A NEED FOR CHANGE: CROSS-CULTURAL SENSITIZATION OF LAWYERS[1]

TROY CHALIFOUX*

In this article, the author reveals a connection between systemic discrimination in the Canadian criminal justice system and the disproportionate representation of Aboriginal people in the system. The injustices faced by Aboriginals are partially attributed to the one-dimensional value system (that of the British Crown) on which the Canadian justice system is based. There is seen a fundamental conflict between the Aboriginal and non-Aboriginal concepts of justice — that of "social harmony" versus punishment. As well, the language barrier and misunderstanding as to courtroom procedure are identified as contributors to this systemic discrimination illustrated in the article. The effect of this discrimination is recognized from the perspective of lawyers dealing with Aboriginal clients, police in eliciting evidence from Aboriginal accused, and judges in the sentencing process.

The author goes on to evaluate the effectiveness of Native courtworkers as facilitators of the justice system in dealings with Native accused, and recommends cross-cultural training for all participants in the Canadian justice system including police, lawyers, judges, and correctional officials.

L'auteur établit un lien entre la discrimination systémique qui se manifeste dans le système de justice pénal du Canada et la représentation disproportionnée des autochtones dans le système. Les injustices auxquelles font face les autochtones sont en partie dues au système de valeurs unidimensionnel (celui de la Couronne britannique) sur lequel repose le système canadien. Un conflit fondamental semble opposer autochtones et non-autochtones dans la façon de concevoir la justice — la notion d'harmonie sociale et de punition. L'obstacle des langues et une mauvaise compréhension du protocole de la salle d'audience contribuent encore au problème dont traite l'article. L'effet de la discrimination est examiné dans la perspective des avocats qui traitent avec les autochtones, de la police chargée d'obtenir la preuve auprès des accusés autochtones, et des juges qui déterminent les peines.

L'auteur examine ensuite l'importance des travailleurs sociaux autochtones auprès des tribunaux, en tant que facilitateurs du système. Il recommande que tous les intervenants du système reçoivent une formation interculturelle, y compris la police, les avocats, les juges et les autorités correctionnelles.

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* Mr. Chalifoux is a former Native Courtworker. Department of Justice, Canada. The views expressed in this article are those of the author and do not necessarily reflect the opinion or policy of the Department of Justice or the Government of Canada.

[1] The author gratefully acknowledges the assistance of Professor Michael Asch, Chief Justice Robert Halifax and Larry Chartrand without whose learned guidance this project would not have been possible.

I. INTRODUCTION

It is trite to say that Aboriginal people are disproportionately represented in the criminal justice system in Canada. It is also apparent that part of the underlying cause of this is the systemic discrimination that arises from a significant cultural barrier between Aboriginal and non-Aboriginal societies. It has been suggested that the justice system should reflect the values of the people that it is intended to serve. Deeply entrenched within each of these cultures are traditions based on entirely alien concepts of justice.

The law, rules of court, rules of practice and rules of evidence all contribute to the systemic discrimination Aboriginal people face when confronted with the criminal justice system. This is so because these elements are based on a one-dimensional value system which reflects primarily the goals and mores of a single culture. In the criminal justice process, particularly with regard to sentencing, it can be said that the values recognized and perpetuated in the judicial process are those of non-Aboriginal people. Aboriginal people have a distinct perspective of justice supported by an equally distinct set of values.

This is the case for non-Aboriginal people as well. However, the Canadian justice system presently does not support or reflect the values of the people that make up a disproportionate majority of participants within the criminal justice system. The tremendous over-representation can be attributed to the cultural gap between Aboriginal and non-Aboriginal people in the criminal justice system. In *Justice on Trial*, an Alberta government task force concluded that:

> The lack of knowledge about Aboriginal people by the legal profession results in the application of a system that is alien to Aboriginals. The failure of the legal profession to understand this condition results in systemic discrimination.[2]

This condition does not have to continue. One way of addressing this problem and bridging the gap between the two cultures is through a greater understanding of Aboriginal traditions, values and culture. *Justice on Trial* later recommended that "in view of their apparent lack of knowledge about Aboriginal culture, judges, lawyers, and prosecutors receive cross-cultural education immediately, intensively, and on an ongoing basis."[3] Participants in the present adversarial system of law should be required to be sensitized to these issues in an attempt to bring within the justice system perspectives that would assist in meeting the needs of Aboriginal offenders. Because lawyers play such a significant role in the judicial process as conveyers of information, they can contribute much to pervade these barriers.

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[2] Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its impact on the Indian and Metis People of Alberta*, vol. I (Edmonton: Queen's Printer, 1991) at 5-9 [hereinafter *Justice on Trial*].

[3] *Supra* note 2 at 5-11.

Cross-cultural sensitization of lawyers can be an effective means of removing the cultural barriers within the present system of law. Based upon the history of cultural differences and inequities, numerous justice inquiries have concluded that there needs to be greater understanding of Aboriginal people through cross-cultural sensitizing of lawyers dealing with Aboriginal people. The intent of this article is to illustrate the necessity of cross-cultural sensitization of lawyers as an effective means of countering the gross over-representation of Aboriginal people in the criminal justice system arising from systemic discrimination towards Aboriginal people. To achieve this, I will focus largely upon the impact of the sentencing process which has developed over time through the application of a judicial process that is foreign to Aboriginal culture. Some of the clearest examples of systemic discrimination occur throughout the sentencing process.

