

*David Leo Milward*

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**Aboriginal Justice and the Charter**  
Realizing a Culturally Sensitive  
Interpretation of Legal Rights



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**Law and Society Series**

*W. Wesley Pue, General Editor*

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and highlight scholarship emerging from the interdisciplinary engagement of law with fields such as politics, social theory, history, political economy, and gender studies.

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# Foreword

David Milward, a law professor of Cree ancestry at the University of Manitoba, has undertaken a remarkably difficult task in *Aboriginal Justice and the Charter*. In these pages, he considers the broad range of issues necessary to make a case for the creation of free-standing Aboriginal justice programs, conceived and administered by Aboriginal communities themselves. Milward examines various Aboriginal concepts of justice, keeping an eye out for the difficulties inherent in reconstructing ideas and practices long since pushed underground by the colonizers. However, since Canadian Aboriginal peoples (First Nations, Métis, and Inuit) are subject to Canadian law, as Milward writes, it is not entirely clear on which grounds they might create and operate their own justice initiatives.

To get at this problem, he advocates the concept of the culturally sensitive interpretation of legal rights as articulated by the Royal Commission on Aboriginal Peoples in *Bridging the Cultural Divide*.<sup>1</sup> Milward makes the assumption (he is aware that it is contentious) that Aboriginal communities can exercise broad jurisdiction over criminal justice under section 35(1) of the *Constitution Act, 1982*.<sup>2</sup> The idea is that the Canadian Charter of Rights and Freedoms might be reinterpreted so as to provide greater room for the operation of Indigenous methods of justice.<sup>3</sup> These ideas, together with the *R. v Oakes* tests for constitutional justification, as refined by the decision in *Dagenais v Canadian Broadcasting Corporation*, Milward suggests, could constitute the grounds that would allow non-hierarchical accommodation when constitutional rights come into conflict (for example, Aboriginal rights to criminal jurisdiction versus legal rights).<sup>4</sup>

This interpretation implies a blending of older Indigenous teachings and Canadian legal principles. Since Aboriginal peoples within Canada have now lived for a century and a half or more under some form of common law, many have syncretic notions of natural law and Aboriginal law, and expectations of the law have also changed. Milward poses the question of whether Indigenous law can evolve to meet contemporary needs in light of

the accommodation of traditional practice and Canadian common law standards. He thinks it can.

Conventionally, there is a division of labour in writing about Aboriginal law, including those who write about law as it concerns Aboriginal peoples and communities within Canadian legal orders. This group is primarily, but not entirely, composed of legal scholars who examine case law, with a smaller contingent coming from history, anthropology, and, perhaps more recently, literary and cultural studies, and who explore the social and cultural ramifications of Canadian law for Aboriginal people and society at large.

Members of an altogether different group write about the historical practice of law within Aboriginal communities. Scholarly attempts to reconstruct Aboriginal legal orders started seventy-five years ago with the pioneering work of a team consisting of legal scholar Karl Llewellyn and his anthropologist colleague E. Adamson Hoebel. Writing within the legal realist tradition, they analyzed fifty cases of Cheyenne dispute resolution, based on the memories of elders, to extract the legal genius of the culture. The resulting seminal work, *The Cheyenne Way*, was published in 1941.<sup>5</sup> However, the work of studying what appeared to be vanishing legal concepts and practices primarily fell to anthropologists who remained interested in the diversity of approaches to justice in non-Western societies. For a long time, the topic seemed unimportant and unnecessary to the Canadian public. Unlike their approach to colonialization in India and Africa, there had been no intention on the part of the British to rule through local elites, a circumstance that would require that regional juridical practices be recorded in writing. In North America, at least following the War of 1812, there was no comparable incentive. I must point out that there were exceptions – senior Aboriginal people adjudicated cases involving whites in the Oregon Territory before the creation of the international border in 1846, for example, and mainstream courts have accounted for Aboriginal law in rulings involving Aboriginal-white crime. In any case, a visit to the law library at the University of British Columbia reveals rows of books about the laws of African and Indian peoples but little about those of North American Aboriginal people. Surprisingly few scholars have considered historical concepts and practices with regard to Canadian law concerning Aboriginal people. David Milward is one of these, and more studies appear to be on the way.

