LIVING LEGAL TRADITIONS: MI'KMAW JUSTICE IN NOVA SCOTIA

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The *Royal Commission on the Donald Marshall, Jr. Prosecution* remains the most important public inquiry into the relations between First Nations peoples and the criminal justice system in the history of Nova Scotia. The Commission's 1989 Report called for the creation of a "Native Justice Institute" to, *inter alia*:

> a) Channel and coordinate community needs and concerns into a Native Criminal Court;
> b) Undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people;
> c) Train court workers and other personnel employed by the Native Criminal Court and the regular courts;
> d) Consult with Government on Native justice issues;
> e) Work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information needs of Native people; and
> f) Monitor the existence of discriminatory treatment against Native people in the criminal justice system.

The "Mi'kmaq Justice Institute" was founded in 1996 to implement this Recommendation. It closed within three years.

The termination of the Mi'kmaq Justice Institute created a significant gap in support for Indigenous peoples encountering the Canadian criminal justice system. It critically fettered both the development of Indigenous customary law practices and their substantive incorporation into all areas of settler law. Responding to the pressing and immediate needs of the community, the "Mi'kmaw Legal Support Network" emerged from a youth-focused Aboriginal restorative justice program into a court worker service provider. Today the Mi'kmaw Legal Support Network is a stand-alone justice service that provides court worker, customary law and victims services programs. Mi'kmaw communities increasingly seek access to justice services that are relevant to their social, political and cultural rights under treaty, customary, constitutional and Charter protections. Although hobbled by severe financial constraints and only modest receptivity by the Canadian justice system to Indigenous legal principles and practices, the Mi'kmaw Legal Support Network has innovatively worked to meet the many demands of those who seek its assistance.

The Truth and Reconciliation Commission very recently implored "the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty

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and Aboriginal rights of Aboriginal peoples". Further to this "Call to Action", this paper will examine the intersection of Mi'kmaw legal traditions with the Canadian justice system through the lens of the Mi'kmaq Legal Support Network and provide an analysis of its successes and challenges.

The realities of colonization and assimilation driven policies continue to resonate in the Canadian legal system perpetuating injustices within Indigenous communities and must be renounced. Canadian society has a responsibility to develop and align its justice system to reflect and support Indigenous legal traditions that offer powerfully beneficial practices for redress, reconciliation and self-determination. Decolonization requires that law be transformed from a tool of oppression and dispossession into a forum where Indigenous peoples' rights and dispute resolution practices are fully embraced. This transformation must occur at every level in the administration of justice, including legal education to facilitate the increased use of restorative justice processes and other initiatives relevant to Indigenous sovereignty.

I. DONALD MARSHALL AND MI'KMAW JUSTICE

Donald Marshall Jr.'s wrongful conviction and life sentence for a murder he did not commit in 1971 exemplified the profound systemic discrimination experienced by Indigenous peoples as they encountered the Canadian justice system. The findings of the *Royal Commission on the Donald Marshall, Jr. Prosecution* (1989) generated 82 recommendations to correct systemic faults in the administration of justice which, when adopted, significantly transformed the criminal justice system in Nova Scotia and across Canada. For example, an independent public prosecution service with a comprehensive prosecutorial policy and best practices aimed at avoiding any further wrongful convictions was created in Nova Scotia in 1990 through recommendation #35. Nationally, through recommendation #39, criminal law procedure was changed through an amendment to the *Criminal Code* to address the flawed regime of disclosure in order to ensure exculpatory evidence is fully and timely disclosed. The Marshall Commission noted that the failure of disclosure was an important contributing factor to the miscarriage of justice which had occurred, and which led the Commissioners to state that, "anything less than complete disclosure by the Crown falls short of decency and fair play."[1]

The Supreme Court of Canada in *R v Stinchcombe* identified the common law right protected in s 7 of the *Canadian Charter of Rights and Freedoms* as a principle of fundamental justice and concluded that the Crown bore a constitutional duty to disclose all fruits of the investigation that are not clearly irrelevant or subject to the Crown's right to withhold privileged information and/or time the release of particular items of disclosure. In reaching the conclusion that a failure to disclose undermines the accused's right to make full answer and defence, in this very

[1] Canada, Royal Commission on the Donald Marshall, Jr Prosecution, *Commissioners' Report: Findings and Recommendations*, vol 1 (Halifax: The Commission, 1989) at 238.

important *Charter* case, the Court relied directly upon the Marshall Commission report and its recommendation for an extensive regime of disclosure.[2]

The Marshall Commission also confirmed that the Mi'kmaw have distinct cultural understandings and customary law practices by identifying in recommendations #20 and #21 the need for a community-controlled "Native Criminal Court" and a "Native Justice Institute" to provide holistic Indigenous approaches using customary law principles as an alternative to the adversarial justice system.[3] The Commission suggested wrap around services that would enhance Mi'kmaw jurisdiction in enforcement, diversion, mediation, sentencing, probation and aftercare, and in the application of Indigenous legal traditions. The Commission also recommended an indigenization of the Canadian justice system through judicial appointments, the recruitment of Indigenous police officers and lawyers, and specialized admission programs to law schools.[4]

Using the Marshall Commission's report as a negotiating tool to bring about social change in their communities, Mi'kmaw leadership mounted a campaign asserting their Aboriginal rights to administer justice on their own terms to better reflect their unique circumstances, values and customary legal teachings. Mi'kmaq political organizations under the leadership of the Union of Nova Scotia Indians, along with Confederacy of Mainland Mi'kmaq (two tribal councils representing 13 First Nation communities), Grand Council (traditional governing body), and Native Council of Nova Scotia (representing off reserve and non-status), the Nova Scotia Native Women's Association and the Mi'kmaw Native Friendship Centre, had to work together, exchange knowledge and collaboratively design the future of Mi'kmaw justice. The Marshall Commission made real the racism many Mi'kmaw experienced and validated their resistance against systemic discrimination. It was an empowering turning point, and the Mi'kmaw were invested in developing a justice system that could meaningfully manage disputes by relying on concepts of collaborative and restorative justice employed by their ancestors for thousands of years.

The momentum for nation rebuilding and breaking of colonial attitudes had solid foundations in the public consciousness, legal and otherwise, as a result of the Marshall Commission. A key argument for the implementation of community-based justice as essential in the recognition and implementation of treaty rights and in the development of self-government was important in unifying often divisive political stances amongst the various interest groups. This unification has manifested in Mi'kmaw juridical discourses and governance practices ever since as it became clear that everyone wanted significant changes to the adversarial justice system and access

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[2] *R v Stinchcombe*, [1991] 3 SCR 326 at 2. Crown's Obligation to Disclose, [1992] 1 WWR 97.

[3] Canada, Royal Commission on the Donald Marshall, Jr, Prosecution, *Digest of Findings and Recommendations* (Halifax: The Commission, 1989) at 28 [Canada, *Digest of Findings and Recommendations*].

[4] *Ibid* at 26.

to dispute management processes that better reflected their cultural principles and customary laws.