II. THEORETICAL BASIS OF EURO-CANADIAN PERCEPTIONS

> These remote savages, really cannibals, the Eskimo of the Arctic regions have got to be taught to recognize the authority of the British Crown ... just as in the same way it was necessary to teach Indians of the Indian Territories and the North West Territories that they were under the law ... This is one of the outstanding ideas of the Government, and the great importance of this trial lies in this that for the first time in history these people ... will be brought in contact with and will be taught what is the white man's justice.
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> They have got to be taught to respect the principles of Justice — and not merely to submit to it, but to learn that they are entitled themselves to resort to it, to resort to the law, to resort to British Justice....[4]

The above passage is derived from a statement made by the Crown as to its theory of an alleged crime. Despite its racially supremacist overtones, the comments reflect the traditional basis through which overt and systemic discrimination have been applied in the Canadian criminal justice system. The content of the passage reflects the underlying values that formed the building blocks of the present system. The case discussed was first heard in 1916. The values reflected in the comments reflect the values underlying the development of criminal law and its application to Aboriginal people. Although much of the overt discrimination has subsided, the question remains; what is white man's justice?

It has been said that the system of justice by which societies live should reflect the values of the society it serves. Canadian law is based on centuries of traditions developed in Europe. The values inherent in these traditions are still reflected in the existing system of criminal justice in Canada. Doctrines such as rules of evidence, procedures and the roles of actors in the judicial system have evolved from common

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[4] R.G. Moyles, *British Law and Arctic Men* (Saskatoon: Western Producer Prairie Books, 1979) at 38-39.

law traditions and principles arising from the church and monarchy in the European tradition.[5]

Modern concepts of law evolved from Europe and were conceived after the Roman model: "'the knowledge of things divine and human', an art rather than a science, but sharing with it the assumption of an ordered universe that was also moral."[6] The fusion of classical and Christian thought resulted in a rule of law that founds its premise in a monarchy legitimized by the backing of the church. Concepts of "order" and "morality" permeate the underlying concept of justice. Consequently, notions of justice reflected societal demands on the state to shape law according to dominant social trends that recognized behaviour as acceptable or unacceptable according to objective standards.

The values inherent in this system of governance reflected the morality, backed and defined by the church and the supremacy of God, and subsequently enforced by the state. Although the state at the time of contact was primarily concerned with the material and human needs of its citizens, the governing power which the state asserted was founded on the notion that Imperial authority derived from God and the assertion of sovereignty was legitimized by the monarchy. The development of law and justice, then, finds its seed in the monarchical assertion of sovereignty.

H.L.A. Hart suggests that law is the primary norm which stipulates the sanctions society wishes to impose upon its members to act or prevent from acting in a certain fashion. He suggests that: "[t]he most prominent general feature of law at all times and places is the existence of means that certain kinds of human conduct are no longer optional, but in some sense obligatory."[7] The corollary to this, then, is that some conduct is prohibited. Coupled with this notion is the idea that moral rules impose another form of obligation upon a society which withdraws certain areas of conduct from the free option of the individual to do as he or she desires.

The connecting factor that joins obligatory conduct to moral rules is the concept of justice. Hart states:

> Further, there is one idea, that of justice which seems to unite both fields: it is both a virtue specially appropriate to law and the most legal of the virtues. We think and talk of justice according to law and yet also of the justice or in justice of the laws.[8]

Law, then, can be based or understood as a branch of morality or justice which can be backed by the threat of force to compel adherence to a certain form of conduct. The

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5 See generally, R.A. Williams Jr., *The American Indian In Western Legal Thought* (London: Oxford University Press, 1990).

6 L. Greene & O. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) at 161 citing E. Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1957) at 139.

7 H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 6.

8 *Ibid.* at 7.

application, interpretation and enforcement of laws in Canada, which are influenced by the moral codes of the dominant society, continue as a legacy of European traditions.

In the *Concept of Law*, Hart confirms, albeit critically, that the foundations of a legal system "consist of the situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one."[9] In the context of criminal law, it is clear that the purpose of such devices used by the dominant society was, and is, an attempt to control actions it considers potentially harmful through enforcement, apprehension, interdiction and punishment in order to prevent the continuance of such behaviour. As suggested above, non-deviant behaviour was governed by a set of values asserted by the dominant society. In the Canadian context, the role of punishment has been an effective means of facilitating these goals.

The current role of sentencing in Canadian law is to deter, punish and rehabilitate. Hyman Gross has identified three fundamental stages in the criminal justice system that preclude, or at least justify, the role of sentencing as a means of facilitating goals of punishment:

> In the first there is an accusation that is critical of some act by a person who is said to have thereby broken the law. But the accusation itself must be critically tested in order to determine guilt or innocence, and this takes place in the second stage. If the accusation survives the test and proves to be sound, there is a third stage to allow for condemnation of what was done through punishment of the accused for what he did.[10]

Clearly, this approach illustrates the accusatory, argumentative and adversarial determinants of guilt and innocence. Legal theorist Martin P. Golding suggests that the process of law enforcement is culminated by "the punishment of the criminal after the elaborate ritual of trial and conviction."[11] The role of punishment, upon a determination of guilt through the above process, is geared primarily towards protection, deterrence and rehabilitation. Although throughout history societal attitudes towards the degree of weight to be placed on these elements have shifted continuously, they remain the key elements in the role of punishment.

None of these goals should be viewed in a vacuum as each is intertwined. The state's role in facilitating these goals is achieved by maintaining a proper balance between public protection and the maintenance of order. The role of sentencing in the Canadian justice system is viewed as a cornerstone in achieving this balance in the role of crime and punishment.

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9 *Ibid.* at 97.

10 H. Gross, "A Model of Criminal Justice" in H. Gross & A von Hirsch, eds., *Sentencing* (New York: Oxford Press, 1981) at 38.

11 M.P. Golding, *Philosophy of Law* (New Jersey: Prentice Hall, 1975) at 69.

III. ABORIGINAL CONCEPTS OF JUSTICE: THE CONFLICT

Having discussed the concepts and purposes of punishment and sentencing in the Canadian judicial system, we should now consider how these conflicting ideas compound the systemic discrimination against Aboriginal people. The Canadian justice system offers staggering contradiction to the aboriginal concept and philosophy of justice. The contradiction arises from the fact that both cultures understand the concept of justice differently, yet only one is accepted.