More recently, legal scholars, often Aboriginal community members themselves, have begun to undertake their own examination of these historical practices. Some have attempted to integrate the ideas inherent in mythology and the behaviour of culture heroes into their interpretations, arguing that these stories constitute the ancestral laws. Notably, legal scholars Val Napoleon and John Borrows are among those attempting to apply Aboriginal narrative to interpreting legal orders, and there is now a younger generation,

trained by Napoleon, Borrows, and others, following in their footsteps. Meanwhile, Milward has noted the scarcity of published material on historical Aboriginal practices. But he has read much of what there is, and it has informed his own thinking. He does not attempt to recreate Cree law in *Aboriginal Justice and the Charter*. However, he notes that he has applied his understanding of his own culture and the ways in which Cree people might approach justice. His combination of talents, in particular, his law school training in common law and his cultural knowledge, strengthen his work.

Milward's project is not prescriptive. He acknowledges that at each step there will be considerable differences in points of view, tenaciously and sometimes combatively held. But he hopes to provide a pragmatic position and describes himself as midway between the polar positions established in Canadian discourse about Aboriginal issues, somewhere between the arguments of the incommensurability of Canadian and Aboriginal perspectives advanced by Taiaiake Alfred and the reactionary and sometimes dismissive position of Tom Flanagan, an academic and former federal Conservative advisor.<sup>6</sup> Milward positions himself with Borrows, as hopeful but cautious about the capacity of Canada to hear Aboriginal voices and to move thoughtfully towards a greater recognition of Aboriginal ideas. In an unusual move, he makes his own case based on what he regards as appropriate compromises, considers what the objections might be, and systematically provides his responses to these objections. He hopes to spark an informed conversation within the communities and among legal scholars and practitioners.

Although he is a self-described centrist pragmatist, Milward's work is timely and is a welcome change from the timidity regarding Aboriginal justice reform that has characterized Canada for far too long. There has been very little serious consideration of advancing Aboriginal justice programs beyond small-scale diversionary justice programs or sentencing circles that incorporate Aboriginal practices and concepts late in the legal proceedings. This timidity is often matched with dangerous jumps in logic, faulty assumptions, and inadequate preparation when Aboriginal practices are engaged in cases involving Aboriginal crime.

Although I do not wish to suggest that it is commonly the case, I have been dismayed on a few occasions to receive phone calls from police or other officials who are about to enter into a sentencing circle and are baffled about what it is about or what their role will be. (I do not mind receiving these calls if anyone has this in mind – I am glad to help when I can.) And I have been puzzled by some of the assumptions behind sentencing circles. For example, in the Coast Salish territory in which I live, cases have arisen in which people of Coast Salish origin, but who have no contact with their ancestral community, have been brought into Aboriginal sentencing circles following an admission of guilt. This seems to me to violate a core principle

that a culturally specific sentencing circle must consist of people with some common understandings and ideally with real connections to the same group of people.

Milward's approach addresses another vital issue, which is the incorporation of generic Aboriginal concepts into the legal practice of specific communities. In one instance, I spoke at a First Nations-sponsored conference on Aboriginal law where the Maōri family group conferencing model was presented. The packaged program was adopted for reasons of convenience by a First Nation interested in establishing a process for what it hoped would eventually be its own legal system. However, very quickly, the discourse shifted, and what had been adopted for expediency became thought of as an ancestral system. It perhaps did reflect something of a historical system, but it was Maōri and not Coast Salish. Milward indicates that although there are features in common between perhaps all historical Aboriginal approaches to justice, there are also local variations, which are highly specific and resonate with local people in ways that generic programs likely do not. Milward's suggestions could potentially lead to circumstances in which the stop-gap justice concepts, which are sometimes ill thought out and even foreign, would no longer be integrated into justice programs. Instead, communities could systematically build their own programs.

A systematic, localized approach to rebuilding a justice system with a strong connection to historical practice would also have the benefit of eliminating the need for under-the-table, sometimes dangerous experiments in justice. Many such programs are underway in Canada, too many to easily track. An example concerns a panel of elders, military veterans, who adjudicated a case of rape perpetrated by another veteran. Their redress, I am told, was to strip the rapist of membership within the veterans' organization. Communities have in some instances created their own new processes for dealing with rape, but these are based on local cultural understandings. These experiments have the benefit of creating local control and of keeping rapists from entering into a Canadian criminal justice system that removes them from community oversight, only to return them much later and badly damaged by their time in jail. Yet all of these efforts, even if thought through, have an *ad hoc* quality.

