingly condemned by a fatal disease that has long inhabited the judicial corpus?

Most of the analysis by the Commission and the first four respondents discussed above proceeds in a theoretical vacuum. Not that the report should have been a grand jurisprudential treatise. This may have made an intelligible report suddenly inaccessible to the general reader. On the other hand, the failure to state clearly what model of law and society the report is founded upon can lead to unrealistic expectations and produce a reformist myopia. The report seems to accept that it is enough to ensure procedural justice and formal equality. These are no doubt important aspirations for a criminal justice system that heralds its dedication to the avoidance of wrongful conviction. These ideals could have saved Donald Marshall, Jr. from his terrible ordeal.

Yet, is this ever enough? Or can satisfaction with this level of change permit, to paraphrase an old saw, the rich and poor alike to be subject to equal treatment on the charge of sleeping under bridges. While not omitting the socio-economic context, the report largely avoids any confrontation with the dilemmas of a highly stratified society. Substantive equality and real social justice, outside the formalistic and ideologically bound world of the courts, are thereby early casualties. The suffering of Natives and other visible minorities does not start with laying baseless charges or faulty conduct of trials. These juridical events merely heighten the pain and increase the penalty for powerlessness.

Again, will it all be worth it? Yes, to the extent that the goal of treating people fairly *within* the criminal justice system is important and independently valuable (perhaps a grain of salt is in order here, given that this reassuring assertion comes from a criminal procedure teacher who must find some value in what he professes). Yes, to the extent that the Marshall case may instill in all actors in the criminal justice system a determination to be more careful and perhaps more respectful. Yes, to the extent that the Marshall Report presents a paradigm of injustice that received national recognition.

However, beyond these possible gains are pitfalls:

- the illusion of final accomplishment, leading to complacency and a more polished ideological veneer.
- the "it could never happen again" delusion. While such epic injustices may be rare, similar, though less dramatic, wrongful convictions are likely to continue to occur daily, in a system that can barely manage to deliver on its promises of formal procedural justice.
- the false sense that this kind of sin only occurs in Nova Scotia, the mid-1950s Selma of Canadian criminal justice, a self-congratulatory notion that belies the basic structural similarity among all the provinces and territories.
- the fantasy of wish fulfillment. That is, having seen an evil, we now merely pronounce it extinct.
- the safety-valve problem. A major case is used to let the pressure off the system, but the conditions causing the build-up are still extant.

Yes, it was all worthwhile, but now is the time to monitor the promissors and measure the proclaimed achievements. It was right to condemn a system that so recklessly and mercilessly preyed upon an innocent person. It remains right to be skeptical of declarations by the same criminal justice system that a cure has been found.

H. Archibald Kaiser is a member of the Faculty of Law, Dalhousie University

Folk Law Commission

A symposium on indigenous self-determination and legal pluralism, non-indigenous ethnic minority law and legal pluralism in the Third World.

Aug. 15-18, Ottawa

Information: Brad Morse, Faculty of Law, University of Ottawa, Ottawa K1H 6N5

If you wish to give a paper, please submit abstract of 50–100 words by May 30.

Sharon Culbertson

WEEKLY Record
Central Nova Scotia's Community Newspaper
75¢ Plus GST
September 13, 1994 • Vol. 16, No. 18
Truro, Nova Scotia

First time in Truro court

Native program plays role in sentencing

The co-ordinator for a program aimed at helping aboriginals in conflict with the justice system was in provincial court Monday to offer insight into the sentencing of a local Micmac man.

Dale Syliboy, of Millbrook, made his first appearance in a Truro court last week where he spoke on behalf of the defence, of Neil Charles Upham.

Mr. Upham, a Millbrook man and the victim of a troubled past including drug and alcohol abuse pleaded guilty at an earlier date to two counts of robbery.

He was one of two men charged with robbery after they followed a Bible Hill resident home from a local tavern and confronted him and his female guest in the yard of his home. Both victims lost money in the incident and identified the accused as the man who struck the male victim.

Mr. Upham has a minor record for drug possession Crown prosecutor Peter Lederman told Judge Ross Archibald and a drug and alcohol abuse problem "although he doesn't admit to a problem." He recommended a sentence in a federal prison as both specific and general deterrence.

However, Mr. Sylliboy said Mr. Upham's needs would be far better served in a provincial institution. Since the program's inception more than a year ago "I assist the courts in pre-sentence reports and sentencing of Micmacs," the ex-Truro police officer said.

He had known the man all his life in the community and as a police officer, and he had never been involved in any violent acts.

