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LES PEUPLES AUTOCHTONES

ROYAL COMMISSION ON
ABORIGINAL PEOPLES

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1 Ottawa, Ontario

2 ---Whereupon the hearing commenced at 8:55 a.m. on Friday,
3 November 27, 1992

4 (Opening Prayers)

5 MURRAY SINCLAIR, ROUND TABLE CHAIRMAN:

6 To set the objectives for the day, and to open the third
7 day, we have remarks from the Honourable Bertha Wilson.
8 Commissioner.

9 Commissioner BERTHA WILSON: We
10 discussed yesterday whether the existing justice system,
11 which has not worked well for Native people, can be adapted
12 to fit their needs. We identified some basic elements
13 of the system that could not be easily adapted, they would
14 require quite radical change. Some change is already
15 happening in many Native communities through the
16 development of more culturally appropriate dispute
17 resolution mechanisms. These alternate mechanisms are
18 working well and are accepted in the communities, but they
19 are, of course, working within the framework of the
20 existing justice system.

21 Today we are going to look at a different
22 approach, namely, the creation of a separate justice system
23 or systems for Native peoples, what such a system or systems

1 would look at, how they would tie into the existing justice
2 system and whether Aboriginal women would be well served
3 or better served by a distinctively Native system.

4 We are also asking ourselves whether a
5 separate system is possible under our present constitution
6 or whether it would give rise to serious constitutional
7 problems. Again, these are very difficult and complex
8 issues and the commissioners look forward to hearing what
9 you have to say about them.

10 **MURRAY SINCLAIR:** Thank you Madam
11 Wilson. We're going to begin the day's events with a panel
12 presentation of the various discussion papers which
13 address those issues contained in fundamental questions
14 numbered 3, 4 and 5. Those questions are outlined on page
15 11 of your agenda document.

16 Discussion Papers G, H and I are
17 identified on page 6 of the agenda. Discussion papers
18 under Item G are a paper by Tony Mandamin, and that's found
19 at Tab 6 of the documents that were distributed to all
20 of the delegates and participants, and a paper prepared
21 by James Zion found at Tab 10 of your materials.
22 Discussion Paper H is a paper produced by Pat Macklem,
23 and that's Tab 7, and Discussion Paper I is a paper produced

1 by Teresa Nahanee and that's found at Tab 8. Those are
2 the participants in this panel presentation. The
3 moderator of the panel is Vina Starr.

4 Vina, I turn it over to you.

5 **VINA STARR:** Thank you, Mr. Sinclair.

6 The panellists and I have agreed this morning that we
7 would proceed in the order shown on your agenda. In other
8 words, Discussion Paper G, consisting of two papers written
9 by Mr. Mandamin and Mr. Zion. I will ask Mr. Mandamin
10 to go first. Each of the panellists will take 10 to 15
11 minutes to review the highlights of their papers, which
12 we assume you have all read. That ought to leave us about
13 a half an hour, assuming that we operate on time, for
14 questions and answers.

15 I would like to start with Mr. Mandamin.

16 Mr. Mandamin is an Odawa from the Wikwenikong First Nation
17 on Manitoulin Island. He has been practising law for nine
18 years in Edmonton where he is a member of the Edmonton
19 Police Commission. The focus of Mr. Mandamin's paper is
20 to examine the existing criminal justice system as it is
21 operated today in Canada, and also he is going to be
22 reviewing some of the Aboriginal justice initiatives.

23 Then we will move to Mr. Zion to give

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1 us his thoughts on the American experience and then Ms
2 Nahanee for her thoughts on the Aboriginal feminist
3 aspirations, and then we will conclude with Professor
4 Macklem.

5 Mr. Mandamin.

6 **LEONARD MANDAMIN:** Thank you. In
7 preparing this paper I struggled for quite a long time
8 before managing to get anything down on paper. The trouble
9 I had was I was to discuss the relationships that would
10 exist between the criminal justice system and parallel
11 Aboriginal justice systems. I had a little bit of trouble
12 with the criminal justice system. To my knowledge at the
13 time, and still today, it is a phrase we use for our huge
14 assortment of different arrangements across Canada to deal
15 with criminal behaviour and we lump it all under that title.
16 It's deceiving when you talk of a single criminal justice
17 system because it's a lot more complicated than that.

18 When I got to Aboriginal justice
19 systems, then I really started having trouble. I did not
20 know what they were. I thought about it and in the
21 knowledge I have from being a member of the Aboriginal
22 community and growing up on an Indian reserve and in the
23 reading I've done, I could not put my finger on a single

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1 formal structure that you could characterize as a criminal
2 justice system.

3 Leroy Littlebear talked about
4 internalizing methods of social control so that behaviour
5 is proper. I basically subscribe to the same view.
6 Indian society had its order governed by essentially the
7 type of upbringing people had, the teaching they had, the
8 examples they had, the kind of social pressures that were
9 brought to bear on correcting behaviour that departed from
10 the norm, and really only engaged in any kind of
11 recognizable "criminal justice approach" when it had to
12 deal with somebody who did step out. Humans being what
13 they are, if there's a society and something is the norm,
14 someone will deviate from that.

15 When there was a departure from the norm
16 where somebody did harm another person, a lot of energy
17 was expended by the society trying to restore the norm,
18 trying to get back to the way things were before. That's
19 where the energy in terms of Indian society was.

20 What we're talking about today,
21 Aboriginal criminal justice systems, is, in a way, a new
22 development. At least this is how I view it. We are
23 formalizing something that didn't exist in the past,

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1 drawing a lot on what did exist and worked in the past
2 for Indian people, and holding it up as an alternative
3 to what we're presently under, namely, the criminal justice
4 system. So when I went through that analysis I finally
5 decided, yes, I can start writing.

6 The second thing that always was in the
7 back of my mind -- one of the earlier papers talks about
8 a culture being conversations through time. I heard a
9 similar entropological description quite a few years ago
10 talking about a culture as a people's adventure through
11 time and space. I myself would probably characterize
12 culture as the experience of people as they travel through
13 time; it shapes them, who they are and what they are, and
14 it changes with their experiences.

15 In thinking about that I was sort of
16 going through and trying to think of an example of a change
17 in the Indian culture that I could use to illustrate this
18 point. Zebedee helped me out with his debate and many
19 exchanges that followed afterward about wife procurement.
20 It occurred to me, listening to that debate, that based
21 on my personal knowledge I probably could put my finger
22 on a change in culture.

23 My grandmother was married when she was

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1 15 years old. She was going to school, in grade 4, in
2 the school run by the Catholic Church, and someone came
3 down and got her and took her off to the church where she
4 got married to the man who became her husband. Many years
5 later, when I was going to university, she told me that
6 she had been visited by one of her contemporaries and the
7 lady apparently had proposed that I be married to her
8 granddaughter. Maybe this is an example of husband
9 procurement, I don't know. My grandmother told me that
10 she said to the lady that she thought that things were
11 different nowadays and that the young people should decide
12 for themselves.

13 Customs change. The norms in the
14 culture adjust with time and they evolve. That does not
15 mean that that's a downslope to assimilation. In Alberta
16 I deal with Indian communities that have a history of
17 contact, some of them as recent as 100 years ago is really
18 the first substantial contact between the communities and
19 the white society. If you assume that that is an
20 assimilative slope, that kind of contact, I think all we
21 have to do is look at the report of the Royal Commission
22 on the Donald Marshall prosecution. It said Donald
23 Marshall was jailed, very simply, because he was an Indian

1 and the system did not afford him his full rights.

2 Well they have 400 years of contact, and
3 yet he's still identifiable and recognizable and treated
4 differently because he's an Indian. Cultures survive.
5 They are very tenacious. That is the point of this whole
6 exercise. Whatever happens, Indians are going to continue
7 to be Indian people, Inuit are going to continue to be
8 Inuit people, no matter what. That's why we're addressing
9 these questions today.

10 In writing this paper I looked at what
11 was going on. First I took a look at the criminal justice
12 system. It's a misnomer to call it a single system. The
13 federal government makes the criminal law. The provincial
14 governments prosecute the criminal law. The federal
15 government appoints Queen's Bench judges. The provincial
16 governments organize the structure of the Queen's Bench
17 court. It even gets more complicated than that.
18 Provincial governments have the power to appoint police,
19 a constitutional power. The federal government does it
20 under its peace, order and good government clause for the
21 RCMP. The federal RCMP provide a contracted provincial
22 police service to Alberta for policing, but the federal
23 officers, instead of using provincial power appointments

1 when they're operating as a provincial police force, are
2 still using their federal appointments. In addition,
3 every province has its own set of rules.

4 I recently dealt with some Indian
5 hunting cases where the Indian reserve straddles the border
6 between Alberta and Saskatchewan. On the same hunting
7 trip the Indian crosses the border and gets charged and
8 trials are run in two separate provinces. It is not a
9 single system, or if it is, "single" is very, very loosely
10 defined.

11 It is a complex web of interlocked
12 jurisdictions between federal and provincial government,
13 with a little bit of common law thrown in, which may or
14 may not be federal or provincial. I figured out a federal
15 common law defence to a criminal code charge in one
16 instance, so it gets complicated.

17 Now I looked at the Aboriginal question.
18 The first question is: Would a parallel Aboriginal
19 justice system mean a single system or would it be composed
20 of many systems? Well, there's that word "system" again.
21 Let's discard it for the moment because it does not really
22 help us in understanding this.

23 The Aboriginal peoples in this country

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1 are as diverse and as varied and as far-flung as all of
2 Europe combined. To say you are going to apply one system
3 that evolved on an island off the continental coast of
4 Europe, or to say that you're going to have a similar type
5 of arrangement, is probably asking for a lot, especially
6 when you're talking about new developments. Maybe in time
7 it would evolve together, but you would need as many years
8 as the common law has been evolving.

9 Aboriginal people vary in geography,
10 population, territory and legal structures. All of those
11 reasons suggest that if things are going to get started
12 in different areas they are going to be different.

13 The next thing is a lot of these are
14 community based. They are starting from the ground up.
15 You are asking a lot to say that those will expand and
16 spread over the whole country. They will go as far as
17 the community extends, where there is a common culture
18 and a common people and a common government, but that is
19 as far as that structure will go. And that is no different
20 than we have here in Canada. Provincial government
21 authorities only extend to the provincial boundaries.

22 The next question: How would
23 Aboriginal justice systems relate to and tie in with the

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1 main system? There are advantages with tying into the
2 main system; resources, stability. In all of the
3 instances that are operating now we are essentially
4 applying the same criminal law, whether it's in Kahnawake
5 or Arctic Bay or the Blood Reserve.

6 There are variations. The criminal law
7 is a large collection of offences, but the central
8 principal offences against persons and property are the
9 same in all of the cultures. If there's an assault, it
10 is still an assault.

11 The next thing is that wherever you look
12 on the existing system there is always a tie in with the
13 Canadian criminal justice structure, whatever initiative
14 there is. In Alberta you have tripartite policing
15 agreements between three levels of government. It draws
16 on the Indian Act, it draws on the treaty, it draws on
17 the federal responsibility for Indians and it draws on
18 provincial policing powers. What was carefully done in
19 Alberta was that from the Indian perspective they used
20 the phraseology "concurrent exercise of jurisdiction".
21 Let us do this together. Let us both exercise authority.
22 Don't lord it over us. That is one mechanism.

23 The Siksika people, Blackfoot, have a

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1 traffic bylaw under the Indian Act. Their officers
2 summons people in the provincial court for violations of
3 their traffic bylaw. The local Crown prosecutors would
4 not prosecute it. As a matter of fact, it started off
5 around meetings involving the Department of Justice,
6 Indian Affairs, the Alberta Attorney General and the RCMP.

7 We heard about the meetings, called up and said, "Listen,
8 this is the Siksika bylaw, you should at least have them
9 in the meeting." They said, "No, no, we want to get this
10 sorted out first." So then I suggested that they add the
11 church because that was the only group they were missing.

12 We looked at the Criminal Code. It said
13 that under summary conviction offences a person can be
14 an agent to the informant. So we made our chief constable
15 the agent of whoever laid the charge, and then he went
16 into court, did the docket matters, and because we felt
17 that police should not be prosecuting the conduct of a
18 trial where there are police witnesses, I went in as the
19 prosecutor. We had no problems.

20 The most striking development in Alberta
21 has been what in Grande Cache is called Native Court and
22 in other places is called Youth Justice Committees. In
23 the simplest description, these are sentencing panels.

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1 One of the reasons they are effective, and their effect
2 has been quite dramatic, is because they are the closest
3 thing to a traditional way of dealing with issues. In
4 this society there is a great preoccupation with the
5 contest, the trial. You have the right to remain silent.

6 Statements must be voluntary, they cannot be forced out
7 by the police. You can consult a lawyer. You are presumed
8 to be innocent and you are entitled to a jury of your peers.

9 That is the nobility I guess. You have a week long
10 trial to decide guilt or innocence and then a half day
11 on sentencing at the end of it.

12 In the Indian system you probably turn
13 that around. There would be no trial. In traditional
14 society, in the way they were, everybody knew who did it.

15 There was not much doubt. If you were going to hold a
16 jury trial the decision was already known before the judge
17 arrived -- not that they hold jury trials on Indian reserves
18 in Alberta.

19 The person who did it does not deny it.

20 He lives in a society that is consensus driven, that makes
21 its decisions by persuading other people. If you get a
22 reputation as a liar, your word is useless from that point
23 on. Denying you did something when everybody has a

1 different view means that your word is going to be
2 discounted in the future. You do not deny it, you admit
3 it, and then you give your reasons why you felt it was
4 justified.

5 In the Indian country it is the
6 sentencing that takes a week. If you notice in all this
7 talk about sentencing panels, these sessions on sentencing
8 take a fair bit of time. What takes five minutes in
9 Provincial Court is going to take an hour and a half at
10 a minimum on a sentencing panel, because it deserves more
11 time, because that is the real question.

12 In these cases the observation that I
13 came to was that the Indian in the community, along with
14 the Indian agent, the judge and the police, had as much
15 to do with taking away any say the community had on being
16 able to regulate its own affairs. If somebody did
17 something wrong, they were charged by the police. There
18 was no reference to the community standards. They were
19 prosecuted and the judge made the decision; all by
20 strangers. It took away from the community their ability
21 to get their own members to conform.

22 The judges in Alberta that have
23 initiated these measures are giving back what they took.

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1 The people have got used to the fact that their own
2 leadership, their own elders, do not have authority. They
3 will not necessarily follow them in the first instance,
4 but if they see a judge respecting it, if they see a judge
5 following that advice, then they begin to believe again,
6 then there is an empowerment to the community.

7 The mainstream criminal justice system
8 can restore to the Aboriginal community what it once had
9 and was taken away. This role is one of receding. The
10 more the community can handle, the more the system can
11 withdraw. The more serious crimes may not be dealt with
12 at first, but there is no reason why they could not be.

13 It all a measure of the rate that the people want to go
14 at.

15 What are the relationships between the
16 various Aboriginal justice systems? Very simply,
17 Aboriginal people are used to consensus building. The
18 more opportunities they have to meet, to discuss, to
19 exchange ideas, the more common their approaches will be.

20 That is no different than the exercises you see in this
21 country. All of the provinces have very similar traffic
22 laws. They do not have to, but it is by comparison and
23 it is a common response to a common problem.

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1 Jurisdiction over some crimes, all
2 crimes; ultimately you are talking about laws to maintain
3 peace and order in a community. Any laws that deal with
4 peace and order in a community must be the subject of this
5 system. To have it any other way is to discredit the
6 system.

7 The one exception is those activities
8 that are traditionally treaty or Aboriginal, hunting and
9 fishing for instance. We now have the situation where
10 hunting and fishing rights of Indian people are decided
11 in criminal courts. They are better decided in their own
12 courts, or their own forums.

13 In closing, these are the observations
14 I would make. Very simply, in my view we are going to
15 have something very similar to the Criminal Code applying,
16 if not the Criminal Code itself. Secondly, the mainstream
17 system is very adaptable and can easily foster and empower
18 Aboriginal communities to proceed in the development of
19 their own justice initiatives. Whether the system will
20 actually do it or abandon it as soon as the Royal Commission
21 has filed its report and it has gathered enough dust remains
22 to be seen. That is a very good possibility.

23 The Aboriginal justice initiatives will

1 involve many structures. In my own view, over time they
2 will grow to have common features. Certainly they will
3 draw on the traditions of the community and the community
4 values and certainly those will be found most often in
5 the elders of the community. They will be part of an
6 interlocked Canadian system, if we can call it a system.

7 The Aboriginal justice systems will be based on territory,
8 with the special exception of the exercise of Aboriginal
9 and treaty rights.

10 One last point which is very important:

11 Every commission that has come out has said that this
12 should be negotiated, with the possible exception of
13 Manitoba, which went further on it. You cannot negotiate
14 if you do not have something to negotiate with. If you
15 do not have the authority or the jurisdiction or the de
16 facto position, then it is extremely difficult to
17 negotiate, because the only thing you have left is your
18 own people's misery, and that's a fine negotiating
19 position.

20 If one talks about a negotiated process
21 then one had better take a serious look at ensuring that
22 Aboriginal people have cards to play in the negotiations.

23 Otherwise, it will be a fine exercise here and I will

1 go back to Alberta and listen to Justice Department
2 opinions that say you cannot do that, or go into court,
3 after listening to the RCMP describe the fine list of
4 measures that they are taking, and defend Aboriginal people
5 who are charged after a donnybrook between the Natives
6 and the Whites and only the Natives are charged. That
7 is what happens today.

8 These are fine words here, but until we
9 actually see results, we have not got anywhere.

10 **VINA STARR:** Thank you, Tony.

11 Mr. Zion is solicitor to the Courts of
12 the Navajo Nation Judicial Branch. He is a former Human
13 Rights Commissioner of Montana and Assistant Attorney
14 General in Montana. He is also the author of numerous
15 publications in Indian Affairs law.

16 Mr. Zion on the American Navajo
17 experience.

18 **JAMES ZION:** Elders, honourable
19 commissioners, friends of many years in Canada, yatayah
20 bene (PH). To give you a little perspective of the Navajo
21 view of justice, the Navajo word for lawyer is
22 'agha'diit'aahii. Literally translated that means "a
23 person who can never lose an argument". I got quite puffed

1 up when I first learned that that was the Navajo word for
2 lawyer. I was properly deflated when I learned that, in
3 context, one who can never lose an argument is a pushy,
4 bossy boots who is actually violating Navajo values by
5 pushing others around and imposing decisions rather than
6 talking them out. I do not propose to be 'agha'diit'aahii
7 here today.

8 The major question before the Commission
9 is: "Would a separate Aboriginal justice system mean a
10 single system or would it be composed of many systems?"

11 I propose to answer that question by addressing the
12 subquestions in a slightly different perspective.

13 The first subquestion is: "How would
14 Aboriginal justice system(s) relate or tie in with the
15 existing system?", and "What would the relationship be
16 among the various justice systems in the different
17 Aboriginal communities?"

18 To reach these subquestions I want to
19 trace the relationship of Native justice with European
20 systems, give you a working definition of law, and talk
21 about some barriers to Aboriginal justice in separate or
22 state systems.

23 First of all the relationship, and I find

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1 some ironies here. On August 9th of 1555 Holy Roman
2 Emperor Charles V made a proclamation. The proclamation
3 was endorsed by a Queen that we know in English history
4 as Jane the Insane of Spain. The proclamation said,
5 basically, to Spanish bureaucrats in the New World, Indian
6 law is law, Indian law includes statutes enacted by Indian
7 governments, and Spanish bureaucrats were ordered to obey
8 Indian law.

9 Well, the problem that Spanish
10 bureaucrats had immediately was they could not understand,
11 or they would not understand, Indian law. So the Spanish
12 formed a body called the Hoskalo Heneral di Indios (PH),
13 which means the General Court of Indians, which was
14 operated by the Spanish to hear Indian cases, and it
15 operated up to the Mexican Revolution of 1820.

16 Now, when the English came to the shores
17 of North America, they too confronted the problem of how
18 to relate to the reality of the existence of Indian
19 government. They saw a government many of them could not
20 understand -- a few of them had an inkling of it -- and,
21 as was mentioned yesterday quite accurately, what they
22 did see formed the values which were used for the United
23 States Constitution.

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1 But in any event, in 1763, at the
2 conclusion of what we know as the French and Indian War,
3 there was the Royal Proclamation of 1763 which implicitly
4 recognized the validity of both Indian government and law.

5 There was a decision of the Privy Council, called the
6 Mohican case, which recognized the validity of Indian law,
7 and various other decisions including Lord Mansfield's
8 Campbell v. Hall. Judge Blackstone summed all of these
9 up to say that there was respect for Indian law under
10 English law.

11 We do not know enough about French
12 colonial relations with Indian nations, although we do
13 know that their trade relationships assumed independence
14 of Indian governmental forums.

15 Now, I suggest that all of this is the
16 basis for the United States constitutional provision that
17 only gives Congress the power to regulate commerce with
18 Indian tribes. It does not give the power to impose law
19 on Indian tribes. I suggest that these historical
20 antecedents are probably the basis for Canadian law as
21 well, and I note that the British Court of Appeals, in
22 the case of Queen v. Secretary of State, look to the Royal
23 Proclamation of 1763 as an Indian bill of rights.

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1 I also suggest that these historical
2 precedents, along with some American precedents that
3 clearly recognize Indian common law, are the basis for
4 both domestic and international human rights of Native
5 peoples to have and maintain their own systems of justice.

6 I am doing ongoing research on this and I simply see
7 centuries of state practice which acknowledges the right
8 of Native peoples to have and use their own law as a
9 fundamental foundation.

10 So for me the beginning point of our
11 discussion is that there was and is a fundamental right
12 of Aboriginal peoples to maintain their own government
13 under law.

14 Now, as was mentioned, I think that
15 separate Indian justice is a reality. When you get into
16 these factionalisms over jurisdiction and all of the fights
17 on whether or not Indian governments can have their own
18 law, the justice system breaks down. I know of an Indian
19 tribe in the State of Montana where, due to a lack of
20 resources for the tribal court system and a failure and
21 refusal on the part of the United States government to
22 act, the traditional revenge systems are in place with
23 modern firearms, so that people are being killed on that

1 particular reservation. That is what happens when
2 governments do not communicate.

3 On the other hand, in 1984 Judge Geneva
4 Stump, of the Rocky Boys Reservation in Montana, and I
5 had the privilege of doing field work in Saskatchewan,
6 and we found several justice bodies in actual operation
7 without codes, without authority, without rules of law,
8 and they were very successful. They essentially handled
9 problems in their own community, hiding those problems
10 from the RCMP or from social workers. When they were
11 unable to handle those problems, that is when they picked
12 up the phone. So I think that there is a reality of
13 Indian justice in place.

14 Now, I think it is important for us to
15 come back to fundamental questions. I am kind of a legal
16 anthropologist and I have reached a working definition
17 of law, and it is fairly simple. It is norms -- ought,
18 should not -- values, moral principles and, as my boss,
19 Chief Justice Yazzie, pointed out to me, emotions, which
20 are a part of the process of values; all of those things
21 which are picked up by institutions and applied to a given
22 problem.

23 Now, I suggest that the two prongs of

1 the definition are important -- the values prong and the
2 institutions prong -- because we need to ask the questions,
3 in looking at all this; "Whose values are we going to use?"
4 and "Whose institutions will we use to apply those values?"

5 There are several possibilities. First
6 of all we have the state system, and I use "the state"
7 in the sense of a national government or a provincial or
8 state government. We can also describe these as
9 assimilationist systems where Native people are invited
10 to come into the system and participate as judges or
11 lawyers. We know there is the problem of the cost of
12 education, the availability of education, and even if
13 Aboriginal lawyers and judges are able to participate in
14 the state system, you ask the question, "Whose values will
15 they be able to apply?" I think the practice answers
16 itself that Indians in those systems have a very difficult
17 time applying their own values.

18 Then there are a number of bodies that
19 the states have adopted where Indian problems are solved.

20 In the United States we have bodies such as the Interior
21 Board of Indian Appeals, where again Indian professionals
22 are brought into the system to deal with the problems of
23 their peoples but they are not permitted to use their own

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1 values as law.