The Mi'kmaw conceded that it was inevitable that they will continue to interact with the Canadian justice system and committed to working with federal and provincial governments to address the needed changes to the criminal justice system. They welcomed efforts to indigenize the system, but cautioned, "[a]n indigenization of the present system will only serve to improve the administration of a non-Mi'kmaq form of justice, law enforcement and incarceration upon the Mi'kmaq."[5]

Over the past quarter century since the release of the Marshall Commission's report, a number of important justice ventures were initiated in Mi'kmaw communities. Pilot projects and government sponsored programs ranging from efforts to indigenize criminal court services, to court worker programs, from creating dispute management strategies using customary law to exploring options for control over resource regulation, from community assisted parole hearings to culturally aligned corrections programs, from crime prevention initiatives to programs of justice as healing and Aboriginal victims services.[6]

To implement the Marshall Commission's recommendations and establish a Mi'kmaw justice system, a Tripartite Forum, based on Marshall Recommendation #22 was formed in March 1991, and a sub-committee for justice started in May of that year. The forum, modeled on the Ontario Indian Commission, was to use mediation to resolve unsettled issues relating to justice between three parties: the Mi'kmaw, Nova Scotia, and federal governments.

II. THE MI'KMAQ JUSTICE INSTITUTE

After years of planning, and often contentious negotiation, the Mi'kmaq Justice Institute was incorporated under the *Societies Act* of Nova Scotia in November 1996.[7] The goals of the Mi'kmaq Justice Institute were to build partnerships with the criminal justice system, to shape justice policy and deliver justice initiatives from a customary law perspective while ensuring that the Canadian system was accountable to Mi'kmaw and all other Indigenous peoples in Nova Scotia. There was a great deal of optimism in Mi'kmaw country that the Institute would lead to long-term employment opportunities, correct systemic wrongs through the administration and supervision of Mi'kmaw justice practices that would be accepted and embraced by Canadian society, thus fostering reconciliation.

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[5] Union of Nova Scotia Indians, "Circular response to the Marshall Inquiry Report," (1990) available by request from the author at 2–3.

[6] Jeffrey R Stutz, "What Gets Done and Why: Implementing the Recommendations of Public Inquiries" (2008) 51:3 Canadian Public Administration 501; L Jane McMillan, "Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness" (2011) 36:1 Law & Soc Inquiry 171 [McMillan, "Colonial Traditions"].

[7] *Societies Act*, RSNS 1989, c 435.

The Mi'kmaq Justice Institute was envisioned to take on all court services including court workers, translation services, create a customary law program, conduct Band by-law development, provides wills and estates services, treaty rights and legal education training. Additionally the Institute was responsible for community outreach and the provision of cultural sensitivity training for provincial agencies. Much emphasis was placed on finding funding to explore the perspicuity of customary law for contemporary application as recommended by the Marshall Commission; however, these efforts were largely unsuccessful. The Justice Institute then decided to seek funds to train and promote the Mi'kmaq Grand Council, the traditional governing body of the Mi'kmaq Nation, symbolic of Mi'kmaw resiliency and sovereignty, as a potential judicature, to which the communities could turn for hearings and determinations of all cases involving Indigenous peoples.[8]

In 1996, the Mi'kmaq Justice Institute developed a set of concepts to frame Indigenous legal traditions in a contemporary context. For the Mi'kmaw the separation of a concept justice was unnatural. Mi'kmaw law, like education, is embedded in the life of the language. Law is lived – it is not compartmentalized in rules. The word ilsutekek conceptualizes the process of a sentencing circle and nijkitekek describes the process as that which heals because it offers an opportunity to create awareness of the impacts of harms (offences) for all those involved. Wi'kupaltimk is a non-adversarial feasting ceremony where people feed one another with spiritual food of kindness, forgiveness and love. Traditionally the feasting protocol reduced ostracism. After eating everyone gathered stood in a circle and a Chief or a special elder with authority recognized by the group would lead the others around the circle to exchange peace with each person. This exchange is called apiksiktatultimk. One cannot demand apiksiktuek ('that which forgives'), but nijkitekek through ilsutekek guides relations toward reintegration and healing.[9] These concepts were to serve as the foundation for the Mi'kmaq Justice Institute's customary law practice.

The Mi'kmaq Young Offender Project was a diversion program for Indigenous youth in Cape Breton launched collaboratively in 1995 as a joint venture of the Union of Nova Scotia Indians and the Island Alternative Measures Society. In

[8] Traditionally the Grand Council members represent the kin groups of the seven sacred districts of the Mi'kmaq Nation, which span Atlantic Canada, the Gaspé Peninsula and northern Maine. As leaders of extended families and community spiritual leaders the Grand Council had the authority to bring everyone together to participate in decision-making. The Grand Councils are occasions for "airing disagreements and developing solutions to help people live together more peaceably. Through these traditions, Mi'kmaq law aims to develop unity by reference to their 'cognitive realm: their language, culture and spiritualty,' and to an ecological understanding of their territories. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 62 and Sákéj Henderson, "'First Nations' Legal Inheritances in Canada: The Mi'kmaq Model" (1996) 23 Man LJ 1 at 13.

[9] Former court worker and Mi'kmaq linguist Bernie Francis developed these concepts for the Mi'kmaq Justice Institute on December 5, 1996. Unpublished document available by request from the author.

1997 an agreement was reached between Island Alternative Measures[10] and the Mi'kmaq Justice Institute to have it administer the Mi'kmaq Young Offender Project. It was a strong program with its own funding and a solid reputation in the Nova Scotia justice community due in large part to its charismatic and culturally fluent director Paula Marshall. Marshall brought the traditional dispute management teachings of Mi'kmaw elders to a cohort of committed community volunteers who applied them to help Mi'kmaw youth in trouble with the Canadian law through justice circles and culturally meaningful remedies in community service orders, apologies and restitution to restore harmed relationships and foster reconciliation. The effective utilization of Mi'kmaw justice circles struck a symbolic chord and its director cultivated an inclusive, victim-sensitive diversion program that drew deeply on Mi'kmaw laws captured in cultural metaphors, language, balance and restoration of relationships, and principles of communitarianism. Respected members of the Grand Council were occasionally involved in justice circles to provide counsel to victims and offenders. The original core-operating mandate of the Mi'kmaq Young Offender Project was restricted to handling police referrals of first time Indigenous young offenders who committed minor crimes.[11]

While the vision of the Mi'kmaq Justice Institute was remarkable, the capacity to fully realize the Marshall Commission's recommendations as a source of a parallel or self-determining justice system was limited in resources and personnel, and by jurisdictional friction, the institutional bureaucracy of the federal and provincial governments, the constraints of the *Indian Act* and shallow readings of s 35 of the *Constitution Act, 1982*. Building trust in community based justice processes, reaching consensus on the operations of an Indigenous court, and forming better relationships and integration with police and the Canadian justice system takes a great deal of time, energy and sustained leadership.[12]

On the surface, the Mi'kmaq Justice Institute was making positive inroads with the Canadian justice community. In June 1998, the organization received the Canada Law Day Award, and recognition in the form of a 'Salute' from the National Strategy on Community Safety and Crime Prevention by the federal Minister of Justice. Beneath the surface, however, ongoing tensions over money, the debilitating challenges of grant-based programming and tailoring activities to funder demands rather than community needs, were exacerbated by the onerous reporting requirements of federal and provincial governments. Increasing demands for justice

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[10] This is a program that brings young offenders and their support persons, victims, and a trained mediator together to discuss why the crime was committed and its effects on the people gathered in order to develop an agreement on how to resolve the issues created by the offence.

[11] Don Clairmont & Jane McMillan, *Directions in Mi'kmaq Justice: An Evaluation of the Mi'kmaq Justice Institute and Its Aftermath* (Halifax: Atlantic Criminology Institute, 2001) at 80. Online: <dalspace.library.dal.ca/bitstream/handle/10222/64597/FUTURE_DIRECTION_IN_MI%27KMAQ_JUSTICE-EVALUATION_OF_MI%27KMAQ_JUSTICE%202001.pdf?sequence=1&isAllowed=y> [Clairmont & McMillan, *Directions in Mi'kmaq Justice* (2001)].

