Native People and Legal Services in Canada

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INTRODUCTION

The relationship between the Native People of Canada and the legal system has received far too little attention from either academics or the various levels of government in Canada. Provincial legal services commissions and legal aid societies have largely ignored the particular problems of Native People. That there are particular problems, there is little doubt. What kinds of legal services are the Native People receiving? Are these services sufficient? Are they successful? Do the Native People need special attention and individualized programmes? These are questions that will, hopefully, be answered in this article.

I. THE PRESENT SITUATION OF NATIVE PEOPLE IN CANADA

It is necessary to understand the social, cultural, economic and geographic position of Native People in our society in order to determine how best to provide the legal services they need.

1. Who are the Native People of Canada?

A recurring source of confusion among many commentators, as well as the general public, is the lack of precision and consistency in the use of terms. The author is using the phrase "Native People" to include all people who trace their roots in this country to time immemorial: all Indians (whether registered under the *Indian Act*[1] or not) and all Eskimos (or Inuit).

The Federal government has been given the power under section 91(24) of the *British North America Act, 1867*[2] to legislate in relation

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[1] R.S.C. 1970, c.I-6.

[2] 30-31 Vict., c.3 (U.K.).

to "Indians, and Lands reserved for the Indians". This power has been exercised in the creation of the *Indian Act*[3] which contains a complex system of registration and administration, the registration system determining the subjects of the administrative system. The concept of such a definitional system has existed since the earliest legislation concerning Indians[4] and has been maintained in all subsequent legislation.[5]

Originally, registration was accomplished by a government agent who went out to the Native population[6] and made a count. If people were away hunting or bands were too remote to be numbered, then they were not registered as Indians under the *Indian Act*.[7]

Many Indians who were once registered, or who are the descendants of people who were registered, are no longer considered to be Indians for the administrative purposes of this Act.[8] Thousands were persuaded to become enfranchised under the provisions in the Act by local Indian agents, who were sometimes acting to meet quotas. Indian people were told they had to become enfranchised and leave the reserve if they wanted to join the dominant society and enjoy its advantages. Until 1960, only enfranchised Indians could vote federally, send their children to public schools, or benefit from the provincially-managed social welfare programmes.[9]

The government's attitude toward Indian people reflected the beliefs of the dominant non-Native society. Without understanding Indian culture, they judged it un-Christian and undesirable.[10] This message was repeatedly relayed through the schools, the churches, and the Indian agents.

Through this process of enfranchisement some Indian people gave up their status under the *Indian Act*. They were then paid a lump sum equivalent to the treaty annuities, if any, they would have received over the next 20 years along with one *per capita* share of any band funds held on trust by the Crown. Many people needed the money to

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[3] *Supra*, note 1.

[4] The term "Indians" was first defined in S.C. 1850, 13-14 Vict., c.42, s.5.

[5] See factums of the various counsel in the *Lavell* and *Bedard* cases, [1974] S.C.R. 1349.

[6] This procedure was only utilized in regard to Indians and not with respect to the Inuit.

[7] For a comprehensive view of Indian history see E. Palmer Patterson, *The Canadian Indians: A History Since 1500* (1972), among others.

[8] This is the effect of ss.7-12, *supra*, note 1.

[9] J.S. Frideres, *Canada's Indians: Contemporary Conflicts* (1974), 3.

[10] Frideres, *ibid.*, 159, 164-5 and Patterson, *supra*, note 7, 109-111, 122, 124, 128, 138.

survive and were given only a cursory explanation of the consequences of signing the enfranchisement paper. They usually did not understand that they were forfeiting their right to be "Indian".

An Indian person could, and still can, voluntarily apply to Ottawa for enfranchisement if he or she is willing to renounce his or her Indian status. If this is done, the individual, the spouse and any minor children (if the family is living together), along with all heirs lose all rights and obligations of Indian status.[11] Over 2,600 Indian adults and children were enfranchised between 1955 and 1970 in this manner.[12]

There are, however, further automatic and involuntary methods of enfranchisement, one of which has gained widespread notoriety in the *Lavell* and *Bedard* cases.[13] A registered Indian woman who marries a non-registered man loses her status.[14] Any minor unmarried children she has may also lose their status as registered Indians.[15] In 1973, 538 Indian women lost their status in this manner[16] and approximately 11,000 Indian women and children have "forfeited" their status in the last 20 years.[17] The fact that an Indian woman may be marrying a full-blooded, but non-registered, Indian man is considered to be irrelevant.

Others who lose their status are those included within section 12(1)(a)(iv) of the *Indian Act*, or the so-called "double-mother rule". This generally unknown provision results in an individual being enfranchised upon reaching 21 if his mother and the father's mother gained Indian status through marriage, provided his parents' marriage occurred after September 4, 1951. The contradictions are blatant. The children of enfranchised parents may be full-blooded Indian people yet may be denied the right to live on a reserve, receive educational assistance or participate in fishing or hunting privileges.

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[11] This occurs through the operation of ss.109-110, 12(1)(a)(iii) and 15 of the *Indian Act, supra,* note 1. The Indian wife and minor unmarried children are automatically enfranchised with the husband unless she and the children are living apart from the husband, and she does not apply in her own right.

[12] Frideres, *supra,* note 9, 4.

[13] [1974] S.C.R. 1349, (1974) 38 D.L.R. (3d) 481.

[14] *Indian Act, supra,* note 1, ss.12(1)(b) and 7(1).

[15] Frideres, *supra,* note 9, 3; *Indian Act, ibid.,* s.109(2).

[16] Department of Indian Affairs and Northern Development, *Annual Report Fiscal Year 1973-1974,* Information Canada (1974), 33 (hereinafter referred to as *Annual Report 1973-1974*).

[17] Statistics computed by the author from Frideres, *supra,* note 9, 4, and the Annual Reports of the Department of Indian Affairs and Northern Development.

The term "Metis" is often used to describe all those people who have a "mixed" ancestry. "Initially the title meant a half 'mixture' of French and Indian, although it has now been broadened to include almost all people with at least some Indian ancestry."[18] It includes many people whose families were never registered, or who had been allotted half-breed lands or money scrip rather than receiving treaty payments and residing on reserves. The terms "non-status Indian" and "non-registered Indian" are recently becoming more common as replacements for the word "Metis".

To make things even more complicated, some Native People are referred to as "treaty Indians" and "non-treaty Indians", yet both groups are registered as Indians under the *Indian Act*. It is sufficient here to note that roughly 50% of the registered Indian population are non-treaty Indians, found in Quebec, the Maritimes, parts of the Northwest Territories, and most of British Columbia.[19] Residence on a reserve is not a factor in differentiating between treaty Indians and non-treaty Indians. Some of the former were never given the reserves promised to them in the treaties and some of the latter were granted reserves while the rest of their land was taken without an agreement or compensation.[20]

Thus the Indian populations of Canada are referred to as treaty Indians, non-treaty Indians, non-registered or non-status Indians, and Metis, although they are all Indians. The result of this process of registration has been to divide the Indian people in half; the dominant white society has decided which Indians it is willing to consider as "Indians". Registration has been amazingly successful in fostering division and competition among the Indians of Canada. Its effect is lessening as the Indian people unite and create their own political and social definitions.

The Eskimos (hereinafter referred to as the Inuit) have historically been ignored by the Federal government. They were not included in the early Indian legislation and are implicity excluded in the present Act.[21] This is presumably due to the lack of contact between the non-Native society and the Inuit until the 20th century.

The Inuit have no reserves, no treaties, and no legislative guarantees to protect them. They do fall within the federal jurisdiction

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[18] Frideres, *ibid.*, 3.

[19] For a more complete history of the treaty process see P. Cumming and N. Mickenburg, *Native Rights in Canada* (1972) and Patterson, *supra*, note 7.

[20] *Ibid.*

[21] This is the effect of the *Indian Act*, *supra*, note 1, ss.5-13.

under the *British North America Act, 1867*,[22] since the Supreme Court of Canada held in *In re Eskimos*[23] that the Inuit are included within the meaning of the word "Indians" in section 91(24). The Federal government has responded to this responsibility with a variety of programmes administered by the Department of Indian Affairs and Northern Development extending to the Inuit in the Yukon, the Northwest Territories and Quebec.[24] This situation will be changing for the Inuit in Quebec as a result of the James Bay Agreement.[25]

It is interesting to consider the possibility of the non-registered Indians seeking the benefits of being within the federal jurisdiction by extending the reasoning of *In re Eskimos*.[26]

2. Demographic and economic background[27]

Part of the difficulty that non-Native members of the legal system face in attempting to understand Native People is the shortage or absence of critical information. There is a wealth of historical, anthropological, and ethnographical studies available on American Indians and a growing number of similar studies on the Native People of Canada but these studies tend to be very specific in nature and refer only to individual bands or tribes. There is very little material in existence of a somewhat broader nature that would be of use to legal services planners in Canada. For example, no one knows how many Native People there are in Canada. As of December 31, 1974, there were 276,436 registered Indians in Canada.[28] The population of the non-registered Indians (this term is used hereinafter to include "non-status Indians" and "Metis") is unknown. One source quotes estimates ranging from 260,000 to 850,000 people,[29] while Douglas Schmeiser places the number at 570,438.[30] The Inuit population is estimated to be about 18,000, which results in the

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[22] *Supra*, note 2.