Milward writes of the possibility that his proposals, if put into practice, would simply lead to the *indigenization* of mainstream law. Critics have argued against the mere substitution of Aboriginal authority for Canadian authority or of Aboriginal people for non-Aboriginal people. These critics claim the effect would simply be to re-inscribe the mainstream common law system onto a purportedly Aboriginal system. A primary objection concerns the question of whether or not the Charter would apply directly to any new Aboriginal systems. Milward recognizes that this issue could emerge, but he argues that there is more to consider. First, he notes that communities can

create their own charters that would be more directed towards local values. These could be carefully crafted to reflect not just historical practices but also the current reality on the reserve and the feelings within the band population off reserve. Consider, for example, the conflict between the common law concept of the right to silence and Aboriginal concepts of truth speaking. As Milward writes,

The possibility of the Charter's application engages a tension between individual rights and Aboriginal justice traditions that emphasizes collective well-being. This tension can be sharp indeed. Some Aboriginal societies had truth-speaking traditions whereby those individuals accused of misconduct were obligated to explain themselves to their Elders. What if an Aboriginal man in a contemporary community accused of wrongdoing invokes the Charter right to silence and therefore informs his Elders that he does not have to speak to them because of the Charter. Does this decision mean that nothing will be done about what the man did? Does it mean that the conflict in the community will remain unresolved? What if he admitted that he did the wrongdoing to the Aboriginal police officers who were employed by the community to keep the peace? What if the officers forgot to inform him of his right to counsel under the Charter? Does this fact mean that there may be evidence concerning the man's responsibility for the crime that will be excluded due to Western notions of limiting the state's power to preserve individual freedom?

Milward argues that one approach is to maintain the right to silence during the police investigation but to make operative the truth-seeking principle "once matters reach adjudication to determine the truth of allegations of criminal misconduct."

What of judicial neutrality? Should justices be members of communities in which they preside? On the surface, this practice would seem to be an insurmountable problem in small communities. Milward deploys the doctrine of necessity as a way out of this dilemma:

The right to natural justice presents difficulties on account of the doctrine that a judicial authority not be personally connected to any party to the proceedings. The practical effect of this doctrine may be the perpetual disqualification of community court judges given the often closely-knit nature of smaller Aboriginal communities. There is, however, a real need for fairness in criminal proceedings in Aboriginal communities since power dynamics and relationships can be abused to the severe disadvantage of either Aboriginal accuseds or victims. The resolution that is proposed is based on a generous understanding of the doctrine of necessity that can shield community court judges from being perpetually disqualified from



hearing disputes. So long as community court judges are actually being fair in the discharge of their duties, natural justice will not be violated. If the parties have any concerns about a community court judge's fairness, Aboriginal courts of appeal and the requisition of recorded reasons also provide possible safeguards.

Another potential objection to Milward's approach is that Aboriginal communities would be pushed into recreating mainstream legal apparatus, including police, bailiffs, and so on, in order to match up with surrounding non-Aboriginal jurisdictions. This, too, is a valid objection, which Milward carefully considers and reveals how it might be overcome.

However, what might happen following the creation of free-standing community legal systems is not entirely a theoretical question. It is also an empirical one. Consider that Canadian First Nations and other Aboriginal groups have lived historically, and continue to live today, all along the international border with the United States. From the east coast to the west, Mi'kmaq, Anishinabe, Lakota, Cree, Interior Salish, Coast Salish, and Nuu chah nulth, among others, are nations whose members live side by side in Canada and the United States. The communities on the American side have tribal courts that have been scrutinized by various scholars interested in the extent to which they reflect local values, are co-opted by the state, or are engaged in the creation of their own new, non-"traditional" Aboriginal state.

My own studies of the northwest Washington State intertribal court system in the 1990s reveals that the extent to which communities connect to their own historical practice is quite varied but that legal analysis commonly misses the localization of what might be mistaken for mainstream ideas. Indeed, a publication of the American Bar Association considered these courts to be merely inadequate versions of the mainstream system. These Washington State tribal courts arose out of the necessity to manage their salmon harvest, which had been newly regained following treaty litigation in the 1970s, but grew into a wider scope of criminal law. Tribal officials initially downloaded legal boilerplate from a variety of sources in order to gain jurisdiction (which would be absent without tribal code), but they quickly adapted code to their own needs and understandings. They also tailored legal procedure to fit with local historical practices and the expectations of community members.