2 Third, we have the Tribal Court system
3 in the United States, and this is one that gives outside
4 observers problems. I complain, in my written paper,
5 about the misperceptions of the Australian Law Reform
6 Commission, for example, that was able to see the imposed
7 American system of non-Indian values in tribal codes but
8 was unable to see what happens when American tribal judges
9 essentially throw those codes out the window and use the
10 values of their communities as well as the procedures of
11 their communities.

12 So again, whose values, whose
13 institutions? As you are looking at American Indian
14 Tribal Courts, in many instances you are going to see a
15 process of adaptation to respond to the community.

16 Finally, we have traditional bodies or
17 bodies adapted for modern circumstances. Again, I suggest
18 the Saskatchewan experience, the Federation of
19 Saskatchewan Indian Nations study which was put out in
20 1985, that showed the existence of those bodies. So the
21 possibilities are wide.

22 In trying to draw a lesson from what I
23 have talked about in history and in the reality of Indians

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1 solving their own problems, I would like to use an
2 Anglo-European value. It is essentially a western value
3 coming from the Old Testament. The value is this: Thou
4 shalt not ration justice. Please, if you are looking to
5 the American experience, take the good stuff and do not
6 get into the jurisdictional quibbles and the jealousy and
7 the withholding and the control. Thou shalt not ration
8 justice. Thou shalt let Native peoples solve their own
9 problems.

10 The answer to the serious offences that
11 we raised yesterday is fairly simple. If a Native
12 governmental group comes across a problem they cannot
13 solve, the answer is simple. Pick up the telephone and
14 call your friends in the RCMP or in the provincial system
15 where you have established a relationship to solve a common
16 problem.

17 On the matter of Aboriginal bodies
18 working with each other, I can tell you that in the United
19 States that is indeed being done. In the Navajo court
20 system we acknowledge, recognize and enforce the judgments
21 of other Tribal Courts. That is not a problem. American
22 tribal judges get together and they discuss common
23 problems. I suggest to you that there a number of existing

1 provincial and other organizations where that will be an
2 easy process. In Saskatchewan the Federation of
3 Saskatchewan Indian Nations proceeded with their own plan
4 for working that out.

5 I would like to close with some personal
6 anecdotes. I was touched the first day by the personal
7 level of the discourse. I live in a small community on
8 the Navajo Nation called Oak Springs. There are a few
9 families up on a mountainside. I would guess the
10 population up there is 50 to 75 people. When I moved into
11 my home my landlord told me that there was a problem because
12 there was a neighbour who was known to burglarize homes
13 in the area, a very serious offence.

14 I thought, as a non-Navajo, how am I
15 going to respond to this problem of this person in my
16 community who burglarizes? I thought, well, the nearest
17 Navajo police substation is ten miles away, I don't have
18 a telephone. I suppose I could go over and threaten this
19 person and say that I will do all kinds of nasty things
20 if I catch him around, but I'm out of town quite a bit.

21 So the solution was I made friends with
22 this person. He comes over periodically and when he
23 doesn't have cigarettes, he has cigarettes, and when I

1 don't have fire wood, he has employment. So we solved
2 the problem in my community by getting to know each other.

3 And I think it's asinine in our setting
4 that if my wife Elsie and I get into a fight which involves
5 drinking on Saturday night, the Navajo police can come
6 and haul her away, charge her with an offence, she will
7 get a \$50 fine for possessing alcohol, and the reality
8 for me is that I would be committing a federal felony where
9 I would be hauled 60 miles away to the county seat and,
10 if I was charged at all, I would be charged in federal
11 court and eventually sentenced to five years in prison.

12 That is utterly ridiculous. It is utterly ridiculous
13 to me that I could not be charged in the court where I
14 work.

15 I think it is important that we put some
16 stereotypes on the table and deal with them. Elsie and
17 I have been working with the problem of domestic violence.

18 We found that the stereotype of the brutal Indian, of
19 the passive Indian woman, of the dumb Indian, that these
20 have been enforced in Indian communities and have been
21 picked up and it is time for both societies to examine
22 and reject those stereotypes because Indian peoples are
23 quite capable of handling their own problems.

1 So I suggest to the Commission, to answer
2 the ultimate question posed here, that it is not a question
3 of a unified system or of separate Aboriginal systems.
4 It is a matter of very simply acknowledging the right of
5 Native peoples to have their own laws and recognizing that
6 this is not a matter of devolution where authority comes
7 down from the state on high. It is a matter of recognizing
8 existing authority and human rights.

9 Thank you.

10 **VINA STARR:** Thank you very much Mr.
11 Zion. We are already seeing a common thread from the first
12 two speakers who are pointing in the direction of
13 territorial jurisdiction.

14 With that I'd like to turn to Ms Nahanee.

15 Ms Nahanee is a Master of Law candidate at Queens
16 University. I believe she just graduated from the
17 University of Ottawa with her law degree this past year.

18 She is also the advisor for the Native Women's Association
19 of Canada. She has been invited to this panel to give
20 the perspective on the Aboriginal feminist view.

21 Ms Nahanee.

22 **TERESSA NAHANEE:** Good morning. I am
23 really pleased to have this opportunity to speak here

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1 today. I guess I owe it certainly to Deborah Hanley in
2 the Royal Commission who is responsible for women's issues
3 in the area of research. I also want to thank the Inuit
4 Women's Associate and Mary Silid (PH) in particular for
5 being so helpful to me in my three years of study at the
6 University of Ottawa. I did a major study on Inuit women
7 and sexual assault in the Northwest Territories and I was
8 able to speak to Mary and other Inuit women in that
9 organization respecting the administration of criminal
10 justice in the Northwest Territories as it impacts on Inuit
11 women.

12 I certainly thank the Native Women's
13 Association of Canada for giving me the opportunity for
14 18 months to be their constitutional advisor. Most of
15 the organizations had a lot of funding and a lot of lawyers.
16 At the time that I was employed by them I was a third
17 year student in law at the University of Ottawa.

18 I want to say a bit about my background
19 because of the nature of the subject upon which I have
20 written. I am a member of the Squamish Indian Band in
21 North Vancouver. I went to an Indian Residential School
22 at the age of five. I was there until I was 12. I was
23 raised primarily and educated in a Catholic highschool

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1 and university. I spent almost my entire career with the
2 Department of Indian and Northern Affairs -- that is almost
3 20 years. I spent two years in Washington, D.C.; one year
4 with the Bureau of Indian Affairs and a year with the U.S.
5 Congress. I spent three years with a federal minister
6 as a legislative assistant, and after that, four years
7 ago, I left the federal service. I did not necessarily
8 leave it voluntarily. I worked with a French minister,
9 Lucien Bouchard, who spoke to me only in French and I
10 answered him in English. My comprehension of French is
11 about 50 per cent of what people are talking about, so
12 presumably he got the right answers for what he asked.

13 I want to try to summarize the paper that
14 I have presented. I was asked to speak on two things,
15 from a feminist perspective; the jurisdiction and
16 structure of a parallel justice system, and whether or
17 not the principles and legal rights in the Canadian Charter
18 ought to apply to Aboriginal justice.

19 I approached the topic from what I would
20 consider to be a realistic approach. Since the
21 Charlottetown Accord was defeated, we will be living within
22 the current constitutional regime at least for the next
23 two to five years. We are not looking at constitutional

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1 amendments that are going to facilitate the transfer to
2 a parallel justice system. We are, then, looking at the
3 law as it stands and as it will be applied to Aboriginal
4 peoples in the very near future.

5 In my experience in the last 18 months
6 I have certainly found within the Native community that
7 feminism is an "F" word. It is not a good word and it
8 is certainly one that Aboriginal people, or at least those
9 that speak in public, do not want to apply to Native people.

10 In my studies of feminist legal theory
11 I have found that there is a value put on individual
12 experience and that this experience can be translated into
13 theories.

14 Catherine McKinnon (PH), in writing on
15 the inter-relationship of practice and theory, wrote, "We
16 know things with our lives and we live that knowledge beyond
17 anything any theory has theorized. Aboriginals need to
18 be involved in designing Native justice systems because
19 of the lives they have lived and because they live that
20 knowledge. For this reason, Aboriginal women know with
21 their minds and bodies what legal system will both deliver
22 justice to the accused and protect society, including women
23 and children."

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1 That pretty well says for me why Native
2 women ought to be involved, because they do have the
3 experience, they are the primary victims of crimes against
4 the person in Native communities, usually at the hands
5 of Native men, and generally men who are related to them
6 either by blood or a legal bond or are in a position of
7 trust.

8 There is a court decision now of August
9 20th, 1992, from the Federal Court of Appeal, which
10 basically declares that Aboriginal women and women's
11 organizations must be consulted equally with other
12 organizations in this country when we are designing a
13 system and policies that affect Aboriginal people. That
14 includes, in the Constitution, self-government, justice,
15 violence and child care.

16 There is increasing concern by
17 Aboriginal women for what is occurring in the Aboriginal
18 justice area. There are over 400 pilot projects and
19 research projects involving Native people. Probably not
20 more than 40 of those are of concern or involve or actively
21 consult with Native women's groups.

22 I have found, in my experience with the
23 Native Women's Association, that Native women in various

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1 parts of the country where there are justice pilot projects
2 are often enraged by the kind of projects that they see,
3 particularly if they deal with a diversion of Aboriginal
4 accused males convicted for sexual offences against Native
5 women and children. Aboriginal women are also opposed to
6 lenient sentencing for Aboriginal male sex offenders whose
7 victims are women and children. The Inuit Women's
8 Association is taking a case against the judiciary of the
9 Northwest Territories over the whole issue of lenient
10 sentencing and whether the judiciary is subject to the
11 Canadian Charter of Rights and Freedoms.

12 Although there has been a lot of talk
13 about cultural differences and the need for cultural
14 sensitivity on the part of the judiciary and the justice
15 system, it is very important to look at who is defining
16 what culture is and Native women have to be consulted by
17 the judiciary and others if they are going to define
18 cultural practices which act against the interest of Native
19 women.

20 When were are looking at changes to the
21 Native justice system we have to recognize that there has
22 been 100 years of statutory sex-based discrimination
23 against Indian women in this country. They have been

1 deprived of their right to vote, they have been deprived
2 of their property rights, which still exists today, and
3 there is a lot of discrimination against Indian women
4 within the statute books of Canada that we are still working
5 on. We have had a very tough battle for over 20 years
6 to try to end this kind of discrimination against Native
7 women. This has to be recognized in the work on justice.

8 I want to mention a couple of other
9 points. One was in the comment a little while ago by Mr.
10 Mandamin. He mentioned, I guess jokingly, about husband
11 procurement in reference to an issue that was raised a
12 couple of days ago by Zebedee who talked about the
13 procurement of wives among the Inuit peoples. There was
14 some discussion about that and some concern because he
15 was using that as an example of the conflict between culture
16 and rights within the current justice system.

17 With respect to procurement in the
18 historic sense, among the Inuit this involved the
19 procurement of wives and polygamy. This involved the
20 taking of young Inuit girls, probably under 18 or 16, who
21 were dragged off kicking and screaming to marry Inuit males
22 that somebody else had decided they ought to marry. This
23 is a practice, obviously, that would not be endorsed by

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1 the Inuit Women's Association or Inuit women today.

2 With respect to punishment, there have
3 been quite a number of very sexist examples and a lot of
4 insensitivity at this forum regarding Native women,
5 sentencing and sexual assault. This outrages me and it
6 is of great concern to other women at this forum.

7 With regard to the discussion of
8 sentencing, people have said that it is not Aboriginal
9 to require punishment. In fact, for crimes against women
10 and children we are saying that we want the same kind of
11 justice given to other Canadians. There is one law right
12 now, it is the Criminal Code. It is not being applied.

13 If others get a three-year sentence, we want the same
14 sentence for our men who commit the same crimes in our
15 community. There is a place for healing. That place for
16 healing may be outside of the Native community. We come
17 from very small communities and there are many women who
18 do not want to see these men who have violated them walking
19 freely within the communities.

20 In particular, the Inuit women have
21 taken a court case to ask for harsher sentences. By
22 harsher I mean more than a letter of apology, more than
23 a one-week sentence or a four-month jail sentence for rape.

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1 As long as these lenient sentences are given by the
2 northern judiciary, this kind of crime is being condoned
3 and encouraged among the Native population. There
4 are many men who will willingly commit this crime to spend
5 four months in jail to get a home away from home or to
6 get a home during the winter. It is the victims of these
7 crimes who suffer the most.

8 The Inuit communities are small
9 communities. This goes for the Indian communities in the
10 south as well. We are talking about an average population
11 of 150 to 250 people. Often in cases of sexual assault,
12 domestic violence, it is the victim that is removed from
13 the home and not the perpetrator of the crime. The example
14 was given a little while ago about the woman being taken
15 away and charged or else a woman being flown out of the
16 community and put into a shelter. This leads to the
17 conclusion, when children are removed in cases of incest,
18 that it is the children that are being punished and not
19 the male perpetrators.

20 I called my paper "Dancing with a
21 Gorilla". The reason for that is that Native women have
22 been treated as less than human within the criminal justice
23 and we want an end to that kind of treatment. We do want

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1 to be involved in sentencing and we do want the law applied
2 as the law exists today if we are subject to it.

3 People have to appreciate that there are
4 two views of Aboriginal justice. Whether people will
5 agree or not, there are two views. There is the view of
6 the Aboriginal men, and they have been victimized by the
7 Canadian justice system because they are the ones who are
8 serving time in jail right now. So when they look at Native
9 justice they see an opportunity to get away from the kinds
10 of punishment meted out by the Criminal Code and by
11 basically a white justice system.

12 But when you look at this problem from
13 an Aboriginal women's perspective, who have been mainly
14 the victims of the Native men who are in trouble with the
15 law, one must appreciate that we do not condone the leniency
16 in sentencing and the setting up of a system of justice
17 that will give one kind of justice to men and no justice
18 to Native women who have to remain in those communities
19 and subject themselves to the kind of social disfunction
20 that we do have in our communities.

21 This, in my view, is the difference
22 between the kind of patriarchy that we live in in Canadian
23 society and within our Aboriginal communities. We want

1 an end to that. We want a voice in determining the kind
2 of future that we will have, and we want to have a voice
3 in decolonizing the criminal justice system, but in the
4 process of doing that we are not willing to sacrifice all
5 our security of the person and the rights of our women
6 to live in social harmony in their communities.

7 I want to explain a bit about the
8 criticism of the individual versus collective dichotomy
9 that we are often accused of as Native women, particularly
10 over the last 18 months. People think that we are fighting
11 for individual rights and that we do not care about
12 collective rights. That is absolutely not true. The laws
13 of this country have demanded that Native women leave their
14 communities. They have been barred from those
15 communities. The majority of them are living in the cities
16 right now, and even though the laws were amended in
17 1985 they have not been allowed to return to the communities
18 that they were born in.

19 We are talking about a struggle to be
20 a part of the community, to be able to return to the
21 community and to establish the kind of government and
22 justice systems that people would like to live in.

23 I have felt very sensitive about the fact

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1 that there is a lot of criticism against our Native women's
2 associations, and certainly against myself for trying to
3 delineate the nature of the struggle between the men and
4 women in our Native society over things like constitutional
5 rights, self-government and justice. I feel a bit guilty
6 at times if we have to stand up and say no, we don't want
7 that. We are not willing to take something blindly like
8 constitutional amendments or self-government or Native
9 justice or Native customary law. We are not willing to
10 sit back and to accept, without definition, the kind of
11 system that we will live in in the future.

12 For the past 18 months the Native women
13 have been saying that they want to be part of decision
14 making, they want to define the kind of jurisdiction,
15 structure and process that we will live in probably for
16 our lives and certainly for the next seven generations.
17 That is why people are not going to blindly accept, as
18 we have in the past, Aboriginal men and male leaders sitting
19 down and defining justice.

20 If you have looked around this room in
21 the last three days and looked at the round table, you
22 will have seen how many women and how many men have been
23 represented here. Women are probably outnumbered seven

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1 to one in the room, and among Aboriginal women it is
2 probably more than that. In the future this kind of thing
3 has to change. We have certainly let the Royal Commission
4 know that we do expect that whatever they decide in the
5 future will concern Native women 50 per cent of the time.

6 We are talking about research, the studies they will
7 do and the findings they will make. In the future
8 this kind of forum will not be acceptable to Native women.

9 We want half of the participants to be women because it
10 is a lot more comfortable to try to develop something for
11 the future when you are not always in a minority situation.

12 Many of the people that we have seen here we have also
13 seen in the constitutional process. In that process the
14 Native women were totally silenced. We were totally
15 excluded from that process. Nonetheless we have
16 continued, through the courts and by appearing at these
17 various fora, to try to make a voice and a place for Native
18 women to be heard.

19 The conclusion of my paper with respect
20 to the Canadian Charter of Rights and Freedoms, the
21 principles of the Charter, the legal rights for accused,
22 is that within the current constitutional regime the
23 Canadian Charter will apply to Native justice. I

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1 certainly would not make any apologies for that. If there
2 are going to be no individual rights given to Native people
3 within the communities in a Native justice system, that
4 is not something that Native women are going to endorse
5 and certainly not something that I would endorse.

6 That is all I will say for now. Thank
7 you.

8 **VINA STARR:** Thank you very much,
9 Teresa. For those of you who aren't aware, it was the
10 persistence of the Native Women's Association of Canada
11 that resulted in the 1985 amendment to the Indian Act.
12 If the record of history be looked at, it should cause
13 us all chagrin that many of the major Aboriginal
14 organizations argued against those amendments.

15 Professor Macklem has 20 minutes left
16 given in our allotted time. I have deliberately asked
17 Professor Macklem to present his paper last during this
18 panel because in it he examines our current constitutional
19 arrangement with regard to the administration of justice
20 who has the responsibility for devising the laws,
21 administering the laws, and he examines in his paper where
22 the jurisdiction may or may not come for endowing an
23 Aboriginal justice system.

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1 As he is going through his analysis I
2 would like you to keep in the back of your mind the comments
3 of Mr. Zion in particular, and of course Mr. Mandamin.

4 Professor Macklem please.

5 **PATRICK MACKLEM:** Thank you, Vina.

6 Elders, commissioners, chiefs, ladies
7 and gentlemen, thank you very much for the opportunity
8 to participate in this round table. I may say at the outset
9 that I fully intend to be a pushy bossy boots today if
10 that is necessary.

11 I have been asked to prepare a paper on
12 potential constitutional impediments to the establishment
13 of an Aboriginal justice system or systems. In my paper
14 I restrict my analysis to the current distribution of
15 legislative authority between Parliament and provincial
16 legislatures and to what are known as the judicature
17 provisions of the Constitution Act, 1867.

18 In my paper I do not directly address
19 the impact of section 35 of the Constitution Act, 1982,
20 which recognizes and affirms existing Aboriginal and
21 treaty rights, nor do I address the impact of the Charter
22 on a parallel system of justice.

23 Teresa Nahane addresses some charter

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1 concerns with respect to gender in her paper and these
2 topics, both the impact of the Charter and the impact of
3 section 35, have been addressed quite fully elsewhere in
4 the literature. However, it should be noted at the outset
5 that you cannot ignore the impact of section 35 in answering
6 these kinds of questions, so orally I will refer to it
7 on occasion.

8 It should also be noted that after the
9 defeat of the Charlottetown Accord the question posed by
10 the Commission is particularly pressing. Reform in the
11 area of Aboriginal justice systems will not, in the short
12 term, be the result of constitutional reform, but rather
13 it will be a combination of court led reform, of treaty
14 making, of negotiations among all three levels of
15 government, as well as statutory initiatives.

16 With respect to statutory initiatives,
17 legislation will be required to alter the existing Canadian
18 justice system so as to accommodate it with emerging
19 Aboriginal court systems. The growing emergence of
20 Aboriginal court systems will require provinces and/or
21 Parliament to, in Grand Chief Mercredi's phrase, vacate
22 the field. Vacating the field will entail the passage
23 of legislation restricting the scope of jurisdiction

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1 currently exercised by Canadian judicial institutions and,
2 from the perspective of Canadian law, transfer of
3 jurisdiction to Aboriginal court systems.

4 So the question posed is how flexible
5 is the current constitutional framework to permit such
6 transfers of jurisdiction to Aboriginal court systems.

7 I differ with the Attorney General of
8 Manitoba, Jim McCrae, in that I believe that constitutional
9 reform is not necessary for the establishment of a parallel
10 system or systems of Aboriginal justice in Canada. I
11 believe that the current framework is sufficiently
12 flexible to house and to authorize the repatriation of
13 the administration of justice to Aboriginal communities
14 across the country.

15 The issue at root is one of political
16 will, it is not one of constitutional constraint, and the
17 Constitution should not be used as a place of refuge
18 for and by those who lack the political will to engage
19 in change.

20 There are two basic questions to be
21 answered. One is which level of government, provincial
22 or federal, possesses the authority to pass such statutory
23 initiatives. The second is what is the effect of the

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1 judicature provisions on such initiatives. I will run
2 through my arguments very briefly. I do not have time
3 to sketch out all the steps in the analysis and I will
4 limit myself to my conclusions.

5 I also want to note at the outset that
6 I use the words "establish" and "establishment" with some
7 misgivings. I do not mean to imply that the legal source
8 of an Aboriginal court system or structure would be federal
9 or provincial legislation. The legal source of an
10 Aboriginal court system is the inherent right of Aboriginal
11 nations to govern their land and to govern their peoples.
12 The implementation of such an inherent right, and the
13 way in which it will mesh with the current administration
14 of justice, will require statutory initiatives
15 establishing Aboriginal court systems. So my focus today
16 is on the constitutionality of such initiatives.

17 It is difficult to assess these in the
18 absence of actual legislation, but my general conclusions
19 are that there is ample constitutional authority for
20 federal or for provincial statutory initiatives
21 establishing and maintaining Aboriginal court systems.

22 Very briefly with respect to provincial
23 authority, the provinces have jurisdiction or legislative

1 competence to pass laws in relation to the administration
2 of justice. I am of the view that section 92(14), which
3 confers on provinces the authority to pass laws in relation
4 to the administration of justice, provides a
5 constitutional basis for the provincial establishment of
6 an Aboriginal court system. It is more controversial
7 whether or not a province, having established an Aboriginal
8 court system -- and by court system I mean anything ranging
9 from a circuit court structure to a regional court
10 structure to the type of pilot projects that were talked
11 about throughout this round table.

12 So I do not mean to imply any specific
13 content into that phrase. But is it more controversial
14 whether or not a province, having established some type
15 of Aboriginal judicial system, is also entitled to vest
16 jurisdiction in that court to adjudicate matters that fall
17 under exclusive federal authority.

18 In so doing it runs the risk of
19 infringing upon federal legislative competence in relation
20 to Indians and lands reserved for the Indians. However,
21 there are certain strands in case law recently decided
22 that suggest that a province is entitled to vest courts
23 of its own creation with jurisdiction over matters that

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1 fall within federal legislative competence. It is likely
2 that the judiciary will look more favourably on a general
3 conferral of jurisdiction, namely a conferral of
4 jurisdiction over both provincial and federal matters,
5 than it will upon a conferral of jurisdiction over
6 exclusively federal matters.

7 A more cautious route would be for a
8 province to establish an Aboriginal court and vest it with
9 jurisdiction over certain matters that fall within
10 provincial competence, and then Parliament would then be
11 free to vest that entity with further jurisdiction over
12 matters that fall within federal competence.

13 But I want to emphasize that my view is
14 that federal-provincial co-operation is not necessary,
15 that it is likely that a province can act on its own
16 initiative, establish an Aboriginal court and vest that
17 court with a certain measure of jurisdiction over
18 Aboriginal peoples and over Aboriginal land.