[23] [1939] S.C.R. 104, (1939) 2 D.L.R. 417.

[24] *Annual Report 1973-1974, supra*, note 16.

[25] *The Globe and Mail*, October 30, 1975, 14.

[26] *Supra*, note 23.

[27] See W. Stanbury, *The Social & Economic Conditions of Indian Families in British Columbia*, November 1974 (unpublished), *Annual Report 1973-1974, supra*, note 16 and Frideres, *supra*, note 9, 13-58.

[28] Department of Indian Affairs and Northern Development, *Annual Report Fiscal Year 1974-1975*, Information Canada (1975), 31 (hereinafter referred as *Annual Report 1974-1975*).

[29] Frideres, *supra*, note 9, 12.

[30] D.A. Schmeiser, *Native Offenders and the Law*, Information Canada (1974), 1-16.

Native population being somewhere between 554,436 and 1,444,436. Combining Schmeiser's figures with the statistics of the Department of Indian Affairs and Northern Development leads to perhaps the most reliable estimate of 864,874 Native People.

An examination of the economic and social conditions of the Native People in Canada is startling. The mortality rates for Native People[31] are considerably higher than for the non-Native population. The infant mortality rate for registered Indians is 8 times greater than the white population.[32] The expected average life span for the registered Indian in 1970 was 34 years, whereas for the non-Native it was nearly 72 years.[33] If a registered Indian survives the first two years of his life, then his expected life span rises to just over 50 years,[34] still 20 years less than the non-Native population on average.

In our affluent society the economic status of the Native People is equally hard to understand. Over 80% of the registered Indians live below the national poverty line.[35] The income of 40% of the reserve families is under $1,000 per year. Native People experience difficulty integrating into the job market due to problems in adapting to non-Native values and customs. The Native person who is confronted with expectations of mechanical efficiency, promptness, rigid role categories and consistency in a new technology, with which he is totally unfamiliar, is confused; and it is no wonder. The expectations of industry have very little to do with the culture and society in which many Native People are reared.

Thus the Native population has an unemployment rate 3 times higher than the total Canadian labour force. Even when they are employed, it is usually seasonal or part-time work providing little job security with an average duration of 5 months.[36] The situation does not appear to be improving on its own, and little is being done about it by the Federal government:

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[31] The following categories refer only to registered Indians. The statistics are generally not available for the non-registered Indians and the Inuit.

[32] Frideres, *supra,* note 9, 19.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*, 24; Stanbury, *supra,* note 27, 45. Using figures suggested by the Special Senate Committee on Poverty (*Poverty in Canada,* Information Canada (1971), 3) Stanbury estimates that 67.5% of all Indian families living off reserves were below the poverty line in 1970.

[36] Frideres, *ibid.*, 27.

[37] S. Jamieson, "Native Indians and the Trade Union Movement in British Columbia" in M. Nagler (ed.), *Perspectives on North American Indians* (1972), 142, 145.

> The native Indians' position in the resource industries has been marginal at best, and recent trends indicate that they may be displaced in growing numbers. At the same time, expansion in secondary (processing) and tertiary (service) industries has failed to benefit but a small handful of Indians, even where such expansion has penetrated into hitherto undeveloped areas within easy commuting distance of Indian reserves.[37]

Recently there has been some improvement in the area of education. However, the "drop-out" rate is still incredibly high[38] due to a wide variety of causes: poverty, racism, poor quality education, the rejection of alien middle class values. Yet the number of registered Indians enrolled in grade 12 has increased by one third in 3 years and university enrollment has doubled in 2 years.[39] It can only be hoped that this trend will continue and that the school system will become more responsive to the experiences, needs, and wishes of Native People.

Poverty breeds other social and health problems. Frideres points out that housing is a major concern. Over 80% of reserve homes can be defined as overcrowded.[40] This factor, plus the generally low quality of the homes, can have serious social and psychological implications.

Tuberculosis is on the rise among Native People while declining in the rest of Canada.[41] Alcoholism is a serious concern among Native

TABLE A

% Incidence of Sentences Among Native People (1970-71)

Province	% Indians*/Total Provincial Population	% Indian Sentences/ Federal Penitentiaries	% Indian Sentences/ Provincial Jails
Quebec	1.63	0.5	—
Ontario	2.00	2.0	10.9
Manitoba	11.33	30.0	50.3
Saskatchewan	12.67	30.0	46.2
Alberta	5.51	33.0	25.8
British Columbia	4.97	10.0	18.1
North-West Territories	46.24	—	91.8

Source: *Report of Task Force on Policing on Reserves;* for DIAND, [Department of Indian Affairs and Northern Development], January 8, 1973, 41.

* "Indians" includes Metis, non-registered Indians and Inuit Peoples.

[38] Stanbury, *supra,* note 27, 25, states that only 12% of the Indian students entering grade 1 in B.C. in 1958-1959 entered grade 12 in 1969-1970.

[39] *Annual Report 1973-1974, supra,* note 7, 44-46. See Stanbury, *supra,* note 35, to see how small a percentage of students this is of the total, university-age Native population.

[40] Frideres, *supra,* note 9, 50.

[41] *Ibid.,* 54, 56.

People and is a major factor in the rising crime rate of Native People.[42] Their incarceration rate is also considerably higher, as shown in Table A.

The statistics do not paint a pleasant picture of the life of Native People. The Laing Report's conclusions, arrived at in 1967, are still true today:

> It is accurate to say that the Indian and Eskimo people of Canada are in cultural, social and economic isolation from the rest of the population. This situation is aggravated by their geographic isolation which compounds the difficulty in providing adequate levels of service. The majority of them lack such basic necessities as running water, electricity, plumbing, telephones, roads and other transportation facilities. The cost of bringing these services to them is substantially higher than to other groups because they are scattered thinly throughout the rural and remote sections of the country. Access to sophisticated services such as employment counselling and placement, child and family services and recreation, is even more limited for many of them, and in some areas not available at all.[43]

3. Native culture

Certain aspects of Native culture that relate directly to legal services and the judicial system must be mentioned. The diversity of that culture is astounding: there are eleven linguistic groups and seven major cultural areas.

The Native People traditionally lived off the land and the sea and their language reflects this relationship by its emphasis on descriptive words rather than abstract ideas.[44] This concrete approach to reality was, of course, also reflected in their approach to law. Law was concerned with right and wrong behaviour and compensating the victims of the latter. The lack of abstract legal concepts has resulted in difficulty in translating many of the terms and ideas of the judicial system into a Native language. There is no word meaning "guilty" in Inuit and some Indian languages.[45] Yet these languages are not simple, nor is the vocabulary limited.[46]

The traditional form of communication was by word of mouth as many tribal groupings had no written language. This emphasis

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[42] See Schmeiser, *supra,* note 30, 81; *Indians and the Law,* The Canadian Corrections Association (1967), 26.

[43] *Indians and the Law, ibid.,* 17.

[44] D. Jenness, *The Indians of Canada* 6th ed., Information Canada (1972), 24-25.

[45] W.G. Morrow, *Riding Circuit in the Arctic* (1974) 58 Judicature 236, 240; J. Sissons, *Judge of the Far North* (1968), 123.

[46] Jenness, *supra,* note 44, 24-25.

on the oral word rather than the written one is still present today and leads to some difficulty in comprehending the complicated system of written laws and procedures by which the dominant society lives.

In most, but not all, Native societies property was held communally. Fish, game and crops were shared. Guests were always welcome and borrowing was common. Many of the nations of the Pacific Coast developed an elaborate system called the Potlach to promote a sharing of even personal goods. These practices completely conflicted with the values brought to the new world by the Europeans. Trespass and theft were important concepts to them while Native People regarded need as the determinative factor and did not perceive a taking as a theft or an entry as a trespass.

Many of the cultural and linguistic distinctions between different tribes have been obliterated by the presence of the dominant society.[47] Legislation has been specifically enacted in some instances to destroy certain aspects of native culture. For example, the Potlach laws made the traditional Potlach practice of sharing goods illegal.[48] All tribes have been treated on the basis of patrilineal descendency although many Native People used a matrilineal system.[49] There has been an attempt to replace Native religions and cultures with Christianity and European values.[50] Traditional means of survival have been rendered impossible by the reserve system and the prevalence of modern technology. Misunderstanding and conflict are inevitable given the historical, cultural and linguistic circumstances that have surrounded Native and non-Native relations.

II. NATIVE PEOPLE IN THE LEGAL SYSTEM

1. Criminal law

The conflicts between Native People and the Canadian legal system are unfortunately far too apparent, particularly in criminal law. The presence of male Natives in correctional facilities is as high as 6 times greater than their proportional representation in Canadian

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[47] Frideres, *supra,* note 9, 13.