The fundamental purpose of justice in a traditional Aboriginal community is to restore peace and equilibrium to the parties and to the community. Efforts are also made to reconcile the accused with his or her own conscience and with the person or persons who have been wronged.[12] The *Report of the Aboriginal Justice Inquiry of Manitoba* considered in great detail the conflicting values and concepts of justice in traditional Aboriginal societies. In a cursory summary, the commissioners defined the fundamental concepts of Aboriginal justice in the following way:

> The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony. It might result in an expression of regret for the injury done by the offender or by members of the offenders clan. It might even have meant, historically, the forfeiture of the offender's life. But whatever the result of the process, the matter was considered finished once the offence was recognized and dealt with by both the offender and the offended. Atonement and the restoration of harmony were the goals — not punishment.[13]

At its most basic level, then, the Aboriginal concept of justice presents a startling contradiction with the present judicial philosophy. Dispute resolution in a communal and collective sense is ignored in the dominant society, as is the role of harmony. The *Manitoba Justice Inquiry* identified the contradiction as follows:

> The concepts of adversarialism, confrontationalism, accusation, guilt, argument, criticism and retribution are alien to the Aboriginal value systems, adversarialism and confrontation are antagonistic to the high value placed on harmony and peaceful co-existence of all living beings, both human and non-human, with one another and with nature.[14]

Moreover, the Inquiry concluded that the "[i]dea that guilt and innocence can be decided on the basis of accusation, confrontation, and argument which is incompatible with the firmly rooted Aboriginal belief in honesty and integrity of the individual precludes the need for an accusatory style."[15]

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[12] M. Sinclair, *Summary to the Report of the Aboriginal Justice Inquiry of Manitoba*, vol. I, "The Justice System and Aboriginal People 1991" (Presented to the Indigenous Bar Association Annual Conference November, 1992) at 3 [unpublished] [hereinafter *Manitoba Justice Inquiry*].

[13] A.C. Hamilton & M. Sinclair, "The Justice System and Aboriginal People" (Manitoba: Queen's Printer, 1991) at 27.

[14] *Ibid.* at 37.

[15] *Ibid.*

Another problem arising from this contradiction, which often is not as obvious, is the language barrier that many Aboriginal people face in the judicial process. Clearly this will not effect all Aboriginal people, but for many, especially in rural and traditionally-based areas, the barrier poses a real threat to the rights of the Aboriginal accused. In everyday language the Aboriginal person can function, but when confronted by complex legal phraseology, the problem is exacerbated.

A courtworker in Manitoba who does translation indicates that there is no translation for the word probation. He is able to define its meaning in Cree as a rope tied to the accused which will drag him back if he commits any more crime.[16] The problem here is not only a question of preciseness but also begs the issue of translation versus interpretation. Quite often, court translators try to translate literally the words of the court instead of interpreting the true meaning. For a profession that is so dependant upon preciseness of language, the problem is obvious.

Many difficulties encountered by law enforcement personnel can be attributed to the barriers that exist between culture and language. In many instances, both police and Aboriginal people are guilty of misunderstanding each other's motives, actions or words. This is critical when played out in the adversarial forum. Language differences are often ignored when an Aboriginal detainee has some, even if extremely limited, ability in the English language. The detaining officer will often assume that the detainee will have sufficient command of the language to understand his or her rights as they are explained. Furthermore, actions and words of the detainee may lead the officer to misinterpret the intent of such words or actions.

The problem of Aboriginal detainees' misunderstanding of their rights was illustrated, almost humorously, by a Legal Aid paralegal in Northern Manitoba. An Aboriginal person, arrested by a non-Aboriginal policeman, explained to the paralegal his interpretation of his right to counsel. He thought the policeman was telling him he needed counselling.[17] Yet police are also guilty of misunderstanding Aboriginal people. The *Manitoba Justice Inquiry* cautioned that despite safeguards in the *Charter*, Aboriginal people:

> [a]ppear to have special problems in exercising their rights to remain silent and to refrain from incriminating themselves. Their statements appear to be particularly open to being misunderstood by police interrogators and, as a result, may convey inaccurate information when read out in court. Their vulnerability arises from the legal system's inability to break down the barriers of effective communication between Aboriginal people and legal personnel, and to the differences of language, etiquette, concepts of time and distance, and so on.[18]

Indeed, even when there is some knowledge of English, the manner in which it is processed by the Aboriginal person whose first language is Cree, for instance, may be challenged to find the equivalent word or concept in his or her language. For instance,

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16 Video presentation of U.B.C. "A Way of Seeing", Narrated by Chief Judge Sinclair. N.D.

17 *Manitoba Justice Inquiry*, supra note 12 at 258.

18 *Ibid.* at 605.

"the Native who knows the moral concept of guilt cannot be expected to know that he may be legally 'not guilty' without being morally innocent."[19] Native Counselling Services of Alberta reported the problems Aboriginal face in exercising and understanding their rights. They found that:

> Native accused have little understanding of their rights prior to or during the arrest process. Many of the accused unwittingly violate or waive their rights during the investigation stage and assist Police when not compelled to do so. Since the majority of offenses occur under the influence of alcohol, the accused may not fully comprehend what is taking place during the interrogation.[20]

One should be cautious, however, not to confuse the resolving of the language barrier as a solution to addressing the problem referred to above, as it is much deeper than just language. The problem extends beyond mere translation of language into the interpretation of culture and culturally motivated statements or actions. As the *Manitoba Justice Inquiry* stated:

> These issues are not merely of language; they go to the heart of our society's obligation to ensure that people understand their legal rights and obligations, the nature of any charges against them and any legal proceedings affecting their rights. The right of all people to use the familiar language, preferably their first language, is not always met. Canadian courts do not automatically provide interpreters for Aboriginal people, nor do enforcement and corrections agencies. An even more fundamental question, beyond this immediate and pressing omission, is whether Aboriginal people understand the concepts behind the language used in the legal system, even when interpreters and translators are used.[21]p

It has often been my experience as a courtworker that Aboriginal people confine themselves to the physical nature of the alleged offence which often leads to unsolicited or unfounded guilty pleas.