[12] L Jane McMillan, "Still Seeking Justice: The Marshall Inquiry Narratives" (2014) 47:3 UBC L Rev 927 [McMillan, "Still Seeking Justice"].

programs in the communities began to put pressure on the skeletal staff, and resources, stretched to their limits, started to run out. In addition to these difficulties,

> [p]erhaps the most important finding with respect to the institute's development was that it quickly, and in hindsight prematurely and inadvisably, became involved in a large number of projects and activities. Program supervision suffered and serious organizational problems were allowed to fester, at least partly because the Mi'kmaq Justice Institute leadership tried to accomplish too much too quickly [without adequate supports and resources.][13]

An overwhelming caseload, increasing community demands that it act beyond its capacity in criminal matters, inflexible justice policies, and tentative governmental support for the institutionalization of Indigenous justice practices caused the Mi'kmaq Justice Institute to close its doors within three years of its inauguration. Marshall Commission recommendation #20, the Native Criminal Court, never came to be. The customary law training of the Grand Council members did not take place. Other than the youth diversion program, the Mi'kmaq Justice Institute's only enduring success is its court worker program.

Constrained by limited resources the Mi'kmaq Justice Institute was unable to facilitate the assertion of treaty and Aboriginal rights. This was a matter of great concern to its constituents, particularly in light of ethos of "difference and autonomy" highlighted in the report of the *Royal Commission on Aboriginal Peoples* (RCAP).[14] RCAP refocused the "fairness and integration" agenda of the Marshall Commission findings toward constitutional rights where cultural difference and circumstances could lead to Aboriginal administration and jurisdiction in justice matters.[15] Four months after the collapse of the Mi'kmaq Justice Institute the Supreme Court of Canada rendered its judgment in *R v Marshall* ,[16] Donald Marshall Jr.'s treaty rights fishing case. This decision has profound consequences for Mi'kmaw justice that are only beginning to be being fully realized.

III. THE MI'KMAW LEGAL SUPPORT NETWORK

After the Mi'kmaq Justice Institute ceased operation in May 1999, the Mi'kmaq Young Offenders Project returned to the administrative fold of the Union of Nova Scotia Indians. The devastating closure of the Mi'kmaq Justice Institute created significant and in light of Marshall's wrongful conviction, potentially dangerous

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[13] Clairmont & McMillan, *Directions in Mi'kmaq Justice* (2001) *supra* note 11 at iv.

[14] *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) [RCAP].

[15] Don Clairmont & Jane McMillan, *Directions in Mi'kmaq Justice: Notes on the Assessment of the Mi'kmaq Legal Support Network* (Halifax: Atlantic Institute of Criminology, 2006) at 44. Online: <dalspace.library.dal.ca/bitstream/handle/10222/64595/DIRECTIONS_IN_MI'KMAQ_JUST]ICE_-_NOTES_ON_ASSESSMENT_OF_MI'KM.pdf?sequence=1&isAllowed=y> [Clairmont & McMillan, *Directions in Mi'kmaq Justice* (2006)].

[16] *R v Marshall*, [1999] 3 SCR 456, 178 NSR (2d) 201.

gaps in services for Mi'kmaw people encountering the Canadian justice system. The most urgent gap was to get support in place for people facing the criminal courts. In 2002 the Tripartite Forum formed a special working group of government officials and members of the Confederacy of Mainland Mi'kmaq – a tribal council incorporated in 1986 dedicated "to proactively promote and assist Mi'kmaw communities' initiatives toward self-determination and the enhancement of community"[17] – to design a new justice service provider, the Mi'kmaw Legal Support Network.

The Mi'kmaw Legal Support Network was framed as an umbrella organization to manage and deliver province-wide Mi'kmaw justice programs and services. The first full year budget was 2003-2004. It was incorporated into the governance model of the Confederacy of Mainland Mi'kmaq who would co-manage financial and personnel matters, but leave the program service delivery to the justice network. This governance strategy was undertaken to distance the Mi'kmaw Legal Support Network from the imperfections of the Mi'kmaq Justice Institute and to reestablish the legitimacy of Mi'kmaw justice practices and financial accountability to funders, politicians and the courts. The Confederacy was highly regarded by government and Mi'kmaw officials for consistent leadership and running a very tight, transparent and fiscally responsible organization. An advisory board was created to oversee the vision and provide direction for the Mi'kmaw Legal Support Network and the Tripartite Forum Justice Committee continued to advocate federally and provincially for Mi'kmaw justice initiatives. Any initiatives advanced at the Tripartite Forum working committees were to be approved by the Officials Committee comprised of the 13 Nova Scotia chiefs and federal and provincial representatives.

The first priority was to restart the court worker program, which is mandated nationally to ensure that Aboriginal people charged with criminal offences receive fair, equitable, and culturally sensitive treatment before the criminal justice system.[18] Services provided by court workers include: referring the accused to appropriate legal resources; providing information on community resources such as drug and alcohol treatment and educational and employment services; promoting community-led justice initiatives; facilitating communication between the client and criminal justice officials; and accompanying the accused to court.[19]

Court workers play a very important role as a bridge between Indigenous peoples and the Canadian justice system, offering clients culturally imbued

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[17] The Confederacy of Mainland Mi'kmaq, "About CMM," online: <cmmns.com/about-cmm/>.

[18] Canada, Department of Justice, *Aboriginal Courtwork Program Formative Evaluation: Final Report* (Ottawa: Department of Justice, 2007), online: <www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/07/acw-papa/acw.pdf>.

[19] Currently court worker services are offered in eight provinces, except for P.E.I and New Brunswick, and all three territories. In Nova Scotia court workers are located in Eskasoni, Halifax, Millbrook, and Paqtnkek but try to cover all criminal courts in the province. The program is funded through the National Court Worker program in a 50/50 cost sharing agreement between federal and provincial Departments of Justice.

understanding, respect and support as they navigate the complexities of the criminal justice system. Court workers help offenders to reconnect with their communities by facilitating access to healing, education, employment and social services.[20] They provide vital information regarding ingress to Aboriginal focused services, social and community programs of relevance to their clients to judicial and court officials. Invaluable translation occurs through court workers who decipher the language of the law and legal processes to reduce the alienation and marginalization experienced by Indigenous peoples before the courts, thus reducing the possibility of miscarriages of justice.

The recognized importance of court workers in facilitating access to justice for Aboriginal peoples in criminal courts has led to calls for their services to be expanded to provide services in all courts, but particularly in family and drug treatment courts.[21] Demands for access to augmented holistic services are relevant within the Mi'kmaw context. "[S]ervice delivery issues, how to respond to victims, and the growing demand concerning family justice issues" are significant challenges that need to be addressed by Aboriginal court workers in Nova Scotia where increasingly Mi'kmaw families are involved in child welfare cases due to the incidence of poverty, mental health challenges, family violence and addictions resulting from systemic discrimination and colonial legacies.[22]

The Mi'kmaw Legal Support Network team and their allies worked hard to develop a positive identity, deliver consistent programming and to build morale in the disappointing aftermath over the Mi'kmaq Justice Institute's demise. Once the governing structure of the Mi'kmaw Legal Support Network (MLSN) was firmly established, the Mi'kmaq Young Offender Project was transferred from the Union of Nova Scotia Indians to the umbrella organization in 2004 and renamed the Customary Law Program. Throughout the next five years MLSN improved and expanded its program base by offering regular cultural gatherings in Nova Scotia correctional facilities, housing Gladue report writers, developing a customized Mi'kmaw Legal Interpreter training curriculum in partnership with the Nova Scotia Community College and a renewed focus on youth crime prevention. In order to address inefficiencies in reporting, MLSN created a database to measure and track their services. Curiously MLSN has never been given access to Nova Scotia's Justice Enterprise Information Network (JEIN). JEIN is an integrated single software

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[20] Canada, Department of Justice, *Aboriginal Courtwork Program Evaluation: Final Report* (Ottawa: Department of Justice, 2013), online: <www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/13/acp-paa/acp-paa.pdf>.