"And he did admit his alcohol problem," although not to the probation officer who compiled the pre-sentence report, he said, as "he had no trust in the probation officer"

If he was sent to the Colchester Correctional Centre and ordered into counselling to help him deal with his past and an adiction program, he could be treated in programs within the local Micmac community.

While the onus is on the individual to accept the treatment and its follow-up, he would have support in doing so from the community, Mr. Sylliboy said. In fact there is a local program already in place which allows Micmac serving provincial time in CCC to attend AA meetings in Millbrook each Tuesday night, he said, "and it works well."

As a first offender he would like to see the court stress rehabilitation for Mr. Pye and he suggested the court, as part of any sentence, recommend treatment programs to help him deal with his past and abuse problems.

Judge Archibald noted that many who came before him for sentencing preferred the federal system as a place to take programs, both self-help and educational. "There is nothing in provincial jails," for the prisoners.

And he added, federal time is often shorter than that served in a local facility.

But, Mr. Sylliboy disagreed and noted he had already identified many problems encountered by aboriginals within the federal system, and again recommended the local jail.

And defence lawyer Stephen Topshee also recommened the local facility, noting his client had a good employment record and had already spent 60 days in jail on remand to his sentencing. He also asked for a stringent probation period following his sentence.

While two years, a federal term, is a benchmark sentence for robbery "I will accept the recommendations of the defence and Mr. Sylliboy" he said and sentenced Mr. Upham to 16 months in jail to be followed by two years on probation. He added an additional 10 days to the sentence on a charge of failing to appear for a court date.

During Mr. Upham's time on probation he is ordered to abstain from alcohol and to attend AA and other recommended programs.

Sharon Culbertson

Mi'kmaqs taking pride in their heritage

By Peggy Mosser
For the Record

Millbrook — The Mi'kmaq across the Maritimes are beginning to rediscover themselves and take pride in their past.

"We are a unique people who (before Europeans came) had our own written language, customs and values," Dale Sylliboy says.

And "we had our own system of justice," in place, the director of Community Legal Issue Facilitators said.

A look at Mi'kmaq history shows "our ancestors didn't need policing" as such and petty crimes were dealt with at the community level. With more serious crimes, such as murder, the person was banished from the community.

All that changed when Mi'kmaq were integrated into the white man's justice system, which they didn't understand and still don't, he added.

Because they, as are all aborigines, basically shy people, they have difficulty asking questions and "they don't know how to complain," to social and public agencies.

And they are easily intimidated by a system staffed by whites and foreign to their culture especially when they are in trouble with the justice system.

Too often when a young person comes in conflict with the law his "attitude is 'I'll plead guilty and get out of here'. But they more often than not go to jail." He or she would be far better off being dealt with in their own community and failing that, having someone from the community act as liaison.

"We'd like to be involved with pre-sentencing reports and consulted about appropriate sentences." If the youth is ordered into community service it should be in his own community, "not at some church in Truro."

He could be placed with an elder and I'd say to him "go and help them as you have to, but listen and learn about yourself."

Many of the problems encountered by the aboriginal in Nova Scotia's justice system were identified in the Marshall report. The inquiry looked into the conviction of Donald Marshall for a murder he did not commit and for which he spent 11 years in a federal prison..

In his case "the whole system failed" from the police on up, he said.

"But Donald Marshall is behind us. It's time to move forward and improve the whole system." Time to begin implementing the recommendation that came out of the inquiry, he said.

The CLIF program has been set up to find answers to the problems the Mi'kmaq faces when he is caught up in the system.

In place for the past year the program has begun to establish [illegible] with the system through police, lawyers, courts and judges, corrections officers and the public legal education program, to promote a link between the the Mi'kmaq and the system to ease the transfer of information.

It works within the Nova Scotia Mi'kmaq communities to develop a greater understanding of how the system works and in the end hope to develop a system "that is fair to all, less discriminatory and more sensitive to the aboriginal communities."

With funding from the federal and provincial governments the three-year program can do a great deal to prevent crime and "make for a safer and better community. Positive results in the aboriginal communities will, he noted, spill over into neighboring communities.

"It is an all new learning process for everyone," in the system," said Mr. Sylliboy .

The program's facilitators, located in Halifax, Bridgewater and Sydney are on hand to handle complaints from on and off reserve natives who feel threatened or mistreated by the criminal justice system.

They also supply interpreters, seek legal advice and funding and act as liaison between the courts and the community.

In time "we hope to have tribal policing" for the reserves. One such system is already in place on Cape Breton and working very well, the former police officer who spent 12 years on the Truro force said. The time must also come when police forces and corrections departments will [illegible]

On reserves where special native constables attached to the RCMP live and work in the community, crime rates have fallen, he noted. "They make for a safer and better community," with the benefits spilling over into nearby towns.