Interestingly, culturally similar tribes have created quite different tribal code, showing that interpretations of historical practice need not and cannot be understood narrowly. In one instance, a tribe created a code that mandated that abused children be removed from their family and placed under the oversight of the tribal authority. This decision followed from the argument

that constituent families are the historical core unit of the larger community and that families sometimes act to protect their collective interests rather than those of individual members. Families sometimes shield the perpetrator rather than protecting the child. A neighbouring tribe, acting on the same understanding of historical social organization, wrote a code that defined family broadly (and in conformity with historical practice) and *restricted* the removal of children from the oversight of the family, so defined. A child might be placed in the custody of someone other than the parents, but he or she must stay within the family. These studies support Milward's contention that the creation of local Aboriginal legal systems need not be understood as merely poor imitations. Still, as Milward notes, others will disagree.

Further, I have argued that when legal systems operate in theory only, an undue emphasis is placed on hypothetical distinctions and abstractions. The northwest intertribal courts, in contrast, have had to deal with the real world of conducting jurisprudence – forcing code writers and tribal authorities to focus on the achievable and on the pragmatic. I spoke once with a tribal council of a recently federally recognized US tribe about their own historical cultural practices as they related to law while they were preparing to establish a tribal court. The councillors were openly concerned, worried, and some were even a bit frightened by the authority they were establishing and the effect this power would have on their own lives and on those of their families and the other constituent families. They sought to deal realistically with problems such as the potential influence on the court by dominant families, which is the sort of issue that Milward considers in his text.

As I have indicated, Milward's project avoids the traps into which so many fall. One is the too easy comparison to restorative justice (as in the case of the community that adopted the Maōri family group conferencing model, a version of restorative justice, as its own). Aboriginal historical practices have features in common with contemporary restorative and transformative justice concepts, but these are not the same. A similar trap in a related field is facile comparisons between the mainstream environmental movement and Aboriginal ideas of the people's place within the land and seascapes. The differences between these positions have been played out in widely noted public conflicts between environmentalists and Aboriginal peoples, but there have been no similar public events concerning justice. The idea that Aboriginal justice is a forerunner of restorative justice persists. There are commonalities, but they are not the same.

There is a paradox here. Aboriginal ideas about justice are thought to both significantly or even entirely overlap with the restorative justice ideas coming from mainstream society (once a pet of Justice Canada), but they are also thought to be entirely distinct from the common law. A recurring feature of many publications about Aboriginal justice is the listing of binary

oppositions. These lists suggest that European-derived law is punitive and individualistic – emphasizing the protection of private property, for example – and that Aboriginal law is the opposite. These binaries have slowed down a serious consideration of the relationship between Aboriginal and Canadian systems of justice. And since Aboriginal justice systems arose before any contact with Europeans, they cannot reasonably be thought to be opposites or to have originated in opposition to each other. Milward points out that Aboriginal systems did have punitive practices for the general welfare of the community and that the common law, meanwhile, is not solely punitive.

One highly touted argument for Aboriginal justice systems is the potential for emphasis on healing and spiritual-based practices, as opposed to punitive impersonal common law. Milward wades directly into this debate, although I think his tendency is to support the proposition. He does not sidestep the problems, though. Emma Laroque, Sherene Razack, and others have raised concerns about the emphasis on healing in cases of sexual assault. They write that this emphasis trivializes the harm and signals to offenders that the consequences of their actions for themselves will be minimal. Milward adds to this idea that healing might not be possible if the defence acts to have evidence excluded or if a harsh cross-examination of witnesses occurs.