[21] See Don Clairmont's excellent analysis of the development of the Elsipogtog Healing to Wellness Court where he identifies the key events shaping Aboriginal justice in Atlantic Canada and leading to the development of a comprehensive community-based Aboriginal criminal justice system in Elsipogtog, New Brunswick: *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; the *Royal Commission on the Donald Marshall Jr., Prosecution*, *supra* note 1; RCAP, *supra* note 14; and the Supreme Court of Canada decisions *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385; and *R v Marshall, supra* note 16. Don Clairmont, "The Development of an Aboriginal Criminal Justice System: The Case of Elsipogtog" (2013) 64 UNBLJ 160.

[22] Clairmont & McMillan, *Directions in Mi'kmaq Justice* (2006), *supra* note 15.

application that is used by the Department of Justice, correctional facilities, the courts and community corrections. The software captures and shares records, information management and prisoner tracking, amongst administrative, corrections, police, sheriffs and court staff. Access to JEIN would enhance MLSN's strategic planning and service delivery; however, requests for inclusion have been ignored for years.

After five years under the excellent financial and personnel management tutelage of the Confederacy of Mainland Mi'kmaq, MLSN began its long-envisioned transition to an independent legal entity where the Mi'kmaw Nation would hold greater control over justice administration and approaches to dispute management.[23] Since the early days of implementing the Marshall Commission recommendations, the Mi'kmaw Nation has advocated for the right to autonomous control over justice services for their citizens. More than two decades later, Mi'kmaw stakeholder groups proposed another governance and organizational structure to their government partners, developed a Memorandum of Association, and bylaws directing personnel, financial and administrative polices as they incorporated as a non-profit society in 2010.

Today MLSN is an independent justice organization governed by a Board of Directors acting for the Assembly of Nova Scotia Chiefs, the traditional governing body of the Mi'kmaq Grand Council, the Union of Nova Scotia Indians, the Confederacy of Mainland Mi'kmaq, the Mi'kmaw Native Friendship Centre, Native Council of Nova Scotia – representing off reserve and non-status peoples, and the Nova Scotia Native Women's Association. The head office is in Eskasoni Mi'kmaw Community, Cape Breton Island and two satellite offices operate on the mainland in Millbrook and in the Halifax Regional Municipality.

Full autonomy remains illusive as MLSN is required to answer to the goals and obligations delineated by government funders and their programming parameters, but they continue to pursue their vision of culturally informed, community driven justice processes. As Indigenous legal scholar David Milward rightly points out, "[b]efore an Aboriginal community can make any serious demand for self-determination over criminal justice, or engage in any meaningful fashion with any potential conflicts between the Canadian Charter of Rights and Freedoms and past methods of justice, it must first sort out for itself what it (and its members at large) want out of justice."[24] These dialogues are occurring in Mi'kma'ki. Most recently the Tripartite Forum Justice Working Committee undertook a 25-year review of the implementation of the Marshall Commission recommendations, engaged with federal and provincial justice stakeholders to map out next steps and have incorporated the findings of that review into their work plan.[25] The current

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[23] *Ibid.*

[24] David Leo Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 214.

[25] I was the principal investigator for Marshall Commission review. My analysis of the process is available at McMillan, "Still Seeking Justice," *supra* note 12 and the executive summary report: Tripartite Forum Justice Committee, "An Evaluation of the Implementation and Efficacy of the

goals of the Mi'kmaw Legal Support Network are to build a partnership and new relationship between the criminal justice system and the Mi'kmaq / First Nations peoples of Nova Scotia; to act as the administrative body on behalf of Indigenous people for the promotion, facilitation, advancement and improvement of the administration of justice; to create and establish new justice arrangements recognizing the diverse justice needs, traditions and cultures of Indigenous peoples; to monitor the presence of and address discriminatory treatment experienced by Indigenous peoples in the Nova Scotia justice system; and to educate Indigenous peoples and mainstream justice workers on the system, cultures and traditions in order to build and strengthen the relationship between the judicial system and Mi'kmaq and other First Nations people in Nova Scotia.[26] MLSN's mandate stipulates, in a carry over from the Mi'kmaq Justice Institute, that it provide services for all Indigenous peoples living in or visiting Nova Scotia.

IV. MI'KMAW LIVING LEGAL TRADITIONS – MLSN'S CUSTOMARY LAW PROGRAM

As they work toward autonomy, MLSN takes direction from and responds to Mi'kmaw community needs. As such, MLSN provides court worker, customary law, offender reintegration and victims' services programs, all of which are inextricably tied to the Canadian criminal justice system. Additionally, MLSN regularly seeks pilot project funds to help offset its operating costs and more importantly to address gaps in cultural services for Indigenous inmates and youth. For example, Bringing Culture Inside was a three-year project funded by Justice Canada that brought Indigenous spiritual leaders and Elders together with incarcerated youth to help connect them with positive Indigenous identities to facilitate successful reintegration into their communities upon release through traditional teachings. The project was designed to provide weekly gatherings for cultural lessons, access to healing ceremonies, such as sweat lodges, and to increase the cultural competency capacity of the Nova Scotia Youth Facility staff.

Another pilot project hosted by MLSN that focused on Indigenous knowledge translation was the Mi'kmaq Venture Project (MVP), was sponsored over four years by the National Crime Prevention Centre. MVP was a successful intervention model for improving social and emotional competence among approximately 250 Aboriginal youth aged 10-14 in the four communities in which it was delivered, Indian Brook, Pictou Landing, Membertou and Eskasoni.[27] MVP's

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Marshall Inquiry Recommendations in Nova Scotia – A Tripartite Forum Justice Committee Project," forthcoming in June 2016, online: <www.tripartiteforum.com/>.

[26] Horizons Community Development Associates Inc, "Mi'kmaw Legal Support Network Evaluation Report" (2013) Unpublished report available by request from the author.