19 With respect to federal authority,
20 Parliament is also entitled to establish courts of its
21 own design. Section 101 of the Constitution Act, 1867
22 authorizes Parliament to establish federal courts for the
23 administration of federal law. But Parliament is only

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1 entitled to vest a court of its own creation with
2 jurisdiction to adjudicate matters involving applicable
3 and existing federal law. This standard can include, in
4 my view, the common law of Aboriginal title as well as
5 matters governed by the Indian Act, as well as matters
6 governed by other federal statutes, either on the books
7 now or passed in the future. It likely also includes
8 criminal matters to the extent that the Criminal Code and
9 other federal statutes creating criminal offences are
10 viewed as laws of Canada within the meaning of section
11 101 of the Constitution Act.

12 It is an open question whether or not
13 a province can vest jurisdiction in a federally established
14 Aboriginal court to adjudicate disputes that fall within
15 provincial legislative competence, but I make some
16 arguments in my paper that a province may be so entitled.

17 Let me very briefly turn to the
18 judicature provisions. For those of you who are
19 unfamiliar with them, they provide essentially that
20 superior, district and country court judges are to be
21 appointed by the Governor General, are to be members of
22 the provincial bar in question, are to be removable only
23 by the Governor General on address of the Senate and the

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1 House of Commons, are to be subject to mandatory retirement
2 and are to be paid by the federal government.

3 Now, these provisions have been
4 interpreted to apply to other courts or tribunals
5 established by a province which exercises jurisdiction
6 broadly analogous to the jurisdiction exclusively
7 exercised by superior, district or county courts at the
8 time of confederation, and that includes quite a lot of
9 jurisdiction.

10 There are two stories behind the
11 judicature provisions. One is that they secure judicial
12 independence. The other story is that they secure a
13 federal role in the constitution and maintenance of
14 provincial courts given that those courts administer both
15 provincial and federal law.

16 I do not have time to run through the
17 jurisprudence with respect to the judicature provisions,
18 but very briefly, if a province elects to confer, on a
19 provincially established Aboriginal court, jurisdiction
20 broadly analogous to the jurisdiction exclusively
21 exercised by superior, district or country courts at the
22 time of confederation, then Aboriginal judges who exercise
23 such jurisdiction may have to conform to the judicature

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1 provisions. That is, they may have to be appointed by
2 the federal government and be subject to mandatory
3 retirement and the like.

4 However, these requirements can be
5 avoided, according to the case law, if it can be shown
6 that avoidance is necessarily incidental to the
7 achievement of a broader policy goal of the legislature,
8 and I sketch out what I believe are strong arguments in
9 favour of the view that the judicature provisions will
10 not bind the provinces when or if they seek to establish
11 a provincial court.

12 With respect to the federal
13 establishment of Aboriginal courts, a threshold question
14 is whether or not the judicature provisions apply to the
15 federal government at all. In my view, federally
16 established courts and tribunals should not be subject
17 to the judicature provisions as those provisions are better
18 viewed as an expression of a federal interest in the
19 composition of provincially established courts and
20 tribunals.

21 In my view, the better place to look for
22 securing the value of the independence of the judiciary
23 is not the judicature province but is section 11 of the

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1 Charter which guarantees a right to a fair and impartial
2 hearing and section 7 which guarantees rights to life,
3 liberty and security of the person.

4 However, if I am wrong on this, if the
5 judicature provisions are seen to apply to Parliament when
6 it establishes courts of tribunals, then Parliament will
7 be under the same strictures as provincial legislatures
8 when it seeks to establish an Aboriginal court system.
9 However, avoidance can still be obtained if it can be shown
10 that avoidance is necessarily incidental to Parliament's
11 legislative objective. Again, I sketch out arguments as
12 to why avoidance is desirable.

13 Just to conclude, it is my view that the
14 constitution can accommodate the recognition of the
15 inherent right of Aboriginal peoples to administer justice
16 over their lands and over their people. Whether this can
17 or will occur is not constrained by constitutional
18 considerations. It will only be constrained by a lack
19 of political will.

20 Thank you.

21 **VINA STARR:** Thank you Professor
22 Macklem. We will not be able to entertain any questions
23 on this panel. We do have ample time in the next panel

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1 after the coffee break.

2 I just want to summarize by saying that
3 Mr. Mandamin has pointed out that we already have an
4 interlocking system of shared jurisdiction in our Canadian
5 administration of justice. Mr. Zion has pointed out that
6 the Aboriginal jurisdiction exists as an inherent right,
7 certainly from the historical perspective, albeit that
8 it has not been recognized in our contemporary times.

9 Ms Nahanee has emphasized that the
10 experiences of Aboriginal women need to be represented
11 in any formulation of Aboriginal justice systems.

12 Finally, we have heard from Professor
13 Macklem that our Canadian constitutional framework is
14 certainly adaptable to vacate the field and recognize the
15 jurisdiction of administration either under provincial
16 authority or federal authority.

17 Thank you. I will turn it over to Mr.
18 Sinclair.

19 **MURRAY SINCLAIR:** Thank you panel.
20 Thank you Vina. We are going to take a short break now
21 and reconvene in 15 minutes. For those of you who want
22 to leave your travel claim forms, there is a representative
23 from the Department of Finance -- you can recognize her

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1 by her calculator -- in the staff room available to take
2 those forms, to assist you in their completion.

3 As well, I would point out that we are
4 going to be amending the agenda for the day. Let me tell
5 you what it is going to consist of. The commissioners
6 have decided to try to complete the day's events before
7 the lunch break. So for those of you who have been
8 contemplating a lengthy lunch in order to attend to other
9 matters, the lunch will be delayed until about 1:30 and
10 the report from the rapporteur will be given before the
11 lunch break. There will be no afternoon session if we
12 are successful in getting that accomplished, so we have
13 matters to proceed with.

14 I would ask the panel that is going to
15 do the round-table discussion to reconvene in 10 minutes.

16 The rest of you have 15.

17 ---Short recess

18 **MURRAY SINCLAIR:** I would like to
19 reconvene the session. Please take your seats.

20 This morning's round-table discussion
21 is going to address the questions that are found in your
22 agenda. The are identified as fundamental question
23 numbers 3, 4 and 5:

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1 "If the present system cannot be adapted to correct its
2 shortcomings, should one or more
3 separate Aboriginal Justice
4 systems be established?

5 a) How would a separate Aboriginal Justice system(s) relate
6 to or tie in with the existing
7 system?

8 b) What would the relationship be among the various justice
9 systems in the different
10 Aboriginal communities?"

11 Question 4:

12 "Under the present constitution does the concept of a
13 separate system or systems raise
14 any constitutional questions?
15 For instance, one impediment to the
16 establishment of an Aboriginal
17 justice system of criminal
18 jurisdiction may be section 96 of
19 the Constitution Act, 1867, which
20 prohibits the federal or
21 provincial government from
22 establishing court structures that
23 oust the jurisdiction of superior

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1 courts for indictable offences."

2 Question 5:

3 "How would the basic principles and legal rights protected
4 in the Canadian Charter of Rights
5 and Freedoms be applied in an
6 Aboriginal justice system(s)?"

7 We have asked the following panel to
8 gather and discuss these issues: Sharon McIvor, Justice
9 Co-ordinator for the Native Women's Association of Canada;
10 Mr. Roger Tassé, former Deputy Minister of Justice for
11 the federal government and legal counsel at the law firm
12 of Fraser and Beatty; Charlene Belleau, Family Violence
13 Coordinator, Canim Lake Band, Co-ordinator Research on
14 Impact of Residential Schools and former Chief of the
15 Alkali Lake Band; Mr. Harvey Longboat, representing the
16 Haudenasaunee Six Nations Confederacy; Mary Ellen Turpel,
17 professor, Dalhousie University, Faculty of Law, and
18 constitutional advisor to the Assembly of First nations;
19 Commissioner Norman Inkster, Commissioner of the Royal
20 Canadian Mounted Police and current president of Interpol;
21 Mr. Ron George, President, Native Council of Canada and
22 Hereditary Chief of the Wet'suwet'en Nation; Judge Barry
23 Stuart of the Territorial Court of Yukon; Mr. Robert

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1 Mitchell, Minister of Justice and Attorney General for
2 the province of Saskatchewan, Minister responsible for
3 Indian and Métis and Affairs, former chief federal
4 negotiator for the Inuit land claim; Judge Graydon Nicholas
5 of the Provincial Court of New Brunswick sitting in
6 Woodstock, New Brunswick, formerly president of the Union
7 of New Brunswick Indians, also well known for his defence
8 of Aboriginal peoples in the criminal, family and civil
9 courts; Cynthia Desmeules-Bertolin, associate for
10 Biamonte, Cairo and Shortreed, former member of the Task
11 Force on the Criminal Justice System and its Impact on
12 the Indian and Métis People of Alberta; Lorene Clark,
13 Deputy Minister of Justice for the government of the Yukon
14 Territory; and Professor Michael Jackson, Professor of
15 Law, University of British Columbia and also legal advisor
16 to the Gitksan Wet'suwet'en peoples.

17 This round table is the last of the three
18 round tables that we have planned for these three days
19 and accordingly it is the one that has probably been loaded
20 down the most, and not just in terms of the number of people
21 who are here but certainly in terms of the issues which
22 they are being asked to address.

23 I would point out, because of our

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1 experience with yesterday's round tables, that the
2 moderator, Professor Brad Morse, of this particular panel
3 has been specifically instructed to be mean. The
4 panellists are not permitted to give speeches. Anybody
5 caught giving a speech will be severely dealt with. If
6 there is any written material that you want to place on
7 the record, please give it to the staff and it will be
8 put before the commissioners and distributed.

9 As well, Professor Morse has been
10 instructed to terminate all of your comments after three
11 minutes, so that you have the right to talk for that period
12 of time. We recognize, of course, that you have a great
13 deal that you want to say and we do not want to improperly
14 terminate conversations, but nonetheless the purpose of
15 these round tables is to dialogue, to engage in
16 conversation, to have a debate. We want to hear that from
17 you, if you don't mind.

18 Accordingly, Professor Morse has been
19 given his marching orders. We ask you to understand that.
20 Please do not take offence if he asks you to get to the
21 question or get to the point. It is very important for
22 all of us to have an opportunity to hear that.

23 There is just one other administrative

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1 matter I have been asked to report on, and that is that
2 the daily summaries from yesterday will be available later
3 this morning. The summaries from the first day are being
4 translated into French and will be available this morning,
5 and the French summaries from today and tomorrow will be
6 distributed to all participants in the future. Today's
7 summary will be distributed to all participants. Please
8 ensure that you take the summaries with you at the end
9 of the day.

10 Thank you very much. Professor Morse
11 needs no introduction. He simply needs an ignition point,
12 so take it away Brad.

13 **BRADFORD MORSE:** I have been officially
14 ordered by the court, although he is perhaps outside his
15 territorial jurisdiction, but we will not challenge him
16 on jurisdictional grounds. Besides, he gives me lots of
17 orders and I have always followed them. He might not quite
18 agree with that, but I have always thought I have.

19 We have clearly been asked to engage
20 truly in a discussion, a free-for-all. I am not going
21 to play referee. I do not plan to have people engage in
22 a long sign-up list where the sixth person on the list
23 wants to jump back into what the first person said, but

1 rather to really engage in a kind of dialogue. So it is
2 a little bit like Jeopardy or something. Fingers on the
3 mike and jump in when you think it is appropriate.

4 As Chief Judge Sinclair has indicated,
5 it is three minutes per person. The idea here is that
6 much of the issues have already been discussed for the
7 past two and a half days in, in some cases, great detail.
8 The objective here really is to focus much more on the
9 blunt explicit positions -- what are your particular points
10 of view -- and not the 20 reasons why but the top reason
11 why, the number one reason why you are concluding what
12 you are concluding.

13 Without any further ado, we have made
14 some initial arrangement for a start-up. Judge Graydon
15 Nicholas wants to initiate this session the way he begins
16 his own personal day each day going into court in New
17 Brunswick, bringing with him the eagle feather.

18 **GRAYDON NICHOLAS:** I am going to stand
19 because this eagle feather was given to me by one of our
20 Aboriginal sisters. To me this is where our answers lie.
21 For the remainder of the three minutes I am going to offer
22 you my silence.

23 **BRADFORD MORSE:** Thank you, Graydon,

1 for speaking to us so eloquently in that time and also,
2 at least for many people in the room, bringing them to
3 the appreciation of how much can be said and how long three
4 minutes really is.

5 That really focuses us very clearly.
6 We have several questions before us. I would like us to
7 commence on an initial question. Let us for these purposes
8 assume that a separate justice system is either appropriate
9 because the existing system cannot be adapted
10 sufficiently, or for other reasons such as the entitlement
11 of Aboriginal people to have a separate justice system
12 if they so desire. So let us start off by, rather than
13 debating whether there should or should not be, let us
14 put that issue aside and move the discussion forward
15 instead on what a separate justice system or systems would
16 be like, have been like, in dealing with these questions
17 how they may relate to each other, how they may relate
18 to the existing justice system. If we can focus in on
19 that I think we move the discussion a little bit in a new
20 direction.

21 Who wants to get us started?

22 **LORENNE CLARK:** It seems to me all of
23 those questions -- and I agree that those are the ones

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1 we should focus on today, but they tie up with the questions
2 raised yesterday -- are really empirical questions. They
3 are not ones we can decide in the abstract. I agree with
4 all the speakers yesterday who stressed the importance
5 of trying to find accommodation and I certainly, as a
6 government representative, accept that the responsibility
7 is on government to try to find an accommodation, but
8 whether or not we can is going to be an empirical fact.
9 The test of that fact will be how Aboriginal people feel
10 about it. If they like it, fine, we will have made the
11 accommodation, but it is not until it meets the test of
12 their lived experience that we will know whether or not
13 the system can adopt. I think the same approach then
14 has to be taken to the secondary question. If it cannot,
15 there will be different systems, diverse or otherwise,
16 and again that will be in the control of Aboriginal peoples,
17 and then it will be again up to government to respond and
18 accommodate that to the best that they can. But I think
19 it is impossible to try to say in the abstract what will
20 happen. It is going to be a matter of lived experience
21 and I think that that is bound to reflect the primary
22 problem of diversity that Mary Ellen talked about yesterday
23 so well. There are diverse situations. The Yukon is a

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1 very different environment than urban Toronto.

2 To pick up on that though, one of the
3 themes that was mentioned yesterday, and I think is very
4 important, is the need for infrastructure. If you do not
5 have an infrastructure, a structure of negotiation, and
6 a process whereby negotiation and consultation can take
7 place, we cannot move forward. Certainly our experience
8 in the Yukon has demonstrated that very well and now we
9 finally have a process since there has been tripartite
10 agreement with respect to how that process should roll
11 out through the settlement of land claims which then is
12 accompanied by settlement of our agreement on the
13 self-government agreement based on a model agreement that
14 was negotiated between the federal government, the
15 territorial government and the Council for Yukon Indians.

16
17 How those will be different for
18 different bands is again an empirical matter, but that
19 at least sets a process. Once the self-government
20 agreement is in we can then move forward by responding
21 to the bands' implementation plan and then we negotiate
22 through the implementation plan. At each stage of that
23 we have had to build the infrastructure. We are now about

1 to enter into the first self-government on the
2 administration of justice powers and all three parties
3 to the tripartite negotiation recognize clearly that the
4 most important thing is to establish the infrastructure
5 for that dialogue to take place.

6 **MARY ELLEN TURPEL:** One of the things
7 I took out of the papers in the last couple of days, and
8 particularly the last panel -- which I think is important
9 but it represents a challenge to how we respond to the
10 situation -- is that there have really been two levels
11 of victimization in terms of the experience in the criminal
12 justice system. There has been the way in which Aboriginal
13 people have been victimized by the criminal justice system,
14 and that is represented by how disproportionately
15 Aboriginal people are represented in prisons, et cetera.
16 And there is the victimization by racism, et cetera, by
17 the denial of difference. And the level of victimization
18 is one that I think has been looked at and we have to respond
19 to it because our people are rotting in prisons and we
20 cannot sit back and ignore that situation. We have to
21 do something about the situation. We have to do something
22 immediately about it.

23 But there is another level of

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1 victimization which I think is really difficult to deal
2 with unless you acknowledge certain things absolutely up
3 front -- and I think Teresa's paper pointed this out --
4 and that is within Aboriginal communities there is violence
5 and there are serious criminal justice problems, if you
6 want to call them that, or social and economic problems.

7 I talked about it a bit in my paper when I talked about
8 how there has been this implosion of violence. I do not
9 think it is because, as some people have suggested -- and
10 this has troubled me deeply -- that Aboriginal people
11 commit more offences than other people and maybe that is
12 an explanation. I think that is absolutely wrong.

13 There has been this implosion of
14 violence. There is in fact a great deal of victimization,
15 and in particular of women, in Aboriginal communities,
16 and that has to be acknowledged and dealt with. But that
17 is not a separate problem from a whole bunch of other
18 problems that Aboriginal peoples face in Canada, and they
19 are beyond the criminal justice system. But if the
20 criminal justice system is going to respond to that and
21 we are going to look at separate systems or distinct
22 institutions to meet our needs, then in terms of internally
23 to communities we have to acknowledge that the victims

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1 must be involved absolutely in the process. So women have
2 to be involved in the process because women have been,
3 internally, disproportionately victimized. I think that
4 is absolutely clear.

5 However, the response cannot simply be,
6 in my view at least, let's send more people to jail, because
7 that is putting them to the second level of victimization
8 that we know does not work. So we have a little bit of
9 a double whammy. We have this over here, which is
10 incarceration, which only further undermines people's
11 self-esteem and their ability to be healthy and to be
12 respectful, and then internally we have this other
13 challenge which is to try and have more respectful
14 relations with each other in the context of a very colonial
15 situation.

16 So this is the challenge for criminal
17 justice. I think it can be overcome. I think it can be
18 overcome if internally, when we talk about distinctive
19 justice institutions, everyone is involved at every level,
20 and particularly women are involved.

21 I know some of the research that has been
22 done on traditional justice -- although I do not believe
23 it has been put in place in any community yet -- shows

1 that in fact women are the ones who have a special knowledge
2 and understanding about justice, and that cannot be
3 bypassed, especially when we come from a criminal justice
4 system in Canada that often overlooks the views of women.

5 But I do not think it means we continue the forms of abuse
6 of Aboriginal people by more incarceration, et cetera.
7 That cannot be the answer either. So it is a challenge.
8 I think it can be met, but it is very complex.

9 **CYNTHIA DESMEULES-BERTOLIN:** I have
10 been listening to the discussions over the course of the
11 last couple of days and one of the things we really have
12 not dealt with, as people who are systemic criminal justice
13 reformers, is the issue of jurisdiction. We tend to focus
14 our discussion on discrete land bases, people who would
15 be considered Aboriginal because they live on a land base
16 or live a subsistence form of living.

17 I would like to add to the comment that
18 the Métis, as a community of people, have been displaced
19 and do not have discrete land bases and they are perhaps
20 most at risk of being brought up into the system because
21 of the powerlessness and the marginalization they have
22 experienced as Aboriginal peoples.

23 When you look at the criminal justice

1 statistics, they do not separate out the distinct types
2 of Aboriginal people, but I would hazard a guess to say
3 that the bulk of the people in there are probably Métis
4 because of the powerlessness and the fact that they have
5 been marginalized.

6 In the area of jurisdiction, when I start
7 to conceptualize what self-government and Aboriginal
8 justice would look to me as a function, or a branch of
9 Aboriginal government, I think about it in terms of my
10 own experience in the places that I live. In Alberta the
11 Métis have discrete land bases but in other areas of the
12 country they do not, so as a result the Métis people that
13 I work with in the communities live in urban centres, they
14 live in rural and remote communities, but Métis people
15 and Indian people and Inuit people who live in the cities
16 are not less Aboriginal because of the place they live.
17 Their conflict with the system is just as relevant and
18 as pressing as anybody that lives in a rural or remote
19 community.

20 So when I start thinking about
21 jurisdiction in terms of self-government and Aboriginal
22 justice, I think about it in mainstream legal terms as
23 jurisdiction that must be implemented based on status of

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1 the person. I am not less Métis because I live in the
2 city or because I live on a reserve or because I live on
3 a settlement. My problems with the system are more
4 fundamental than that. I am going to have those problems
5 no matter where I live.

6 So that is sort of my conceptualization
7 about how we activate this stuff.

8 **ROBERT MITCHELL:** I am going to toss
9 away what I had planned to talk about and address the
10 interesting subject that Cynthia raises, which is the
11 relationship between a land base and what we are talking
12 about here.

13 We encountered this problem at an early
14 stage during the constitutional discussions, during the
15 multi-lateral process. Several of the governments at the
16 table were hung right up on the idea that you could only
17 have a power to legislate as an Aboriginal government if
18 it was in relation to a land base. I kept asking myself
19 why that is so. I came to the conclusion eventually that
20 it was a distinctly European idea that you could only have
21 sovereignty in relation to a patch of ground and once you
22 moved off that ground you then got on somebody else's ground
23 and became subject to somebody else's laws and, barring

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1 some sort of diplomatic arrangements, you were then subject
2 to the law of that other piece of ground.

3 I ask myself why this is so. Is it
4 beyond our ingenuity to address the very real issues that
5 Cynthia raises and think about a government over people
6 rather than government in relation to ground? I know it
7 has all sorts of problems, but it is not beyond our
8 ingenuity to solve it. I think we did it in the accord,
9 at least until the very final stages. I am not just sure
10 how the accord should be interpreted, and maybe that is
11 all academic now, Brad, and we do not have to worry about
12 it.

13 I harken back, for example, to Rome.
14 Rome did not worry about ground. If you were a Roman
15 citizen you were subject to Roman law and you remained
16 so. Taking that to this question -- I'm conscious of the
17 prohibition against making speeches -- it seems to me that
18 we must decide at the beginning that the concept of an
19 Aboriginal justice system does not have to be tied to an
20 Aboriginal land base, because if we are talking about that
21 then we are talking about a system that is really not very
22 relevant for more than half the Aboriginal people in this
23 country who live in off-reserve, off-land-base situations.

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1 We simply have to expand our minds to conceive of
2 structures that will be responsive to the needs of
3 Aboriginal people as far as the justice system is concerned
4 and yet does not require a particular land base.

5 I have dozens of other things to say,
6 Brad, but I am going to follow the rules, at least for
7 now.

8 **BRADFORD MORSE:** If you do not, Mr.
9 Attorney General, I am going to enforce the rule anyway.
10 Seriously, let me thank you, Bob, for a couple things;
11 first, your initial opening statement. You discarded what
12 you were going to say and you moved with the flow. I would
13 like to try to keep that going as much as possible and
14 not jump around. Let's try to move with an issue and we
15 will keep coming up to other issues.

16 The other point is that the idea of
17 keeping the interventions short is so that people will
18 have lots of interventions, not just one. So if you have
19 spoken once do not feel that you cannot speak until
20 everybody else has spoken, or you cannot speak for the
21 rest of the morning. Let's have lots of different
22 interventions.

23 **CHARLENE BELLEAU:** I just want to expand

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1 on what Mary Ellen was saying earlier. I am not a lawyer,
2 I am not a judge, but I am a community and front line worker
3 who has come face to face with holding some of the victims
4 together who have been abused in the residential schools
5 and otherwise.

6 I think her observation is really true.
7 We go through a process in the criminal justice system
8 where the victims are further traumatized because there
9 is no protection within the criminal justice system going
10 through court processes.

11 I also think that when we're looking at
12 solutions to the whole criminal justice system and whether
13 it will fit our needs or not there are going to have to
14 be a lot of risks taken by the government, by people within
15 the system itself, to make the system more meet the Natives'
16 needs. As well, attitudinal changes have to come from
17 the top down, not from the bottom up. I say that based
18 on experience in delivering cross-cultural seminars to
19 local criminal justice personnel in our area.

20 We took the initiative to deliver those
21 seminars. I was the one who co-ordinated. I said that
22 if an officer's attitude is going to change toward the
23 people in the community it has to start from the top down.

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1 So I took the risk and said to the Inspector, to the
2 Superintendent and the Staff Sergeants that they have to
3 come first. That was really important because once they
4 participated in the seminar it had an effect on the whole
5 justice within our region and within our province from
6 that some other initiatives have happened. Crowns within
7 the province, regional directors within Corrections with
8 the province, other RCMP and other institutions have said
9 that it is great, it is something their people need.