[48] Waubageshig, "The Comfortable Crisis" in Waubageshig (ed.), *The Only Good Indian* (1970), 80-81.

[49] Jenness, *supra,* note 44, 147; *Indian Act, supra,* note 1, ss.11(1)(c),(d); 12(1)(b), 109(1).

[50] Frideres, *supra,* note 9, 31.

society.[51] The situation of the Native woman is even worse. Schmeiser has discovered that approximately 90% of the female prison population in Saskatchewan is composed of Native women.[52] Is it possible that Native People simply commit more crimes? Such a conclusion would be both shortsighted and misinformed.

Schmeiser, in his study, found that Natives were involved in much less serious crimes than other offenders, such as breaches of provincial liquor and vehicle registration statutes. Alcohol was a major contributor to Native crime, directly or indirectly. Not only was the average length of sentence served by a Native offender less than that of the non-Native, but the sentences were often served for non-payment of fines.[53] A recent study by the British Columbia Native Indian and Metis Education Club confirms Schmeiser's conclusions. This study indicates that the average sentence of Native offenders in the federal institutions in British Columbia is less than that imposed on non-Native offenders, yet the overwhelming majority of the Native People are placed in maximum security and remain there throughout their prison term.[54]

The effects of this experience with the judicial system go beyond even the normal repercussions, social stigma or difficulty in obtaining employment. There are hidden costs for Native People which include higher recidivism rates.[55] Native People often live in remote areas not served by public transit. Appearing in court can be very costly: the Canadian Civil Liberties Association recently uncovered a number of cases where people have had to pay as much as $80.00 in taxi fares just to appear in the nearest criminal court.[56] Correctional facilities, like the courts, are often geographically limited to the more populated areas. An offender in such an institution is cut off from the community in which he or she resides, a situation which promotes family instability.

It must also be remembered that the life expectancy of Native People is much lower than that enjoyed by the rest of society. This is an aspect considered by the Northwest Territories Supreme Court in its sentencing policy, whereby it generally imposes shorter senten-

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[51] Table A, *supra*, "Demographic and Economic Background".

[52] Schmeiser, *supra*, note 30, 81.

[53] *Ibid.*

[54] British Columbia Native Indian and Metis Education Club, *Columbia Penetentiary: B.C. Native Brotherhood Briefing Paper*, presented to Ministry of the Solicitor General, February 1975, 3 (unpublished).

[55] Schmeiser, *supra*, note 30, 81.

[56] *Submission to the Task Force on Legal Aid*, May 1974 (unpublished).

ces on Indian offenders, and even shorter ones on Inuit. This is done in an attempt to relate the length of the sentence to the expected life span of the offender in order to minimize any special harshness, due only to the race of the accused.[57]

2. Family law

The conflict between Native People and the law does not only arise in the criminal justice system. It also occurs far too frequently under child welfare legislation. The Laing Survey, *Indians and the Law*, noted with particular concern that there were many Indian children in foster care:

> The legal rights of parents concerning their own children appeared to be regarded too casually by the Indian Affairs Branch and by other agencies. Indians people are, for the most part, totally unaware of their rights and responsibilities under child welfare legislation, and in many cases, have become apathetic to the point where some do not even bother to attend court hearings involving the custody of their own children.[58]

Eight years later the situation is even worse. The Tenth Report of the Commission on Family and Children's Law of British Columbia[59] devotes considerable attention to this problem. The Commission discovered that there had been no set policy regarding the apprehension of Indian children in that province until 1955. In the last 20 years the number of Indian children in care has jumped from 29 to 2,825. Almost 40% of all children in the care of the Superintendent of Child Welfare of British Columbia are of Indian ancestry.[60]

The high proportion of Indian children under foster parent care does not necessarily reflect abuse or neglect on the part of their Indian parents. "[C]hildren are taken into foster care through court orders simply because social workers feel they will give the children a better opportunity off the reservation."[61]

3. Causes

What are the underlying causes of the conflicts that are reflected daily in the family and criminal courts?

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[57] Morrow and Sissons, *supra*, note 45.

[58] *Indians and the Law, supra*, note 46, 18.

[59] The Royal Commission on Family and Children's Law, Tenth Report, *Native Families and the Law*, Vancouver, May 1975.

[60] *Ibid.*, 5. These figures do not include the number of Native children that have been adopted by non-Native families.

[61] *Ibid.*, 5-6.

Undoubtedly, the lack of respect for the existing criminal law system has historical roots:

> In specific terms, what the Indian people regard as the failure of successive governments to live up to the terms and spirit of the original Treaties is, in the eyes of most Indian people interviewed, a stumbling block to their acceptance of the white man's law in its widest terms.[62]

As well, the Native People are the victims of the jurisdictional disputes between the federal and provincial governments, especially in the area of health and welfare, adding to their confusion and frustration.

The resulting gap in services exacerbates the present social disintegration which is the source of most of the legal ills of the Native People.

(a) *Family instability*

Native People are still required to leave home for part or all of their education in many places in Canada. In 1974-75, 36,725 registered Indian children were enrolled in provincial schools.[63] Many of these students had to be boarded with other families because the school was too far from their home reserve.[64] Some of the reserve-based schools, in which 37,614 Indian children were enrolled in 1974-75,[65] are also residential schools. The children from the more isolated reserves are housed in these institutional settings with little or no contact with their families for extended periods of time:

> It was the unanimous opinion of field staff that these frequent and lengthy separations from the family setting contributed substantially to the incidence of familly breakdown in subsequent years, and that the roots of deviant behaviour, including anti-social acts, might be traced to lack of stable family environment during childhood years.[66]

The Sanders Report has noted a similar devastating effect that urban life has upon Native families, disrupting traditional bonds and relationships and thus increasing the instances of homeless children.[67]

(b) *Lack of knowledge about the legal system*

The general lack of knowledge and understanding of the legal system by Native People cannot be over emphasized. Many Native

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[62] *Indians and the Law, supra,* note 42, 19.
[63] *Annual Report 1974-1975, supra,* note 28, 32.
[64] *Native Families and the Law, supra,* note 59, 52-53.
[65] *Annual Report 1974-1975, supra,* note 28, 32.
[66] *Supra,* note 42, 18.
[67] *Native Families and the Law, supra,* note 59, 4.

People perceive the legal system as an enemy since their only contact with this system has been as a defendant in a criminal or child apprehension action. The civil law is largely unknown. The possibility of suing a landlord, a dishonest merchant, a welfare officer or the government is never considered. The problem extends beyond the lack of legal information. The procedures involved in seeking out available services are "alien to traditional native ways of dealing with life".[68] This can lead to tragic consequences and misunderstandings on the part of the white professional:

> Thus native parents who have had their children taken into care may not make persistent demands for the return of the children or continued contact with them. This can easily be misinterpreted as constituting abandonment, and reinforces whatever negative images were formed about the parents initially. In turn this can reinforce the native sense of futility in making any impact on decisions made by white social workers and white judicial officers.[69]

The adversary system is at odds with the traditional forms of dispute resolution practised by many Native groups.[70] As opposed to the common law belief in punishment, compensation for the victim is their key philosophy: the debt is owed to the individual and not to society in property-related actions or criminal offences.[71] The imposition of the European legal system has tended to deny the validity of traditional Native practices. This has begun to change recently in the Northwest Territories where customary adoptions and marriages have been recognized.[72] The Family and Children's Law Commission of British Columbia has recommended such legal recognition of customary adoptions.[73]

Little has been done to explain this "foreign" legal system to the original inhabitants of this land. The assumption underlying our legal system is that all people do know, or should know, the law. This assumption may be justifiable in a society where everyone has some basic understanding of how the legal system functions. It may not be justifiable when dealing with Native People who do not share a common legal philosophy and value system.

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[68] Quoted in *Native Families and the Law, supra,* note 59, 16, from M. Jackson and B. Morse, "Summary of Prince George Native People's Conference" (1974) (unpublished).

[69] *Ibid.*

[70] Jenness, *supra,* note 46, 125.

[71] *Ibid.*

[72] Morrow and Sissons, *supra,* note 45.

[73] *Native Families and the Law, supra,* note 59, 40.

(c) *Isolation from the legal system*

The Native People have been isolated geographically, culturally, socially, and ideologically from the dominant legal system. Numerous studies over the last ten years have demonstrated the lack of knowledge and contact between lawyers and the poor.[74] I would argue that this is even more true of the Native People of Canada.[75] The likelihood of knowing a lawyer socially or having one as a relative is quite small when there is only one Indian judge[76] and a handful of Indian lawyers in all of Canada.

The legal profession could play a valuable role in the process of educating Native People to know and assert their legal rights, remedies and responsibilities. Bands have frequently been seriously disadvantaged through poor negotiations and contracts with either Provincial or Federal governments or with private interests.[77] Neither the Department of Justice nor the Department of Indian Affairs and Northern Development has recognized the responsibility to provide independent legal advice to band councils, even though some bands have been involved in major economic development projects, surrenders of reserve land, or pursuit of their aboriginal or treaty rights.