[27] This project was built on a vision of Donald Marshall for youth justice programming. After eleven years in prison Mr. Marshall held a series of cultural youth camps for those experiencing or at risk of conflict with the law. These camps instilled traditional teachings, were land based and helped foster pride and security in embracing Indigenous identities. Paula Marshall supported these programs and after Donald's passing wanted to honour his legacy by creating an experiential learning program to help keep kids out of jail.

experiential activities encouraged critical thinking and problem solving. Youth were challenged to develop their interpersonal and intrapersonal skills and thereby enhancing resiliency through life skills training, and social and communication development. MVP provided cultural and traditional activities, increased physical and recreational aptitude, developed a successful mentoring program and built positive relations with schools, community associations and families through its service-learning and family fun day programs. Collectively the activities of MVP facilitated capacity building in all sectors including Mi'kmaq legal traditions. The staff became highly trained program facilitators, Elders and youth benefitted from knowledge exchange and translation opportunities that invigorated cultural teachings, youth benefitted from extensive programming that helped develop their community consciousness through applied service-learning projects that improved feelings of self worth and goal orientation, and families were given opportunities to participate in generating solutions to improve their quality of life. Despite its successes, the MVP was not sustained, as the National Crime Prevention funds were terminal.[28]

The MLSN program that contributes most significantly and consistently to cultural translation is the Mi'kmaw Customary Law program, which is a pre- and post-charge diversion program for Mi'kmaw youth and adults. It is the primary fountainhead of cultural production and expression of Mi'kmaw legal traditions as they live today.[29] The Mi'kmaw Customary Law program works with Aboriginal and Mi'kmaw communities to find meaningful and culturally appropriate ways to hold wrongdoers accountable and to support the healing processes of Aboriginal victims and offenders with the goal of revitalizing Indigenous legal perspectives in practice throughout Nova Scotia.

MLSN trained its staff and conducts dispute management methods using Mi'kmaw legal traditions captured in ilsutekek (the process of making right in justice circles), nijkitekek (that which heals), wi'kupaltimk (collective feasting ceremony), and apiksiktuek (that which forgives), to guide relations toward reintegration and healing. These concepts are expressed as foundational for customary law practice and facilitate the goal of consensual reconciliation as mobilized in Mi'kmaw legal consciousness.[30]

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[28] L Jane McMillan, "Mi'kmaq Venture Project Final Process Evaluation" (2013) National Crime Prevention Centre File number: 6935-M1 on behalf of the Mi'kmaw Legal Support Network.

[29] Proulx argues that diversion programs need to address the uniqueness of each Aboriginal community. He views the question of how "community" is defined as being central to the creation and usefulness of these programs.Craig Proulx "Current Directions in Aboriginal Law/Justice in Canada" (2000) 20:2 Can J Native Studies 371; Donald Clairmont, "Alternative Justice Issues for Aboriginal Justice" (1996) 28:36 J Leg Pluralism & Unofficial L 125; Bruce Archibald & Jennifer Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice" (2006) 29:2 Dal LJ 297; Kent Roach "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise" (2000) 42:3 Can J Crim 249; Aboriginal Justice Strategy's website includes two evaluations of community-based justice programs, online: <www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html>.

[30] I discuss Mi'kmaw legal consciousness more fully in McMillan, "Colonial Traditions", *supra* note 6.

In customary law, kinship and extended family relations remain paramount to Mi'kmaw justice, which operates on principles of inclusive processes whereby survivors, offenders and families and by extension the community, collaborate for remedies that hold people accountable in a timely manner. Shared responsibility in making remedy plans work through compliance monitoring and enforcing agreed upon consequences in situations of non-compliance constitutes a community-driven approach to justice. Collective and flexible communal approaches to justice run against compartmentalized and codified adversarial processes of Canadian law and require different sets of criteria to determine fairness, equity and efficacy. Highlighted in Mi'kmaw customary law activities is the importance of ceremony as congruent with positive identity formation and for fostering inclusivity to buttress against times of anomie and oppression. Ceremony offers opportunities for prevention, healing and protection.

The customary foundations of the Mi'kmaw justice process include dealing with root problems by 'talking it out' and 'talking it out with Elders' to find solutions in terms of kinship and communal obligations. Key ancestral concepts such as apiksituaguan (processes of forgiving) and netukulimk (responsible provisioning and sharing practices), are embedded in how people get along with each other. Mutual forgiveness, talking it out, elder instruction and reprimands, acts of restitution and reintegration, reinforce ways of living right with each other. Culturally Mi'kmaw are concerned with respecting ancestors to facilitate taking care of matters in the present for the honour and protection of future generations in an interlinking life cycle. Justice is about relationships. The teachings of netukulimk and apiksiktuaguan provide guidance for uniquely Mi'kmaw approaches to dispute management and serve as guiding principles to frame sacred relationships, which connect people with their responsibilities to each other, to ancestor spirits and to their territories and resources to collaboratively design resolutions to a variety of problems.[31] Such concepts have the potential to legally frame, inform and sustain culturally aligned governance strategies.

In their research on Mi'kmaq legal traditions, Lindsay Borrows and Laura Meyer, under the guidance of Val Napoleon, identified that family and extended kinship networks are important in legitimizing decision-making processes and that grandmothers, elders and traditional authorities, such as Grand Council members, continue to play key roles in helping to examine the evidence, leading discussions and in executing resolutions in dispute management. The principles of Mi'kmaq legal responses include the promotion of taking responsibility for harmful actions, providing restitution to those harmed and encouraging empathy toward the harmed. Personal transformation is a key and desired response achieved by addressing the underlying causes of offending behaviour, collective facilitation of harm reduction and communal obligations to provide healing and support for the harmed and for the offender. As interdependence is highly valued in Mi'kmaw communities there is a "strong recognition that wrongdoing should not be kept hidden, but instead become widely known throughout a community in order to protect the community and

[31] Kerry Prosper et al, "Returning to Netukulimk: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance" (2011) 2:4 Intl Indigenous Policy J 1.

promote individual responsibility."[32] Other active legal traditions include the principle belief that harmful actions will attract spiritual and natural consequences and sharing is an inherent communal activity that supports the central legal perception that is it a substantive right to be helped in time of need.[33]

Mi'kmaw customary law and the above noted legal traditions are practiced by MLSN through justice circles, healing circles and sentencing circles, which all have different attributes and contexts. Support and reintegration circles are designed to help inmates upon their release to transition back into a community after a period of estrangement with a focus on reconciliation and rehabilitation and are usually accessed through federal referrals. The other types of circles provide an inclusive community alternative to formal court processes. Participants, whether of the community or the Canadian justice system, are tasked with understanding the social conditions contributing to crime and developing an action plan to address the crime that is respectful and reflective of the Indigenous heritage of those involved. Justice circles are pre- and post-charge referrals from the police or a Crown attorney. Participants may include victim(s), family and community members who work together with MLSN facilitators to finds ways of holding wrong doers accountable and through consensus building draw up an agreement to guide the activities required to make amends to the offended. Healing circles are conducted without prejudice to sentencing and are performed to "share the pain of a person or persons who have experienced trauma or loss" and may result in a healing plan.[34]

Sentencing circles are the most formalized of the MLSN offerings. Section 718.2 (e) of the *Criminal Code* states that "[a]ll available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders," and gives authority to alternative processes for sentencing Indigenous offenders. The Alberta Court of Appeal in *R v Wells* found that sentencing judges are required to take into account unique considerations relevant to the Aboriginal offenders not only with respect to sentencing outcomes but also in the decision making process.[35] In *R v Gladue*, the Supreme Court noted:

> The background considerations regarding the distinct situation of aboriginal people Canada encompass a wide range of unique circumstances, including most particularly;

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[32] Lindsay Borrows & Laura Meyer, "Mi'kmaq Legal Traditions Report" in *Accessing Justice and Reconciliation Project* (Victoria: University of Victoria Indigenous Law Research Clinic, 2013), at 39.

[33] *Ibid* at 37 and 39. See also McMillan, "Colonial Traditions", *supra* note 6 for a discussion on spiritual sanctions.

[34] As quoted by Paula Marshall, director of the Mi'kmaw Legal Support Network, online: <www.mlsn.ca/index.php?cont=customary-law-program>. Note that the MLSN website is unavailable at time of publication as it is undergoing maintenance.