10 So the opportunity to participate
11 changed a lot of attitudes that lend to the kind of
12 community processes that we want to try. We want to try
13 new and different things and we are finding that within
14 the system itself there are a lot of changes that can be
15 made if attitudes change.

16 I say attitudes from the top down because
17 I really believe it has to start in the government. We
18 heard Ovide yesterday say that they are adversarial in
19 nature and all of that can be changed and that really has
20 to start from the government down.

21 I want to encourage, in that process,
22 that you allow us, as Aboriginal communities, to take the
23 initiative and to allow us to make some of the same mistakes

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1 that have happened over the last few hundred years.

2 We want decisions regionalized. We do
3 not want Victoria or Ottawa saying what we can and cannot
4 do. It is going to be really important to the success
5 of how we deal with the justice system.

6 **BRADFORD MORSE:** Thank you, Charlene.

7 There are two things I would like to quickly tease out
8 of that. Often, particularly senior government officials
9 or politicians, say it has to come from the bottom up,
10 and therefore we can kind of sit back, hide out, and go
11 deal with it at community levels. I think that is an
12 important point that you have brought home to us in many
13 ways, as well as a number of other really quite essential
14 issues. Needless to say, Alkali Lake is a good example
15 of a community that has taken risk and it is very valuable
16 for you to share that with us.

17 **ROGER TASSÉ:** I think we are dealing
18 with very, very complex systems; formal systems and also
19 informal systems. I have always been puzzled by the way
20 changes come about. It is true that the leaders, political
21 and others, have responsibility to show the way, to propose
22 visions, to stimulate change, but at the same time I have
23 been puzzled and astonished at the difficulty of making

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1 change, especially, I would say, in the criminal justice
2 system.

3 It is not sufficient to change the law
4 to get changes. Because of the informal system, the
5 culture of the various instruments of the systems because
6 in the system, there is a broad system, I think, which
7 is made up of subsystems that have their own culture.
8 And the people in the system are probably the most important
9 resource and they are the ones who make the changes. The
10 ministers here know that it is not sufficient for the
11 minister of the government to say that that shall be the
12 way now. I mean that will not happen the next day. It
13 will take time, it will take years, before this permeates
14 through the system. But there are people in the system
15 that will relate very well with the vision that is being
16 proposed, and then real change can start to happen. So
17 it is a very, very complex system and I do not yet understand
18 how you make change happen because of the complexity, the
19 formal and the informal, and also we are dealing with a
20 system that is the last resort to bring harmony, to
21 reconcile people in the communities. It is because other
22 systems have failed that we are caught up in the justice
23 system and we are dealing with very, very difficult human

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1 problems.

2 We are dealing with people that are maladjusted. We are
3 dealing with people that are just bad people, due to no
4 fault of their own probably, just because of their roots
5 and what they were exposed to. But they are there and
6 they have to be dealt with.

7 So change in the criminal justice system
8 is very, very complex. When we talk of the Aboriginal
9 people, the Aboriginal communities, we are talking of an
10 environment that is very, very propitious to the kind of
11 vision that is at the root, as I understand it, of the
12 Aboriginal soul -- reconciliation and harmony. And you
13 have communities that are very much in sync with these
14 philosophies, although they are also -- in the next round
15 I will say something about some of the things that are
16 happening in the criminal justice system and the capacity
17 for change that there is there.

18 **CYNTHIA DESMEULES-BERTOLIN:** I am
19 conscious of the deadline. I was going to continue to
20 speak and build on how I saw the relationship of Aboriginal
21 systems, specifically a Métis system, with the mainstream
22 system, and to sort of deal with that question.

23 I have already said that I believe that

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1 Métis justice systems should be established based on an
2 acquired jurisdiction based on status of the person as
3 Métis, no matter where they live. Knowing that that is
4 how I see it, you are going to wonder how I am going to
5 relate this to the mainstream.

6 I have had an opportunity to think about
7 this because I work at both the community level, in
8 community justice initiatives, and I also work at the
9 constitutional level in the rights area. So I have had
10 a lot of opportunity to think this through since I was
11 about 17 years old.

12 How I see it working, I have used
13 mainstream principles like conflicts of law. In the
14 conflicts of law area we have a set of rules that have
15 developed to determine whose law applies. Now, when you
16 have Aboriginal laws and Aboriginal systems and a
17 mainstream system and trying to determine whose law
18 applies, why not just simply apply conflicts principles
19 that we have now and adapt them and keep the flexibility
20 that is there.

21 One of the questions the Royal
22 Commission raises is the relationship between an
23 Aboriginal justice system and the mainstream system. I

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1 think that relationship is potentially very profitable
2 but it also has a lot of danger inherent in how we define
3 those relationships. Those relationships could be
4 determined by negotiation, but one of the things I
5 continually hear is that an Aboriginal system that is
6 established must have a right of appeal to a higher or
7 superior court in the mainstream system. I think that
8 unless that is confined a great deal there is a great deal
9 of danger in doing that because we would have a superior
10 court telling an Aboriginal court that the procedure or
11 the process or the rules it applies are not appropriate
12 and that would actually harm the integrity of that system.

13

14 So I think that relationship could be
15 profitable if the two systems were compatible, but until
16 those systems are compatible in process and rules, that
17 relationship is just fraught with danger.

18 **SHARON McIVOR:** This is a brand new
19 experience for me, being invited to the table and being
20 allowed to talk.

21 I want to address the parallel systems,
22 or how the systems would interact, and I guess a little
23 bit in response to what Mary Ellen said and what Charlene

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1 said about longer sentences, people in jail, is not going
2 to solve the problem. When we talked about that, that
3 was not what we were saying. We were not saying that in
4 our Aboriginal justice system that is how we are going
5 to solve it. We are saying that as long as we are in the
6 regular, mainstream system, when our women or children
7 are being violated and the men are being given very short
8 sentences in deference to their culture or whatever, it
9 is giving the message that somehow the violation of our
10 people is less important than the violation to the
11 mainstream society.

12 That is the point. If we are in the
13 system, we want the system applied equally. If we want
14 to give deference to culture and differences, well let's
15 get the heck out of the system and let's do something that
16 is more than tinkering with the system and actually doing
17 something that addresses all of the problems and looks
18 at the whole problem, not just one end of it.

19 Basically what we are trying to say is
20 not that in our system we have punishment or whatever.
21 I think that an Aboriginal system can address those. But
22 if we are in the mainstream system, at least be equal,
23 treat us fairly; as victims treat us fairly and recognize

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1 that harm to us is harmful the same as it is to
2 non-Aboriginal women.

3 **RON GEORGE:** A recurring theme over the
4 last couple of days has been the need to heal as well as
5 addressing the problem that we are dealing with in justice.
6 I get the impression that most Aboriginal systems have
7 had the holistic approach to dealing with conflict, and
8 ours is no different. The hereditary system of the Gitksan
9 Wet'suwet'en -- and Michael will probably support me on
10 this -- is the collectivity protects the individual rights
11 through the clan system. For instance, if I offended
12 someone, it would not be me that would make the retribution,
13 it would be my clan. And the deterrent to offend anyone
14 is that anything you do reflects on your nation and your
15 clan, your whole tribe. So it is more a preventive system
16 than it is a reactionary system. In the event there is
17 some sort of conflict that needs resolving, the healing
18 process is incorporated into it.

19 With regard to how it could be adapted
20 to the present system, let's check out the military system
21 that already exists in this country with a separate
22 judicial system. They seem to have found a way to interact
23 with the system that we are discussing and are existing

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1 as we speak.

2 As far as the off-reserve, or the Métis,
3 or the people without a land base, the same would apply.
4 The military has jurisdiction over people. There does
5 not seem to be a big debate over that.

6 I am glad that Bob Mitchell brought that
7 up. It was a subject of discussion at the constitution
8 table; how would self-government apply to off-reserve
9 people. Well there are thousands of examples of how
10 parallels to off-reserve governments are already in
11 existence. I mentioned that the military is one. There
12 are other institutions that govern their people without
13 land bases, so that should not be an issue.

14 What should be an issue is the rights
15 of the people who are being denied those rights and we
16 should be finding a way to deal with that. I do not think
17 it is a matter of if it should happen, it is a matter of
18 when it should happen.

19 Those are the three points I wanted to
20 make immediately. In closing I would like to point out
21 that there was an example two days ago by Jonathan Rudin
22 on how a community system is working in Toronto, and I
23 think there are many other examples we can point to.

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1 Finally, I was gratified to hear that
2 Bob Gillen was at this cross-cultural workshop in Kamloops
3 in 1989 where Vina and I were two of the presenters. I
4 am glad we made an impression. The first one that I was
5 ever at was also in Kamloops in 1977 and I almost got run
6 out of that one. So we have made some major progress and
7 I think it should continue.

8 **MICHAEL JACKSON:** I would like to
9 address a point Roger made about how you bring about change.
10 To the extent that you are thinking about how the existing
11 system might interact with a separate system, there are
12 already some examples of how that is happening in this
13 country, and you heard about them in the last couple of
14 days. It is no accident that those examples have all
15 focused on sentencing.

16 I have spent a lot of time working with
17 people in prison, as I think a lot of people around this
18 table and in this forum have done. For people in the
19 communities struggling with dealing with the destruction,
20 the harm, the enormous personal costs which have
21 accumulated for the last 100 years in Aboriginal
22 communities and with Aboriginal peoples, it makes sense
23 to start with those people who have suffered the most,

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1 to try and avoid that kind of harm as you envisage a new
2 future in which that will not be part of the cultural
3 heritage of Aboriginal people.

4 In the sentencing area you have these
5 new relationships forming. They are working best where
6 you have partnerships where you have Aboriginal people
7 and the community coming to terms with the existing
8 professionals and telling them, "Your system is not
9 working. It has got to change in our vision, not in your
10 own." We have examples in the Yukon with Barry Stuart
11 attempting to sentence in the context of a circle in which
12 everyone has some equality, in which relationships
13 dominate rather than a hierarchical approach.

14 That is part of the way in which you get
15 the contours of a relationship and how inter-relationships
16 happen between the systems, when the two systems recognize
17 and deal with each other on the basis of mutual respect,
18 which Mary Ellen has talked about. So the first principle
19 on which our systems relate is based upon respect, and
20 you don't get respect unless you deal with people and
21 understand the difference and try and accommodate that.

22

23 The message is there clear, and it has

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1 come through the conference, that things have to be based
2 at the community. The system has to be prepared to make
3 way for community initiatives based upon Aboriginal
4 values. But that is part of it, and there are lots of
5 examples of that happening around the country. You can
6 sit back and say that we should just let them evolve and
7 in the fullness of time we will see how they work out.
8 There have been lots of initiatives like that in many parts
9 of the country and often they have fallen to the ground
10 when the judge who has the personal initiative, or the
11 RCMP, or the Crown counsel gets transferred, someone else
12 comes in, and there is no institutional structure of
13 respect. The new people have to learn it all over again.
14 Aboriginal people have to explain again what it is their
15 system is, why they want to accommodate. There has to
16 be some recognition and some respect, not simply at the
17 local level. There has to be some at a national level.

18 I am speaking here to the commissioners
19 in terms of the role of the Royal Commission. There is
20 at the moment before Parliament a piece of legislation
21 which for the first time in 100 years would put into the
22 Criminal Code a statement of purposes of sentencing. It
23 is a unique, historical opportunity to say something about

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1 the nature of the justice system and its purposes at the
2 point where it cuts hard against people's lives and
3 particularly, as we all know, where it cuts deepest against
4 the lives of Aboriginal people.

5 When you look at that statement of
6 purposes, there is almost no conceptual space for respect
7 for Aboriginal peoples. There is nothing about that
8 statement in terms of healing. There is nothing in that
9 statement about restoration. It starts off with the
10 purposes are denunciation, deterrence, incapacitation.
11 Now, those are the traditional bases upon which we have
12 imprisoned Aboriginal people. If we are looking for
13 respect at a national level to complement the enormous
14 energy which is being put in by people at the community
15 demanding and creating that kind of space, the government
16 of Canada should, in its first statement of principles
17 in 100 years, make way for that kind of acknowledgement
18 of the enormous contribution of Aboriginal justice
19 systems. We know enough about them, about what they are
20 based upon, and that should be reflected in a national
21 statement about what the purposes of the criminal justice
22 system are about.

23 As I said, it would be a way of bringing

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1 together and affirming and giving legitimacy, at the
2 national level, and demonstrating, at the national level,
3 that there is respect. Maybe we cannot come up with a
4 constitutional amendment right now, but we sure can come
5 up with a national statement enshrined in legislation which
6 accords equal respect and legitimacy for Aboriginal
7 justice systems. It is not a difficult step. It requires
8 political will.

9 **BRADFORD MORSE:** Thank you, Michael.
10 Just as a little footnote to that, your comments and some
11 of the others remind me of discussions going on at a
12 conference held in Edmonton in 1975 on Native peoples and
13 the criminal justice system. Some of the answers were
14 "pilot projects", "need more political will", "statements
15 from government". In fact it is a wonderful report and
16 I think 31 of the 32 recommendations that were generated
17 by Aboriginal people were endorsed by every provincial
18 government and the federal government across the land.
19 The only one that was not was peacemaker courts, separate
20 justice system. Need a little more study on that. All
21 of the rest were endorsed. However, here we can be, 17
22 years later, still in fact saying these things on the one
23 hand and still getting it wrong in legislation. I think

1 it is very helpful to bring us back on that line.

2 **HARVEY LONGBOAT:** I would like to say
3 that, like my friend over there, I am hereditary chief
4 of the Kiuga (PH) Nation of the Six Nations within the
5 Shawnee (PH) Confederacy. I am going to throw something
6 a little bit different out to the whole last three days
7 that we have been talking about.

8 I am going to throw out the fact that
9 in 1664 we signed an international treaty with the Dutch
10 first, the English, which was a Two Row Wampum (PH) treaty
11 which set out our relationship with you as European people.
12 Canada has never acknowledged this international treaty
13 which is separated by three beads, and that is peace,
14 righteousness and respect of what we have just been talking
15 about.

16 It is the Confederacy's view that we have
17 always maintained, even though we were uprooted in 1924
18 by the RCMP at the point of a gun, from the governing body
19 of Six Nations to be implemented and run by an elective
20 system which was put in its place. We continue to function
21 and we continue to uphold and we will always maintain --
22 we will never get off of that rock -- that that is our
23 relationship to the federal government, is that we are

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1 on two roads working side by side with respect.

2 Before 1924 we had the same type of
3 system. We run through the family with the mother as the
4 matriarchal system which the lineage of our children come
5 from. The woman is very, very important in our system
6 of everything; not just government but religious, social
7 and everything. And it is the family of the mother who
8 look after, initially, the justice in our society, which
9 is then transformed to the clan and shame, disrespect,
10 as he spoke of earlier, not only to the family, to the
11 clan, to the nation and to the Six Nations was a very dearly
12 held thing that you had to uphold.

13 So our relationship to the federal
14 government continues to be on that basis and we handled
15 our justice system by working out mutually with the
16 outside. According to our Two Roll Wampum Treaty, if our
17 people did harm in your community you brought them back
18 to us for discipline, and vice versa. And at one point
19 after the coming of the North American people, because
20 there were some things that we could not handle, because
21 it is not our duty to judge other people, it is only the
22 Creator that judges other people. And the land base is
23 very important to us because our prayers this morning

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1 started with our mother the earth. If we do not have a
2 mother, if we do not have an earth, or a piece of that
3 ground, then where do we come from, how do we continue
4 to nurture back and forth our mother and how do we respect
5 our mother?

6 And therefore we dealt with -- and at
7 that point in time, because of the inability of the
8 Confederacy Council whose mind was set on peace, and with
9 the use of a good mind, to judge our own people we gave
10 to the non-Indian; murder, theft and rape, for them to
11 judge. And so if any of our people were guilty of those
12 crimes they were turned over to -- so we have a
13 relationship. What I am saying is that we already have
14 an established relationship on a treaty basis, and that
15 is the only way it is going to work. Because through a
16 treaty basis and what I have heard is self-respect, and
17 that is where we get our self-respect, is to be viewed
18 as equal.

19 And the Two Roll Wampum sets out that
20 equality between our two peoples and how we are to interface
21 and how we are to relate with each other as we travel down
22 that stream of life in our two vessels.

23 I would also like to say to the people,

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1 because my grandmother told me, after I went out and
2 received an education in a non-Indian world, that Two Roll
3 Wampum, because they ask what is going to happen if people
4 have one foot in each of those canoes. My grandmother
5 said, "Let your education govern you, because one of these
6 days there is going to be a big storm come and our boats
7 are going to begin to separate and what will happen with
8 those people who have one foot in each of those canoes
9 is that they are going to go down, they are going to be
10 lost to the non-Indian world and to the Indian world."
11 Therefore she said, "Keep your feet in your canoe and it
12 is from there that you will gain the insight, the wisdom
13 to relate to the non-Indian and to work with the
14 non-Indian."

15 So the Confederacy throughout, on a
16 treaty basis -- Canada has never acknowledged that. The
17 Dutch have, the Americans have, the French have
18 acknowledged that international treaty. And through the
19 RCMP the federal government saw fit that they should
20 replace a government with a government that they could
21 handle.

22 One thing that I have always wondered
23 as I went through life is that we are talking about justice

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1 in isolation from everything else that is happening to
2 our people. We cannot talk about justice in isolation
3 from everything else. Everything else causes the justice
4 or causes the misbehaviour of our people. So we are going
5 to have to address that also. Economic development has
6 never taken place, to my knowledge, on an Indian Reserve.

7 Why? Because they are afraid that they are going to lose
8 the control over our people. You think about it.

9 That is our relationship and standard
10 and it has been our standard from time immemorial that
11 I can remember, that we are a nation, we are sovereign,
12 we have a relationship with the non-Indian and we will
13 continue to work towards that. Thank you.

14 **BRADFORD MORSE:** Not only have you
15 described the relationship but also, to some extent, even
16 the inter-relationship, particularly in criminal justice
17 terms. Thank you.

18 **NORMAN INKSTER:** I would like to build
19 on a point that Charlene has raised and, in doing so, make
20 reference to a speech that I heard the Honourable Bertha
21 Wilson make some time ago, and that is the importance of
22 words.

23 I am always a little worried when we are

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1 trying to change things and we talk about systems; the
2 justice system, the legal system. The difficulty with
3 systems is that they, by definition, prescribe rules.
4 And once we have a set of rules, being human beings, we
5 are anxious that your rules are my rules and my rules are
6 your rules.

7 I would be a lot more content in these
8 discussions if we started talking about the justice
9 community. Community, for me, brings the concept of
10 working together, or sharing.

11 As the justice community developed over
12 time we in the RCMP lived in our own house, and we have
13 lived in it for 119 years and we built walls around it
14 and as we evolved we put lights in it and so on and so
15 forth, often times without reference to or connection with
16 other people who are living in this justice community.

17 There was a time when we worked very
18 closely with the Native people, but there was a more
19 important time when we worked in disharmony with the Native
20 people. We lost touch with what was important in their
21 communities. We said we are going to talk about the
22 policing of Native people. We adjusted that a little bit
23 and started talking about policing for Native people.

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1 But to the extent that my sense of community is a good
2 one, we now have to start talking about policing with Native
3 people.

4 The concept of justice carries with it
5 the belief that there must be some rules to live by.
6 "Rules" is perhaps even too strong a word, but there must
7 be some rules which allow me to make certain assumptions
8 about what you are going to do and you can make certain
9 assumptions about what I am going to do, and based on those
10 assumptions we can find a way to live together.

11 What we have been trying to do in the
12 RCMP is talk to people in the community about being
13 partners. We are trying to take the walls down. We are
14 trying to relate better to all of the communities we serve.
15 The difficulty is that there is perhaps a belief that
16 the RCMP is so constrained by tradition and regulations
17 that that kind of relationship is impossible.

18 I do not happen to believe that. I think
19 that the RCMP can work with the communities. I think we
20 have attempted over the last few years to demonstrate that
21 indeed that is not only possible but it is also practical.

22 In other words, in terms of my house in the justice
23 community, we have begun to renovate it. We are not going

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1 to tear the house down. I do not think we need to tear
2 it down. And in respect of other elements in the justice
3 community, I think we need to renovate those as well to
4 relate to a community that has changed around us.

5 I think that in dealing with the rules
6 and regulations, however we might describe them, we cannot
7 look at them in isolation. We must look at them in terms
8 of symptoms of a problem and we must deal with the problems,
9 and often times the problems are not those that are best
10 handled by law enforcement officers, but I think law
11 enforcement officers can behave as catalysts in
12 communities to help solve the problem.

13 If, for example, the police officer
14 finds himself or herself arresting the same person every
15 Saturday night because that person is intoxicated in a
16 public place and misbehaving, if we are arresting the same
17 person every six months as he or she comes out of jail
18 because they have assaulted their children, that is not
19 a police problem. We can continue to arrest them, and
20 the justice system can continue to incarcerate them, but
21 we must find a way, as a community, to address the problems
22 that cause this behaviour to occur.

23 In other words, we have to break the

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1 pattern. We have to break the pattern of violence, of
2 poverty, of lack of respect for one another, and we have
3 to build our community together again.

4 I view the justice community as a
5 continuum and therefore in my mind, in the mental construct
6 that I am building, I think that the justice community
7 could lend itself to renovation. I have been most
8 impressed by the innovative techniques that have been
9 applied by many native communities, and we in the RCMP,
10 in terms of our enforcement responsibilities, have no
11 difficulty in adjusting to those at all.

12 For us the future of policing lies in
13 the community taking responsibility for keeping itself
14 safe, secure, prosperous and healthy, and we can be helpful
15 in that. We cannot do it by ourselves, we can only do
16 it working together with the community in a sense of a
17 commonality, a common approach.

18 We have to do it by thinking ahead and
19 not thinking backwards. The lessons of the past are
20 important. We do not want to repeat our errors, we want
21 to admit to them, and we want to move ahead together because
22 this country we live in, ladies and gentlemen, is going
23 to become more diverse, not less diverse. We are going

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1 to have to live together with elements that we have not
2 even yet thought of. It is therefore important that we,
3 working and living beside and with the Canadians who have
4 been here the longest, learn how to do that in peace and
5 comfort.

6 **BRADFORD MORSE:** Thank you, Norm. Let
7 me, if I can, try to move us back a bit to some degree
8 to where we started from and building a bit on Harvey's
9 presentation in terms of a specific example, a specific
10 historical basis for the current issue. Again, whether
11 that is founded in treaty or whether that is founded in
12 a decision that the existing system is a bust, if the
13 direction that people move forward is separate systems,
14 how do they relate?

15 Harvey has given us some concrete
16 examples in terms of the Six Nations Confederacy making
17 specific determinations with the Crown of where the
18 dividing line is. As you have indicated; murder, theft,
19 rape, that is your system; all other criminal matters,
20 that is our system. Civil matters are our system. So
21 that is a dividing line.

22 What are other views on if there is a
23 separate parallel system, where is the dividing line, how

1 do the two relate?

2 **BARRY STUART:** I have some good news and
3 some bad news from the North essentially on that very
4 question. The good news is that communities are already
5 doing it. The bad news is they did not need the
6 professionals and the lawyers to figure out how to do it.

7 There is another alternative that has
8 not been raised. We talk about two separate systems.
9 I think it would be worthwhile to look at how we can take
10 the best from the Aboriginal system and the best from our
11 system. I have been accused of the destruction of the
12 criminal justice system in the Yukon. It's not me, it's
13 the communities. But I am a very ardent believer that
14 our justice system can do and has to do a lot of things,
15 and we should not forget that. Equally, we should find
16 out how to limit its intrusion into the communities.

17 What we have done, and I found this from
18 dealing with the communities, is robbed the communities
19 of conflict resolution. We have taken away from the
20 communities the ability to resolve conflict. If conflict
21 is processed properly in the communities it is the
22 fundamental building element in a community. That is how
23 they form a community, that is how they learn how to deal

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1 with each other, and that is how they deal with the problems
2 which underlie the crime. Our justice system just deals
3 with the criminal.