(d) *Economic welfare of Native People*

The Native People of Canada are economically the poorest group in Canadian society. They have the lowest average education, the poorest quality housing, the lowest income, and the shortest life span. This situation can not be conducive to social harmony nor to an appreciation and acceptance of the legal system.

III. INTEGRATED LEGAL SERVICES IN CANADA

There is presently a wide range of methods being utilized in Canada to deliver legal services to people who could not otherwise afford them. The initial impetus for these programmes flowed from a sense of charity and public obligation on the part of the lawyers who

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[74] *E.g.*, P. Wald, *Law & Poverty* (1965); C. Messier, *In the Hands of the Law*, Montreal, Commission des services juridiques (1975).

[75] H. Savage, *Report on the Delivery of Legal Services to Native Population in Ontario*, July 1974, 2 (unpublished).

[76] Mr Justice Alfred Scow of the Provincial Court of British Columbia.

[77] Private communication by the author with legal counsel to Native groups in Canada.

controlled a monopoly over legal services. These privately motivated services have existed for some time on a very limited scale, and have now generally been replaced by government funded programmes.

It was not really until 1967 that a scheme of any magnitude was developed in Canada.[78] The first legal aid plan in Canada was established in Ontario, using provincial funds to pay the costs of individual lawyers who rendered their services to eligible recipients. The Federal government later assumed part of the expense under a cost-sharing agreement with each province.[79]

The basic concept was borrowed from the famous experimental judicare programme that was established in Wisconsin.[80] The person who qualifies under the eligibility criteria can choose any lawyer that he wishes, provided the lawyer is willing to accept a reduced fee under the legal aid tariff. The organized Bar argues that this freedom of choice is also an essential aspect of the system. Each plan places some limitations as to who can qualify as a proper recipient and on what types of litigation or services can be sought.[81] Thus the scheme maintains the traditional lawyer-client relationship, except that the client does not pay the actual fee. He cannot then exercise the control that normally flows with the employer-employee relationship.

The judicare approach has been the primary delivery mechanism of legal services to disadvantaged persons in Canada. Some of its flaws have led to the creation of clinics connected with the law schools which were initially staffed entirely on a volunteer basis. These clinics used law students as the primary deliverers of legal assistance with a lawyer present to fill a supervisory role. The service offered was usually one of legal advice or referral,[82] however these clinics have slowly been expanded in nature. Some law schools now grant students academic credit for this work. These clinics are often supervised on a permanent basis by a member of the faculty or a staff lawyer. The largest of these programmes, Park-

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[78] I. Cowie, *The Delivery of Legal Aid Services in Canada,* Information Canada (1974).

[79] *Ibid.*

[80] S.J. Brakel, *Wisconsin Judicare: A Preliminary Appraisal* (1972).

[81] L. Taman, *The Legal Services Controversy: an Examination of the Evidence,* a study prepared for the Office of the National Council of Welfare, September 1971.

[82] J. Atrens, *Experimental Legal Services* (1970) 5 U.B.C. L.R. 91.

dale Community Legal Services in Toronto has 6 lawyers, several legal service workers, and 20 students per semester.[83]

Another variation on the judicare model has been the neighbourhood law centre. These centres utilize the services of full-time staff lawyers to dispense legal advice and legal services and many also employ legal service workers or paralegals. There are two basic types, the first of which could be called the "neighbourhood legal aid office". It is located in an area that would have a number of potential clients. The staff retains the traditional lawyer-client relationship with its client community and provides a high quality service by dispensing legal advice and representing the eligible poor in litigation. It may even assist community groups with their legal problems. It is, however an outside agency that is located within the community. It is controlled by a regional or provincial legal aid society or a legal services commission. All major decisions as to policy, eligibility, location, and distribution of activity are made by officials appointed by the Provincial government or the law society of the province rather than by the client population.

The second type is the "community law centre". It is similar to the first in that it also provides a similar high-quality legal service to the community. However this type of operation serves its community in a way similar to that in which a lawyer represents his corporate client. Representations are made on behalf of the community or community groups before the town council, planning bodies, and government agencies. Lobbying for desired legislation, administrative changes or funding is an essential part of the activity of the centre.[84] Test case litigation that is of importance to the community, and not merely of academic interest to the lawyers, is launched, as are public legal education programmes. The centre is a non-profit society managed by a board of directors that represents the community, although the government and the law society may have a presence on the board. Through this involvement the community becomes activated to make progress in other areas.

Economic development is a major concern of the centre and is promoted through the organization of cooperatives and community action groups. Other vital social services are improved or obtained for the community. The philosophy behind the community law centre

[83] Personal communication by the author with members of the staff of Parkdale Community Legal Services.

[84] D. Kirkpatrick, "Community Development", in *Conference on Legal Aid: Reports and Proceedings,* Ottawa: Canadian Council on Social Development (1975), 107.

is one of social improvement and change. It does not merely service an individual's immediate legal problems, as it attempts to remove the source of those problems as well.[85]

The neighbourhood legal aid office has been the more popular of the two approaches to delivery of legal services. Quebec, Manitoba and Saskatchewan have opted for this approach as a major complement to judicare.[86] The Osler Task Force in Ontario has followed the same perspective in its recommendations,[87] and the Legal Aid Society of British Columbia also uses this system as a part of its judicare plan.[88] There are, however some places where the community law centre has been established. Several such centres are in operation in Quebec, and British Columbia has also created sixteen within the last year throughout the province.[89]

IV. DEFICIENCIES IN THE INTEGRATED LEGAL SERVICES APPROACH FOR NATIVE PEOPLE

There is a major drawback in the existing systems of delivery of legal services: the underlying philosophy of integration. That is, no special attention is paid towards any one segment of the potential client population and no special efforts are made towards increasing access to the service by one group.

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[85] *Ibid.*

[86] Cowie, *supra,* note 78; Savage, *supra,* note 75.

[87] *Report of the Task Force on Legal Aid: Part I,* Toronto: Queen's Printer (1974), 27, 31-32, 54-55 (hereinafter referred to as the Osler Task Force).

[88] Cowie, *supra,* note 78. This approach is used in a more limited sense by this group.

[89] Several experimental projects have been developed in North America, including Toronto, by established law firms through which a neighbourhood law office was opened in a disadvantaged area. This branch office would be staffed by members of the firm who could draw on the entire firm for resources and expertise. The offices generally provided free legal advice and accepted many civil and criminal legal aid cases. Although the offices were not expected to return a profit to the firm, these projects have all been abandoned because of the financial losses incurred: H.D. Pitch, *Poverty Law and the Private Law Firm: An Experiment in Judicare* (1974) 22 Chitty's L.J. 60. Public legal education programmes have also been created in several urban centres in Canada using the volunteer labour of lawyers and law professors. The function has been to educate the general public about various areas of the law through free evening lectures: Community Law Program, *A Directory of Community Legal Education Programs in Canada,* Windsor, Ontario: University of Windsor, Faculty of Law (1975).

The liberalist tradition deeming "separate but equal" unjust, and integration good, continues to persist. But people are not in an equal position in society, and integration may precipitate assimilation and absorption. The argument in favour of integration has its roots in the discrimination faced by black people, Jewish people, Chinese and other minority groups. These people were specifically *excluded* from the dominant society which they wished to join. The Native People, on the other hand, have faced repeated efforts to be forcibly *included* in this society against their will.[90]

Native People feel excluded from the operational control of the integrated legal services system. The Law Society of Upper Canada recently stated:

> Indians represent one example of a group who demonstrate an abnormal reticence toward assisted legal services offered in a conventional manner and require some special consideration.[91]

This "reticence" is in part due to the urban focus maintained by the predominant delivery mechanisms in Canada today. The judicare schemes rely on lawyers in private practice who congregate largely in urban areas, to be the primary deliverers of legal services. The overwhelming majority of Native People live in rural parts of Canada.[92] This isolation from the deliverers of legal services inevitably creates hardships.[93]

Although there are no known statistics concerning the utilization of legal aid by Native People, it appears that Native People do not use the system as much as they should, or could. This is most noticeable in the area of civil litigation, where such coverage is included within a legal aid plan.[94] One lawyer, who has acted as the duty counsel in the James Bay area of Ontario since the inception of legal aid in that province, has stated:

> I do not know of any civil litigation coming from the area, and I really wouldn't know how to handle it if it were available. The distances are just too great, and the cost of service of documents is prohibitive. There is not even a Justice of the Peace or Commissioner to my knowledge any place

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[90] M. P. Gross, *Reckoning for Legal Services: A Case Study of Legal Assistance in Indian Education* (1973) 49 Notre Dame Law. 78, 98.

[91] Legal Aid Committee of the Law Society of Upper Canada, *Community Legal Services; A Subcommittee Report,* August 1972, 77.

[92] *Annual Report 1973-1974, supra,* note 16. Stanbury, *supra,* note 27, 2, notes that 69.3% of Indians in 1971 were classified as rural compared with only 23.9% of the total population.

[93] Savage, *supra,* note 75; D. E. Sanders, *A Legal Services Program for Indian Communities in Canada,* (unpublished).