I have my own concerns about claims of healing in justice systems that have been partial (such as sentencing circles), underfunded, and short-lived. In these cases, the justice system lacks the social and financial capital to undertake the long and difficult task of healing. There is less cause for concern with fully established systems that have a chance to gain legitimacy within the communities they service. However, this will not happen unless the programs are able to withstand the sources of abuse of justice. An important feature of Milward's proposals is that they offer insight into the most pressing questions facing present-day Aboriginal communities and how justice systems might address these issues. He mentions, in particular, violence against women and the domination of council and the justice system by large families and community elite. Justice systems that are able to exist under these stresses would, I think, very likely gain legitimacy among community members. As has been widely documented, Aboriginal peoples of Canada have considerable distrust of the Canadian legal machinery, including police, courts, and justices. There are sound reasons for this distrust. And although one outcome of the colonial experience has been the distrust of members' own community band council and administration, the addition of a free-standing justice system will be central to establishing the totality of institutions. Evidence from US tribal courts suggests that these institutions can gain acceptance internally. The development of a full set of community-directed institutions, including justice, may be a step towards overcoming members' alienation.

There are several possible reasons put forward to explain the limited attention given to the possibility of establishing band justice systems. Justice Department officials have suggested to me that Canada is too large, and the bands too small, for an efficient delivery of legal services. Attention has been turned elsewhere, with concerns for the residential school abuse now taking centre stage within a Truth and Reconciliation Commission. Community leaders are directing their efforts to the creation of sustainable economic development. And public attention – and the attention of Aboriginal leaders – has focused on a whole cluster of other urgent concerns, including what to do about various proposed oil pipeline projects intended to cut directly through First Nations lands. The failure of Canada to assist in establishing safe and reliable water supplies on northern reserves continues to be a national embarrassment, as is the suicide rate on some reserves, and the public and sometimes violent clashes over the ownership of land in Caledonia, Ontario, and elsewhere. In British Columbia, the disappearance of some six hundred Aboriginal women from the streets of Vancouver and the highways heading north remains an open wound. Meanwhile, the refusal of the Missing Women Commission of Inquiry and society at large to take seriously the systemic racism so obviously at the core of this problem has led grassroots activists such as Gladys Radek to organize mass protest marches to Ottawa. These issues, and many more, including the slow grinding of land claims through the federal and provincial courts, has absorbed the strength of a generation of leaders and the community members trained as lawyers.

Milward is not distracted. He calls for a greater financial, legal, and political commitment than Canada has heretofore demonstrated through the current creation of underfunded projects that have led to incomplete social institutions and a pilot-project mentality. There is now a considerable history of projects that have failed to gain the support of community members. I must add that, to a very considerable degree, the Canadian experiments in Aboriginal justice have failed precisely because of the timidity I previously mentioned. Since they are partial, they fail to provide adequate protection for community members, who rightly look askance. Of particular concern is the fear that female community members have experienced regarding their own community's new programs. In one instance in British Columbia, a pilot justice project collapsed because rape victims were put into the hands of elders serving as counsellors who were family members of the perpetrator. In this case, there was an inadequate understanding of the exercise of power and of the social organization of the community by those engaged in the creation of the program. And on the north shore of Greater Vancouver, women of the Squamish First Nation have publicly and loudly protested what they regard as gendered bias in access to community housing. They have expressed their notion that there should be a retrenchment – a retreat

from the development of community self-governance infrastructure when it creates vulnerability.

David Milward gives central place to his concerns about the possibility of rank and file community members being dominated by an elite and of women being exploited by men. He expresses the view that this is a clear danger in Canadian Aboriginal communities, and he points to specific ways to deal with these problems while developing justice systems. A problem has been, to my mind, that Canadian justice initiatives have stopped mid-stream, at just the wrong place, which, as the Squamish women have said, will leave people in jeopardy. Rather than retreating from the institutional development of Aboriginal communities, Milward suggests a move forward, to building justice institutions that might be able to protect the interests of community members from their own elite, from predatory men, or from any other individual, group, or faction. He raises the question of domestic violence against women and shows how women's concerns can be addressed by an Aboriginal justice system.

It does not seem to be fully clear to Canadian justice authorities that there is utility in participating in the development of self-directed Aboriginal justice or, at least, in standing aside while this happens. For some years now, representatives of the Canadian government have claimed that Aboriginal ideas of justice would be helpful in transforming the beleaguered mainstream system. They have primarily meant the application of Aboriginal concepts to restorative justice projects. The neo-colonial Canadian state and many citizens within it remain fearful of Aboriginal people and their institutions, while simultaneously being fascinated. In British Columbia, fear of Aboriginal self-government has slowed the modern-day treaty process. Similarly, fear and misunderstanding stands in the way of Aboriginal justice. *Aboriginal Justice and the Charter* shows how a much bigger step may be contemplated and taken.