4 In the circle -- and there are now ten
5 communities and we have done about 50 circles and we have
6 processed about 120 offenders through -- they focus on
7 the victim, they focus on the community, and the offender
8 is almost an afterthought. In fact, in one recent case
9 we walked out of the circle and the police reminded me
10 that we hadn't dealt with the offender. But what we had
11 done in that particular circle is we had dealt with the
12 problem. In fact, the chief in that particular circle
13 said we should thank the offender for having committed
14 the crime and allowing the community to focus on the
15 underlying problem.

16 So I guess my message is that communities
17 themselves are partly at fault. They have relied too much
18 on professionals to deal with their problems. They become
19 excessively dependent on professionals. We have to back
20 up and let the community become the front line.

21 Roger, don't worry about it. These
22 communities are taking ownership of their own change.
23 They are changing their attitudes and that is what is

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1 changing the system.

2 If I can just pick up your point, with
3 regard to the police in the Yukon, it used to be that every
4 chief would spend at least a full day a week calling
5 somebody in authority somewhere to get the police out of
6 their community, faster than the two-year stint that they
7 were there. That was six or seven years ago. Now those
8 same chiefs are calling everybody they possibly can to
9 see if they can keep the RCMP there. It is a change in
10 attitude.

11 The RCMP for the most part in Yukon
12 communities, and through these circles, are now
13 participating effectively, and that has changed. They
14 still wear the same uniform, still get paid the same, still
15 report along the same lines, but now they have a change
16 in attitude and that, I think, is what is going to result
17 in the change.

18 So to answer your question, I think that
19 if we move too quickly in trying to design it in the back
20 rooms in Ottawa and do not allow the communities the
21 empirical time, the ability to move ahead, then we will
22 lose sight of the ability of the communities to solve their
23 own problems and to solve them in a fundamentally different

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1 way than we have ever done in the criminal justice system.

2 So have patience, but it is happening
3 today. It is happening not just in the Yukon but right
4 across this country that people are beginning to say enough
5 is enough and we want a say. And we have to learn and
6 have the courage to step back and let them have their say.

7 **ROBERT MITCHELL:** I will abandon what
8 I was going to say and pick up on something that ties into
9 what Roger was saying and what Michael Jackson was saying
10 about the process of change. I think that we ought not
11 to concern ourselves with the question of establishing
12 a system or working to establishing a system or designing
13 a system. I think that those things will happen by
14 themselves as they will and that the role of government
15 and professionals is to find ways to support and encourage
16 and facilitate that.

17 A lot of work has to be done at the
18 community level. Every community is not in touch with
19 its traditional roots and it will take a while and it will
20 take patience. The system did not come apart in a day
21 and it is going to take more than a day for it to be put
22 back together. If we government people can resist our
23 normal urge to get in there and impose a solution, then

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1 this may turn out all right.

2 I remember on Wednesday of this week
3 listening to the discussion and the intervention by the
4 prosecutor from Alberta who said to us, "Look, we know
5 enough about this, let's just do it." He meant something
6 different than I heard. What I heard was, "Yeah, do it.
7 Go back to Saskatchewan and stop flying those planes
8 filled with judges and prosecutors and defence lawyers
9 all over Saskatchewan at enormous expense to go in and
10 do a day in a community and probably, at the end of the
11 day, have done more harm than good." But then I stopped
12 myself at once and said, "Hang on now, that's not for me
13 to do." I can't do anything. The communities can do a
14 lot and what I have to do is help the communities in any
15 way that is appropriate to do what they consider
16 appropriate.

17 Now this is a long process and it is
18 incremental I think. It does not just all happen
19 overnight. If we keep in mind Ovide Mercredi's idea that
20 the root of it is the inherent right to govern yourselves,
21 that that is the root of the development rather than just
22 tinkering with the existing system. And at the same time
23 keep Jim McCrae's analysis in mind that we have to start

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1 doing something right away, it just cannot wait. Then
2 I think we may be able to work our way out of this problem.

3 **BRADFORD MORSE:** Thank you Bob. Let
4 me just add to that it seems to be not only what governments
5 have to do in terms of being supportive, it is also not
6 do what they generally do, which is to say what cannot
7 be done and say you can do within this range but not over
8 here and not over there.

9 **ROBERT MITCHELL:** That is a very good
10 point. Be flexible and be prepared to make room and get
11 out of the way.

12 **CHARLENE BELLEAU:** I want to build on
13 that. Probably one of the reasons I remain on the front
14 lines -- I am in university and I have considered law but
15 I do not want to be restricted by the policies and the
16 laws that exist and I think that is a real advantage to
17 the Native communities that I work with and allows us to
18 be flexible and to develop the kind of systems that we
19 want.

20 But I have been thinking over the last
21 couple of days about the questions of two separate systems.

22 Again, a lot of it is not based on looking at what is
23 good and not good about it all, but thinking about society

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1 as it exists and thinking about some of the personal
2 experiences of having to help the Native community, but
3 also over the last little while having to receive requests
4 from some non-Native people that if that's the way you
5 do it, can we be a part of that.

6 And I reflect specifically on one lady
7 that lives in one of the bigger eastern towns here in
8 Canada. She is a non-Native lady. She was abused as a
9 little girl by a priest back in our area. She said, "I
10 need help but I don't have the kind of family you do, I
11 don't have the kind of community you do. If I go to court
12 my family is not going to help me." I said, "Fine, we'll
13 be your family, we'll support you through court."

14 Those are the kinds of things that we
15 need to be considering when we look at whether we need
16 two separate systems. I would imagine as we develop our
17 systems based on healing and wanting to provide healing
18 as a part of the process that the non-Native people want
19 that as well. We can't be looking at two separate systems
20 that would make twice the cost, but I really believe the
21 non-Native people want the healing process as part of what
22 they need to do as well.

23 I wanted to express that. I think a lot

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1 of non-Native people want healing as part of the system
2 as well.

3 **BRADFORD MORSE:** Thanks for that,
4 Charlene. It seems to me that if we reflect on most of
5 the so-called innovative moves in the criminal justice
6 system on sentencing over the past years; community work
7 services, fine options, restitution, victim-offender
8 reconciliation, all of these great jargonistic labels are
9 all things that flow out of traditional Aboriginal justice
10 systems anyway. So in fact the European system is starting
11 to come to some realizations along those lines, even if
12 they do not realize where they took the ideas from.

13 **MARY ELLEN TURPEL:** I have some real
14 problems with some of the ideas that have been expressed
15 around the table. It is not out of disrespect, because
16 I think the sentiments are genuine, but I just find it
17 really troubling and constraining in many ways. We can
18 talk about renovating the system and renovating policing
19 or what have you, but let's not renovate it with colonial
20 architecture. It is one thing to renovate but another
21 thing is where are you going to go and who is involved
22 in making the decisions about how it is renovated. Is
23 it power sharing with Aboriginal people or is it just sort

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1 of unilaterally saying we need to make changes.

2 I do not mean this towards you only Mr.
3 Inkster, but I mean it more generally. It is one thing
4 to say let's go out and just do this. Who is going to
5 do it? Who is going to make the decisions and how is it
6 going to be imposed?

7 We hear about the talking circle from
8 the Yukon, which I think is really interesting, but let's
9 not forget, sir, you're the head of the talking circle.

10 **BARRY STUART:** No, I'm not.

11 **MARY ELLEN TURPEL:** You're not the judge
12 at the end of the day in the talking circle?

13 **BARRY STUART:** No, one of the nice
14 things about the circle is you don't have to go to the
15 court of appeal to be overruled. It can happen right in
16 the circle. What we are now trying to do, and it is now
17 happening -- initially that was true. Initially --

18 **MARY ELLEN TURPEL:** That was my
19 understanding, unless it's changed suddenly.

20 **BARRY STUART:** No, no, initially that
21 is clearly true. But as the communities have -- and it
22 picks up your other point. It is not the political leaders
23 in the Aboriginal communities that are taking the

1 leadership in the circle. It is the women that are
2 supporting the victim, and they are now basically setting
3 the rules for the circle, deciding who is going to come
4 to the circle and essentially setting the pace of the circle
5 based on mediation. Everybody gets an opportunity to
6 talk.

7 **MARY ELLEN TURPEL:** But who makes the
8 decision?

9 **BARRY STUART:** Ultimately the
10 community. It's a consensus process. Twice in the early
11 stages I went against the consensus of that particular
12 circle. But even in doing that, at least I had an
13 opportunity to be able to understand what the community
14 wanted and be able to address back to the community the
15 differences.

16 Since then -- it's a learning curve for
17 me -- in most of the situations in the hundred odd cases,
18 I would say two to three times I had the final say. In
19 a hundred odd cases they had the final say. So it is a
20 working and blending.

21 **MARY ELLEN TURPEL:** If you're not the
22 judge, why are you there?

23 **BARRY STUART:** Good question.

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1 **MARY ELLEN TURPEL:** So the next step is
2 to remove you completely.

3 **BARRY STUART:** That has already
4 happened and some of the communities are now having the
5 healing circle before and in some cases the people are
6 going before the healing circle and the police are
7 diverting it right out of the system, and that is the
8 ultimate goal, that on those cases that don't need -- we
9 spend far too much money in the justice system. We're
10 too expensive. What is now happening is that by being
11 in the circle the communities are beginning to understand
12 that they can't rely on us, that they have to take
13 responsibility, that they have to take ownership, and they
14 are doing that. And through the healing circles before
15 court a lot of the cases are beginning to fall out. And
16 I think that is the way it should happen.

17 **DONNA GRESCHNER:** Who makes the
18 decision then about what cases come out of the system?

19 **BARRY STUART:** The community.

20 **DONNA GRESCHNER:** And the community can
21 also then take a case out once it is already in the system?

22 **BARRY STUART:** Yes.

23 **DONNA GRESCHNER:** So it is not just a

1 preliminary decision? It can happen along the way?

2 **BARRY STUART:** That's right. There are
3 ten different communities and there are ten different ways
4 in which they are progressing and it really depends to
5 the extent to which each community now has the confidence
6 to take it over, but that is also what is happening in
7 some of the communities.

8 **BRADFORD MORSE:** And the willingness,
9 though, of the existing justice system not to try and
10 overrule, the police not to say instead, "No, sorry, we're
11 going to prosecute", or the Court of Appeal overturning
12 you. So to some degree it is dependent upon the existing
13 system stepping back.

14 **MARY ELLEN TURPEL:** Can I just complete
15 my thought? I am grateful for your reaction. The idea
16 of having a healing circle to deal with the problem is
17 exactly what we are talking about, and it is not just the
18 traditional actors in the system that are involved in a
19 healing circle. In fact, they do not necessarily even
20 need to be there. When you have a healing circle maybe
21 you do not have to have the criminal justice system to
22 come in afterward and say your healing circle worked well
23 or it didn't work well or we're going to support your

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1 healing circle or we're not.

2 And this is the point that Michael
3 Jackson made that I think is critical that I do not want
4 to be missed in this symposium, and that is institutional
5 support is needed. It is not enough to say that these
6 things are all happening and isn't it interesting that
7 there are 400 projects and they are going to develop.
8 Well they are not going to develop very far if people don't
9 have resources and don't have the support of other actors
10 in the system and there are not people who say that now
11 is my moment to withdraw, now is my moment to realize,
12 as Harvey has said to us, that I cannot judge this
13 situation, and allow Aboriginals to in fact deal with it
14 according to their own values, to deal with problems that
15 cannot be dealt with for instance in the court system.

16 We can so easily overlook institutional
17 support and focus on how much we have all been working
18 to try to set something up without any support. I think
19 it is a miracle that we even have 400 projects given the
20 degree of support, financial and otherwise, that we have
21 not received from the system. So the institutional
22 component has to be there. It is not just going to evolve
23 naturally. Michael queried this. It is not just going

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1 to somehow grow. We have to see support. All the actors
2 in the system, the Royal Commission and others, have to
3 say that there must be support for these approaches.

4 **BRADFORD MORSE:** I hate to interject
5 again, but I would also just mention that a number of the
6 initiatives that are existing today as new initiatives
7 have been done in the past but they are not still around.
8 Why are they not still around? In part because they were
9 pilot projects, the pilot funding ran out, the projects
10 disappeared.

11 **CYNTHIA DESMEULES-BERTOLIN:** I would
12 like to build a bit on what Mary Ellen and Barry have said,
13 that is that the relationship we seem to establish as
14 Aboriginal lawyers trying to build flexibility into the
15 mainstream system is constantly justifying ourselves and
16 our culture to back the system off. That is exhausting
17 work for us as Aboriginal lawyers and at times it is
18 demeaning because we just cannot seem to break through
19 those barriers and the frustration level is immense.

20 So in addition to wanting to reform the
21 system, because I understand that there will always be
22 Métis people that come into contact with it, understand
23 what it costs us to continually have to justify our

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1 existence, our culture, and create that flexibility. By
2 having criminal justice service providers in some of the
3 pilot projects, what Mary Ellen is saying is implicitly
4 or explicitly what they are saying is, "Yes, we agree with
5 that", and somehow we need an endorsement to justify what
6 it is that our communities want to do. And that is a
7 dangerous thing to do because it is paternalistic is what
8 it is.

9 I would like to talk a little bit about
10 empowerment because that has come up a little bit and it
11 is one of the questions that I had wanted to deal with.

12 I have dealt with jurisdiction, I have dealt with the
13 relationship, now I would like to deal with empowerment,
14 how I see Aboriginal justice systems being empowered and
15 perhaps where we can get the resources from.

16 The simplest way to create an Aboriginal
17 justice system, and this is what I tell people in the
18 communities, is simply do not call the police, just solve
19 it yourselves. If there is a problem in your community,
20 just handle it. You do not need any special resources
21 for that. But for them to develop and flourish and become
22 structured in a way that becomes an aspect or an institution
23 of self-government for our communities, the resource

1 aspect and developing more structure is going to be
2 essential.

3 As far as empowerment, there is
4 certainly enough flexibility in section 35 of the
5 Constitution Act and the federal government's jurisdiction
6 under 91(24). Or we might look at section 101, the power
7 to create courts. There are many different ways to empower
8 an Aboriginal justice system in law. What we need is the
9 desire to do it.

10 As far as resourcing goes, the existing
11 criminal justice system will spend \$50,000 to \$60,000 a
12 year to keep a Métis in jail if they have a systems-related
13 offence or a minor offence in the community, or whatever.
14 There is a great amount of resources being spent.

15 As a task force one of our
16 recommendations in Alberta was to take the resources that
17 are being spent and transfer them into the communities.
18 Surely the money is better spent there.

19 **LORENNE CLARK:** The points that Mary
20 Ellen and Cynthia have been making are certainly the ones
21 that I want to underscore and were exactly what I was
22 getting at in terms of recognizing the need to build
23 permanent infrastructure to let First Nations develop

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1 their own institutions in their own particular settings,
2 but to make sure that they have the resourcing to guarantee
3 their continuity and our ability then to talk together
4 to work out the details around the edges that have to be
5 negotiated. Certainly from my perspective now in
6 government, working with First Nations to develop
7 self-government, that is the primary problem, and that
8 must be the focus of our attention.

9 **MICHAEL JACKSON:** I want to pick up on
10 that in terms of a point Tony made this morning in the
11 first panel discussion in which he said that there is lots
12 of talk about partnership, lots of talk about working
13 together, and obviously in terms of this particular panel
14 there are people who speak from very high places with very
15 good hearts about the need to renovate and to change, and
16 I do not question that at all. They exist in every
17 government department. The minister came here and
18 expressed the same kind of sentiments and I do not question
19 the integrity and honesty of her approach.

20 The reality is when you get down to a
21 particular Aboriginal community -- and I have sat at the
22 negotiating table -- when I go into court and I argue there
23 is a section 35 right for the Gitksan and Wet'suwet'en

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1 having inherent right to self-government -- and I spend
2 too much of my time doing that -- there is a legal argument
3 and the court acknowledges the legitimacy of that argument
4 and engages it with me.

5 To the extent I sit around a negotiating
6 table and make the same argument, to the extent it has
7 not yet been recognized in law in any authoritative sense,
8 government officials can say, well that's your ideas,
9 that's your thoughts, let's try and work this out without
10 determining the rights issue. To the extent that a
11 community wants to take back control of its justice system,
12 at the moment it is dependent upon there being judges like
13 Barry Stuart, RCMP who are prepared to step back and, in
14 many cases, to do that which, in terms of the actual rules,
15 they aren't supposed to do. It depends upon prosecutors
16 being prepared to participate. And that is wonderful and
17 it is important and the system really is not going to change
18 very much from within unless that happens.

19 But the great advantage of the Navajo
20 system -- and I do not think that we have to necessarily
21 replicate courts. I mean we heard from the Navajo. They
22 started with courts as an imposed system and they are taking
23 back control and they are developing the peacemaker, which

1 is their traditional system. We can learn from that so
2 we do not necessarily have to start with courts, although
3 that may be the way to do it for those people who want
4 to do it.

5 I understood the strength of the
6 Manitoba Justice Inquiry to be that if there is a recognized
7 right, based upon an inherent right to self-government,
8 to set up a justice system and it takes the shape of a
9 court, it will then get the resources, it will have the
10 jurisdiction, it will have the things Sharon has talked
11 about, to do it, but not to do it on the basis of please
12 will you help us, please will you give us back the power
13 which you took from us which judges like Judge Stuart
14 recognize as the problem and is prepared to do that. But
15 for every judge like Judge Stuart there are a hundred judges
16 who have not come to understand that lesson of colonialism,
17 who resist it, and to get them all to that point of
18 understanding will take another hundred years. And I
19 think Aboriginal people do not have that time. There has
20 to be some recognition of a right and then it can be done.

21 **BARRY STUART:** A bit of good news. That
22 is the case that I thought. I will not mention the
23 province, but I went to a province and talked to the Court

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1 of Appeal in a session and expected to get roasted. Quite
2 the contrary. I think there are many judges who are
3 looking for a way to do things fundamentally differently.

4 I have been amazed at the number of judges, Crown
5 prosecutors and policemen who are looking for a way. The
6 way is the community, and I think now that the community
7 has taken down the Berlin Wall, if you like, in the Yukon
8 by themselves, and I think that this system of judges and
9 police and stuff like that are willing to follow. I do
10 not think there are a hundred out there against it. I
11 think there are hundreds out there for it.

12 **BRADFORD MORSE:** Let me just throw the
13 wet blanket in. What is to prevent a change in that will?
14 We are still talking about good will. There is a lot
15 of good will around this table. Well, some people in this
16 country do not have the good will. There are some
17 political parties that may not be in office now, but maybe
18 some day in the not-too-distant future, who do not have
19 that good will.

20 What prevents the change, the return to
21 that whole period of colonization continued?

22 **NORMAN INKSTER:** I am not sure that I
23 can answer your question, but while you are asking the

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1 question; who is going to pay for it, how is it going to
2 get done, who is going to build the infrastructure, where
3 are the monies coming from, the people on the line, the
4 police officers who are working with the community cannot
5 wait for that, absolutely cannot wait for it. We are not
6 saying that what we are doing is going to work. What we
7 are saying is we are going back to the community and we
8 are turning the problem over to the community and saying,
9 how can you solve it.

10 In my own organization in 350 Aboriginal
11 communities we set up community consultative groups. The
12 community can be represented on that group any way that
13 it likes, send any leaders that it likes, young, old, their
14 choice. And our starting point is there are no rules.
15 Tell us. We are your police force for the current time.
16 You are our taxpayer, our client. You tell us what it
17 is you want us to do, how you want to do it, and we will
18 be as adjusting and as accommodating as we can possibly
19 be and, as has been mentioned, we have gone well beyond
20 the bounds of what would have been part of my imagination
21 five, six or seven years ago.

22 What we are really saying to the
23 communities is that they have to help heal themselves and

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1 we will help them do that to the extent that we can be
2 helpful and to the extent that they want us involved.
3 But the problems are community problems and the community
4 has to ultimately solve them. And we cannot wait for
5 money, we cannot wait for resources, because the problems
6 exist today.

7 **BRADFORD MORSE:** Thank you Norm. Don't
8 ever retire or die.

9 **CHARLENE BELLEAU:** Just to add to the
10 comments regarding resourcing, I think that is one of the
11 biggest problems we will run into when we start looking
12 at new initiatives, the excuse by the government that there
13 is no money, there is not enough money to do everything.

14 But I think of what can be done right
15 now. I think of what is happening in the Yukon and other
16 parts of the country. It would be good if the Royal
17 Commission would recommend the transfer of some of the
18 money that we save by going into those community
19 initiatives with you to the Native people. For every
20 person that we save from going to jail and want to work
21 within our community, transfer that amount of money. It
22 is transferred from one pot into another, but at least
23 it is to the community, not to the judges, the lawyers

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1 and everyone else who is making money off of the system.
2 Everyone does but the Native community. If those savings
3 could be transferred to the Native communities for the
4 community initiatives I think it would really help the
5 community projects that want to get under way.

6 **BRADFORD MORSE:** Then maybe we would not
7 have communities competing with each other for limited
8 money.

9 **CHARLENE BELLEAU:** Yes.

10 **BRADFORD MORSE:** I now feel like Phil
11 Donahue or Oprah Winfrey. Can we go to the mikes on the
12 floor. Just before that, I have new instructions here.
13 We are going to move right into opening it up generally
14 for people in the audience to hit the mikes and join in
15 the debate. We will just kind of keep it going but expand
16 the circle.

17 **ALF SCOW:** Thank you Brad. Naturally
18 I am very pleased to hear all the wonderful creative things
19 that are happening in our system today, but I rise to remind
20 people that the problem is not simply turning everything
21 over to our people or turning it all over to you. We know
22 that one of those has not worked.

23 We have to remember some very important

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1 things. As we look toward the future the Aboriginal
2 people, the Indian people, will be progressing in so many
3 different ways on so many different fronts. I can foresee
4 the time -- maybe not in my lifetime -- when we will have
5 an economic base, where we will have to have more and more
6 contact in the business world with the white community.

7 This will involve some further changes in our view of
8 the justice system. Right now it is very easy to say that
9 this is great, we will turn the responsibility back over
10 to the Indians and we will get out of it. But it is not
11 that simple, and I think it is good that it is happening,
12 and I think it is good that there is a recognition of the
13 values that we had in our system, but I think also we have
14 to remember that we plan for the future not only for today.

15 We have to look to the future and we have to be aware
16 that protections are needed to be built into the system
17 because it is going to change. The community is going
18 to change. It has already changed now.

19 In my own community for example, my own
20 hereditary community of Gilford Island, more than 80 per
21 cent of the members of the community live away from the
22 reserve. What happens there is that we are no longer
23 recognized as having an Aboriginal voice because the Indian

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1 Act says only the electors are allowed to speak on any
2 of the issues. We are disenfranchised. We suffer from
3 systemic disenfranchisement, from systemic exclusion from
4 participation in what happens to our particular tribe.

5 That is why I said yesterday that we have
6 to look at the overall picture when we are considering
7 justice. Even though I am a professional, and have been
8 for a number of years, I feel that I have a great
9 contribution to make in my own community, in my own tribe.

10 So we look at the community. I do not accept the fact
11 that the off-reserve Indians should not have a say in the
12 direction of our future. I think we must remember that
13 in thinking about these things we have to plan for the
14 future, we have to plan for greater involvement and
15 built-in protections. That has always been the case.

16 **BRADFORD MORSE:** Thank you Judge Scow.

17 Let me also throw out of that one of the comments that
18 you made in there. It is not only a function of the future
19 but also the present. What do Native communities do about
20 non-Native people within their communities, non-Native
21 corporations that engage in activity in their communities?

22 What do we do about joint offenders; an Aboriginal
23 offender with a non-Aboriginal offender, or difference

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1 in victims? How do we deal with, to some degree, where
2 the two systems or two peoples are interacting right now,
3 as well as in the future?

4 Sam, do you want to jump in?

5 **SAM STEVENS:** My question actually is
6 for the Commissioner of the RCMP. I liked your words on
7 respect and your attitude of working with the community.
8 I am wondering how you would feel about instructing your
9 officers in command at each detachment to sit down with
10 the community and to enter into a memorandum of
11 understanding with each community to cover such things
12 as looking at the personnel that are going to come into
13 the community before they actually get there, such things
14 as developing a plan on how that community is going to
15 be policed, looking at the kind of resources that you have
16 and maybe what other kind of resources you need, looking
17 at how the community can actually help you in policing.