Translators are often challenged to inquire of an accused the nature of their actions because in Cree, for instance, there is no direct translation for the word "guilt". The closest English translation in interpreting the concept of "guilty" is to ask "did you do that or didn't you?"[22] No translation can encompass its conceptual meaning as it is commonly understood in its legal context. An accused is likely to respond in terms related solely to the physical nature of the offence or confine answers to very basic actions.

Similarly, the concept of truth is all-encompassing in any legal system. However, interpreting the concept is significantly more difficult in some Aboriginal languages where there is no equivalent of "absolute truth". The *Manitoba Justice Inquiry* further stated:

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19 E. Pasmeny, "Aboriginal Offenders: Victims of Policing and Society" (1992) Sask. L. Rev. 402 at 410 citing J. James, "Toward a Cultural Understanding of the Native Offender" (1978-79) 21:1 Can. J. Crim. 453 at 456.

20 *Justice on Trial*, supra note 2 at 2-56.

21 *Manitoba Justice Inquiry*, supra note 12 at 39.

22 *Ibid.* at 38.

> When an Ojibway says "niwii-debwe", that means he is going to tell "what is right as he knows it". A standard expression is "I don't know if what I tell you is the truth. I can only tell you what I know."[23]

Understanding legal concepts in common legal discourse is a challenging obstacle for Aboriginal people. It also presents a challenge to lawyers representing Aboriginal clients. Caution must be taken to ensure that questions and answers are framed in such a manner that is capable of being understood by all. Knowledge of such language barriers will help to prevent misunderstanding between the justice system and aboriginal accused.

That there will exist a clash of culture in law enforcement is an obvious conclusion if we continue to apply current legal philosophies and practices. Communication and cultural barriers will continue to contribute to over-incarceration as long as the stereotypical and systemic discrimination remain unchallenged.

When Aboriginal people are brought to court they are faced with systemic discrimination that also arises from the physical structure and atmosphere of the courtroom setting. The positions held and maintained by court personnel have significant meaning that is foreign to Aboriginal perceptions. Built into the Canadian criminal justice system is the notion of sovereignty and supremacy. The rigid application of the rules and roles that judicial personnel play exist to maintain and perpetuate the legitimacy, authority and "equality" of the law. Strict adherence to these rules and respect of the roles of judicial personnel is rigidly enforced by various statutory devices. Stuart J. describes the situation as the following:

> In the criminal justice process (arguably one of contemporary society's great predators), the physical arrangement in a courtroom profoundly affects who participates and how they participate. The organization of the courtroom influences the content, scope and importance of information provided to the court. The rules governing the court hearing reinforce the allocation of power and influence fostered by the physical setting.
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> The combined effect of the rules and the courtroom arrangements entrench the adversarial nature of the process. The judge, defence and Crown counsel, fortified by their prominent places in the courtroom and by the rules, own and control the process and no one in a courtroom can have any doubt about that.[24]

Overcoming these barriers presents lawyers with a significant challenge. Addressing the problems of systemic discrimination may require lawyers to take different approaches when dealing with Aboriginal clients. They should become aware of the unique circumstances of Aboriginal people and the inequities they encounter. But the ability to meet such challenges are often inhibited by the very nature of the conventional role of lawyers.

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[23] *Ibid.* at 41.

[24] *R.* v. *Moses* (1992), 71 C.C.C. (3d) 347 at 355.

IV. THE CONVENTIONAL ROLE AND WEAKNESS OF THE LAWYER

The administration of justice in Canada is facilitated largely by an adversarial system of law. The role of a lawyer in an adversarial setting is, generally, to retrieve, apply and convey information so that judges can make informed decisions. The lawyer, as an advocate, is to be the protectorate of the rights and privileges of those people in conflict with the law. The duty of a lawyer to represent his or her client was summed up concisely by Lord Reid in *Rondel* v. *Worsley*, where he stated:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.[25]

As advocate, the lawyer is also a key player in the judicial process as they control the input of information in the courts. The question thus becomes, in certain contexts, how does the adversarial system work to protect the rights and privileges of Aboriginal people?

It has been suggested that "[t]he defence of any Indian client is, from a legal point of view, generally no different than that of any other client charged with the same offence."[26] This comment is based on the common law approach to the role of the lawyer in an adversarial context which evolved from Great Britain and was superimposed into the North American context. In *Law and Other Things*, Lord Macmillan succinctly states the common law role of the lawyer as advocate:

> In advocacy, what the advocate says is not presumed to be, and ought not to be, the expression of his own mind at all, and those whom he addresses are not entitled to believe, and do not believe, anything of the sort. In pleading a case an advocate is not stating his own opinions. It is no part of his business, and he has no right to do so. What is his business to do is to present to the Court all that can be said on behalf of his client's case, *all that his client would have said for himself if he had possessed the requisite skill and knowledge.* His personal opinion either of his client or of his client's case is of no consequence. It is the business of the judge or the jury to form their opinion of his client's case. It is not for the counsel himself to pre-judge the question at issue. His duty is to see that those whose business it is to judge do not do so without first hearing from him all that can possibly be urged on his side.[27]

Based on this definition, the lawyer can convey only the knowledge which he or she has acquired. This being the case, the lawyer must be equipped to acquire the requisite knowledge to convey to the court. Indeed, while controlling the input into the courtroom setting, the lawyer is ethically bound to provide thorough and complete information on the accused. At the very least, this knowledge should encompass the overwhelming differences inherent in Aboriginal people. In applying Badcock's

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25 [1969] 1 A.C. 191 (H.L.) at 227-228.

26 W.T. Badcock, "Representing the Indian Defendant: The Role of the Lawyer" (1982) 5 Bull. Can. L'aide Jur. at 151.

27 The R. Hon. H.P. Macmillan, *Law and Other Things* (New York: Books For Libraries Press, 1971) at 181 [emphasis added].

definition, the lawyer must be informed and sensitive to the cultural intricacies so that he or she can convey the pertinent information sufficient to fulfil his or her duty to the client.