[94] Saskatchewan Legal Aid Committee, *Final Report,* presented to the Attorney-General of Saskatchewan, March 1973, chapter VI.

> north of Moosonee, so it is impossible to complete the simplest legal documents.[95]

Thus, not only are there few lawyers available in rural areas, but there are no court registries, notaries public, or justices of the peace. To this must be added a general lack of legal information on the part of Native People concerning the civil law.[96] Therefore, divorces are not obtained, social services and benefits are not sought and civil remedies are not pursued. It must also be mentioned that in many areas where there are no legal services, there is no dearth of law enforcement personnel.

This urban orientation of the judicare system is also evident in the location of neighbourhood legal aid offices and community law centres. Until recently, there were no permanent legal services offices in the more rural areas of Canada. Even these few new ventures must service huge geographic areas with limited staffs and minimal transportation allowances. Considering that the Native People are the poorest of the poor, it is unlikely that they can afford the costs of transportation to visit a lawyer for legal advice.[97]

Fortunately, more satisfactory levels of performance can be found in the criminal law coverage of the legal aid plans. Most Native People presently before the criminal courts do receive the services of a legal aid lawyer and/or a courtworker. Criminal courtworker programmes have been developed, as have duty counsel programmes which means that a Native accused is approached by either a courtworker or a duty counsel before entering a plea.[98] It should be noted that this is not always true in every province as there still are many Native People who plead guilty without understanding the gravity of their situation and without the benefit of independent legal advice. Yet the progress over the past eight years has been encouraging.

Another reason for this progress in criminal law is that the accused is physically taken before the court. The accused does not have to discover a legal problem and then seek legal advice: the entire system including, hopefully, a lawyer, is thrust upon him. Many Native offenders are arrested in more urban areas to begin

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[95] Letter of J.D. Bernstein of July 23, 1973 in *Report on the Delivery of Legal Services to Native Population in Ontario* (1974), 5, Appendix H.

[96] Savage, *supra*, note 75, Appendix J, brief of Ontario Federation of Indian Friendship Centres.

[97] Canadian Civil Liberties Association, *Submission to the Task Force on Legal Aid*, May 1974.

[98] Cowie, *supra*, note 78.

with. They are, therefore, easier to "service" under a judicare system.

There is a greater quantity of legal services for Native People in the criminal law sphere but rural inhabitants still will not know or have much contact with the urban lawyer prior to trial. The fly-in court system used in Northern Ontario is a good example of this. The prosecutor, the judge, and the duty counsel all arrive and depart together leaving little time for pre-trial communication between lawyer and client.[99] The defendant may also be left somewhat sceptical concerning the impartiality of counsel.

This dilemma is exacerbated by a language barrier. Many Native People still do not speak English at all or only with difficulty. One report estimates that over one third of the Native population of Ontario, north of Kenora, speak only Ojibway, Cree or Inuit dialects.[100] This inevitably leads to confusion, misunderstanding and fear of the judicial system and its officers. The shortage of competent interpreters is a severe problem facing the courts, the accused and the lawyers in pre-trial and trial communications.[101] The fact that much of our law and our administrative requirements do not translate conceptually into these native languages[102] compounds the problem.

It is interesting to note that these barriers of distance, language, and culture still exist and are being discussed in much the same manner by the Sub-committee on Community Legal Services of the Law Society of Upper Canada[103] as they were in the Laing Report.[104] Eight years of legal aid has made little progress against these barriers. In fact, the Sub-committee admitted that the "presence" of legal aid, apart from duty counsel, was non-existent in most of Northern Ontario.

The relative paucity of major litigation concerning the *Indian Act*, treaty rights, hunting and fishing rights, aboriginal title claims, the corporate powers of the band, customary adoptions, and breach of trust actions against the Department of Indian Affairs and Northern Development can be explained in part by the general lack of legal

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99 Savage, *supra*, note 96, 4.

100 Sub-committee on Community Legal Services in Ontario, Law Society of Upper Canada, Supplementary Report, *Aid to Persons in Remote Areas of the Province and in Particular to the Indian and Eskimo Population of Northern Ontario* (1974), 2.

101 *Ibid.*; Savage, *supra*, note 75.

102 *Ibid.*; Sissons and Morrow, *supra*, note 45.

103 *Supra*, note 100, 2.

104 *Supra*, note 42.

knowledge of Native law on the part of most lawyers. Most community clinics in operation have yet to rectify this problem. Neither those clinics nor the judicare system will embark on such litigation until they develop an appreciation of Native problems.

The emergence of major Native political organization on the national, provincial, and local levels has created a special need for legal services. These organizations need legal representation in the same fashion as other legal entities. They also need the expertise of lawyers as consultants in negotiations with governments and as lobbyists for legislative reform.[105] The existing legal services systems cannot respond to their needs.[106] Either lawyers are prohibited from representing groups, or they do not have the time, interest, or expertise.

In addition, many bands are realizing that economic development of reserve land may be one way to revitalize their economy. Major projects are being undertaken without any legal advice whatsoever. Even if a lawyer were available, it is unlikely that he would be aware of special tax provisions, restrictions on band management of funds, limitations placed on dealing with reserve land or other complex issues flowing from the unique constitutional position of status Indians.[107]

Since the existing programmes are generally managed by non-Native lawyers from urban centres, there is little impetus to transform the system to better serve the needs of Native clients. The geographic locations selected for the offices, the under-usage by Native People, the lack of an outreach programme, the lack of preventive-educational programmes, the lack of legal expertise in certain areas, the language and cultural barriers, and the emphasis on professionalism and the independence of the lawyer are a result of the type of people who currently populate the legal services systems. It is in no way unrealistic to assume that if Native People had either the money or the power, many, if not all, of these problems would be dealt with and hopefully eradicated. Through money or power, or both, they would gain access to the legal system.

Gaining access is one problem, control is another:

> Paternalism has been the dominant characteristic of delivery of services to Native People in Canada. History has not indicated that this approach

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[105] Sanders, *supra*, note 93, 2.

[106] *Ibid.*

[107] *Ibid.*, 3-4; J.P. Icenogle, *Economic Development of Indian Reservations: Increasing Tribal Participation, Limiting Federal Control* (1973) 48 Tul.L.R. 649.

> is successful in terms of preserving or facilitating self-determination on the part of Native People. Paternalism fosters dependency relationships and thereby destroys any real equality of bargaining power between Indian people and the government. Native Peoples must move from being merely *recipients* of social services to being *participants* in the delivery process, and ultimately to being the sole distributors and administrators of these social services.[108]

This transformation from passive recipient to active participant is impeded in part by the present legal services framework and the lack of awareness on the part of the legal profession.

V. NATIVE LEGAL SERVICES PROGRAMMES

1. United States

Until 10 years ago there was virtually no legal representation for any Indians, Indian tribes, or Inuit in the United States. Prior to that time there had been some representation for a few wealthy bands or in claims before the Indian Claims Commission in regard to aboriginal rights or treaty violations.[109] This suddenly changed when the Office of Economic Opportunity established a Legal Services Program to oversee all federal funding to legal services projects across the country.

In 1966 the first Indian legal services programmes were funded. Over the next 9 years, a number of programmes were established throughout the country varying considerably in size, purpose and impact. They can be generally categorized as: (1) reservation-based projects; (2) state-wide projects serving only Indians; (3) state legal aid programmes that pay special attention to Native People; and (4) national projects.

There are no accurate reports readily available concerning the number and size of the various reservation-based legal services programmes. The author is aware of 9 such projects, varying in size from one lawyer and a secretary up to a staff of over 100 with budgets ranging from $25,000 to over $1,000,000 annually.[110] Despite their

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[108] J. McFadyen and B. Morse, *A Proposal for a Task Force on Delivery of Legal Services to Native People of B.C.*, Vancouver (1974) (unpublished).

[109] D. Getches, *Difficult Beginnings for Indian Legal Services* (1972) 30 N.L.A.D.A. Briefcase 181.

[110] *Ibid.* See M. E. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession* (1969) Law and Social Order 161, 168; J. Richards, *Providing Legal Services to Montana Indians* (1968) 27 L.A. Briefcase 62; S. Cohn and A. Hippler, *Conciliation and Arbitration in the Native Village and*

differences, the projects have tried to emphasize local control. The larger projects have been able to create their own law reform units with several full-time staff attorneys to launch test cases, prepare briefs, assist in negotiations with business and government, and improve the procedural and substantive tribal law.[111] The avowed purpose of these various programmes, as Robert Swan maintains, is to provide the possibility of choice:

> The ultimate goal of the reservation legal services program must be to strengthen the Indian's autonomy while enabling him to preserve his sense of community. By assisting the Indian in developing the resources of his reservation, while concurrently providing him with the capability to interact on an equal basis with members of Anglo society, the OEO [Office of Equal Opportunities] lawyer can perform perhaps his most significant service for the members of the reservation community. With this assistance the reservation Indian will then be afforded a meaningful choice between the two options which control his destiny: assimilation into Anglo society or development of progressive reservation communities.[112]

There are criticisms however. The experts are generally non-Indians who receive more money and status than do the Native lay advocates.[113] The relationship between the lawyer and the client is the traditional one since the client comes to the lawyer with a problem which the lawyer solves on his own by making all necessary decisions himself.[114]

The only state-wide programme that specifically addresses the legal problems of Native People is California Indian Legal Services, or CILS. This organization has existed as a distinct entity since 1968 to handle the non-criminal needs of rural Indians in the state.[115] Its staff of approximately 12 lawyers is spread throughout the state primarily to act as counsel in litigation of either a routine or precedent-setting nature. CILS is extremely well-respected in the United States for the quantity and quality of services it has provided.[116]

Urban Ghetto (1974) 58 Judicature 228, 229; Native Programmes Division, Legal Services Commission of British Columbia, *Legal Services for Native Peoples of North America,* Vancouver (1976) (unpublished).