The facilitators are already holding sensitivity sessions with justice system workers and hope in time to hold seminars with the public at large.

But the prime thrust is to the community. "If we can get to the youths the first time they are in trouble," it will go a long way to easing the problems they face, he said.

Community education is one answer to the problems faced by native youth. "Especially the young are suffering from loss of identity. We need to take a holistic approach (to their problems) and teach them self-esteem self-respect." They need,he said, a pride in their past and a hope for the future."

One way under consideration is the centuries old native tradition of the talking circle. Which he agreed is the not-too old psychological practice of group therapy, "except we have been doing it for centuries."

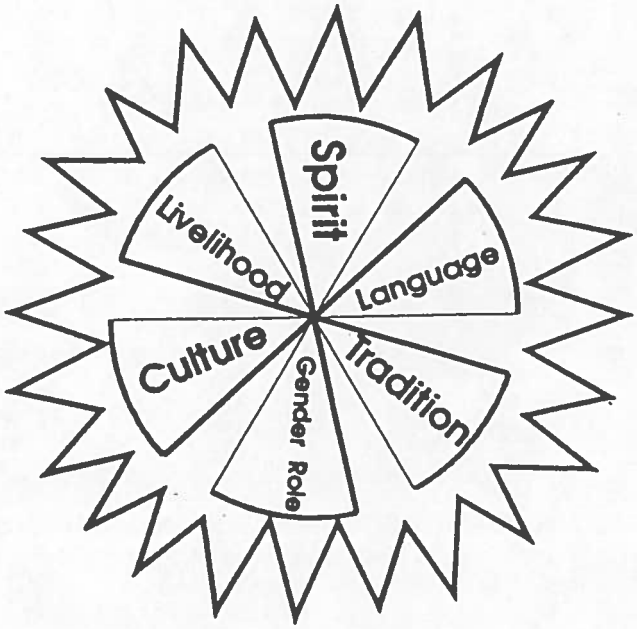
Although the program will be a year old in November it is just now becoming known among mainland natives, he said. "I am starting to receive calls about the program."

More invitations are coming in for seminars and speaking engagements, he added. "I am always available for sensitivity sessions and to speak to service clubs and groups," who [illegible]

Sharon Culbertson

Mi'Kmaq Sensitivity Training

Module



CLIF Demonstration Project

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CAUSE OF TENSION

The reason why there is so much tension and confusion between the law enforcement personnel and the Mi'Kmaq aboriginal community today is due to what is being said through the Marshall Inquiry recommendations.

The report given stated that the Mi'Kmaq are being discriminated against and are treated unfairly by the Criminal Justice System. **This statement should not be denied, it's a true fact...**

One sector of the Criminal Justice System stated to CLIF that in the Correctional Services if an aboriginal person worked full-time in their department this would not be a problem with the aboriginal community. The full-time aboriginal could assist with problems and help in resolving any conflict. They can help identify problem areas.

Through my experience as a Police Officer this was a proven fact.

In the Criminal Justice System the only areas that could identify aboriginal people working full-time is the Royal Canadian Mounted Police in Nova Scotia.

❶ The Correctional Service could only identify part-time employees;

❷ No one in the Municipal Police Forces;

❸ No Aboriginal Lawyers that work for the Crown Attorneys, NS Legal Aid;

❹ No Courtworkers in the Provincial Court, etc...;

❺ No Aboriginal Judges;

1

[1]Dale Sylliboy was a Police Officer with the Town of Truro for 12 years, and was the only Aboriginal Municipal Police Officer in the Province of Nova Scotia.

ATTITUDE TOWARDS THE POLICE/CORRECTIONAL PERSONNEL

The attitude of the law enforcement officers towards the Mi'Kmaq aboriginal people is Negative, and the attitude of the Mi'Kmaq aboriginal people is also a negative one towards the police and correctional officers.

The reasons for this negativity, is that the Law Enforcement Officers lack the knowledge of the Mi'Kmaq people. The majority of enforcement officers grew up going to school in Nova Scotia only learning that the "**MicMac**" in Nova Scotia were "**Savages**".

♦ Example: When I was on the Truro Police Force, our patrol vehicle was parked on one of the side streets of well-to-do people. Two young boys, around the ages of 8-10 years old came up to the patrol vehicle. That weekend a shooting occurred on the Indianbrook First Nation. This made the news. I asked the boys what do you want to be when you grow up. One of the boys replied, "I want to be an Indian". I asked why, the boy replied "So I can shoot people." I told the boy that I was an Indian and he was shocked with my reply. The boy probably learned from his parents talking about the incident and got the impression that only Indians do this.