18

19 I am wondering what your thoughts would
20 be on whether in fact you might be able to instruct, in
21 a hypothetical sense, these communities, these commanding
22 officers, tomorrow to do that.

23 **NORMAN INKSTER:** I am not sure what

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1 community you represent.

2 **SAM STEVENS:** I am sorry. I am Sam
3 Stevens from the Northwest Territories.

4 **NORMAN INKSTER:** What you have
5 suggested does not fall out of character with the
6 instructions that we have already given. That is to say,
7 in developing the community consultative groups we said,
8 "We in Ottawa will not design the rules for you because
9 you have to sit down with the community." The communities
10 often times came back and said, "What is it, Commissioner,
11 that you expect of us as community consultative groups?"
12 And I said, "No, it is what do you expect of us as your
13 police force and what are your priorities? What is it
14 you would like us to do?"

15 Dealing with what we might characterize
16 as first offenders, how do you want to deal with those?
17 Do you want them dealt with by the community? Do you
18 want to have written rules of procedure? That is your
19 choice. Do you want to sit down and write rules about
20 how things ought to be handled? If you want to keeps terms
21 of reference, that is entirely up to the community.

22 I refuse to take a template designed in
23 Ottawa and snap it over each community that we happen to

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1 police. We are saying to the community, you design it.
2 You have three or four police officers here, let's see
3 how we can work together.

4 In addition to that, on your other point
5 -- and I must say that the community have responded with
6 open arms -- we are saying that having taken a couple of
7 cross-cultural courses, don't assume that you know
8 everything about Indians. Go to the community because
9 each community is different. It has its own traditions,
10 its own culture. Meet with the elders. Determine who
11 the leaders are in the community. Learn some of the
12 language if you can. Why should an elder always have to
13 come in to the detachment and speak English? Why can we
14 not at least greet them in their own language? Why can
15 we not learn what their traditions are and ask the community
16 to teach us about your traditions and culture?

17 I must say that the communities have
18 responded. We have not done as much as we would like yet.
19 There is a long distance to go, but we are moving in that
20 direction.

21 **SAM STEVENS:** In fact that is exactly
22 what I am asking. Really you need more than that. You
23 need a memorandum of agreement, some piece of paper which

1 these two systems agree on -- the community and your group
2 there in the community -- that will specifically say this
3 is how it is going to work. This is how the plan is going
4 to work, here is your responsibilities insofar as teaching
5 us about the community. Here is your responsibilities
6 insofar as providing us assistance when we go to the house,
7 providing us that kind of back-up assistance because we
8 don't have another RCMP officer there, providing us the
9 kind of support. But at the same time, they can look at
10 this thing and say, you agreed to this, rather than tell
11 us, yes, we agreed to this, we agree that the community
12 should do this, and we'll sit down with the community,
13 but at the same time nothing happens.

14 **NORMAN INKSTER:** I do not disagree with
15 you. The only point of departure is I am reluctant to
16 tell any community that it must have a memorandum of
17 understanding. But I am saying that if your community
18 wants a memorandum of understanding, then sit down and
19 write a memorandum of understanding.

20 **LORENNE CLARK:** On that point I would
21 just like to say that the level now has come down past
22 the level about which Commissioner Inkster is talking.
23 We established a Native policing policy committee to

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1 establish the whole policy made up of five band chiefs
2 and one member of the RCMP who we have seconded into the
3 Department of Justice to help us. So our RCMP official
4 that is seconded to us and five band chiefs are now meeting
5 to devise and talk about all of the issues associated with
6 a Native policing policy for the entire territory.

7 So it is not just words. We are now
8 bringing it down to that level and ultimately, depending
9 on what happens, we will have a memorandum of understanding
10 or an agreement, whatever we decide. But there is every
11 intention that those arrangements will be put in place
12 in a way that they cannot simply be changed with a change
13 in personnel.

14 **BRADFORD MORSE:** Now that we have opened
15 it up to the floor, can I ask each person at the microphones
16 to identify themselves for the cameras or audio.

17 **JOE MORRISON:** My name is Joe Morrison.
18 I have sat here and listened for a few days. I had an
19 opportunity to speak yesterday but today I want to share
20 something with you regarding what happened quite some time
21 ago in terms of our Native community.

22 You know that Native people used to
23 travel around in family groups, and as these family groups

1 moved around they came in contact with other people with
2 the result that sometimes a woman met a man that she wanted
3 to marry, so the marriage was arranged. Also, she was
4 told that if she was going to marry this man she had to
5 live under that clan's laws for the community. And also,
6 if the man wanted to move to the woman's family area in
7 a clan that he also had to abide by and live under their
8 laws for the community.

9 Today that is not happening in terms of
10 justice. When we move to a community, particularly out
11 in the northern areas, we do not live under that community's
12 rules. We live by rules that are separate from that
13 community.

14 In terms of justice for non-Native
15 people that work and live in those communities, they do
16 not live and work under the rules of that community.
17 Rather they live under another separate community.

18 I was just using that as an example.
19 When you go to a different country as a visitor there you
20 have to live under those rules. You have to live under
21 the laws that are in place in that country. Even if you
22 go into a municipality, the municipality has municipal
23 laws that you have to obey.

1 So why is it different for the Native
2 community? They are a separate community. They do have
3 community laws that govern the behaviour of the people
4 in the community. Why is it different for the people that
5 move into that community, whether they be other Native
6 people or non-Native people going into that community?
7 Why are they not being governed by the rules of that
8 community?

9 That is something I want to see if the
10 Commission could address and also for the people that are
11 involved in the justice field to address. It is something
12 to consider because there was a person talking about
13 protocol. That is a very good idea if you can do that.
14 There has to be some movement from the people that can
15 make all those kinds of decisions, the willingness to give
16 up some control. But what happens is that people are being
17 controlled external of the community. What happens is
18 that people feel no longer that they can control their
19 own community.

20 We begin to talk about self-government.
21 When is that going to happen to the Native people to be
22 able to do that? I certainly hope that it will come very
23 shortly, but we cannot continue to impose another's will

1 unto another person, because you never reach harmony in
2 that.

3 Somebody mentioned something about the
4 justice parties going to the northern communities, that
5 they need to look at in terms of what is good for that
6 community and they need to hear that from the community.
7 Then the Native communities also have to begin to take
8 responsibility to let the people know what type of social
9 norms are acceptable in that community.

10 The only way the whole system of justice
11 can begin to be addressed is when everybody works together,
12 not in isolation of one another. You have to have people
13 who make decisions, people who can make changes, go to
14 those communities and meet with the people in that
15 community.

16 Just like when they signed the treaties.
17 The treaties were signed on the basis that there was a
18 group of people that were willing to give up something
19 and another group of people were willing to recognize that
20 they gave up something and also give up something to them.

21 So that's the kind of understanding that
22 we need to develop, the kind of undertaking that has to
23 be done, and it has to work from both sides. You cannot

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1 just work on one side and not the other. It has to come
2 all together. We all need to work together at the same
3 time, not just one side going over somewhere else and
4 developing something then somebody else going over at
5 another time. But this is what has been happening.

6 Somebody mentioned the justice report
7 of 1975. That was 17 years ago and it still hasn't
8 happened. That is because all the people have been working
9 in isolation, not together. That is why nothing has been
10 happening.

11 **PATRICIA LINN:** I am going to speak very
12 briefly. My name is Patricia Linn. I sit on the
13 Provincial Court in Saskatoon. I feel compelled to say
14 that in Saskatchewan certainly, where my experience is
15 on the Provincial Court, there are many, many judges who
16 are very sensitive to and who want very much and indeed
17 are working with Aboriginal communities to make changes
18 at the community level. In the North all three of our
19 judges are conducting sentencing panels now. In the South
20 several of our judges have ongoing initiatives within
21 Aboriginal communities, and I can assure you that after
22 today I -- and I chaired the Indian and Métis Justice Review
23 Committee which ended its work earlier this year, and since

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1 then I have been called on to speak and address groups
2 and whatnot.

3 The fact of the matter is I have been
4 sitting on my laurels a tad, I think. I can assure you
5 that after today I will be going back to my community in
6 Saskatoon and doing what I can to work at a personal level
7 and as a judge with the community.

8 I felt compelled on behalf of my
9 colleagues back home to say to this group that there are
10 many judges certainly in my province who are and want to
11 work with the communities, thanks in no small part to Doug
12 Campbell and his Education Centre, but through personal
13 will.

14 In closing I do want to reiterate though
15 and echo that all of these initiatives, including the ones
16 going on in Saskatchewan, cannot continue without concrete
17 infrastructures. That is absolutely necessary or much,
18 if not all, of what we have gained and are working toward
19 may be for naught.

20 **BRADFORD MORSE:** Thank you Judge Linn,
21 for those judicially enforceable commitments.

22 **DOUGLAS CAMPBELL:** I want to refresh
23 some earlier thoughts that I gave you about the conceptual

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1 framework in which all this is taking place. We heard
2 a few moments ago about the conceptual framework of
3 Aboriginal people when the first settlers came here and
4 at the eastern gate it was the Two Row Wampum (PH), which
5 is two societies or two communities living in parallel
6 in a condition of respect.

7 The trouble is settlers had a different
8 idea. In fact, their conceptual framework for this
9 process was assimilation and, accordingly, everything that
10 has happened in the last 150 years has been along those
11 lines.

12 As that process now appears to be at an
13 end, the reversion to the initial conceptual framework
14 may be the goal. In fact, my recognition of what has
15 happened here in the last three days is that the weight
16 of authority is toward that fact, that the two communities,
17 Aboriginal and existing justice, need to be respected
18 equally and live in a condition of respect together, but
19 they are indeed separate. We have gone that far. The
20 only question is now how to get to that place, because
21 there has to be a process whereby that does in fact occur.

22

23 I spoke earlier about the point of

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1 personal relationships leading to trust, leading to
2 action. What it really takes is people with courage on
3 both sides to create those relationships. I cannot
4 underscore that enough. The courage is really, really
5 important, and the courage comes from the support that
6 both sides offer each other.

7 We heard a bit about that. Michael
8 Jackson referred to this at a high level. He said that
9 you cannot get this working at the ground level unless
10 you get high level support and I want to underscore those
11 comments. From that high level support comes the kind
12 of incentive and ambition to go ahead and make the steps.

13 When the steps are made they are made
14 faultingly at the outset because nobody knows quite how
15 to go about this at this point. So what I would like to
16 say about Barry Stuart and efforts he is making, and other
17 judges that I know, is that maybe these steps are not
18 precisely the steps that everyone would like to see. In
19 other words, maybe they are not exactly in the right
20 direction and maybe they are steps made by a leader on
21 one side rather than the other when one would prefer, for
22 example, in the situation Barry Stuart's been involved
23 with, the total leadership coming from the Aboriginal

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1 community.

2 I see it differently. I see the
3 leadership coming from both sides, and I just wanted to
4 say from my experience and working with judges -- and I
5 know Pat Linn is correct -- there are a number of judges
6 out there who want to do a good job, but the goal is to
7 support them first and then let them try to work with
8 counterparts in the Aboriginal community to effect the
9 end result. I have already given you my image of the end
10 result, which I do not think anybody here will find
11 startling.

12 **GRAYDON NICHOLAS:** As I listened to how
13 some of the communities now want to assume this
14 responsibility that was given to us by our Creator, I hope
15 the resources they are focusing on are human resources,
16 not financial. If it is financial, you are going to have
17 a system of fines and that perpetuates itself. The human
18 resources that are there in the community do not have any
19 institutions of any kind, because it is the structures
20 after a while that will need to continue to be propped
21 up, and at the expense of all of our fundamental rights
22 as Aboriginal people.

23 We cannot forget the spiritual basis of

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1 our teachings, and if our laws, our institutions or our
2 people -- the human resources, our own people, forget that,
3 then that thing is destined to fall.

4 I just wanted to remind the people here.
5 Take courage. I began this process in 1967 with a report
6 called Indians and the Law, and in 25 years we have reached
7 major strides. But I hope in the next 25 years we will
8 be talking about in fact how our systems are meeting the
9 needs of our people in every community across this country,
10 because it is varied, but also that non-Indians will be
11 the ones that will be coming in and saying, "What can you
12 offer to us?" Because we have a lot. We should not take
13 for granted our traditional teachings. I thank you.

14 **JONATHAN RUDIN:** I am Jonathan Rudin
15 from Aboriginal Legal Services. I want to comment on the
16 notion of evolution and control because the two are linked.

17 I have spoken earlier. Our project is evolving very
18 slowly. We think we are evolving responsibly. But the
19 control issue is still paramount because certainly we feel
20 that if we have to rely on good will, if we only have to
21 rely on trust, then we cannot afford to make a mistake.

22 And my concern is that all the justice programs that are
23 going on, sentencing circles, all these things work as

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1 long as they work well, as long as they are perfect, but
2 the minute there is a mistake then there will be a demand
3 to shut them down, to make them more accountable, to have
4 oversight requirements. And that is going to finish them.

5

6 That is why I think Michael Jackson's
7 point and Mary Ellen Turpel's point is very important.
8 There has to be some sort of institutionalized protection
9 for these programs.

10 Donald Marshall, Wilsa Nepoose (PH),
11 that is always described as, "Well, you know, the system
12 is okay, but occasionally it falls apart a bit at the
13 edges." I do not see that sort of good will -- I mean
14 I hope it is there but I am not confident it is there.
15 I am not confident that that same spirit will be there
16 when there are mistakes. And there will be mistakes made
17 by Native-run programs. I want to emphasize that. I have
18 noticed that people are happy to give responsibility but
19 they are not happy to give up control. So as long as you
20 do everything right, you can continue to do it, but we
21 are not going to let you do anything wrong.

22 I just wanted to raise that as we are
23 going along.

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1 **SHARON McIVOR:** I just want to comment
2 a little bit on what Doug Campbell said about not having
3 to worry about assimilation any more. The whole
4 interaction we have had with the government in the last
5 20 years anyway points to exactly the opposite. Every
6 new policy, every time we sit down to negotiate, every
7 time we do something, it is aimed at taking what we have
8 and making it smaller and trying to integrate us into what
9 is there. The idea that the assimilation has gone
10 underground does not detract from the fact that it is still
11 there.

12 The other thing that I wanted to comment
13 on is that, okay, people are opening their eyes, they are
14 seeing what is going on now. I had the opportunity to
15 interact with a first year law class and they were given
16 the problem of an Aboriginal family on reserve having been
17 reported as not taking care of their children properly,
18 reported by the school, children going to school with
19 inappropriate clothing and sometimes without lunches.
20 The children were apprehended and placed in a non-Native
21 home off reserve and after much investigation they found
22 out the problem was not care for the children, it was money.
23 They could not afford it. By the end of the month they

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1 did not have the money to be sending lunches. And that
2 was the clothing problem as well.

3 They were asked what the solution was.

4 Not one of them suggested returning the children -- not
5 one of them. They all assumed that leaving them there
6 in that non-Aboriginal home was best for those children.

7

8 It is a small example. It was only 100
9 law students. But if we have that in our law schools being
10 trained now, it gives me a lot of concern about what we
11 are going to have coming up through the system.

12 **PATRICIA MONTURE-OKANEE:** My name is
13 Patricia Monture-Okanee and I am getting a little bit
14 impatient this morning. Actually that is a feeling that
15 has been developing over the last three days. Perhaps
16 one of the reasons I am impatient is because I am the mother
17 of sons. My oldest son is eight. I know full well that
18 in ten years, if we have not addressed these problems,
19 chances are that it is my children, not non-Aboriginal
20 children, who are going to be the building blocks on which
21 the system is continued to be based.

22 I do not like what I am hearing. It is
23 a very narrow vision that is being articulated here. I

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1 am not trying to trash anything or 400 projects that are
2 going on. It is very good that there are these small
3 initiatives, that there are these pockets of hope, because
4 heaven forbid how we would go on without having some kind
5 of hope.

6 But I am hearing a lot of words that
7 really terrify me; words like "diversion", "alternatives".

8 Those words do not mean anything of substance to me.
9 You have a diversion program and you say, okay, we're going
10 to have a healing circle or a talking circle, and that's
11 this alternative over here. But to divert means to go
12 away from the mainstream, to go away from what is accepted.

13 The criminal justice system still maintains that control
14 to reassert its jurisdiction. It is fundamentally not
15 changing anything. It is moving maybe from overt
16 colonialism to a kind colonialism, and I am not satisfied
17 with that.

18 There needs to be a shift away and a
19 commitment to move away from the power dynamics and the
20 relationships that have been oppressing Aboriginal people
21 for a long time. We need to move away from those
22 fundamental coercive relationships that I mentioned and
23 explained how I saw them when I talked at the opening of

1 this conference.

2 Let's talk about responsibility. We
3 hear Aboriginal people standing up all of the time saying,
4 "We want to take responsibility." But where is the
5 existing criminal justice system taking responsibility
6 and ownership for what has happened? It was my friends,
7 it was my sisters, the women who died in prison for women.

8 It was my friends who had to call their families and
9 explain to the families. It wasn't the criminal justice
10 system. It wasn't the police. It was Aboriginal people
11 there at the end of that line picking up the pieces.

12 Let's talk about policing for a minute.

13 When Mary Ellen and I wrote for the Law Reform Commission
14 we were sitting out by the ocean at her place and all of
15 a sudden we both had an incredibly spooky feeling, because
16 we knew the reason there was not sexual abuse and there
17 was not incest and there was not wife battering in our
18 traditional communities. And maybe I should speak only
19 for Mohawk communities because that is what I knew. It
20 is because the women had power. It is because the women
21 were respected. It was because the women had the power
22 to say that those things are wrong and we will not tolerate
23 them. You did not have police, you did not have officers,

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1 you did not have authority. You had mothers, and that
2 was the policing that existed in Aboriginal communities.

3 Well, when you talk to me about
4 alternatives and diversion, I'll tell you what you are
5 talking to me about. You are talking to me about a failure,
6 an absolute failure to recognize the power and authority
7 of women, because policemen are not women.

8 Another example of how diversions and
9 alternatives are not changing. In the mid seventies law
10 schools flung open their doors to allow Aboriginal people
11 the opportunity to attend law school. Ten years ago when
12 I was in law school I was the only Aboriginal person in
13 my year. There was no one ahead of me, no one behind me.
14 It was an experience not only in alienation from the
15 professors, but from the other students, from the
16 materials. It was just total alienation.

17 This past December we did a study at the
18 law school that I now teach in. We have 35 Aboriginal
19 students. Do you know that their experience is still one
20 of total alienation? Verbatim they said the same thing
21 that I said ten years ago when I was the only one. That
22 is what access has done. That is what that alternative
23 of flinging open the door has done.

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1 I just want us to know that when we walk
2 away from here if we don't start talking about fundamental
3 change and fundamental responsibility and respecting
4 women, we are not going to change a thing.

5 **CHARLENE BELLEAU:** I would like to thank
6 Patricia for her comments. I also want to make sure that
7 I do not pass today without commenting on a statement that
8 was made yesterday that I think is hurtful to our people,
9 and to make sure that those things do not happen again.

10 Yesterday there was a comment made that
11 you cannot fight crime with prayers. That was really
12 hurtful because that gets to the core of who I am and what
13 I am as a Native person and goes back to what Graydon was
14 saying earlier.

15 It is really important for people within
16 the justice system to understand that prayer is an
17 important part of our overall healing process. When we
18 sit and have prayers in the morning by the elders who said
19 the opening prayers every day here, and the ceremonies
20 that we have at home are very important to the healing
21 processes that our people have to go through.

22 When we sit in those prayer circles we
23 pray -- or at least I pray, and I sit and I think. I pray

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1 to the Great Spirit to open my ears, to listen to the pain
2 of the offenders and the victims that have to go through
3 courts. I pray to the Great Spirit for guidance for the
4 words that I have to say to people, because our elders
5 tell us not to be angry. I pray to be sensitive when I
6 speak to the people, speak to the offenders that have hurt
7 our own people. I pray to feel good in my heart, to feel
8 compassion for the people that we have to work with within
9 the criminal justice system, to be forgiving if there are
10 people within the system that may have hurt us along the
11 way.

12 Prayer is so important to who we are and
13 what we do, whether it is within the criminal justice
14 system, whether it is through education processes, or
15 through anything else that we do as Native people. It
16 is so important and I felt hurt yesterday that it was said
17 that we cannot solve crime with prayers and I wanted to
18 make sure to express that to the round table.

19 I want to close by saying that it is by
20 no accident that we are here together in this justice round
21 table having these kinds of discussions with the criminal
22 justice system. It is part of the prophecies of our elders
23 that the day would come when we would come together and

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1 try to resolve the pain and trauma we have been through
2 over the last few hundred years. A lot of times I sit
3 and wonder, through my own work with the Aboriginal people,
4 why is it me, why is it Ron George, why is it anybody else
5 that has to sit here and go through this.

6 If we sit long enough with our elders
7 they will tell us that it is because we were the ones who
8 had the strength to endure the sexual abuse in the
9 residential schools, to endure the wife battering that
10 some of the men have perpetrated, that we have had the
11 strength to come through those hard times and it is us
12 that the Great Spirit chose to go through these hard times
13 and that it is us that will find the kind of solutions
14 that we will so that our children do not have to suffer
15 any more, so that our women do not have to suffer any more.

16 I really believe in the gifts of the
17 Great Spirit and the gifts of prayer in all the work that
18 we are doing and that we will move on into the future with.

19 **AL HAMILTON:** I am Al Hamilton from
20 Manitoba. I start with a sense of the same frustration
21 that Ms. Monture expressed, a frustration with what appears
22 to be a lack of acceptance by a lot within the Canadian
23 community, and occasionally you see bits and pieces of

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1 that here today of the situation that this Royal Commission
2 is being called upon to address.

3 There seems to be an unwillingness to
4 accept that the present justice system has caused untold
5 hardship to Aboriginal people, and that tinkering with
6 the existing system is not going to address that hardship
7 or correct the faults that are causing our jails to be
8 filled with Aboriginal people, of Aboriginal people
9 staying in custody for extended periods of time awaiting
10 bail, or not getting bail and awaiting trial, and being
11 removed often from their communities while the legal
12 process wends its way. Young people taken from one
13 community, sent 500 miles away while tests are taken or
14 while people prepare for a convenient date for trial.

15 I do not think there is a recognition
16 generally within the system of the hardship that results
17 from that sort of result of what we all liked to think
18 was a perfect system that provided equal justice for all.

19 I think we are only coming to realize that perhaps
20 different treatment has to be applied to obtain real
21 equality.

22 I do not think the problem is as great
23 to overcome as some of the speakers have suggested. I

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1 do no think we are bound up in a very complex sort of
2 situation where it will take years of discussion and debate
3 to resolve.

4 While I think Professor Macklem gave us
5 a good outline of some of the initiatives that might be
6 taken by federal or provincial legislatures, he stopped
7 short of recognizing what I think is the easy approach
8 and the easy solution. Aboriginal rights have never been
9 destroyed in Canada. They may have been put on the back
10 burner. The treaties recognized the rights of Aboriginal
11 people to have their own territory, as it were, where we
12 are talking of that, in effect to live as they wished in
13 that territory. It was only the Indian Act applied shortly
14 after that changed the interpretation and said, oh no,
15 you will live as we tell you to live. That I do not think
16 that was ever the intent of the treaties.

17 Section 35 of our Constitution now
18 recognizes as well the continuing existence of Aboriginal
19 rights in this country. It is not a very big step then
20 to say Aboriginal people have the right to control their
21 own system of education, and we know that is now happening
22 all over Canada, mind you, just through the good graces,
23 I suppose, of Indian Affairs in allowing that to happen.

1 But they are running their education programs.
2 Aboriginal people have economic development programs in
3 a number of communities. Although there are problems here
4 or there, in the province of Manitoba Aboriginal people
5 run their child welfare system affecting every single
6 reserve in the province of Manitoba. And they, like other
7 agencies, certainly have had their problems, but overall
8 that program of self-administration has been a tremendous
9 success.