[35] *R v Wells*, 1998 ABCA 109, 125 CCC (3d) 129.

> a) a unique systemic or background factor which may have played a part in bringing the particular aboriginal offender before the court; and
> b) the types of sentencing procedure and sanctions which may be appropriate in the circumstance for the offender because of his or her particular aboriginal heritage or connection. [36]

More recently *R v Ipeelee*[37] has made it clear that there is a positive duty on counsel to adduce and on judges to consider information related to the unique circumstances of Aboriginal peoples who come before the courts. The *Gladue* decision caused courts to reconsider they ways Indigenous offenders are sentenced. The *Ipeelee* decision builds on *Gladue* and has produced great interest in Aboriginal-specific courts and in *Gladue* reports' applicability at all stages of justice, from bail to sentencing.[38]

The successes of community-driven sentencing circles are evident in their positive impacts on recidivism for like offences and the expansion of opportunities for offenders to reintegrate into communities post incident. Mi'kmaw sentencing circles are sites of the resilience that illuminate the ongoing efficacy and practicability of their legal traditions and are thus far unparalleled in their ability to proffer healing and reconciliation within communities affected by criminal behaviour. There are five components to the MLSN sentencing circle process: referral; eligibility investigation; circle preparation; circle proceedings; and sentencing.

In theory referrals to instigate a recommendation for a circle process may be sourced from RCMP, court workers, defence or Crown counsel, the offender or victims. In practice MLSN has struggled with its referral process and maintaining awareness outreach to justice personnel due to frequent staff turnover, which inhibits open and regular communication channels, and a reluctance of lawyers and court officials to participate in what are perceived to be time consuming alternative

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[36] *Gladue*, *supra* note 21 at para 66 (CanLII). The *Gladue* Supreme Court decision arises from Section 718(e) of the Criminal Code that states a court shall impose a sentence that takes into consideration that "all available sanctions or options other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." This section of the *Criminal Code* was introduced in 1995 to deal with concerns about the overuse of incarceration as a means of addressing crime, particularly as it applied to Aboriginal peoples. Parliament recognized that the over-representation of Aboriginal offenders in prisons was systemic and race-related, and that the mainstream justice system was contributing to the problem. Since the enactment of this section of the *Code* in 1996, courts across Canada have been mandated to exercise restraint in imprisonment for all offenders, but particularly for Aboriginal people.

[37] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

[38] Citing *Gladue* in *R v Ipeelee*, the Supreme Court again called upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders by paying particular attention to the unique circumstances of Aboriginal offenders. In so doing, Canada's highest court called for culturally appropriate sanctions to be handed down for Aboriginal offenders. A reasonable interpretation of these decisions is that *Gladue* principles should be applied to all areas of the criminal justice system in which an Aboriginal offender's liberty is at stake.

processes has reduced the pool of potential candidates. A community-based referral process is often heralded as a path toward justice sovereignty, however community referrals are rare and no clear process has been established as of yet. In the end it is the presiding judge who holds the authority to refer an offender to a sentencing circle.[39]

Once a case is forwarded to MLSN the facilitator begins the eligibility analysis. The criteria for eligibility are:

- The offender has been found guilty or has plead guilty.
- The offender must accept full responsibility for the offence.
- The offender must be willing to listen and acknowledge the harm to the victim and the community.
- He/she must be honest and willing make amends for the harmful act(s).
- He/she must be committed to the process and willing to accept the sentencing plan.
- The community must be willing to offer the offender support and guidance.
- The community must be willing to take a lead role in the reparation of harmful behaviours and seek solutions to assist re-integration into the community. Elders or respected non-political community members must be willing to participate.
- Disputed facts of the case must be resolved in advance.[40]

The MLSN facilitator interviews the candidate to determine eligibility and suitability as they review the disclosure provided by the court. If the offender is confirmed as eligible the facilitator then meets with the victim to discuss their willingness to participate.

Victim participation is a contentious issue as noted by critics of restorative and Indigenous justice methods who are concerned with processes that inadequately address potential power imbalances between offenders and victims and their families or create conditions that will lead to re-victimization.[41] MLSN has tried to ameliorate these concerns by being flexible in their victim participation procedures and providing alternative involvement through victim impact submission and surrogate speakers to ensure that all voices male, female, and other, are included in the judicial construction of the case.[42] To answer to community demands for holistic justice

[39] Interestingly the Provincial Court that sits in Eskasoni Mi'kmaw Community, home to MLSN's head office, has only requested one sentencing circle in the past 10 years. MLSN is actively working with the court to increase the number.

[40] Mi'kmaq Legal Support Network, "Mi'kmaq Legal Support Network Sentencing Circle Protocol" (2013) Unpublished document available by request from the author at 5 [Mi'kmaq Legal Support Network].

[41] Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19:1 CJWL 1.

[42] Donna Croker suggests five criteria to ensure that restorative justice processes are helpful and safe for women who experience domestic violence: prioritize victim safety over batterer rehabilitation; material and social supports for victims; it works as a coordinated response;

services, MLSN sought funds to include victims' support services in its programming in 2008. The mandate of Mi'kmaw Legal Support Network's Victim Service Support (VSS) is "to develop and specialize a mode of service delivery that addresses the unique needs of Aboriginal victims of crime with a focus on the development of a culturally supportive Victim Services that encourages the participation of Aboriginal victims in the justice process."[43] As noted in their 2013 Project Summary, work undertaken by VSS and MLSN has been vital in the development of important relationships between Mi'kmaw service providers and the provincial justice system. In terms of victim outreach, VSS reports that since their inception there has been an increase in victim participation in the court process as well as more Aboriginal victims completing victim impact statements.[44] Funding and the referral process, however, remain challenges for the program. A shortfall in funding in 2013 forced VSS to terminate service provision to parts of mainland Nova Scotia. This reduction will remain in place until alternate funding sources can be identified.[45] Currently referrals must traverse the provincial victims' service and various privacy protocols before contact is made with Mi'kmaw Victims' Services. Mi'kmaw communities want the option and ability to self-refer. The circuitous bureaucratic route to Mi'kmaw services impedes access to justice and is an example of paternalistic, albeit couched as benevolent, surveillance and control.

MLSN is associated with the Nova Scotia Restorative Justice (NSRJ) program through a service agreement to share training resources for MLSN customary law and court worker staff. Nova Scotia Restorative Justice is a youth focused program with four referral points: police, Crown, court and corrections. In 2000, NSRJ imposed a moratorium on the referral of cases related to sexual assault or spousal/partner violence to which a judge could potentially refer after a finding of guilt.[46] MLSN provides customary law services for youth and adults and has conducted justice circles for serious offences including historical sexual assaults, partner violence, attempted murder and assault. Recent studies have found that programs similar to MLSN's customary law healing plans, such as Circles of Support and Accountability models of wraparound care, significantly reduce the risk for sexual reoffending, particularly amongst high risk/high need sexual offenders.[47]

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engage normative judgments that oppose gendered domination as well as violence; and do not make forgiveness a goal of the process: Donna Croker, "Restorative Justice, Navajo Peacemaking and Domestic Violence" (2006) 10:1 Theoretical Criminology 67.

[43] Mi'kmaq Legal Support Network, "Project Summary Report: Victims Fund" (2013) Nova Scotia: Mi'kmaq Legal Support Network.

[44] Mi'kmaq Legal Support Network, "Victims' Service Support Annual Report" (2013) at 5–6. Available by request through MLSN.