♦ Another reason that law enforcement officers treat Mi'Kmaq Aboriginal People and Black People as Second Hand Citizens:

♦ Through the working career of the law enforcement officers, he/she experiences working alot with social problems of the aboriginal/black and non-native community. This develops a low opinion of them.

♦ The development of awareness of this behaviour and being able to treat them on an equal basis would help to make a better relationship.

Through the Marshall Inquiry, the Mi'Kmaq Aboriginal Community are learning that they do not have to tolerate the abuse that they encounter any longer in the Criminal Justice System. Since the CLIF Demonstration Project was developed and promoted as a service to the Aboriginal Community, the Mi'Kmaq are coming forward. The Mi'Kmaq learned not to trust the Police and Correctional Officers mainly through their experience of being mistreated by **some** members **not all** members.

The law enforcement officers have learned **not** to respond with verbal abuse, or physical abuse mainly due to the fact that a complaint can be made against them.

Complaints to the Police Departments and Correctional Agencies and the Police Commissions have increased over the past few years. **This is not the solution.** Through sensitivity training to the various Criminal Justice Agencies on the topics of Mi'Kmaq communities' lifestyles, their customs, traditions and values, it will benefit all that have to deal with the Mi'Kmaq Aboriginal Community. **Needs:** We have to find ways to promote and encourage our children to take on career choices for the future. One of the recommendations from the Royal Commission on the Marshall Inquiry stated that if you have a member who is aboriginal you should use him/her to their best advantage.

Until we see the day where they are employed in the field of:

- **Policing Services**
- **Correctional Services**
- **Court Services**

the problems that are identified today, will still exist tomorrow.

POLICE INTERVIEWING ABORIGINAL PEOPLE

The Aboriginal People view the Police in a role of "Enforcement Officers". When I was growing up in my community, the Millbrook First Nation, the only time you ever seen a patrol vehicle or a Police Officer was when they came to the community to either arrest someone or inquire about an investigation.

The people would be intimidated by observing the Police Officers wearing their black uniform with these big, shiny buttons and badges.

In the 1950's, and early 60's, the Aboriginals were restricted from having alcohol in their possession. They were not allowed to enter the Nova Scotia Liquor Commission or have liquor in their homes. The Police Officers had these cards that were given to them from the Nova Scotia Government giving the Police Officers the powers to enter the homes of the Aboriginal Person and siege all the liquor.

When I joined the Local Police Force in my community, I was the first Aboriginal Police Officer to work for a Municipal Police Department.

In 1980 when I began my career as a Police Officer I was trained to do law enforcement. The Community People that had any involvement with the Police became confused with this process. They could not understand why they were being charged with Break and Enter in the Community Hall and also being charged for Mischief. They had to go through the court process and not have any support service to assist them in the process. The Aboriginal Person was also intimidated by the courts what they observed in the courtroom.

The court staff being all NON-NATIVE.
The lawyers being all NON-NATIVE.
The judge being NON-NATIVE.

The Aboriginal Person entering the court room when asked by the judge to enter a plea they would make a plea of **guilty**. When the **Charter of Rights** came into effect and everyone became educated about having individual rights, the Aboriginal Person would be asked , Why did you plead guilty? they would respond with "Just to get it over with."

When Police Officer come into contact with Aboriginal People areas to identify in our observation of the individual. Aboriginal Culture has identified body language. When being blamed of an offence, they have their heads down, they don't make eye contact, they have been taught it is disrespectful to make eye contact.

They also have their own language, **english** is their **second** language. **YES** can mean two things, "Yes, I know I am being accused", and "yes, I know that I am not guilty".

When reading the **Charter of Rights** to an Aboriginal Person it is also important to remember that **counsel** can have a different meaning for an Aboriginal Person. **You have the rights to instruct counsel without delay.** Counsel can mean a band **counsellor** to an Aboriginal Person, you have to use plain language when dealing with an Aboriginal Person.

Points to Remember:

- THE MI'KMAQ PEOPLE **DID NOT** DEVELOP THE INDIAN RESERVATION, THE FEDERAL GOVERNMENT **DID.**
- THE MI'KMAQ **DID NOT** DEVELOP THE WELFARE SYSTEM.
- THE MI'KMAQ **DID NOT** DEVELOP THE INDIAN ACT.
- THE MI'KMAQ **DID NOT** DEVELOP RACISM OR DISCRIMINATION (RACISM IS A LEARNED BEHAVIOUR).

The Marshall Inquiry and the events of the Donald Marshall case are in the past. Let's leave them in the past, and go forward to develop a new relationship and friendship and find new ways to be friends.

We'lalin,

(b:/creations/conlegal.ed)