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# 1

## Introduction

By way of introduction, I am of Cree descent and a member of the Beardy's and Okemasis First Nation in Saskatchewan. When I first entered law school, my hope was to become a lawyer fighting for Aboriginal rights, such as the fight for land reclamation, the honest recognition of treaties, our constitutional rights, and all the rest of it. But then my first year of legal studies showed me a new path. For reasons that I still cannot quite put my finger on, first-year criminal law quickly became my favourite course. Furthermore, as I was growing up, I had lived in an urban Aboriginal community in Calgary, where many of the issues that I discuss in this book were affecting the lives of those people around me, many of my friends included. Some of my old friends I have lost to suicide, others have taken their turns in the prison system, and one was even designated as a dangerous offender deemed fit for indeterminate detention. These two realities suddenly coalesced into a new career objective. I wanted to become a defence lawyer helping my people defend themselves against the Canadian justice system. My pursuit of this career objective, however, encountered a hitch when a difference of opinion between a provincial law society and my first legal employers escalated needlessly, in my honest opinion, and I became part of the collateral damage.

Initially, my subsequent pursuit of graduate legal studies was simply a way to try and get back into the legal profession after I had fallen on some hard times. My subsequent success, coupled with encouragement from my master's degree supervisor, Catherine Bell, however, convinced me that I could join the legal academy and that I had plenty to talk about. In the course of my studies, I began to contemplate in earnest some sincere questions about the interaction of Aboriginal peoples with the Canadian criminal justice system. In particular, my thoughts were directed to the question of how the Canadian Charter of Rights and Freedoms might apply to Aboriginal justice systems.<sup>1</sup> And so the seeds were sown for the focus of my graduate studies, of which this book is an end product.

The subject of the book is self-determination for Aboriginal peoples over criminal justice, an idea that has been around for decades. Self-determination as an abstract concept sounds simple enough: “The principle of self-determination refers to the right of a people to determine its own political destiny.”<sup>2</sup> The principle is also recognized under international human rights law. The United Nations’ *International Covenant on Economic, Social and Cultural Rights* states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>3</sup> The right of Aboriginal peoples to self-determination is also recognized in international law. For example, the *Declaration of the Rights of Indigenous Peoples* reads in part:

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies ...

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.<sup>4</sup>

The idea of self-determination seems fairly straightforward or at least straightforward enough that it can be enshrined in international legal instruments. An issue that is a good deal more complex is the realization of Aboriginal self-determination within a domestic jurisdiction such as Canada, where Aboriginal peoples remain a clear minority that lacks economic or political power and whose members are often interspersed among non-Aboriginal Canadians within both rural and urban settings. It should therefore not be surprising, given the complexity of the Canadian situation, that the subject of Aboriginal self-determination in Canada has generated a good deal of academic debate. Aboriginal scholars such as Taiaiake Alfred and Jeff Corntassel have argued that arrangements that involve working within a state framework do not truly amount to self-determination, are recipes for continued colonialism, and are not conducive to revitalizing Aboriginal cultures and dealing with the social problems faced by Aboriginal peoples.<sup>5</sup> Some non-Aboriginal scholars such as Alan Cairns and Thomas Flanagan have vigorously argued against Aboriginal self-determination.<sup>6</sup> Their arguments suggest that it is impractical for Aboriginal peoples to carve out separate political entities within Western democracies, that it would be destabilizing for existing social orders, and that self-determination is not required for dealing with Aboriginal social problems. Then there are Aboriginal scholars who may be thought of as taking positions that can be situated somewhere



in between. Dale Turner and John Borrows have argued for visions of self-determination that do not altogether eschew participation within, or harmonization with, a Canadian state framework but still involve Aboriginal peoples' attaining considerably more control over their institutions, governance arrangements, and law than they now have.<sup>7</sup> It is not my intention to participate in this debate, at least not directly, although I think that much of what I will propose in this book falls into the "in between" camp.