[45] Mi'kmaq Legal Support Network, "Annual Report" (2013) at 9. Available by request through MLSN.

[46] Nova Scotia Restorative Justice, "Programs and Services," online: <novascotia.ca/just/rj/program.asp>.

[47] Robin J Wilson & Andrew McWhinnie, "Circles of Support & Accountability: The Role of the Community in Effective Sexual Offender Risk Management" in Amy Phenix and Harry M Hoberman, eds, *Sexual Offending: Predisposing Antecedents, Assessments and Management* (New York: Springer, 2015).

MLSN continues to advocate for the right to the option to manage all charges following Mi'kmaw legal traditions providing the parties and communities support a customary law process.

Once there is clarity on offender eligibility and victim desired participation in whatever form, a community justice panel is struck to review the suitability of the case from the community perspective. Calls for participation are made directly to individuals and through postings in local communications networks. The panels tend to include staff from relevant service delivery agencies, including victims' service, community leaders, elders, and extended family members. MLSN has undertaken to train community justice advisory committees as per the Marshall Commission recommendation (#29) which states: "we recommend that the advice of leaders chosen by the Native community and sitting as a Native Justice Committee be sought by judges in sentencing Natives, where possible," in each of the 13 Mi'kmaw communities in Nova Scotia.[48] The sustainability of these volunteer committees has proven to be challenging over the years, but concerted efforts to improve access to justice for Mi'kmaw members to enhanced community-based and culturally centred processes are reinvigorating their legitimacy and function. If a community justice panel feels a sentencing circle is not appropriate the case is referred back to court. If they decide to go ahead the panel advises MLSN on who should participate in the circle, the inclusion of culturally appropriate ceremony, circle preparation procedures and they identify the availability of community resources relevant to the specifics of the parties involved. Participation is voluntary. People holding political positions of power can attend a circle but can only participate in their capacity as an interested community member. A time frame is set and the MLSN facilitator meets with the judge to set a date.

Once all of the participants are identified and express willingness to accept the responsibilities that come with their involvement MLSN works diligently with each member to review the information of the case, ensure that they have a clear understanding of their role and what they bring to the circle. The details of the proceeding, the expected codes of conduct and the court based sentencing parameters are iterated to help guide the consideration of available options for reparation and sentencing. "Each participant is advised that MLSN accepts the responsibility of reporting any disclosures of sexual abuse of a minor, indications of self-harm on the part of the offender, or any perception of public danger that may be revealed in the circle process."[49]

Each circle is unique, although the process is standardized. Circle facilitators work with the advisory panel to select a safe and accommodating space and sort a seating plan that allows for the reduction of intimidation and adversity. Victims and offenders do not sit together or directly across for each other. In Mi'kmaw circles the judge, if participating, usually sits to the right of the facilitator and the offender sits to their left. Circles conducted in the Mi'kmaw language

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[48] Canada, *Digest of Findings and Recommendations*, *supra* note 3.

[49] Mi'kmaq Legal Support Network, *supra* note 40 at 8.

include simultaneous translation by a trained court interpreter. Before commencing the facilitator performs a smudge ceremony to cleanse and prepare the space for the justice work to be done.

Generally, there are four phases in MLSN circles: opening, storytelling, agreement building and closure. The opening includes a prayer by an elder followed by the facilitator explaining the ground rules, codes of expected conduct and their roles.[50] The storytelling phase consists of a round of introductions wherein a talking stick is passed clockwise (in the Mi'kmaw way) and participants, when holding the stick, state who they are, what they do, what brought them to the circle and who they are representing. The Crown attorney then reads the charge and an agreed statement of facts. The offender addresses the circle and tells their story, discussing the incident and its impacts on the victim and community and presenting how they may act differently if confronted with a similar situation. The victim or the surrogate for the victim describes the incident and its consequences. The talking stick is passed around the circle, providing "everyone with the opportunity to express concerns, feelings and reaction to the offender and victim statements and giving their perception of the impact on the community as a whole."[51] It may take a few rounds to have people feel that their concerns have been fully expressed.

Once the storytelling phase is fully articulated participants are asked to reflect on what they heard and consider recommendations for sentencing. To begin the agreement building phase the facilitator summarizes the previous rounds and passes the talking stick as contributors contemplate possible solutions to the problems at hand. Here knowledge of community services is critical to the formulation of a sentencing plan that is realistic in the specific context of the community and the parties to the case. Beginning with the offender, this round "examines the crime and criminal in the larger context of the social, economic, family and cultural environments to determine the underlying causes of crime and recommends what must be done to prevent crime and make reparations for damages cause by crime."[52] The options are collected and recorded and the facilitator helps the circle reach consensus on what to include and how to monitor a sentencing plan, this make take a series of rounds. Once a general consensus is reached the sentencing plan is prepared by the MLSN facilitator and presented to the judge for their decision. At times communities are not able to reach a general consensus, and so the various views and recommendations are presented to the judge as a spectrum of perspectives. Sentencing can occur within the circle or reserved to a future court date. The final phase is a closure round where participants are asked to reflect on their experiences within the circle. The facilitator acknowledges the work and progress and thanks everyone. An elder performs a concluding ceremony or prayer.

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[50] Codes of conduct include sober, uninterrupted, respectful focus on the issue at hand, adherence to the rules of the talking stick, and the maintenance of confidentiality to protect sacred stories shared within the circle. *Ibid* at 13–14.

[51] *Ibid* at 9.

[52] *Ibid*.

Altering the adversarial and confrontational approach of prosecution in sentencing circles and in courts is a difficult challenge.[53] The Nova Scotia Public Prosecution Office recently appointed a designated Crown attorney for all sentencing circles across the province to help address the problem of regional withdrawal from sentencing circle processes. This is the start of a very important dialogue to address the multitude of processual concerns of all parties. Issues range from who constitutes the community, to the matters of the public record, from rules of evidence to the inclusion of elders, from conceptualizing consensus to perceptions of confidentiality, from clarifying referral criteria to public and personal safety, and are all part of the conversation.

Crown attorneys, like defense counsel and judges, want sentencing circle processes standardized. They have concerns for their safety and security and will sometimes refuse to participate in sentencing circles if judges are not participating. Crown attorneys need to be able to make objections to defense submissions and to make their sentencing submissions at circles, but also need assistance in considering evidence and presenting their submissions in ways that fit with the ethos of consensus-centred dialogic justice of circles rather than adversarial rule-based processes found in courtrooms. Legal counsel may want to consider the concept of circle equity and transform their court performance in sentencing circles.