The conventional role of a lawyer has played a significant part in the systemic discrimination of Aboriginal people. Systemic discrimination arises when there is an adverse impact upon a group in society resulting from the systemic application of neutral criteria. Systemic discrimination has been defined by Archibald and Clark as treating unequals equally by applying the same criteria to all offenders when considering disposition.[28]

The *Saskatchewan Justice Inquiry* described systemic discrimination as a:

> [s]ocial, political and economic system that perpetuates traditionally 'accepted' inequities. Even when everyone is treated equally, some groups still end up with fewer *benefits* than others.[29]

The criminal justice system creates various forms of adversities through the search or application of seemingly neutral criteria. Indeed, the inequalities discussed above are not limited solely to tangible benefits and could also be extended to basic human expectations or other intangibles such as credibility and trustworthiness. For example, the judiciary often looks upon employment as a positive circumstance in sentencing or interim release. For instance, it can be interpreted as an indication of trustworthiness or that the accused would not risk his or her job by getting into any more trouble with the law. In bail hearings, the hearing officer considers criteria for release on primary grounds. These will reflect considerable socio-economic characteristics which often will not apply to Aboriginal people. Items such as employment, residency or standing in the community are merely a few mitigating factors for which Aboriginal people seldom qualify. So if the court seeks the same indicia of all accused, some may be treated adversely because of the socio-economic and cultural realities. When providing information to the court, lawyers generally look to traditional methods of sentencing criteria to illustrate their clients' needs and circumstances.

The Euro-Canadian perspective of substantive criminal law re-enforces the notion that equality is achieved by treating everyone identically. Indeed, the notion of 'blind justice' infers that differences amongst people are ignored. It would follow then that differences in values among cultures are not relevant in criminal law because everyone is held to the same standards.

However, the Supreme Court of Canada has suggested that equality can arise in more than one instance. It is not a uni-dimensional concept and can mean and be interpreted in many different ways depending on the social setting. Equality, therefore:

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[28] C. LaPrairie, "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutes" (1990) Can. J. Crim. at 428.

[29] Judge P. Linn & Representatives of the Federation of Saskatchewan Indian Nations, *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon: Queen's Printer, Saskatchewan, 1992) at 5.

> [is] a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.[30]

In some respects the concept echoes that of the reasonable person standard, thus begging the question "who is one to be measured by, or against?" The opportunity will often present itself to incorporate, albeit unintentionally, culturally oppressive criteria from an external and impartial source and apply them to all equally, despite differences. It will continue to occur in the search and application of seemingly neutral expectations and criteria. Cultural sensitization towards issues of difference can assist in ensuring the rights of an Aboriginal accused as guaranteed under the *Charter*.

V. SENTENCING THE ABORIGINAL PERSON

Having an Aboriginal person for a client today raises a number of problems. Although Badcock's assessment of the role of the lawyer is technically correct, its application is too narrow. Such a definition may prohibit an ability to recognize the inherent differences between Aboriginal and non-Aboriginal persons within the judicial system. Prosecutor Rupert Ross suggests that the problem arises out of the fact that:

> We in the mainstream culture remain largely ignorant of the fact that native people-and native communities-operate under a scheme of ethical commandments which vary significantly from our own. When, at sentencing, our focus shifts from a particular act or assessments of the attitudes and resources of the accused and of his community content, failure to make *accurate* assessments of their realities will necessarily imperil successful attainment of the goals of sentencing.[31]

The most critical and controversial area of the criminal justice system is in the "processing" of Aboriginal people. The problem in sentencing is compounded by the fact that lawyers often search for and apply the same informative indicia for every client. Such practice has the potential for discriminating solely by treating an Aboriginal person the same as any other accused without considering the significant cultural differences. In *Andrews v. Law Society of British Columbia*, McIntyre J. stated:

> It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.[32]

A cursory look at sentencing criteria used by Student Legal Services at the University of Alberta reflects this "equality" principle. Students are instructed to use a

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30 *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 (S.C.C.) at 231.

31 R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" (1989) 3 CNLR 1 at 1.

32 M. Sinclair, "Aboriginal People and the Administration of Justice:The Identification of Discrimination" (Paper presented at Western Judicial Education Center's Western Workshop, June 1991) at 2 [unpublished].

standard form for acquiring sentencing criteria information from their principals.[33] Primarily, the "list" is concerned with education, size of family, place and duration of residence, employment, future plans and co-operation with the police. A positive response to most of these indicia reflect personal characteristics of a middle class person. It ignores the fact that Aboriginal people are at the bottom of the socio-economic scale nationally. Those persons disadvantaged by these criteria are those without financial security, formal education, dispersed families and transient or displaced residency, all of which are a reality for many Aboriginal people.

Based on my own experience as a Native courtworker in an urban setting, the most effective sets of sentencing circumstances to consider and put forth were based on the middle-class values mentioned above. The questions asked of the accused were often those which conformed with equality in the application of justice. In very few situations were there attempts to bridge cultural barriers to benefit such individuals before the courts.

There have been, however, significant undertakings made by some legal personnel to bridge this gap and create an understanding of the Native accused by the court. The late Hewitt J., an Alberta provincial youth court judge, would single out Aboriginal offenders facing property charges and take them into his chambers for a less formal sentencing hearing to acquire more significant information and make available to him more sentencing alternatives. He would ask questions of a mere conversational nature to make the accused more comfortable in a non-confrontational and non-adversarial atmosphere. On Judge Hewitt's desk he had a stuffed magpie. Judge Hewitt would proceed to ask the accused if he understood the lifestyle of a magpie. Upon hearing the accused's response, he would then explain his version of the Aboriginal interpretation of the life of a magpie — a bird possessing few redeeming qualities. He would say that a magpie lived off of the efforts and misery of others by destroying smaller, less fortunate birds and their homes for its own personal satisfaction. He concluded by saying that a magpie is not well-liked or respected by other birds in the community and asked if the accused was desirous of such a lifestyle.