Of course, Aboriginal demands for self-determination include demands for greater control over criminal justice for a number of reasons.<sup>8</sup> An important background is that the current criminal justice system, with its heavy reliance on incarceration, has resulted in the drastic over-incarceration of Aboriginal peoples in Canada – a problem that has been well documented and studied for at least the past two decades.<sup>9</sup> A recent statistical analysis reveals that Aboriginal persons have consistently comprised 17-19 percent of all adult admissions to Canadian federal penitentiaries for the past decade, even though Aboriginal peoples represent only 3.8 percent of the Canadian population.<sup>10</sup> The statistics are even more appalling when it comes to admission to provincial jails. In 2007-08, Aboriginal persons comprised 21 percent of all admissions to provincial jails in Newfoundland and British Columbia, 35 percent in Alberta, 69 percent in Manitoba, 76 percent in Yukon, 81 percent in Saskatchewan, and 86 percent in Northwest Territories.<sup>11</sup> These large percentages persist despite the fact that Aboriginal peoples are clearly a small minority, constituting 3.8 percent of Canada's population as of 2006.<sup>12</sup> The notion of using contemporary adaptations of past Aboriginal justice practices with parallels to restorative justice as more constructive alternatives to incarceration is an important impetus behind Aboriginal demands for greater control over justice. It has therefore not been surprising that much of the literature in the field has focused on this theme, holding up visions of Aboriginal justice as an ideal that is yet to be realized. It is not to say that the topics that get emphasized are unimportant, far from it. My point is that it may have had an unfortunate consequence in that other important aspects of Aboriginal justice that need to be explored have been left relatively neglected. For example, how is Aboriginal self-determination over justice going to work if we actually succeed in achieving it? How can it be implemented? Can it play out on the ground in such a way that it eventually accomplishes its stated goals?

There is one particular question surrounding the future of Aboriginal justice that I focus on in this work. What happens when interested parties insist on applying the Canadian Charter of Rights and Freedoms to Aboriginal justice systems? This question has been raised before but very often in a hypothetical framework and without anything resembling a concrete and earnest search for tangible solutions.<sup>13</sup> The possibility of the Charter's application engages a tension between individual rights and Aboriginal justice

traditions that emphasize collective well-being. This tension can be sharp indeed. Some Aboriginal societies had truth-speaking traditions whereby those individuals accused of misconduct were obligated to explain themselves to their Elders. What if an Aboriginal man accused of wrongdoing in a contemporary community invokes the Charter right to silence and therefore informs his Elders that he does not have to speak to them because of the Charter. Does this decision mean that nothing will be done about what the man did? Does it mean that the conflict in the community will remain unresolved? What if he admitted that he did the wrongdoing to the Aboriginal police officers who were employed by the community to keep the peace? What if the officers forgot to inform him of his right to counsel under the Charter? Would this mean that there may be evidence concerning the man's responsibility for the crime that would be excluded due to Western notions of limiting the state's power in order to preserve individual freedom? Would it mean that nothing would be done about what happened? Clearly, the possibilities can be alarming for an Aboriginal community that wants to revive past methods of justice for contemporary use in order to remedy the social problems associated with Aboriginal criminality and over-incarceration.

There are also concerns surrounding what may happen if there is no individual rights regime to regulate the exercise of Aboriginal self-determination. The old ways of proving oneself as a worthy leader in Aboriginal communities have been eroded to a large degree. People often become leaders in Aboriginal communities nowadays by mimicking the ways of Canadian leaders. Members of contemporary communities often compete with each other for power and money. Will those individuals in power, including those involved in the justice system, abuse their advantages to the detriment of the people they are supposed to be serving? What does this possibility mean for resolving conflicts in the community? Does it mean that innocent people will be persecuted by being punished for things they never did? Does it mean that the powerful can use law enforcement authorities to intimidate community members? Will it leave vulnerable people, such as women and children, unsafe in their own communities? Maybe the Charter will be helpful after all if it can prevent these abuses from happening. However, using the Charter in the first place brings us back to the original concerns about applying the Charter to Aboriginal justice. The tension is palpable. How is it to be addressed?

In 1996, the Royal Commission on Aboriginal Peoples published a number of reports that considered various solutions for the problem of strained relationships between Aboriginal peoples and the Canadian state. One such report, *Bridging the Cultural Divide*, focused on Aboriginal justice issues.<sup>14</sup> The report explores a broad array of issues, including the tension involved in applying the Charter to Aboriginal justice systems. The report suggested

addressing this tension by using the concept of a culturally sensitive interpretation of legal rights, which essentially means reinterpreting legal rights under the Charter to better reflect Aboriginal justice traditions while still leaving in place meaningful safeguards against the abuse of collective power. The report did offer a few brief suggestions about how the culturally sensitive interpretation of legal rights could work, but it did not purport to engage in any in-depth search for specific proposals. The field of Aboriginal justice has since returned to its near exclusive focus on sentencing initiatives and parallels to restorative justice. This book strives to pick up where *Bridging the Cultural Divide* left off. It puts culturally sensitive interpretation into action by exploring specific proposals with reference to a number of specific rights in the Charter.