10 So is it not merely a simple step to
11 recognize the ability, and I have great faith in the ability
12 of Aboriginal people to run their own affairs in any of
13 these areas; to say that Aboriginal people already have
14 the right to have their own justice system. And all the
15 federal or provincial governments have to do is recognize
16 that, and maybe that is just by resolution of a house or
17 an Order in Council or something of that nature, and back
18 away and allow the Aboriginal people to institute their
19 own court system. I should say justice system because
20 in our report Murray and I were careful to use the term
21 "justice system" because it is more than the court system;
22 it is police, it is having Aboriginal police, and certainly
23 I am very appreciative of the work the RCMP is doing and

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1 will continue to do in dealing with Aboriginal people,
2 but we need police who will -- to use that horrible term
3 Ms Monture did not like -- divert people away from the
4 criminal justice system so that they can be dealt with
5 by peacemakers in the community or can be dealt with by
6 elders in elders' circles and so on.

7 I am afraid I am going on at too great
8 a length, Mr. Chairman, and I will try to bring this to
9 an end.

10 In my experience in the courts for a
11 considerable length of time there were murder cases that
12 I heard that I would be happy to have an Aboriginal
13 community deal with. Now, in our report we did not
14 recommend starting with that. We recommended summary
15 conviction jurisdiction, something like that, plus child
16 welfare jurisdiction, civil jurisdiction, young offender
17 jurisdiction, things like that that we felt the Aboriginal
18 communities are now capable of handling. And I think it
19 is just a matter of other governments stepping back a bit.
20 It is a matter of the legal community stepping back a
21 bit. And it may be necessary to build in appeal systems
22 within an Aboriginal court so that what happens from the
23 Northwest Territories does not happen, the Alberta Court

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1 of Appeal stepping in and saying we do not go along with
2 the decisions of an Aboriginal system; everybody guilty
3 of rape gets four years or something of that nature. I
4 just use that as one example in passing.

5 I think the solutions are fairly simple
6 and I think we just have to allow them to operate. Thank
7 you.

8 **ERNIE BENEDICT:** During my life time I
9 have encountered the Indian Act at various times and the
10 Indian Act, they say, is the statement of the policy of
11 the Canadian government toward Indians. Recently I have
12 re-read the Indian Act and in one section I found where
13 persons or Indians are mentioned five times in one
14 sentence. Is that the continuing relationship that will
15 obtain between Indians and the Canadian government?

16 **CLEM CHARTIER:** I wish I had the
17 composure that Ernie has. It seems that the more I get
18 up to make comments the more nervous I get because we have
19 been saying these things for years and we must be saying
20 the wrong things. But for the sake of being on the right
21 track, I am going to make these comments again.

22 My name is Clem Chartier. Officially
23 I am here to represent the Métis Nation. The president

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1 of the Métis National Council could not attend and I was
2 asked to be the delegate to this conference on behalf of
3 our people, so I am going to make some comments with respect
4 to that.

5 The Métis are put in a difficult
6 situation. You heard the president of the Métis women
7 yesterday. I always have this apprehension, when I come
8 to conferences like that about how we should react or how
9 we should not react. I thought I did not want to react
10 in any way this time, but I was not in here for any more
11 than about 15 minutes and one of my colleagues came up
12 to me and said, "You have to get up there and you have
13 to ask them why we are being marginalized, why they are
14 culturally insensitive, why we are not part of the people
15 making presentations and why this and why that". I got
16 angry and I got frustrated with my colleague. I said,
17 "Look, I don't want you whispering these things in my ear
18 during this whole conference. I'm sick and tired of this."
19 She said, "Well you are representing our people, the onus
20 is on you."

21 So I reflected on it and I thought that
22 we are caught up in the whole system internally to our
23 different nations and we take it out on ourselves and here

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1 is a prime example of my doing that. So I thought that
2 I would respect her knowledge and her wisdom of saying
3 we have to continue fighting for our people and making
4 our voices known, and I did make an attempt to do that
5 but unfortunately we were five minutes over the agenda
6 and I was refused the opportunity to make those comments
7 at the start. I wish I had, because my participation in
8 this conference would definitely have been different and
9 I would have felt like I was a participant as opposed to
10 an intruder.

11 I was doubly insulted because in the
12 afternoon, after being a half hour over time, the Minister
13 of Justice attends the conference. All of a sudden, forget
14 the agenda, make time for the minister, and a presentation
15 is made. So it appears that there is selective deviance
16 when it comes to certain individuals or institutions.

17 So that anger was there. It kind of
18 dissipated. I decided to take a break. I went away for
19 a while. I came back after lunch and I was asked by one
20 of the conference participants to be on one of these round
21 tables on these questions and I said, "No, I don't want
22 to be", and I told her why. It was because I felt insulted
23 and I did not feel like participating at that point.

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1 Sheila has specifically stated how we
2 have been marginalized so I will not go into that, but
3 it is not only in this process. We have been marginalized
4 in the land claims processes, the comprehensive claims,
5 the specific claims. Almost everything that happens in
6 this country the Métis get marginalized and we find
7 ourselves in this kind of situation again today.
8 Hopefully it will not continue.

9 This morning I read in the Globe and Mail
10 that Mr. Erasmus makes a comment that the Royal Commission
11 may be prepared to have a separate inquiry into the
12 relocation of the Inuit, and that is good, but what about
13 a special or separate inquiry into how our people have
14 been treated, how we have been dispossessed? In fact I
15 asked that of Mr. Erasmus and Mr. Blakeney about three
16 weeks ago in Saskatoon. Hopefully we will get some
17 response to that. It is a difficult thing for us.

18 And this morning I heard one of the
19 presenters state that Indians will always remain Indians,
20 Inuit will always remain Inuit. What is going to happen
21 to the Métis? He didn't say anything about that. Again,
22 another example of how we are being sort of ignored or
23 not addressed.

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1 I was thinking, and I guess I will state
2 it, that perhaps this round table should be recharacterized
3 and be called the Round Table on Indian and Inuit Justice
4 Issues. In fact, if the Royal Commission does not take
5 our people seriously, perhaps the Royal Commissioners
6 should consider going back to the Prime Minister and asking
7 him for a mandate to call it a Royal Commission on Indian
8 and Inuit Peoples. But hopefully that will not be the
9 case because we do want to see some radical change within
10 this Commission to address our people. I can say that
11 over the last two week a lot of the research people are
12 being sensitized and are wanting to co-operate, but we
13 need the Commission as a whole to deal with that.

14 If the Royal Commission does not change
15 its direction and its focus, our nation is going to be
16 very poorly served. So that is my hat as a representative
17 of the Métis Nation.

18 I just want to make a personal comment
19 or two that I have not had permission to from the nation.
20 These are strictly my own comments. So it is Clem the
21 Métis that is speaking based on my experience.

22 This was to be a round table on justice
23 issues and I thought, when I heard about it, great, we

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1 can talk about issues of justice. But when you look closer
2 it is on criminal justice. Now, I have been a sessional
3 lecturer at university in Saskatoon where I have taught
4 Native People and the Criminal Justice System. And I did
5 not like doing that because it is so narrow and, of course,
6 I broadened it, but the title was still there. I think
7 we have to go beyond just looking at Aboriginal peoples
8 and the system of justice as dealing with criminals. That
9 is what it makes me feel, we are dealing with nations of
10 criminals and how do we reform that.

11 Who is the real criminal? That is
12 something that I have wanted to say over the last few days.
13 The very foundations of Canada are founded on crimes
14 against humanity, in this case on crimes against the human
15 rights of all indigenous peoples. Now that is what I call
16 a crime. The dispossession of the Métis from our
17 traditional lands, that is what I call a crime. The
18 creation of the Northwest Mounted Police in the 1870s to
19 control our people and to occupy our lands, that is what
20 I call a crime. The military attack on our people and
21 our nation in 1885 at Batoche and the murder of our people,
22 that is what I call a crime. In fact, the stealing of
23 the bell as a military trophy from the Métis church at

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1 Batoche in 1885, that is a crime. Now someone has removed
2 that same bell from its trophy case somewhere in Ontario.
3 If that person is a Métis, you can rest assured that if
4 he or she is caught that person will be charged with break,
5 enter and theft. Now that would be a crime against our
6 people. The hanging of Louis Riel for fighting for our
7 nation, for our rights, that is a crime. And today, the
8 continuing conviction of our people that go out to hunt
9 to feed our families, that is a crime.

10 I could go on and on; this continuing
11 denial and suppression of the exercise of our right to
12 self-government, the denial of our right to the return
13 at least of portions of our homeland, that is a crime,
14 that is a crime against our Métis nation. So I would say
15 that until and unless these things are corrected, until
16 decolonization takes place and the rights of
17 self-determination is realized and given full expression
18 by our people in all areas including justice, solutions
19 that we are attempting, or you are attempting to address
20 in this forum, are going to be very elusive.

21 The reason I am making this statement
22 now is because the agenda has changed. I was going to
23 do it at the next session when the report was going to

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1 be up, but I have been told that there is no opportunity
2 -- again deviance -- so I am doing it now.

3 In conclusion, are we addressing the
4 real criminals?

5 **RON GEORGE:** I am glad Clem said a lot
6 of the things that I certainly can support. When we were
7 discussing how to prepare for this round table we got a
8 stack of studies and papers to review before we came here.
9 It occurred to us very quickly that there was nothing
10 that the off-reserve and Métis people could draw from to
11 contribute to that stack, maybe making it another inch
12 higher or something. It just reiterates the sentiments
13 that Clem has stated to us today, that we are always
14 marginalized. There is no study for off-reserve people
15 and Métis people on justice or health or anything else.
16 All of the programs that are being meted out by the
17 governments are strictly designed to who they say they
18 should be designed to, who they say they recognize. The
19 Brighter Futures program for health is strictly designed
20 for on-reserve groups. Even though they use the
21 off-reserve head count to justify their numbers, they are
22 still designed for on-reserve people. The same with every
23 other program. That was the reason why we had the equity

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1 of access clauses put into the Charlottetown accord, to
2 try and rectify that situation to enable the off-reserve
3 and Métis groups to be part of the process and part of
4 the equation instead of being marginalized as we are now.

5 This leads to the point that I was going
6 to originally make until Clem opened another door for me.

7 Whenever there are discussions about self-government the
8 questions always is, "How much is it going to cost"? Well,
9 while I understand that question, it is not asked in the
10 context of we have self-government and it costs us money
11 so how much is it going to cost you. It is always in an
12 accusatory way. How much is it going to cost us? How
13 much is it going to cost the taxpayer?

14 That is a question that seems to be only
15 asked when self-government is being considered for brown
16 people is basically the way I see it. No one asks how
17 much it is going to cost to subsidize the fishermen who
18 lost their way of life in Newfoundland. I mean the bloody
19 cheque just gets written just like that. Nobody asks.
20 No one asks how much it is going to cost to replace those
21 jobs in Newfoundland. Ninety-five per cent of the
22 Aboriginal community is unemployed. How much is it going
23 to cost? An attitudinal change has to take place over

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1 all.

2 Education must take place. What
3 we are doing here is like damage control. We are trying
4 to repair damage that has been done because history has
5 taught us a way of life and an attitude. The only way
6 to change that is to make sure that the education system
7 changes over all, right from kindergarten onward. We
8 learn a set of values from kindergarten to matriculation
9 and then we start unlearning it in the post-secondary
10 educations institutions and going through processes like
11 this. It is not going to change until our children start
12 learning the truth about who Aboriginal people are. We
13 are people who live on reserves, we are people who live
14 in urban communities, we are Métis, we are non-status,
15 we are red ticket Indians, we are Indians south of 60,
16 Indians north of 60. We are all those 17 categories that
17 were created by the government before 1985. That is who
18 we are. How come people don't know that? How come we
19 have to put this information through cross-cultural
20 workshops to do the damage control that is required before
21 we can take the next step to decide whether Indians are
22 capable of running their own justice system or doing these
23 other things?

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1 Why is that question even asked in the
2 first place? We are human beings. We have minds. We
3 ran this country before the advent of the European. There
4 should not even be the question can we do it. It is just
5 when we should do it. That is what the question really
6 should be. To ask that question is just basically
7 perpetuating the myth that Aboriginal people are people
8 who should be wards of the government and we should consider
9 whether or not they should have their own systems, be it
10 justice or otherwise.

11 So there is an attitudinal change that
12 must take place. Education has to be rewritten. The
13 truth must be told to our children so that we do not have
14 to go through these exercises any more and leave it up
15 to the next generation.

16 **BRADFORD MORSE:** I think those words are
17 an appropriate way to end this session. Thank you all
18 for your attention.

19 **MURRAY SINCLAIR:** Thank you all, ladies
20 and gentlemen. We are now in the home stretch of the
21 agenda. If you wish to remain at the round table you are
22 more than welcome to continue to sit there. We are not
23 going to take a break, despite the temptation to do so,

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1 because I know if we do I am going to lose most of you.

2 We are now in a situation where, short
3 of the closing portion of the week, we have only one major
4 item left on our agenda and that is the report from the
5 rapporteur. I would like to commend Professor Morse and
6 the members of that last panel and all of the participants.

7 There was a great deal of energy generated during this
8 last few hours and a great deal of dialogue. You did what
9 you were told. I appreciate that very much. You all did
10 a good job.

11 During the course of the last three days
12 since this round table opened on Tuesday morning, and as
13 you were all told at the outset, a stalwart individual
14 of broad shoulder and great foolhardiness was assigned
15 the task of trying to wrap this all up and trying to detect
16 themes and ideas that were running throughout the three-day
17 discussion so as to advise the commissioners what exactly
18 has gone on here.

19 I say of tremendous strength of
20 shoulders and foolhardiness because, firstly, to think
21 about the awesome task of trying to assess from all of
22 the papers that were put forward and all of the comments
23 that were inevitably going to be made, all of the issues

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1 that would be raised and some that might not be for, as
2 Ovide Mercredi said during one of the panel discussions,
3 you may remember, perhaps by my silence I was saying
4 something, to paraphrase him.

5 Through all of that to try to come up
6 with something that was common, or perhaps not common,
7 to try to determine what it was that was being said here,
8 or not being said, was a terribly difficult task.

9 Accordingly, the responsibility given
10 to Dean MacPherson of Osgoode Hall Law School was one that
11 we are all appreciative that he undertook. I am sure he
12 has not shied from his job but, on the other hand, I am
13 not so sure he did so willingly at some points in the last
14 few days.

15 Accordingly, the rapporteur now is going
16 to be called upon to present to the commissioners on these
17 last three days. You will note from the agenda that there
18 had been an indication that discussion of the rapporteur's
19 report would be provided for, but that now has been put
20 by the wayside in accordance with our policy today of
21 organizing on the fly because of the time lines that we
22 have now given ourselves. We are going to hear the report
23 from the rapporteur and then we are going to go to the

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1 closing and concluding remarks.

2 Dean MacPherson.

3 **DEAN JAMES MacPHERSON:** Thank you,
4 Judge Sinclair. Elders, Commissioners, ladies and
5 gentlemen, let me assure that when I accepted this task
6 I did regard it as a major one, but since it is 1:20 on
7 Friday and lunch is supposed to be at 1:30, I will convert
8 it instantly from a major to a minor assignment in my eyes.

9 Yesterday several people started with
10 a story and perhaps I could be permitted a brief one.
11 I am a Nova Scotian. I grew up in villages and towns in
12 several communities in Nova Scotia. My grandfather was
13 a parson and one of his two sons was a parson and my only
14 brother is a parson, so for my entire lifetime I have
15 listened to church services, the sermons and the prayers.
16 From a very young age I developed a particular interest
17 in prayers. When you are young perhaps that interest would
18 develop because at least they are shorter than sermons.

19 But as the years have gone on I have
20 listened carefully to prayers all over the world. Let
21 me just say, if I may, at a personal level, that listening
22 to the five prayers by the two elders, Ernie Benedict and
23 Flora Tabobondung, has been a very special experience for

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1 someone who grew up in sort of a parson's family for 40
2 years. They are very beautiful prayers. Even for someone
3 whose roots are quite rural, they are much more tied into
4 nature than anything I had ever heard before and they meant
5 a great deal to me.

6 I had never heard the word "rapporteur"
7 until I was 26 and went to a conference in Vienna and watched
8 someone called a rapporteur summarize a conference, and
9 he took three hours to do that. All it seemed to me he
10 did was regurgitate what everybody else had said and put
11 no analysis on it. I have been to many conferences since
12 and I realize that that is not what you are supposed to
13 do.

14 The Commission asked me to do two things.
15 One is try to identify some of the shared themes that
16 emerged in the papers and the discussions over the last
17 three days and, number two, make suggestions about the
18 future research agenda of the Commission in light of those
19 themes that have developed at this conference, and I intend
20 to do that. Five minutes on each is my hope.

21 Because I like numbers, I will tell you
22 right now that I have nine points to summarize the
23 discussion and eight points for future research, but they

1 will all be stated very briefly. The reason I like to
2 use numbers is my grandfather, the parson, said to always
3 tell people how many points you are going to make. It
4 makes it easier for them to follow and also it makes them
5 feel good as they see you are getting near the end of what
6 you are saying.

7 The summary of the discussion; nine
8 quick points. Let me compliment all the people who wrote
9 the papers. They were very well researched, very
10 thoughtful and that rarity in academic life, on time.
11 You rarely see that in academic life. And let me
12 compliment all the people who made the presentations here
13 during the last three days. The presentations were very
14 fine. There was a great deal of information in those
15 presentations based on experience and knowledge and
16 emotion, all of which will be, I think, quite valuable
17 to the commissioners.

18 Nine themes. The first three, I think,
19 are simple and unanimous and I had elaborated on each of
20 them but I think I will just state them very simply.

21 Number one; current justice system,
22 especially the criminal justice system, has failed the
23 Native people of Canada. The principal reason for this

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1 is the fundamentally different world view between
2 Euro-Canadians and indigenous peoples with respect to two
3 things: what constitutes justice and the process for
4 achieving justice.

5 If you ask a Euro-Canadian person what
6 justice is, almost immediately the word "fairness" will
7 come into play. The Supreme Court of Canada said that
8 in the Nicholson case. So all of us think in terms of
9 fairness. But I have heard words here this week that I
10 have never heard before in the context of justice, or
11 rarely; peace, balance, and especially harmony. I have
12 never heard the word "harmony" so much, and yet it was
13 harmony which was tied so much in to the Aboriginal notion
14 of justice.

15 Moreover, the process for achieving
16 justice. It is clear that the adversarial system does
17 not reflect the way Aboriginal people think or resolve
18 their problems, and in the 300 pages that you may have
19 read last weekend or in the evenings here, the one page
20 I would refer you to is page 29 of Professor Dumont's paper.

21 It is a chart, Zone of Conflict in the Justice Arena.
22 On one side of the chart is Expectations of Legal System,
23 the current one, and on the other side of the chart is

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1 Native Response to the Law. There are seven items under
2 each. When you look at those seven items and read them
3 the conclusion has to be crystal clear that the adversarial
4 system does not work for Aboriginal people. Query whether
5 it works for anybody else in the country as well.

6 Point two; the justice system,
7 especially the criminal justice system, is too
8 centralized, too legalistic, too formal and too removed
9 from the Aboriginal communities it is supposed to serve.
10 One reason for that may be Professor Littlebear's comment,
11 the external versus the internal perspectives on the nature
12 of social control.

13 I was struck by a comment by Justice of
14 the Peace Mitchell when she talked about her appointment
15 to the bench and the judicial education that she underwent.

16 Judicial education in the mainstream court system would
17 involve you taking some courses in -- and I did not have
18 a list but I remember these courses -- you would go away
19 and you would take courses immediately in evidence and
20 procedure and computer training, if you want, and there
21 is one called Conduct of a Simple Trial and there is another
22 one called Conduct of a Complicated Trial. Those are the
23 things that mainstream judges take.

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1 What did Justice of the Peace Mitchell
2 teach herself when she became a judge? I did not get a
3 chance to write them all down, but three I did. She said
4 she went away and took courses in counselling, mediation
5 and suicide intervention. Very different more
6 personalized view of the justice system from Judge Mitchell
7 than from the mainstream judicial circuit. I think from
8 judges right from the top down through the system you would
9 have that very different view of the justice system.

10 Point three; easy one. The time for
11 reform is now. Minister of Justice Campbell said it.
12 She said it before. The time is for action now and reform
13 now, not for a whole lot more study.

14 Point four; there is no serious
15 jurisdictional problem in the way of achieving reform in
16 the justice system in this country. Read pages 57 to 59
17 of Professor Macklem's paper. That is as clear an analysis
18 and summary of the constitution as you will find, and I
19 would suggest and submit that what he says about the justice
20 system applies equally, on the issue of jurisdiction, to
21 the health care system and the education system and the
22 housing and the social services system. There are no major
23 constitutional impediments to reforming any of the systems

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1 in this country and I do not sense that there was anyone
2 here who disagreed with that.

3 The Attorney General, Mr. McCrae,
4 yesterday said it may well involve, at points, tripartite
5 negotiations, and he is right on that. It may be that
6 sometimes people alone can do it. Maybe dual parties do
7 it sometimes, maybe tripartite parties do it sometimes.
8 But it can be done. There is no constitutional roadblock
9 in the way in my view.

10 Point five; there is not agreement, in
11 my view, at least there was not here this week, on whether
12 there should be a separate Aboriginal justice system,
13 although I think that was the majority view. I detected
14 three different groups of people arguing for three
15 different versions of major reform.

16 One view is try to abandon or get away
17 from the current system as quickly as possible; establish
18 Aboriginal governments, real governments and then let
19 these governments establish justice systems.

20 The second view is let's have radical,
21 planned, concerted reform of the current justice system,
22 and this may lead to the development of separate justice
23 systems.

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1 The third view I detected a lot this
2 morning was let's have and encourage a lot of grass roots
3 eclectic reform which is profoundly local. It may involve
4 just a few people, not even 100, and we have no idea where
5 that is going to lead. But it will lead somewhere. It
6 may be separate systems, it may not be. We do not know
7 yet, but encourage it, let it happen.

8 Point six; many of the theoretical
9 arguments in favour of a separate Aboriginal justice system
10 are convincing -- Professor Turpel's paper. And the
11 arguments against such a system are not convincing --
12 Professor Webber's paper. Professor Webber talks about
13 the objections; the objection on grounds of protection
14 of individual liberty, the objection on grounds of
15 equality. I had three or four pages here to elaborate
16 on that, which I will not elaborate, but I think he has
17 responded very effectively to those points in his paper.

18

19 And Mr. Mandamin, in his paper, talks
20 about the objection on the grounds of confusion. What
21 is the basis of the system going to be? Is it going to
22 be the status of the accused, the status of the complainant,
23 the choice made by the accused, the nature of the offence,

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1 the territory of the offence? Mr. Mandamin says,
2 correctly in my view, all of these options already exist
3 in the current justice system anyway in Canada.

4 For the first time in 20 years this
5 morning I heard someone make reference to the conflict
6 of laws courses. Ms Bertolin said, look at conflicts
7 rules. We have those problems anyway, we can deal with
8 those problems.

9 Number seven; if there are separate
10 justice systems they will be plural -- justice systems.

11 The reason for that is history. Mr. Giokas' paper, his
12 analysis of history, why history of Aboriginal communities
13 in the country tells us that it will be plural systems.

14 And the other reason, just today, what is happening today,
15 the developments today. Mr. Mandamin, a single sentence,
16 "Aboriginal justice initiatives have commenced in
17 different communities across Canada." It would be
18 unrealistic and counter-productive to expect these
19 community-based initiatives to give way to a single
20 Aboriginal justice system.

21 Point eight; there have been many good
22 initiatives and developments in the justice domain in
23 Canada in the last few years, and you have heard about

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1 many of them this week. The need is to identify them,
2 analyze them, and develop those that are good initiatives
3 on a more visible or broader plain.

4 In the words of Chief of Police McKay,
5 "It is time to turn from pilot projects to permanent ones,
6 and it is time to extend the projects into other communities
7 and to develop new ones."