The Customary Law Program is funded through the Aboriginal Justice Strategy in a 60/40 agreement between the federal and provincial governments. The court worker program is funded through Canada's only Aboriginal justice program (program as opposed to a project), the Native Court Worker program where federal and provincial governments equally share costs. Both programs typically have multi-year contracts, which offer some financial stability, but there is significant instability in core funding for the operation of MLSN itself because there is no associated government program. Governments embrace a project fund structure, which are usually pilot in nature and inherently undermine sustainability and consistent program delivery – two characteristics critical in facilitating an accessible and equitable customary law process. Due to the advocacy of the Tripartite Forum Justice Committee, federal and provincial governments have recently come up with base funding for a modest core staff, "but each year much effort has to be expanded – and much anxiety experienced – securing the funds and that has usually entailed the Tripartite committee assisting MLSN in securing one time grants from other governmental agencies, usually at the last moment to cover potential shortfalls."[54]

MLSN funding is as uncertain today as it was when it started. Such unstable funding models precipitate problems in staff retention and significantly limit the reach, consistency and efficacy of services. Competition over scarce resources has

[53] The Nova Scotia Public Prosecutions Office developed the Aboriginal Law Working Group to deal with cases involving Aboriginal peoples on a case-to-case basis. However, the language in the group's policy seems to focus on treaty rights, rather than issues of systemic discrimination in the criminal justice system: Nova Scotia Public Prosecution Service, "Aboriginal Cases," online: <http://www.gov.ns.ca/pps/publications/ca_manual/AdministrativePolicies/AboriginalCases.pdf>

[54] Clairmont & McMillan, *Directions in Mi'kmaq Justice* (2006), *supra* note 15 at 51.

created a silo effect that divides the ability of overburdened service providers to collaborate to safely meet the needs and demands of their communities. Accountability structures and policy incongruence create additional burdens fettering Indigenous institution building. Long term strategic planning is frustrated by high staff turnover in relevant sectors of the Canadian justice system. However, and fortunately, the core MLSN staff are tenacious in their desire to deliver culturally relevant justice services to their clients and their programs continue to evolve under the direction of Paula Marshall who has worked in Mi'kmaw justice services for more than 25 years.

Access to justice is problematic under such fiscal and cultural restraint. Mi'kmaw people are forced to engage in adversarial justice processes that have little to offer in terms of cultural relevance or remedy because they are denied choice. There are judges and other justice personnel who are not aware of, or find it inconvenient to utilize the services of MLSN, and there are community members who do not know where to go to get help when they need it.[55] MLSN strives to provide choice for Mi'kmaq people, but the capacity to do so is severely and regularly restrained, ontologically, fiscally and jurisdictionally. These challenges will only be compounded by mandatory minimum sentencing legislation.

V. LIVING MI'KMAW LEGAL TRADITIONS AND RECONCILIATION

In the final report of the Truth and Reconciliation Commission of Canada the Commissioners advocate for the fulsome application of Aboriginal rights protected in Section 35(1) of the *Constitution Act, 1982*, the recommendations of the *Royal Commission on Aboriginal Peoples*, and the articles of the *United Nations Declaration on the Rights of Indigenous Peoples*. Under Article 40 of the *Declaration*,

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[56]

The Commissioners further argue that,

> The reconciliation vision that lies behind Section 35 should not be seen as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown, but as a means to establish the kind of relationship that should

[55] Nova Scotia Legal Aid focus group, "Interview transcripts: Mi'kmaw community forums," Membertou (November 15, 2012); Potlotek (November 21, 2012); Wekoqmaq (November 27, 2012), available by request from the author.

[56] *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, GA, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) 1.

> have flourished since Confederation…So long as the vision of reconciliation in Section 35(1) is not being implemented with sufficient strength and vigour, Canadian law will continue to be regarded as deeply adverse to realizing truth and reconciliation for many First Nations, Inuit, and Métis people. To improve Aboriginal peoples' access to justice, changes must occur on at least two fronts: nationally, and within each Aboriginal community.[57]

In the review of the Marshall Commission recommendations, institutionalizing Indigenous legal traditions in justice services was seen as an answer to the complex problems of access to justice and could help overcome barriers created by situations of poverty and systemic discrimination.[58] Community-based decolonized justice in the full sense, not just indigenized settler justice, is cast as the best way to problem solve criminal activity, improve prevention and reintegration and assist family healing on reserve.

"We have our own laws" and "we should have our own courts," were common positions shared by the participants throughout the province. Support for Marshall Commission recommendation #20 to create a native criminal court was almost universal because these courts would be best suited to employ Mi'kmaw legal traditions in managing disputes and encouraging resolutions without resort to settler criminal and family courts.[59] Often envisioned as full or holistic services, such courts would generate remedies that provide alternatives to fines or incarceration, but balance deterrence and denunciation through their visibility and community input on sentencing. Whether it is a centre or an institute or a Mi'kmaw courthouse, people want a place for Mi'kmaw justice to be visible and to have these places populated by Indigenous persons working together to find remedies relying on living legal traditions that are meaningful to reintegrating offender, victim and community. Participants identified the need for effective outreach and consistent service delivery through an amalgamation of services to break down bureaucratic silos to meet the expanding demands from community members to be self-determining in criminal, regulatory, civil and family matters. A former court worker from Eskasoni Mi'kmaw Community shared his views:

> A tribal court has to be for the people to decide. You would have an Aboriginal judge. For me the White man's justice compared to the native justice is that we sit here (in a circle) everybody gets to see everyone. In a courtroom it is you and the judge. You don't see the people behind you. You are not responsible to the community. You are just responsible to the

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[57] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015) at 203.

[58] L Jane McMillan, "An Evaluation of the Implementation and Efficacy of the Marshall Inquiry Recommendations in Nova Scotia" (2014).

[59] For a discussion of the Aboriginal perspectives on the Canadian criminal justice system and section 35 interpretations see Patricia Monture & Mary Ellen Turpel, "Aboriginal People and Canadian Criminal Law: Rethinking Justice" in Martin John Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Don Mills: Oxford University Press, 2011).

> judge, the lawyer and the prosecutor. You don't have to look in shame and face your fellow community members where you have wronged the community. You have to be responsible to the community not the system. The recommendations of that court would come from the community to decide what is the best way. Is it punitive or educational or maybe it is both?[60]

Community demand for Mi'kmaw legal traditions is increasing in all justice sectors including customary, criminal, civil, regulatory, mental health and family law. Many of these demands are emerging from legislative and policy responses to Aboriginal overrepresentation in correctional facilities in Canada and from members of Mi'kmaw communities who want to be empowered to have access to justice services that are relevant to their social, political and cultural rights under treaty, customary, constitutional and Charter protections. In exercising their s 35 and Supreme Court-affirmed treaty rights, the Mi'kmaw Nation in collaboration with the Mi'kmaq Rights Initiative, the Unama'ki Institute of Natural Resources, the Nova Scotia Department of Natural Resources, Parks Canada and MLSN created a community-based justice protocol for hunting and fishing offences. Breaches of communal hunting and fishing guidelines and other regulatory infractions are diverted to the customary law process outlined above. In the past year several moose hunting violations were dealt with through a community-based process that helped instill traditional teachings regarding respectful resource use, the concept of netukulimk, and the sacred responsibility of sharing. Such opportunities expand the reach of Mi'kmaw legal traditions and improve access to justice.

The Mi'kmaw Legal Support Network continues to be innovative and responsive to community needs and is establishing a firm legitimacy in the revitalization of Mi'kmaw legal traditions and their applications today. The current Chief Justice of Nova Scotia and other members of the judiciary are actively working with MLSN and the Department of Justice in realizing the legacy of the Marshall Commission recommendations and the value of Mi'kmaw legal principles in ways that affirm that we are all treaty people. The Truth and Reconciliation Commission Call to Action #50 states:

> In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[61]

The adequacy of the intersection of the Canadian justice system with Indigenous legal systems and the delegation of jurisdiction are critical avenues of further inquiry in this new and hopeful era of reconciling nation-to-nation relationships between

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[60] Eskasoni community forum transcript. March 23, 2013. Available by request from the author.

[61] Truth and Reconciliation Commission of Canada, *Honouring the Truth*, *supra* note 57 at 207.

Indigenous peoples and settler society in which justice sovereignty and the right to self-determination may become reality, at last.