111 R.C. Swan, *Indian Legal Services Programs: The Key to Red Power?* (1970) 12 Ariz. L.R. 594, 599-600.

112 *Ibid.,* 626.

113 Gross, *supra,* note 90, 82-83.

114 *Ibid.*

115 CILS is expressly prohibited from assisting Indians when they live in urban areas or in regard to criminal cases. (Personal communication by the author with Bruce Greene, former executive director of CILS).

116 *Ibid.*

The Board of Trustees of CILS is composed of representatives of the state Bar and selected Indian people. Although the latter are in the majority, they have been unable to exercise any practical control due to the general ineffectiveness of the Board as a decision-making body. The lack of unity within the Indian population in California has created a climate where "there is no community or political leadership to control or direct the program".[117]

Most states provide some kind of legal services system ranging from judicare, to public defenders, to neighbourhood law offices. Native People can use these services in the same manner as anyone else, if they meet the eligibility criteria. Some of these programmes, due to the greater number of Native People living in the state, have a fairly high percentage of Native clients. However, it appears that only two states have responded to the challenge of delivering legal services to Native People in any concrete fashion, namely, Montana and Alaska.

There is a wide variety of national programmes relating to Native People and the law in the United States. Several different organizations have been created to monitor federal legislative action and to promote legal research on important aspects of Indian law.[118] Some of these organizations have also filled the important role of providing financial assistance to young Indian lawyers[119] or to individuals or tribes engaged in litigation with potentially widespread ramifications.[120] The only national organization that delivers any form of legal services on a regular basis is the Native American Rights Fund, or NARF. NARF's major purpose has been as a resource and research center for tribes and lawyers in regard to test cases.

The existence of these programmes, even with their faults, has led to a dramatic upsurge of interest in Indian law by both Indians and non-Indians in the United States along with a tremendous improvement in the quantity and quality of legal services available to the American Native People.

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117 Sanders, *supra*, note 93, 17.

118 *E.g.*, The Institute for the Development of Indian Law; the Indian Legal Information Development Service; the Office of Indian Law; the National Indian Justice Planning Association; and the National American Indian Court Judges Association. These organizations are referred to by Sanders, *supra*, note 93, 8-12.

119 The American Indian Lawyer Training Program does this as well as organizing intern programmes for Indian law students, arranging training conferences and publishing a periodical.

120 The Native American Legal Defense and Education Fund, established by Americans for Indian Opportunity, fulfilled this role among others.

2. Canada

There are no reserve-based legal services programmes in Canada. Unless a band is fortunate enough to be able to afford to retain a lawyer, as, for example, the Squamish band of British Columbia, there are simply no legal services available to the band. The band members are in the same position as all other Native People, that is, forced to rely on legal aid with all its shortcomings.

The only exception to this has been a brief legal aid pilot project conducted by Harvey Savage in 1972 on the Islington reserve, which is 65 miles from Kenora, Ontario.[121] The Legal Aid Plan of Ontario agreed to pay for the costs of Mr Savage spending approxicately one day a week on the reserve as a "special Reserve Duty Counsel". He was then able to devote all of his time to discussing people's problems with them in an informal manner on the reserve and to act on them accordingly.[122] Unfortunately, this project was discontinued.

The national Native organizations (the National Indian Brotherhood, the Native Council of Canada, and the Inuit Tapirisat of Canada) do frequently have a lawyer on staff or on retainer. These lawyers deal with the legal problems of a non-profit society and occasionally write briefs for presentation to a government, or intervene in the occasional case of interest to the organizations. The Canadian Association in Support of Native People (formerly called the Indian-Eskimo Association) has some lawyers as members. The organization does not provide legal services, but it does promote legal research concerning Native problems and aboriginal claims.[123] It also makes representations to the various governments on behalf of Native People as does the Canadian Civil Liberties Association.[124] This group has attempted to educate Native People about the law through pamphlets,[125] and through a pilot project in the Kenora area which involved the training of several "indigenous ombudsmen" for each reserve.[126]

The Saskatchewan Legal Services Commission has established a programme in Northern Saskatchewan somewhat equivalent to the efforts of the Montana Legal Services Association. The pro-

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[121] Savage, *supra*, note 75, 1, Appendix C.

[122] *Ibid.*, 4-5.

[123] *E.g.*, Cumming and Mickenburg, *supra*, note 19.

[124] *E.g.*, its submission to the Osler Task Force, *supra*, note 87.

[125] *E.g.*, *Indian Life and Canadian Law*, Canadian Civil Liberties Education Trust (1974).

[126] *Ibid.*

gramme involved primarily the opening of a legal services office in La Ronge. The office is staffed with 3 lawyers, an articling student, and several native community legal services workers. This staff must deliver all civil and criminal legal services in the northern part of Saskatchewan as there are no lawyers in private practice in that region.[127] The Carter Report does indicate that expansion of the northern legal services operation would be possible if the caseload so required,[128] but did not address itself to the issues of law reform, public legal education, community development, or community control. It can only be hoped that that outpost will grow and tackle the challenges confronting it.

Manitoba has a northern fly-in programme. A junior lawyer is dispatched into the community a day before the senior counsel and the rest of the court's party arrive. During this one day, the junior attorney has to prepare all criminal cases for trial as well as dispensing summary advice and discovering civil problems in need of a legal remedy.[129] This approach cannot provide a high quality service, let alone promote law reform or increased awareness and understanding of the legal system.

Ontario's major attempt to deliver legal services to Native People has been to use the duty counsel format along with a circuit-court system under the legal aid plan. The presence of duty counsel ensures legal representation for most Native People in the criminal courts. Therefore, all criminal courts, including the ones in the most remote areas of the province which have the highest percentage of Native offenders, are serviced by Ontario's Legal Aid Plan.[130]

The only remaining programme delivering legal services to Native People is also the most important. This is the Native courtworker, or counsellor, or communicator as he or she is also called.[131] Native courtworker programmes are now in existence in 6 provinces: British Columbia, Alberta, Manitoba, Saskatchewan, Ontario and Nova Scotia.[132] The John Howard Society, the Elizabeth Fry Society and the Salvation Army have all operated courtworker programmes in the past that included Native People.

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[127] *Supra,* note 94, 4-18, ch. VIII and ch. VI.

[128] *Ibid.,* 5, ch. VIII.

[129] Savage, *supra,* note 75, Appendix A.

[130] *Supra,* note 100; Savage, *supra,* note 75.

[131] All information on these organizations, unless otherwise indicated, is from personal knowledge of the author.

[132] P. C. Cameron, *Programme Evaluation: Native Court-worker Programme in British Columbia* (1975), 21 (unpublished). The Northwest Territories is in the process of establishing a Native courtworker programme.

The role of the courtworker varies somewhat according to local needs and desires, and also according to the individual involved. Generally, the Native courtworker makes the first contact with the accused shortly after his arrest. The courtworker explains the charge to the accused, the procedure for obtaining bail, and the method of applying for legal aid. The courtworker then assists the accused throughout the entire process. He ensures that the defendant is competently represented by a lawyer who is aware of all of the circumstances and the potential witnesses. He usually helps prepare any pre-sentence reports and he may even act as a probation supervisor or a family counsellor. The Native courtworker, who also assists non-Native offenders, is the vital link between the foreign and frightening legal system and the Native offender. He encourages mutual understanding and fairness while allaying the apprehension of the accused. The cooperation and active support of the judicial system is, of course, essential to his efforts.

The first native courtworker programme in Canada was established in Alberta in 1962 with a total staff of one. This Native-controlled organization now operates with a staff of approximately fifty and an annual budget in excess of $1,000,000. The courtworkers concentrate on either criminal cases or family and juvenile problems after receiving an intensive training programme. Legal Education Seminars have been offered to thousands of Native People over the past few years by each courtworker in his local region, in conjunction with necessary resource people.[133]

The Native courtworker organizations in the other provinces function in basically the same manner as the Native Counselling Society of Alberta. All of them have been growing in size and scope over the past few years,[134] led by the British Columbia Native Courtworkers and Counselling Association.[135] The programmes really only differ in terms of their administrative structure. The Indian friendship centres in Ontario and Saskatchewan operate the courtworker programmes in their provinces as part of their overall approach towards delivering social services. The Manitoba programme is

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[133] Personal communication by the author with Chester Cunningham, executive director of this organization.