8 Point nine, the last one; reform comes
9 from conversations between and negotiations between
10 governments and Natives. In the words of Justice Cawsey
11 yesterday, everything that has worked for Natives has come
12 from Natives, and the non-Aboriginal participants in the
13 justice system are going to have to understand that and
14 they are going to have to plug in to the developments that
15 are already happening around the country, try to learn
16 what they are, try to understand them, try to then offer
17 support for them. And that is the route to reform in the
18 country.

19 Now let me turn to what that means for
20 the Commission's research in the future. I have just eight
21 quick points on this. Some of these points flow from the
22 description of the themes I have just discussed and some
23 of them are my own points.

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1 Research point one; if you have to err
2 on the side of theory on the one hand and practical results
3 on the other hand, err on the side of practical results.
4 There is a lot of awfully good theory in the Aboriginal
5 justice out there. It is in the reports of the provincial
6 inquiries and the law reform commissions and the federal
7 studies that have been written over the last 25 years,
8 and some of that is very learned and very eloquently
9 expressed.

10 What is needed now is more of a focus
11 on trying to suggest, having identified the problems and
12 developed a conceptual base, much of which is out there,
13 as a Royal Commission, practical solutions to those
14 problems.

15 Point two; it would be useful, in my
16 view, for the Royal Commission to document the initiatives,
17 the experiments, the projects that are already out there.
18 The Commission has started to do this partly already
19 through visits to communities, through sessions like this
20 here today. But I think it should do some quite detailed
21 case studies, a few of them, of some of the projects we
22 heard about this week, or of other projects. Detailed
23 case studies should be done to try to describe in detail

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1 what has happened in these projects and how they occur,
2 and then to draw out of that some general principles, if
3 you can, about what are the important features of
4 successful initiatives in the country: what is the
5 territorial base of some of these projects; is there a
6 population factor that is relevant; what is the point of
7 intervention in the system; what is the organization of
8 what group is dealing with it; what is the process of that
9 group; what are the substantive decisions made in this
10 experiment or project and what are the links of that
11 project, which is a justice project, with other areas in
12 the community like education and health and employment
13 and social services and housing.

14 So to do some case studies, detailed case
15 studies, that identify and analyze and then generalize
16 from some of the things that you have heard about today
17 or that you may have seen around the country as you have
18 travelled.

19 There was a study three years ago by the
20 Assembly of First Nations in the field of education. It
21 is a four-volume study. It took the Assembly of First
22 Nations four years to do it. The first volume was a lengthy
23 description of education at a community-by-community level

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1 throughout the country, from Whycocomagh to Vancouver
2 Island. There is a tremendous amount of practical
3 information in that Volume 1, which then enabled the
4 Assembly of First Nations to build on that and talk about
5 what is wrong and what is right and with what is wrong
6 how do we make it better. I would commend to the
7 commissioners Volume 1 of that AFN study on education as
8 a useful research methodology.

9 Point three; concentrate your research
10 more on what I would call the front end of the justice
11 system. Concentrate your research a lot more than you
12 heard in these three days in what I would call the front
13 end of the justice system. My only surprise in the three
14 days, other than how much I learned, was how much of the
15 conversation and how many of the pilot projects focus on
16 what I would call the back end of the justice system;
17 sentencing, or, slightly removed from the back end; trial.
18

19 There is nothing wrong with any of that.
20 That is all important. But it seems to me that the justice
21 system, the real reforms, need to be made, in many cases,
22 long before you are talking about sentencing someone who
23 is, at that moment, at the last hurdle in the justice

1 system.

2 I thought of the case Judge Paul
3 mentioned, the graffiti on the wall, and his sentence.
4 I sent him back to paint it, and he did a good job painting
5 it and I was there till Friday and could confirm he did
6 a good job of painting it, and maybe that was an illegal
7 sentence. Well it was not an illegal sentence at all.
8 It was probably a fine sentence, both in law, I suspect,
9 and morally a good sentence.

10 But I thought to myself, it's a bit of
11 shame that it is Judge Paul with the red sash coming to
12 that common sense, good conclusion. Too bad that if the
13 elders were involved in suggesting that, that it did not
14 happen a whole lot earlier in the process; the elders being
15 involved with the police -- is a charge going to be laid
16 here at all. Or with the prosecutor -- why don't you
17 drop the charge -- much earlier in the system than just
18 the sentencing or the trial end.

19 On that point, I was impressed by a
20 comment of Ms Barnaby yesterday. When the elders, after
21 the case she had testified in, were asked if they would
22 like to become involved in judicial education. I thought
23 for a moment her answer was going to be "of course", because

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1 she had described a situation that had been quite unhappy
2 for her and I thought that she would of course want to
3 be involved in that to improve. And she said no, the elders
4 decided they did not want to be involved in that. And
5 the reason was they decided what energy and time they had,
6 and wisdom, they wanted to devote to community education
7 and development.

8 That sort of made a point that I was
9 groping for, which is try to get involved in the
10 partnerships, to use Professor Jackson's word and
11 Commissioner Inkster's word. The partnerships that you
12 need to develop need to be developed earlier in the system.

13

14 Number four; in your research and in your
15 report deal with the question of resources head on. Until
16 Mr. George spoke right at the end there had been very little
17 specific reference to the problem of resources. One or
18 two people floated the sentence, well of course we need
19 resources, but that was about all that was floated. Mr.
20 George got a little bit specific.

21 What I had written down last night, which
22 ties into what he said, is in my view in your research
23 identify several good initiatives in the justice field

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1 that have occurred and cost them specifically. Show what
2 they have cost. Because governments are going to say,
3 increasingly in the 1990s when they want to say no to ideas
4 and reforms, they are going to say it costs too much, we
5 cannot afford it. So let's cost a few and then let's do
6 a little bit of comparison costing.

7 After you have figured out how much one
8 of the pilot projects has cost or how much a new prison
9 cost in Maple Creek or in Hobbema, compare them with some
10 other expenditures, both outside and inside the justice
11 area. Compare them with how much one federal submarine
12 costs, if it is a federal pilot project that you are costing
13 and you want to compare it with federal expenditures.
14 Compare it with how much one provincial government -- let's
15 say my old government in Saskatchewan -- spends to get
16 Mr. Submarine to relocate its head offices to Regina.
17 Cost that one out. Compare it to the costs of ministerial
18 travel on private jets in the course of one year. Compare
19 it to the costs of what MPs and MLAs spend on foreign trips;
20 even narrower, what they spend on foreign trips in the
21 months of January, February and March to warm countries.
22 You can clap at that but you may not like the next one
23 as much. Compare it to the cost of one year of contracted

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1 services for lawyers, media and consultants and ad
2 agencies.

3 Do some comparison costing just so that
4 governments, who can quite legitimately say there is a
5 resource issue here -- they have to say that -- are then
6 told what the comparisons are on the resource issue that
7 you have identified and that are legitimate for them to
8 have to respond to.

9 Number five; and I think this is a
10 sensitive one, perhaps the most sensitive, and it is the
11 one I would know least about and I interject myself into
12 the debate most tentatively and modestly. Recognize in
13 your research, as you develop it, that there is a tension
14 between some of the proponents of Aboriginal
15 self-government on the one hand, and the consequences that
16 are flowing from Aboriginal self-government, and some
17 Aboriginal women on the other hand who are fearful about
18 the consequences of Aboriginal self-government.

19 As a Nova Scotian I would say that is
20 like a wave and an undertow. The wave is visible, and
21 it is strong and it moves in one direction. And the
22 undertow is strong and it moves in the other direction
23 and it is less visible. Well, in this area there is a

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1 wave and an undertow and it is a very difficult issue.
2 The wave -- and you heard it here most of the three days
3 -- was a wave of justice is rehabilitation, restoration,
4 restitution, reconciliation, harmony, peace, balance.
5 And the undertow was, in Ms Nahanee's words, protection,
6 safety. Those have got to be important values in an
7 Aboriginal justice system as well.

8 I would say that there is a need for
9 research when you are talking about Aboriginal systems
10 of justice just as when you are talking about mainstream
11 systems of justice. There is need for research to overtly
12 identify safety and protection as very important values,
13 and to talk about those in the context of the other values
14 as well.

15 Number six; I would say you need to
16 conduct research on methods to move away from the
17 adversarial system for Aboriginal offenders, both in their
18 communities but also in urban centres. And I had a few
19 suggestions here. Justice Paul's one-liner yesterday was
20 intriguing. Amend the Criminal Code so the communities
21 could opt in or opt out of the Criminal Code. We are
22 talking about identifiable communities, maybe small, but
23 what an intriguing idea. Just amend the Criminal Code

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1 so that they can opt in or opt out in those communities.

2 And in urban centres perhaps pilot
3 projects involving police, prosecutors, defence counsel
4 and social service staff, using elders earlier on in the
5 process with all of those people rather than in the
6 adversarial system and the sentencing process after the
7 adversarial system.

8 Number seven; I think you should do
9 research and recommendations about a separate justice
10 system. Some of the studies have said there should be
11 a separate justice system; the Manitoba study, the Law
12 Reform Commission of Canada. Others have said there
13 should not be a separate Aboriginal justice system and
14 I think this Royal Commission, a national commission
15 composed of an equal number of Aboriginal and
16 non-Aboriginal people, roughly, is well positioned to
17 address that issue and come to some conclusions and some
18 recommendations on that question.

19 Number eight, and finally; do research
20 on implementation mechanisms. Everything I said where
21 I have tied it into a name is something that somebody said
22 here publicly, but something Justice Cawsey said to me
23 yesterday out by the elevator -- and I hope he does not

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1 mind that although he did not say it by a microphone I
2 am going to say it, because I think he is right in this.
3 He just said, as we were introducing ourselves and talking
4 for a moment, "You know, it's really the implementation
5 of these commissions and inquiries that requires so much
6 more concentration and effort than we have had in the past."

7 I think that is right. There are 25
8 years, there are 30 studies out there. There seems to
9 be a shared consensus that there has been a general failure
10 to implement them. Why is that? The commission paper
11 has some very useful first thoughts on that. But I would
12 suggest the Commission should do some detailed research
13 on different models of implementation and make some
14 specific recommendations on that.

15 The research might involve some serious
16 talk about what is the model of negotiation for
17 implementation, what type of negotiation model will work
18 to get the best implementation of the recommendations of
19 this commission. And it might also have a reporting
20 mechanism in it, something like the Auditor General.
21 Recommendation number one from this Royal Commission in
22 two years could be -- the very first one: We recommend
23 that the government of Canada refer the rest of the

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1 recommendations of this committee to a House of Commons
2 committee, and that the House of Commons committee report
3 annually on each and every one of these recommendations,
4 or things like that.

5 There are models of implementation in
6 other jurisdictions, but I would urge the Commission to,
7 in the research part, address how not only recommendations
8 of this Commission, but just how reform generally gets
9 better implemented than it has in the past. And be
10 aggressive on that.

11 I will conclude on that note. Let me
12 just say that I have enjoyed the three days here. It is
13 wonderful to have three days not sitting in an office in
14 Toronto with a phone in one hand and the march of the human
15 condition coming through the door on the other hand, and
16 just sit here and listen. I have not listened for three
17 days since I was a law student. It was very pleasant.

18 I think if we keep listening to each
19 other and keep thinking a lot and keep trying to understand
20 each other we will have a better justice system. Language
21 is a problem. Many people have said language is a problem.

22 I liked Mr. Morin's two examples yesterday about the
23 hippopotamus and, perhaps more seriously, his comment

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1 about the word "judge". The word for "judge" means "set
2 things right" in his language, but it is very close to
3 "to lose things" in his language as well. But, if nothing
4 else in this country, we have a long history of overcoming
5 language problems and I suspect we can be successful.

6 Nothing can be quite as bad as the
7 Supreme Court of Canada decision about 25 years ago in
8 a contracts case. The whole case had to be translated
9 from English into French and Justice Louis Philippe Pigeon,
10 at a time when the translation services at the Supreme
11 Court were quite rudimentary, used to read every
12 translation and make corrections for the editors. He was
13 reading one in a contracts case one day where the words
14 in English were "and the offerer underwent a change of
15 heart and withdrew the offer". In French that had been
16 rendered into "and the offerer underwent a heart
17 transplant".

18 Nothing I heard here this week suggests
19 that we are that far apart in terms of lines of
20 communication. If we work together we can have a better
21 justice system, and to me a better justice system is very
22 simply less need for a justice system at all for Aboriginal
23 people, more need for education and health and housing

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1 and social services, but within the justice system better
2 justice for those who have to be caught within it.

3 Thank you very much.

4 **MURRAY SINCLAIR:** Thank you Dean
5 MacPherson. We are going to move to the closing remarks
6 from the Commissioners. The co-chairs, I understand,
7 Judge René Dussault and Mr. Erasmus, will be following
8 closing remarks from the honourable Bertha Wilson.

9 **DONNA GRESCHNER:** Excuse me. I hate to
10 pre-empt the honourable Bertha Wilson, for whom I have
11 the greatest and utmost respect, but interruption seems
12 to be, with you and several other women the exceptions,
13 the way women get to talk at this forum.

14 I am speaking here not only for myself
15 but also for several other women. A lot of time and energy
16 of women within the Commission, including the honourable
17 Bertha Wilson, and women who were invited here to the forum,
18 went into ensuring that the concerns, experiences and
19 perspectives of Aboriginal women did not take a back seat.

20

21 It is thus a matter of great
22 disappointment that the word "woman" was not mentioned
23 in the rapporteur's report until point number five. That

1 absence was certainly not, I think, a theme that most of
2 us got out of this conference. It is disappointing. I
3 think it is tragic. When we get to point number five we
4 hear Aboriginal women being talked about as putting forward
5 and being concerned about the values of safety and
6 protection. That recognizes Aboriginal women as
7 victims. It does not recognize them as participants and
8 designers in systems of criminal justice. I think that
9 that is more than unfortunate. It is a tragedy.

10 I would like to ask -- although we likely
11 do not have time for the response -- the rapporteur why
12 he thought that that theme which I have felt for the last
13 two days since I have come, and which certainly I think
14 every Aboriginal woman in the room, at least the ones I
15 have talked to, felt was there, was not worthy enough to
16 make it into his report.

17 **JAMES MacPHERSON:** My response would be
18 that I think it is important for absolutely everyone --
19 men and women -- to be involved in all aspects of the
20 recommendations that I have just mentioned. I am sorry
21 you interpreted it that way. When you sit at night and
22 write down eight points they come to you in a certain order.
23 You do not necessarily think which way you are going to

1 priorize them. I did not mean in any sense to say that
2 there is not a role for Aboriginal women in designing
3 systems. In fact, I would say the opposite. It is crucial
4 for Aboriginal women to be involved in that. That, to
5 me, is important and necessary and I would not try to deny
6 it at all. It is silly for anyone to try to deny it.

7 **Commissioner BERTHA WILSON:** We have
8 had a wonderful three days discussing matters of great
9 concern to all of us, and now the Commission must take
10 time to reflect on all it has heard during these three
11 days, but we cannot leave this round table without
12 expressing our appreciation to a number of people, and
13 that is what I would like to do now.

14 We are deeply indebted to all who
15 participated in this conference on justice issues; the
16 people who prepared and presented papers, which were of
17 an extremely high quality and obviously involved a great
18 deal of research and hard work. We are indebted to our
19 indomitable master of ceremonies, Judge Murray Sinclair,
20 who seems to have mastered the art of being both firm and
21 gentle at the same time. I would like, on behalf of the
22 Commission, to present to him a token of our appreciation.

23 We are deeply indebted also to our

1 moderators, our panellists and our participants in the
2 round tables, also to those who came and told us about
3 the Aboriginal justice initiatives going on in their
4 communities. We are especially indebted to the two
5 elders, Ernie Benedict and Flora Tabobondung, who opened
6 and closed our sessions with prayer. And I would like,
7 again on behalf of the Commission, to present them with
8 a token of our appreciation.

9 We are, of course, deeply indebted to
10 Jim MacPherson, our rapporteur. I hope I got the accent
11 correct, René. I think he did an excellent job of
12 highlighting the themes that arose during the three days.

13 We are also indebted to those who spoke
14 from the floor, and also to those who just sat and listened.
15

16 Last, but by no means least, we are
17 deeply indebted to our own commission staff who worked
18 so hard and such long hours to put our national round table
19 on justice issues together.

20 So on behalf of our colleagues on the
21 Commission and myself, to you all our grateful thanks.
22 Thank you.

23 **MURRAY SINCLAIR:** I would now call the

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1 co-chairs of the Royal Commission on Aboriginal People
2 to come forward for their closing remarks; Mr. Georges
3 Erasmus and Judge René Dussault.

4 **Co-Chair GEORGES ERASMUS:** I would like
5 to thank all the participants. I also have learned a lot
6 over the last three days. I thought there was a lot of
7 courage shown here by people, whether they were government
8 representatives, provincial politicians, women, Métis.
9 I thought there was a level of exchange that I have not
10 seen over 20 years of trying to work with government.

11 Yes, there is a lot to be done and, as
12 Patricia was pointing out very powerfully, this may really
13 only be the beginning that we are seeing across the country.
14 But I really feel that there is the beginning of something
15 very real going on.

16 A lot of times I do not have a belief
17 that there will be change soon enough for people to really
18 salvage as many of the Aboriginal people -- and there may
19 be others living in Canada also -- but I felt here there
20 was a feeling of the beginning of openness, the beginning
21 of trust that I have not always seen.

22 Perhaps it was because of what happened
23 in the constitutional process. Perhaps it has been

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1 because of the many efforts of Aboriginal people,
2 particularly women, that we have gotten to this situation
3 now where the beginnings of communications is really
4 starting to happen.

5 I really felt that as commissioners we
6 were more or less sitting watching from the side and at
7 times it wasn't really necessary for us to do very much
8 and that really there is a movement in this country, the
9 beginnings of partnerships that is really well on its way.
10 So I certainly feel very good about that.

11 I also heard very, very loudly and very
12 clearly from people like Clem and the head of the Métis
13 Women's Association that they felt that they were not yet
14 fully a partner in efforts of the Royal Commission, and
15 I personally feel very sad for that. Obviously we can
16 do better. It is very unfortunate Clem was one of the
17 last people that could have spoke. It would not have taken
18 very much for us to have heard Clem make his statement,
19 but obviously it would have been very, very significant
20 for him and for the rest of his party.

21 It was an oversight on our part that we
22 did not invite the leadership of the Métis women
23 immediately when we were organizing for this, for all of

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1 the people in the Royal Commission who were involved in
2 this. Certainly it was not only the commissioners. I
3 must say it was an oversight, unfortunate, and we certainly
4 must do better next time.

5 The statement that Donna just made about
6 role of women in the last three days -- the efforts that
7 have been made here and leading up to this on this
8 particular issue. Do not feel that as a Commission we
9 were not listening and hearing very, very clearly that
10 while Aboriginal people and women in particular are in
11 support of Aboriginal people again fully exercising the
12 kind of control over their lives, being actors again, that
13 to get back to a situation where women indeed, as Patricia
14 says, have power again in our communities, as they did
15 previously, there has to be change. There has to be change
16 in the larger society by also there has to be an
17 accommodating change within the Aboriginal society.

18 Unfortunately one of the things we have
19 adopted from the larger society is men have assumed a role
20 in society that we traditionally never had. We have
21 somehow been burdened, or we accepted a responsibility
22 that is not ours alone to carry, and that really needs
23 to change. I think it needs to change in the larger society

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1 but obviously for Aboriginal people, if we are indeed going
2 to go back to some of the fundamental things that made
3 Aboriginal people different, it is going to have to be
4 a situation where the power sharing within the Aboriginal
5 community is much more equal. And that does not only mean
6 adults have power. It means children have power also.

7 So while a lot of times men focus on the
8 power struggle that exists between the larger society and
9 the Aboriginal people as a collective, unfortunately we
10 leave it up to women to remind us that while we want that
11 larger power sharing to occur between the larger society
12 and Aboriginal people within the society, just acquiring
13 that power and misusing it, not sharing it within the whole
14 of what makes up Aboriginal societies, will not be
15 sufficient. We have heard that very clearly.

16 Thank you for the last three days.

17 **Co-Chair RENÉ DUSSAULT:** Elders,
18 friends, mes chers amis, I share everything that Georges
19 just said. I would like to say that I think it was quite
20 apparent for each of you who participated in these three
21 days that even for a Royal Commission there is no royal
22 road to learning. So far we have been muddling through
23 the participation process that will enable us to get the

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1 grass roots thinking, ideas, and also the more expertise
2 that is in the communities at the level of organizations
3 and also the more scholarly expertise.

4 We know that our challenge at the end
5 will be to blend those two streams of information into
6 something that will make sense and that will be meaningful
7 for Aboriginal people and the Canadian public. We do hope
8 that by our choice of words, that by the way we will express
9 ourselves, people will feel an ownership in the discourse
10 of the Commission and that we will be able to create
11 constituency and movement for implementation.

12 Before closing this session I would like
13 to say, from a practical point of view, that we are going
14 to publish documents out of this round table that would
15 include the rapporteur's report that will probably come
16 at greater length, in larger form. Also, we are going
17 to publish the papers. We are going to publish the daily
18 summaries that we have provided to you. We hope that in
19 doing this we are going to be able to send the message
20 outside of this room because there are many, many people
21 across Canada that, unfortunately, did not have the benefit
22 of participating in these three days. There is public
23 education, there is the creation of a greater awareness

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1 in order to make sure that we will get, as much as possible,
2 a larger impact when we are on the road for the other rounds
3 of hearings and also for preparing our recommendations.
4

5 Again, a Commission like ours can give
6 back what it received. In fact, we are here to channel
7 ideas and to try to give them a form that will be acceptable
8 by Aboriginal people but also by the larger public.

9 Alors, je voudrais remercier au nom de
10 la Commission, tous ceux qui ont mis des efforts dans ces
11 trois jours, de table ronde. Ceci est la deuxième d'une
12 série de sept, huit ou dix tables rondes que nous espérons
13 tenir. La prochaine sur les services de santé et toute
14 la question de la santé. Nous espérons que, au fur et
15 à mesure que nous progresserons, la formule sera de mieux
16 en mieux rodée et permettra d'atteindre des résultats qui
17 sont déjà, je pense, excellents.

18 This round table will be an inspiration
19 for the Commission in the following months, not only in
20 the justice area, but we know, and this was told to us,
21 that justice is only part of a whole system. We are lucky
22 enough to be given the kind of mandate where we are going
23 to try to do our best to show the interconnection between

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1 the various themes and points of our mandate.

2 Thank you very much again. Merci.

3 **MURRAY SINCLAIR:** The one final
4 official act to close the session down involves the calling
5 of our elders to come forward and say the concluding prayer.

6 Before I do that, I would like to express
7 my own personal thanks to each and every one of you for
8 the co-operation that you have shown, for the degree to
9 which most of you participated, for the willingness that
10 all of you had in coming here and putting forth your ideas,
11 your views and your thoughts.

12 If, as your chairperson for these last
13 three days, I have in any way, through my actions or my
14 words, hurt anybody's feelings or offended you, I
15 apologize. I assure you it was not intended. I hope that
16 I get to see many of you -- not all of you necessarily
17 -- but many of you again in the future.

18 I do want to thank you all for these few
19 days, and in particular, before they come up here to do
20 their work, I would like to thank our two elders, Flora
21 Tabobondung and Ernie Benedict, for their being here during
22 this time. We have had some very difficult words said.
23 We have had some very difficult issues to contend with

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1 and we have had some very tense moments and they have,
2 in their presence and in their words, been a calming
3 influence for all of us and I appreciate as well as accept
4 the wisdom that they say. But I appreciate their presence
5 and I appreciate the fact that they also have been so
6 willing to bring what they have to offer to a gathering
7 such as this. I know from my own teachers back home how
8 difficult it is to come forward at events like this and
9 share those things. They have shown great courage and
10 great kindness in doing that. I want to thank them for
11 that.

12 I would now call upon our elders, Flora
13 Tabobondung and Ernie Benedict, to conclude this for us.

14 **(Closing Prayer)**

15