The use of the story of the magpie has significant meaning and has the potential for an equally significant impact on the criminal justice system. By departing from normal practices, Hewitt J.'s efforts signify a willingness and ability to incorporate such measures into the judicial process in an attempt to foster a more positive understanding of the cultural differences of Native people. The exercise illustrates a bridging of cultural understanding by injecting into the proceedings a different perspective. It also illustrates a sad fact that if His Honour was continuously taking these offenders aside to acquire more information, arguably the lawyers may have failed in their duties to sufficiently inform the court about the Aboriginal accused and his or her unique situation.

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[33] The term "principal" refers to an individual being assisted by Student Legal Services. The more common term "client", more commonly recognized to define the relationship, is not used in this context.

Disparity in sentencing has been the subject of considerable debate. The gross over-representation of Aboriginal people in both the judicial process and correctional institutions suggest that few options are used during the sentencing process. Some argue that this is due largely to a lack of knowledge and understanding of the unique circumstances of Aboriginal people. If one is to obtain a better understanding, statistics are a useful place to start as a social indicator of Aboriginal circumstances.

In Ontario, 31 percent of the admissions to provincial institutions in 1987-88 were for fine default. Of the 5,172 admissions to prison of Aboriginal people, 47 percent were admitted for defaulting on payment of fines.[34] That means that nearly 1,800 Aboriginal people were incarcerated largely because of their financial status. Justice inquiries and reports in Alberta, Manitoba, and Saskatchewan are strikingly similar.[35] It has been suggested that:

> The reason for disparity in sentencing may not necessarily be due to prejudicial behaviour but rather it is attributable to lack of understanding. This lack of understanding is perpetuated by a perception that there is a shortage of options for offenders. A thorough search into the socio-economic status of Aboriginal people within Canadian society is likely to turn up more alternatives.[36]

Aboriginal people feel the full thrust of systemic discrimination because of unique social and economic disparities between themselves and non-Aboriginal society. Poverty and suppression of traditional values makes them vulnerable when trying to be understood in the justice system. In 1980, a Department of Indian Affairs and Northern Development survey reported the existence of social and economic deprivation. Ignorance of these statistics is said to have contributed to the over-representation of Aboriginal people in the "system". Such statistics can and should be utilized by lawyers in the criminal justice system to reflect the social realities of these people. It is relevant that the average income of the Aboriginal person is one-half to two-thirds of the national average.[37] It is also relevant that housing and facilities on the reserve would be unacceptable to modern standards. Impoverished and socially deprived people by the very nature of their lifestyle may be rendered incapable of adapting or structuring their lives to effectively utilize resources which our justice system so strongly depends upon. These socio-economic realities, in addition to the cultural differences, should always be injected into the sentencing procedure to increase the knowledge and options of the court when dealing with Aboriginal people.

Accordingly then, the lawyer is under an obligation to inform himself or herself with as much knowledge as he or she can so that the numbers of options become greater as more information is injected into the process. Often, however, sufficient information

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[34] *The Osnaburgh/Windigo Tribal Council Justice Review Committee Tay Bway Win: Truth, Justice and First Nations* (31 July 1990) at 114 [hereinafter *Osnaburgh/Windigo*].

[35] See also statistical corrections data in the *Justice on Trial, Manitoba Justice Inquiry* and *Saskatchewan Justice Commission* reports which all suggest abnormally high incarceration rates of Aboriginal people for failure to pay fines.

[36] R. Watts, "Systemic Discrimination and Sentencing; The Practitioners Dilemma" (District of the Ministry of Solicitor General, 1992) at 4 [unpublished].

[37] *Osnaburgh/Windigo*, *supra* note 34 at 94-96.

on the Aboriginal person's unique conditions and status cannot be acquired in a few short interviews with the client. Indeed, the whole "docket" process is designed, though perhaps not intentionally, to prevent any such informative process. The necessities of expediency ultimately overwhelm the requirement of thoroughness. I would suggest that the problem lawyers are faced with when dealing with Aboriginal people is that the knowledge required to convey to the court cultural intricacies can only be acquired through an intense learning process, rather than cursory, spontaneous, and often improvisational "sessions" in court and pre-trial conferences. To summarize then:

> Sentencing Native people — or people from any other culture — poses a very substantial challenge. Sentencing is not, after all, an end but a means to other ends. It is a tool employed in an effort to accomplish rehabilitation of the individual, deterrence to him and to others in the community, and protection of that community. It requires that we learn as much as we can about that individual and about the context in which he lives. The greater our misrepresentation, the less likely it is that our sentence will produce the results we intend.[38]

Lord Macmillan's earlier definition can be applied positively to the role of the lawyer in dealing with the Aboriginal client if the lawyer has the appropriate tools at his disposal. Cross-cultural sensitization will afford lawyers the ability to retrieve, apply and convey information that reflects the unique cultural, economic or social disparities and provides more acceptable options in dispute resolution.

As long as lawyers maintain their prominent place within the judicial system, it is imperative that they equip themselves with adequate knowledge of their Aboriginal clients. In *R.* v. *Moses*, Stuart J. succinctly described the inherent weakness of traditional "Euro-Canadian sentencing" practice pertaining to the collection of information:

> The paucity and stagnancy of sentencing information severely handicaps any endeavour to purposely employ sentencing remedies. Very little is known about offenders, victims, the crucial underlying factors causing the criminal behaviour or about the larger context of the home and the community, and almost nothing is known about how the court process affects the conflict or upon the persons involved. Acting on a woefully incomplete understanding of either the larger circumstances, or of the specific life circumstances of those directly affected by crime, the court rarely appreciates whether the sentence resolves or exacerbates the fundamental problems promoting crime.[39]

Stuart J. advocated traditional Euro-Canadian roles of justice with greater participation of the community while emphasizing that the active participants in the legal system should acquire greater knowledge of the customs and traditions of the Aboriginal accused. I would suggest that by becoming sensitive to the cultural attributes, advocates of the present judicial system will acquire greater certainty and greater acceptance of non-traditional alternatives, options and practices to Euro-Canadian sentencing. Incorporating more knowledge and different perspectives with flexibility will make the present system more conducive to a fairer process and outcome

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[38] Ross, *supra* note 31 at 2.