[134] The Nova Scotia programme is the smallest with only 4 courtworkers, whereas Manitoba has 14, Saskatchewan has 10, Ontario has 18 and British Columbia has 31: See Cameron, *supra*, note 132, 21; *Report of the Task Force on Legal Aid: Part II*, Ministry of the Attorney General (1975), 5.

[135] See M. C. Bennett, *The Indian Counsellor Project — Help for the Accused* (1973) 15 Can.J.Corr. 1, for a discussion of a prior programme operated by the John Howard Society of British Columbia.

operated in an entirely different manner as the individual court communicators are all civil servants. They, presumably, are recognized more favourably by the other professionals within the judicial system. The courtworker associations are operated as independent native organizations in the remaining provinces. The net result of these programmes has been impressive. Thousands of Native People are receiving legal representation in criminal cases.

It must be recognized that these programmes do suffer the limitations inherent in a piecemeal approach to criminal legal services. The court workers must begin to prevent Native People from appearing in Criminal court, as well as helping them once they get there. Diversionary, educational and fine-option programmes are essential in this regard as is the reallocation of services towards the non-criminal sphere.

The organizations need to realize that law reform is an essential element of any social, legal, or economic change desired by Native People. Legislative lobbying and test-case litigation are presently beyond the means of these programmes, but these are the tools which could be utilized by Native associations to reach their long-term objectives. This orientation requires a dramatic transformation in the position of courtworker, namely a change from second-class assistant to full-fledged participant in the judicial system with the talent and knowledge that is respected by the other participants. This obviously necessitates a considerable change in attitude on the part of the legal profession and the judiciary which is long overdue.

VI. NEW DEVELOPMENTS IN NATIVE LEGAL SERVICES IN CANADA

A variety of major breakthroughs in Native legal services occurred in 1975 in Canada. The National Conference on Native Peoples and the Criminal Justice System was held in Edmonton prior to a Federal-Provincial Ministerial Conference, prompted by "[c]oncern over the jailing of disproportionate numbers of Canada's Native People".[136]

The ministers approved a number of policy initiatives relating to all facets of the judicial system, including community legal services. The Canadian Advisory Council on Native Peoples and the Criminal

[136] Ministry of the Solicitor General, *Native Peoples and Justice*, Information Canada (1975), 3.

Justice System was established to promote consultation between the various governmental ministries and representatives of the Native associations in regard to the implementation of these, and future, policy initiatives.[137] This national council, and its provincial and territorial equivalents, have met on several occasions since the conference, but the progress has not been dramatic.

The following statement of general philosophy was adopted by the ministers as underlying any approach to the problems of Native People within the criminal judicial system:

(1) Native persons should be closely involved in the planning and delivery of services associated with criminal justice and native peoples.
(2) Native communities should have greater responsibility for the delivery of criminal justice services to their people.
(3) All non-native staff in the criminal justice system engaged in providing services to native people should be required to participate in some form of orientation training designed to familiarize them with the special needs and aspirations of native persons.
(4) More native persons must be recruited and trained for service functions throughout the criminal justice system.
(5) The use of native para-professionals must be encouraged throughout the criminal justice system.
(6) In policy planning and program development, emphasis should be placed upon prevention, diversion from the criminal justice system to community resources, the search for further alternatives to imprisonment and the protection of young persons.[138]

It is difficult to discern anything in these guidelines that can be criticized. The only question that remains is will they be followed? The Native People of Canada have received many glowing assurances and promises in the past. What they have received very little of, though, is positive action.

Despite fiscal restraints, some implementation of the various resolutions adopted at this Conference has begun. Several provinces have developed special programmes to recruit Native Royal Canadian Mounted Police constables, while Saskatchewan has trained and appointed Native justices of the peace. British Columbia, with the assistance of the federal Department of Justice, has increased the budget for the Native Courtworkers and Counselling Association of British Columbia by over 100% in one year.

The Native Legal Task Force was jointly created by the Native Courtworkers, the Union of British Columbia Indian Chiefs, the British Columbia Association of Non-Status Indians, and the At-

[137] *Ibid.*, 59.
[138] *Ibid.*, 38.

torney-General's Department. The mandate of the Task Force was to investigate the overall problems of Native People in the judicial system. Extensive fact-finding tours were taken to promote a discussion throughout the province between the local non-Native professionals and the Native community concerning the causes and solutions of their problems. The result of this process has been the establishment of a Native Programmes Division within the new provincial Legal Services Commission to implement the recommendations of the Task Force. A province-wide, toll-free, legal information telephone line was in operation under the control of the Native courtworkers from September 1975 to April 1976. Unfortunately, a change in leadership has caused abandonment of this programme. Three provincially-funded community law centres, under the direct control of local Native residents, have come into existence within the last year. These programmes operate in addition to the provincial legal aid (judicare) scheme, therefore the bulk of the caseload will be civil problems. The centres are similar in nature to many of the Native legal services projects in the United States in that a staff of lawyers and legal services workers will respond to individual and group problems by using all conceivable methods: litigation, conciliation, legal education, economic development and law reform.

In January 1975, the College of Law of the University of Saskatchewan received a grant of $400,000 from the Donner Foundation to establish a multi-disciplinary Native law centre. The development of a major library on Native law and Native People, in conjunction with the centre, should promote essential research in Native law.

A community law centre in Frobisher Bay has also been funded by the Federal government. This centre employs a staff lawyer and several Native legal services workers to handle the civil problems of that area and to develop educational programmes.

These are all good beginnings that should be nurtured and supported. They are, though, only beginnings.

VII. THE DEVELOPMENT OF NATIVE LEGAL SERVICES

If the integrated delivery system continues as the sole delivery mechanism serving the legal needs of Native People, its deficiencies will counteract an increased utilization of legal services:

> [U]nless the proposed program is undertaken with other than a centralist, paternalistic administrative approach its impact and success will be limited, as have been other government-funded service programs in the

> past. Unless a community focus, including ongoing input and control, is built into delivery systems the Indian People will continue to be recipients and not participants. Because one of the key concerns is utilization of the service by people who have, over time, grown mistrusful and apprehensive about governments, services and the non-Indian social system, the primary focus on planning and implementation must also be on utilization. It is suggested that community participation at all levels of the program is a step in the right direction.[139]

It must be remembered that Native People are not in a position equivalent to other minority or oppressed groups. There is a dis- the original citizens of this land, who suffered the effects of colonization for several hundred years, as no other group in Canada has. ation for several hundred years, as no other group in Canada has. The statistics on child apprehension rates and imprisonment rates indicate that they are still suffering. The legal system has failed in relation to Native People more than it has to any other group in Canadian society.

The question remains: Why offer any kind of legal services to Native People? If the reason is because of a feeling of guilt or a sense of charity, then the assistance is doomed to be mere tokenism:

> This aid has suffered from a psychological infirmity common to many interracial, interclass, intercultural gifts: the infirmity inherent when masters do something for slaves.
>
> Social reform caunot succeed in that fashion ... .[140]

The dependency on non-Natives, forcibly developed among Native People over the last 150 years, is maintained and even promoted under our present legal services system.

Lawyers must talk in terms of Native "control", and not just Native "involvement", if they wish to transgress the "Salvation Army approach to technical assistance for the poor".[140a] Lawyers must learn from the American experience and realize that simply representing Native People in the criminal and civil courts will not change their social or economic position. Extending to them control over a judicare scheme or the management of a grossly underfunded, overworked, community, law centre is not enough. The legal profession must go further than merely transferring to Native People administrative regulation of the funds along with majority representation on the local board, or simply providing one paralegal to a band. This approach occurred in many of the projects in the United States, and their impact was not as great as might otherwise have been expected.

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[139] McFadyen and Morse, *supra*, note 108, 13.
[140] Gross, *supra*, note 90, 80.
[140a] *Ibid.*, 93.

Gross discerned the existence of professional elitism being exercised by the lawyers in these projects. They operated under the assumption that only someone with legal knowledge could understand the legal issues involved, let alone solve them; a result of the traditional lawyer-client relationship in which, if the lawyer does not actually make the decision, he predetermines his client's choice.[141] The lawyers did not realize that their goal should have been to assist the Native community in developing its own abilities to solve its problems and concerns on a permanent basis.[142] Unfortunately,

> [p]overty lawyers, without realizing the implications of their elitism, unwittingly became part of the vast bureaucracy charged with the care and tending of the poor and lacking in any accountability to the poor.[142a]

Even the treasured domain of progressive lawyers, law reform and test-case litigation, is fraught with potential dangers and misapprehensions. Lawyers often believe that breaking new legal ground will invariably achieve substantial benefits for their client population. However, Michael Gross argues that from his experiences he has determined that "law reform in its usual meaning — 'significant' lawsuits — cannot reach the subtle relationships between the oppressed and the dominant society which constitute the heart of the problem".[143] This approach to dispute resolution can remove the initiative from the community with the problem. Therefore, even if the lawsuit is triumphant, it is a win for the lawyers rather than the community, since the latter did not create the victory.