This exercise will by its very nature engage in a sort of legal syncretism. Some of the proposals reached as a part of this exercise will resemble features of common law systems. For example, I will suggest that Aboriginal communities can design their own court systems in a culturally sensitive manner. The judge's role would for the most part be restricted to ensuring that the participants do not behave in a coercive or exploitative fashion, thus addressing recent critiques that have been directed against restorative justice and Aboriginal justice initiatives alike. Judges, however, would not interfere with the parties' resolution, so long as they had participated in the process fairly and had reached a genuine consensus on a resolution. The law of the Aboriginal community – not Canadian criminal law – would thus govern disputes. I will also suggest that cultural perspectives can be incorporated whenever Aboriginal police forces need to engage in warrantless searches for evidence. This is partly what I meant when I said that I did not intend to directly participate in the debate on what Aboriginal self-determination means or on what its nature should be. These proposals may very well be dismissed by Alfred and others as mere Indigenization, not truly amounting to self-determination. There is, however, no single vision of self-determination, as the work of Aboriginal scholars such as Borrows and Turner suggests. My view is that the pursuit of a culturally sensitive interpretation of legal rights, and the proposals that are explored in this book, can be situated somewhere between the visions of Alfred and Flanagan.

And, indeed, other proposals may also be quite controversial from a Canadian legal standpoint. For example, I suggest that the right to silence need only be applicable during the stage of police investigation. Truth-speaking traditions can become operative once matters reach adjudication in order to determine the truth of allegations of criminal misconduct, civil libertarian objections notwithstanding. Another suggestion involves Aboriginal communities' using judicial corporal punishment in instances where restorative resolutions are deemed inappropriate and as a punitive

sanction that avoids the worsening effects of incarceration. The Charter bars corporal punishment as a cruel and inhumane punishment. I will argue that an Aboriginal accused can undergo corporal punishment on the basis of a full and informed waiver of the right against cruel and unusual punishment.

Before I begin the discussion in earnest, there is an issue about my methodology that I need to address. A reader with any degree of academic proficiency will notice that I rely on secondary research instead of primary research, which in this context means collecting first-hand opinions on justice from Aboriginal peoples themselves in order to articulate Aboriginal visions of justice. There are a number of reasons for this reliance. The first one is an honest recognition of my own limitations. As a lawyer, I was trained to interview clients in anticipation of a court case. I do not, however, have the training of an anthropologist, or an ethnohistorian, to seek out primary accounts of Aboriginal justice both past and present. Second, there are plenty of good secondary sources by experts who have already made this effort and spoken with Aboriginal peoples about their approaches to justice. I submit that these examples can blur the line between secondary and primary sources as secondary representations of primary information. It is my sincere hope that these representations faithfully recount how some Aboriginal peoples have envisioned and practised justice and, therefore, that they provide a meaningful basis for me to proceed with my own discussions. Third, I have a certain personal knowledge of Aboriginal spirituality, culture, and justice, through my own lifetime spent within my community. At the same time, I am not an Elder or a carrier of oral history. My preference whenever possible has been to rely on sources from experts with better experience and qualifications than myself who have gone out and spoken directly with Aboriginal peoples. Fourth, even if I had conducted primary research, there is always the risk that I may not have ended up getting the kind of content that I was hoping for. This last point will be demonstrated when I describe towards the end of this book the efforts made by John Borrows, Alfred Scow, and DeLloyd Guth to conduct their own primary research. After I had reviewed the available secondary literature, I concluded that there was enough material available to enable a meaningful discussion of the issues raised in this book.

As a final note, I would like to advise the reader that I am not claiming to be setting out what justice has to look like for all Aboriginal communities. My purpose has simply been to spur some much needed discussion on issues that will have to be addressed in the future. Now I will begin by providing some background, by flushing out the differences between various models of justice in order to articulate Aboriginal visions of justice.

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