[39] *Supra* note 24 at 358-359.

that recognizes the existence of different values in a traditionally one-dimensional system of justice. Therefore, the conventional role of the lawyer can still be utilized to best represent and inform both the Aboriginal accused and the court of essential knowledge. Another way in which this can been achieved is through the use of a Native courtworker which has been somewhat successful.

VI. THE NATIVE COURTWORKER

It has been suggested that Aboriginal over-representation in the criminal justice system is due largely to their own inability to understand their rights within this system. This point has been echoed in numerous studies that advocated the use of courtworkers to keep Aboriginal accused informed of their rights within the criminal justice system. One such study suggested that:

> The native Indian often feels greatly handicapped by virtue of his different cultural upbringing, lack of formal education, understanding and acceptance the non-Indian way of life, in asserting and ensuring his rights when brought in contact with the various law enforcement agencies. The strange situation with which he is faced when brought before the courts is often overwhelming and incomprehensible... 'Indians have little understanding of their legal rights, of court procedures or resources such as legal aid'...(as a consequence) 'it appears most Indian people enter guilty pleas either because they do not understand the concepts of legal guilt and innocence, or because they are fearful of exercising their rights'.[40]

Aside from the less than favourable generalities, the above suggestion was indicative of the period from which it was written, yet much remains true today. Recommendations were directed towards ensuring that the accused person knew of his rights within the process through the use of Native courtworkers. This was, and is, a positive approach that ensures that the rights of Aboriginal accused are protected. However, notwithstanding the success of the courtworker program, it is not without its limitations.

Ensuring that an accused person's rights are protected within the judicial system fails to address the lack of understanding that legal personnel possess about Aboriginal culture. In effect, this also serves to legitimize the current practice of a justice system that reflects only one set of values. The courtworker program does not allow for an exchange of reciprocal information whereby the courtworker ensures that the lawyers are fully informed as to the personal conditions of the accused, particularly if they are culturally based. In many instances, this is the goal of courtworker programs[41] but seldom, especially in urban settings, has there been purely reciprocal relationships between the courtworker and legal personnel.

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[40] M.C. Bennet, "The Indian Counsellor Project: Help For the Accused" (1973) 15 Can. J. Crim. & Corr. 1 at 1-2 citing The Canadian Corrections Association, *Indians and the Law* (Ottawa: The Canadian Welfare Council, 1967) at 39-40.

[41] Native Counselling Services of Alberta, "Native People And The Criminal Justice System: The Role of The Native Courtworker" (1982) 5:2 Bull. Can. L'aide Jur. 53 at 55.

How can one or two people gain full knowledge of the large number of accused and convey the necessary cultural information to the literally hundreds of lawyers that pass through the courthouse every day?[42] Quite clearly, neither the legal society or the courtworker programs are equipped to deal with this on an improvisational basis. Cross-cultural sensitization on an ongoing basis is preferable because it will ensure better representation and conveyance of crucial information in the judicial process beyond first or custodial appearances. Rather than information passing from the system to the accused, judicial personnel will be adequately equipped to respond to cultural disparities that might otherwise impede the realization of justice.

By no means should this undermine the progressive developments the Native courtworker programs have achieved and the degree of success and acceptance with which they have been received. It does not however, entirely address the problem that systemic discrimination is currently contributing to the over-representation of Aboriginal people in the criminal justice system. Greater steps should be taken so as not to rely solely on the courtworker programs currently in place to effect a change in handling of Aboriginal people passing through the system. Over-reliance on courtworkers places an unfair burden on such individuals and fails to address the real problem, that being the one-dimensional system of justice presently in existence in Canada.

The use of courtworkers, in conjunction with the duties of lawyers, can contribute to a greater realization of informed decisions in an adversarial setting. A lawyer can utilize the effectiveness of courtworkers to ensure that all avenues of communication and interpretation are executed in an attempt to convey or retrieve important information. These efforts should go beyond preliminary matters into trials, bail reviews and sentencing procedures.

VII. CHANGING THE STATUS QUO

The current system of criminal justice has developed from generations of adherence to rigid rules and practice. The current status quo is challenged to address the inequities Aboriginal people face within the criminal justice system. Cases like *R.* v. *Moses*, as well as efforts by judges such as Hewitt J., indicate the system's capacity and some degree of willingness of persons to recognize, appreciate and account for some of the cultural and socio-economic disparities between Aboriginal and non-Aboriginal societies. In various parts of the country there are cases which validate and illustrate the need for and effectiveness of cross-cultural sensitization of judicial personnel. Rupert Ross explains:

> At an Ojibway reserve — while the miscreant and his victim were summoned before an elders panel, there was never any discussion of what had happened and why, of how each party felt about the other

[42] Native Counselling Services of Alberta typically has two courtworkers in docket court who oversee both docket and custodial matters every day. One person is assigned to each of two docket courts. This does not include those accused who proceed to trial. Similarly, Youth Court has one courtworker who deals with docket and custodial matters but not trials.

> or of what might be done by way of compensation. Nor was there any imposition of punishment. Each party was instead provided with a counselling Elder who worked privately to cleanse his spirit. When both counselling Elders so signified by touching the peace pipe, it would be lit and passed to all. It was a signal that both had been restored to themselves and to the community.... As far as the community was concerned, the matter was over.[43]

This case illustrates that these people possessed a preconceived and long-practised tradition of justice within their community.