How then can these problems be avoided? The most promising approach is to have an active Native community in control of both the board of directors and the daily administration of a community law centre comprised of lawyers and legal services workers. It is preferable that a particular Native community initiate the community law centre entirely on its own. This necessarily implies that it possesses sufficient funds, and that it has the necessary skills to establish and define such a project. Unfortunately, this is likely in only a small percentage of the Native communities in Canada at the present time as they generally lack both financial and legal resources.

The most probable procedure is for the initiative to come from an outside agency, such as a legal services commission. This obviously has its hazards. The outside agency can choose to parachute into

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[141] *Ibid.*, 97.

[142] *Ibid.*, 94-95.

[142a] E. and J. Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law* (1970) 79 Yale L.J. 1005, 1041.

[143] *Ibid.*, 94.

the Native community and simply open an office. This route is not to be recommended, although it has been occasionally successful. It can create a climate of antagonism and minimize the possibility of community control. Alternatively, the agency can perceive its own role as that of a resource person who provides necessary expertise to the decision-maker. The local Native community should initially be granted an assurance of adequate funding to overcome their properly held scepticism.[144] The range of options in legal services programmes should be clearly delineated to the native leadership. The method of implementation and its pace should be determined by the local Native community, if they are really to control the project and view it as their own. This does not mean that the agency should refrain from offering any assistance. On the contrary, it should inform the community that it is ready, willing and able to provide its expertise on a consultative basis as requested by the Native People.

If any non-Native lawyers are to be involved on the staff of the project it is recommended that the Native legal service workers be hired before the lawyers commence working in the community. Both lawyer and legal service worker should undergo a joint orientation programme before the first case is accepted. The lawyers will educate the legal service workers about the law, while they in turn will be educated about the culture, history, values, problems, and aspirations of the people of the client-community. This mutual exchange of information will form the basis of their future relationship.

It is most appropriate initially to place the major emphasis on tackling immediate problems of an individual nature. This emphasis should slowly be shifted towards the legal, social, and economic problems of the community as a whole. Individual problems should still be handled, but they should not remain the sole preoccupation of the staff. The backlog of untouched legal problems should disappear, providing the staff with more time to confront these community issues.

It must be perfectly clear, however, that this transition occurs according to the wishes of the predominantly Native board of directors, and not simply due to the influence of the staff lawyers. The lawyers must also realize that test-case litigation is not the only avenue to be utilized in confronting social, legal and economic injustices. The effects of assisting in the creation of a fishing co-

144 This scepticism has been engendered by the repeated, but hollow, promises offered to Native People over the years by missionaries, charities, academics and government agencies.

operative may far outweigh those engendered by "landmark" decisions like *R.* v. *Drybones*.[145]

Immediate individual needs must be balanced against long-term projects. Reaching and maintaining an appropriate equilibrium between these two competing influences is important. First of all, Native People generally have a strong sense of community that traditionally orients them towards collective action. This factor, when combined with a deep interest in the future of their children and their children's children, increases the possibility of an adequate resolution. This result can be promoted by the actions of the legal staff in relation to their cases. If they use each case as a vehicle for educating the client about the law, then the perennial problem of the case overload will be minimized by this attention to future prevention.

The lawyers must be continually reassessing their position in the community as long as they are there. They should be preparing for their eventual departure from the moment of their arrival. Each lawyer should attempt to distribute as much of his knowledge to as wide an audience as possible, in order to lessen the chance of dependency relationships being fostered. This will also serve to demystify the law and make the legal system, as well as lawyers, appear less overwhelming to the people who will remain after the lawyer ultimately departs. This goal will be further ensured by the presence of Native lawyers in increasing numbers in the near future.[146]

This is a three-pronged attack involving short-range, intermediate and long-term objectives founded on the premise that local Native community control[147] is the best and only road to achieving a successful legal services programme for Native People. For Native

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[145] (1970) 71 W.W.R. 161, 9 D.L.R. (3d) 473, 10 C.R. (2d) 334.

[146] See the following articles for a discussion of several pre-law programmes that have been developed in Canada and the United States to promote Native lawyers: R. Carter, *Legal Studies for Native People* (1973) 4 (no.4) C.B.A.J. 6; P. MacKinnon and P. Rhodes, *The First Canadian Program of Legal Studies for Native People* (1973-74) 38 Sask.Law Rev. 40; S. Deloria, *Legal Education and Native People* (1973-74) 38 Sask.Law Rev. 22.

[147] The phrase "local Native community" must be particularly stressed as the concerns and wishes of Native communities vary tremendously within each province and across Canada. Although there may be a useful role for a provincial Native organization in this area, for example, to provide educational materials and conduct training seminars, the decision-making authority in regard to fundamental policy questions must exist at the local level. It is for this reason that the author does not agree with the views of the Osler Task Force; the scope of their suggestions is too narrowly defined; *supra*, note 87.

control to be a reality it must be complete and actual control. This means that the Native community decides who sits on the board of directors. It should be their right to choose to invite members of the legal profession or the funding body to be represented on the board or not to do so. The decision-making authority in reference to priorities, programmes, allocation of resources between lawyers and legal services workers, delivery methods, eligibility criteria, areas of law handled and other matters must be vested in the Native community through its representatives. Only Native community control will create an environment in which the clientele will be encouraged to utilize effectively the expertise of the legal staff.

It should be recognized that the problems encountered by lawyers involved in legal services in the poor urban communities are not entirely transferable to the Native community. Since Native People primarily reside in rural or remote areas, the specific tensions engendered by the urban environment do not exist. The Native community is not as disorganized and dispirited as are the urban poor. Credible indigenous leadership that has been elected exists in almost all native communities. These leaders have some level of administrative sophistication due to their contact with the Department of Indian Affairs and Northern Development and their previous experiences in operating programmes. A sense of homogeneity exists in Native communities, particularly on reserves, that is unequalled in any urban centre. This has been produced by the sharing of a common culture, tradition and philosophy. Poverty and discrimination bind Native People closely together.

An awareness of these distinctions should render it possible to avoid the disappointing experiences of urban legal services programmes. It is feasible to speak in terms of Native community control from the inception of the projects. This may not be practical in every Native community. However, the combination of limited resources and immense demand will inevitably cause a selective process to occur.

VIII CONCLUSION

Continuing research is necessary on a number of topics touched upon above: the viability of tribal courts in Canada, methods of sensitizing non-Native professionals to the needs, values and aspirations of Native People, the best techniques for informing Native People of their rights and liabilities under the law, the ways of developing diversionary or preventive programmes, and the creation of a system of Native justices of the peace.

A warning is perhaps appropriate here for all those lawyers who may become involved in Native legal services programmes. The lawyer's pride in due process, individualism, and the sanctity of the lawyer-client relationship may be impinged upon by the interests of the community as a whole.[148] The lawyer must avoid becoming involved in Native politics at all costs. The history of Native legal services indicates that it can lead to disastrous consequences.[149] The lawyer can not allow his expertise and his success to threaten the local leadership.[150] There will be political divisions within the Native community, but the lawyer must remain neutral and respond to the wishes of the recognized leadership as the employee of the programme.

Many communities may properly choose to eliminate some of these problems from the outset by deciding that the legal staff will not intervene in disputes between the members of the community. This would permit the lawyers to stay clear of potential conflicts in which their role would be criticized harshly by some.

All of these ideas and proposals will, of course, cost money. They will in fact cost a great deal of money. Harvey Savage emphasizes how much it has already cost:

> Until now it is the Native population itself which has borne the brunt of the cost of legal services. It has borne it in the form of excessive transportation costs to and from court hearings, rights in numerous civil areas which have been long neglected or lost because they were not defined as such and were unattended to, rights in the criminal area which have been compromised because material defense witnesses could not afford to travel to court. All of the costs are inestimable. The transportation costs, though in dollars and cents, cover numerous incidents over many years. There were other hardships, such as returning to custody, which over the years have been directly associated with inability to return to one's home. The costs of social malaise, lost rights, unmet needs are virtually impossible to calculate. It would seem a reasonable assumption to make that the cost of justice has been excessive to the Native population of Ontario.
>
> It would, therefore, ill behoove the various levels of government to say they cannot afford the cost of implementing the recommendations ... [i]t would be a question of redressing a balance and providing for a meaningful delivery system.[151]

The value to society is worth the price. The existence of Native legal services in Canada will not lead to a dramatic revitalization of

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[148] Getches, *supra*, note 109, 183.
[149] *Ibid.*, 183; Price, *supra*, note 110, 177-179.
[150] Price, *ibid.*, 177.
[151] Savage, *supra*, note 75, 81-82.

the Native community overnight. By itself it may not even halt the social deterioration that has been taking place over many years. "Legal services are interwined with social fabric. All promise and hope lies in the restrengthening of that social fabric, and anything which helps to that end must be worthy of serious consideration."[152] The Native People have been dealt with as human commodities rather than human beings. This is not the Indian way, and has not been successful. Native community influence, participation and control are the issues and are best resolved by the Native People themselves.

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[152] *Ibid.*, 94.