Courts can go a long way to implement these traditions into the existing system, as was done in *R.* v. *Moses*. In this case, the court accepted and implemented the use of a sentencing circle. The trial was conducted in the traditional Euro-Canadian model but the sentencing procedure resembled a traditional Aboriginal practice. The effectiveness of the circle was considered to have arisen from the fact that the circle breaks down the air of dominance traditional courtrooms have accorded lawyers and judges. The atmosphere is open and honest. Everybody involved, the lawyers, judges, offender and victim, as well as community members, all face each other and are given opportunities to speak. Stuart J. describes the circle in the following way:

> By arranging the court in a circle without desks or tables, with all participants facing each other, with equal access and equal exposure to each other, the dynamics of the decision making process were profoundly changed.
>
> Everyone in turn around the circle introduced themselves. Everyone remained seated when speaking. After opening remarks from the judge and counsel, the formal process dissolved into an informal, but intense discussion of what might best protect the community and extract [the offender] from the grip of alcohol and crime.
>
> The tone was tempered by the close proximity of all participants. For the most part, participants referred to each other by name, not by title. While the disagreements and arguments were provoked by most topics, posturing, pontification, and the well worn platitudes, commonly characteristic of courtroom speeches by counsel and judges were gratefully absent.[44]

Although this practice goes beyond mere cross-cultural sensitization of personnel, it does suggest that significant steps were taken to recognize and incorporate into the "system" a set of values other than those which have traditionally been recognized to this point. *R.* v. *Moses* indicates that the court has an appreciation of not only the cultural differences in perceptions of justice, but also of the effectiveness of traditional Aboriginal practices and values.

It would follow then, that before such integration can take place in the criminal justice system, there must first be an understanding of the differences in perceptions. Possessing a greater understanding of the cultural differences will also allow the "system" to adapt to and incorporate these new practices and recognized values. The

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[43] Ross, *supra* note 31 at 5.

[44] *Supra* note 24 at 8.

legacy of the problem and its solution was summed up concisely by the *Law Reform Commission of Canada Report on Aboriginal Peoples* where it concluded:

> Greater cross cultural training was proposed at the 1975 National Conference on Native Peoples and the Criminal Justice System. Despite this, fifteen years later the Cawsey Task Force [Justice on Trial] observed that in general "court personnel know little about the culture of the Aboriginal people of Alberta." Lack of cultural sensitivity operates in a subtle way: we all make assumptions based on our own experience about the way people behave, and we judge others based on those assumptions. When those other people are from a different culture, however, our assumptions can be mistaken: as one prosecutor has noted: "I had been reading evasiveness and insincerity and possibly lies when I should have been reading only respect and sincerity." These mistakes, if made by police, lawyers, judges or correctional officials, can have devastating consequences.[45]

It comes as no surprise, therefore, that the Commission, like every other Aboriginal justice inquiry in the past decade, recommended that:

> 3.(3) Cross-cultural training for all participants in the criminal justice system, including police, lawyers, judges probation officers and correctional officials, should be expanded and improved. This training should be mandatory and ongoing for those whose regular duties bring them into sufficient contact with Aboriginal persons. Local Aboriginal groups should be closely involved in the design and implementation of the training.[46]

By implementing more knowledge and flexibility into the process, greater steps can be taken to achieve a greater understanding of these differences. Such efforts should serve to address some of the inequities encountered by Aboriginal people.

While much can be achieved in addressing the over-representation of Aboriginal people in the criminal justice system, we must also be careful not to address this in a vacuum. We should be weary of implementing standard "models" and "general policies" that allow or promote integrated or cross-culturally sensitized "systems". The very nature of such a practice would ignore the lack of homogeneity and disparities of practices within the Aboriginal community across the country. By the same token we should strive to encourage dynamics and flexibility in the judicial system that reflects the dynamics of Aboriginal communities. A similar caution is echoed by Watts where he suggests that:

> The native population is not homogenous and factors such as urban vs. rural, environment, levels of political development, extent of social infrastructure, degrees of geographic isolation, size of population base, cultural differences and historical influences will have to be factored into any solution.[47]

Implementing any programs to ensure a better understanding of Aboriginal culture presents a tremendous challenge to provincial Bar associations and to the judiciary.

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[45] Law Reform Commission of Canada *Report 34: Aboriginal Peoples and Criminal Justice* (Ottawa: Queen's Printer, 1991) at 30.

[46] *Ibid.*

[47] Watts, *supra* note 36 at 4.

Consideration of the dispersed geographical representation of the Aboriginal population may dictate the direction of any need for change. But whatever direction is taken to meet this end must take into account individual uniqueness of respective Aboriginal groups. For example, the needs of Aboriginal groups from the West Coast may differ from those in the Prairie Provinces. Recognizing these differences is the first step towards understanding cultural uniqueness.

VIII. CONCLUSION

The fact that systemic discrimination contributes to the overwhelming representation of Aboriginal people in the criminal justice system cannot be denied. The recognition of a single set of values in a traditionally rigid and one-dimensional system of justice compounds the problem. The present criminal justice system must accept the reality that Aboriginal people are not a primitive society. It must be recognized that, in order for Canada to have a true "justice" system, it must abandon its one-dimensional approach to the judicial process. While this approach should not undermine any attempts by various Aboriginal groups to develop separate, individual justice systems, it should persuade society that the present judicial system is capable of change. Of course such measures will not be required of the legal profession entirely. It should be recognized that not every practitioner is going to assist representatives of the Aboriginal community. But it should also be recognized that practitioners working in the criminal law area will be better served to obtain a greater understanding of the Aboriginal community as statistics suggest encounters between the two cultures will be likely.

Aboriginal people are complex societies with histories, traditions and values that perceive justice and its purpose in a different term than does the dominant society. By becoming culturally sensitive to these differences and incorporating new approaches to the criminal justice system, lawyers can bring about a change in the trend of Aboriginal over-representation by offering culturally complete information which should facilitate the availability of greater options in the sentencing process.