

**A LAWLESS LIFE, UNREST AND STRIFE?  
THE EXISTENCE OF ABORIGINAL CUSTOMARY LAW  
IN MANITOBA FIRST NATIONS COMMUNITIES:  
AN EXPLORATORY STUDY**

**BY**

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A Thesis  
Submitted to the Faculty of Graduate Studies  
in Partial Fulfillment of the Requirements  
for the Degree of

**MASTER OF ARTS**

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University of Manitoba  
Winnipeg, Manitoba

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ISBN 0-612-16115-3

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## ABSTRACT

The literature dealing with traditional methods of dispute resolution indicate that increasing support is found for the contention that the application of customary law in First Nations communities is the most promising route to improving upon the current dismal relationship between First Nations peoples and the Canadian criminal justice system. There is, however, a lack of information regarding the current state of knowledge of - and belief in - customary law. This is compounded by a lack of clear descriptions of its content.

This research is intended to address these questions through an examination of current attitudes of First Nations peoples in Manitoba toward customary law. Data were collected through interviews conducted in the member-communities of the West Region Tribal Council. Respondents were asked to describe what they believed to be the most appropriate response to several detailed hypothetical instances of deviance. Respondents were drawn from three age groups: "older" (56 years and over), "middle aged" (36-55 years), and "young" (18-35 years).

Analysis of the data showed that the three age groups applied three differing methodologies for responding to deviant acts. The "older" group displayed a "community focus", the middle aged group a "family focus" or "mixed focus", and the young group a "state focused" approach to deviance-response. Analysis of the content of customary law shows that context, restoration, prevention, publicity, group decision-making, and apology/forgiveness are its central elements. Belief in customary methods of dispute resolution remains strong among the older respondents. It is concluded that while the application of customary law is a viable and desirable option for justice initiatives in the future, caution must be exercised in the design of any such programs to ensure recognition of the complexity of this issue.

## ACKNOWLEDGEMENTS

A great deal of credit for the successful completion of this thesis is due to the many individuals who assisted me in the course of my research. The extensive field work required would not have been possible without the assistance of the West Region Tribal Council. The issues dealt with in this work are complex and delicate; the effort required to attempt to explain them to an ignorant student is immense. To Wally, and to the many Elders who so generously and patiently helped me to understand, I offer my respect and gratitude.

On the academic side, the knowledge and assistance provided by my committee members, Dr. Fred Shore and Dr. Russell Smandych, was invaluable throughout the course of data collection, writing and revision. Both gave willingly of that most precious commodity, time, and for that I give my sincere thanks. The contributions made by my advisor, Dr. Steve Brickey, are so numerous and important that any attempt to single them out specifically would provide but a shadow of their true depth and scope. His unflinching belief in me and in the importance of this endeavour carried me through many moments of frustration and confusion. Such a level of dedication and wisdom cannot be adequately described, I can offer only the assurance that I am truly grateful.

Thanks to Darrell Mauthe, my resident hardware and software engineer, for technical support at all hours of the day and night; without your help and expertise this work would be written on the back of a napkin.

Finally, to Laurel, my proofreader, sounding board, office assistant, and wife. You have returned the favour.

*For Mom and Dad*

*You showed me how to build a fire.*

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In days of old our fathers, bold  
In arts of war must chase  
To bend a bow, or scalp a foe,  
Gave *strength* the highest place.

Chorus

Then let us praise the peaceful days  
Of that Queen Mother's rule,  
Whose kindly laws must give us cause  
To love our Indian school.

A lawless life, unrest and strife,  
Lone graves among the trees;  
But heart and brain find higher gain  
In nobler crafts than these.

'Tis ours to learn the thoughts that burn  
In Christian hearts, to train  
Both head and hands in heathen lands  
From *work* true strength to gain.

**(From the 1894 Anglican bulletin *Aurora*; to be sung by Indian students in residential schools.)**

## INTRODUCTION

...in the spirit of recognition of aboriginal rights to self-determination and the need to take innovative steps to deal with the abysmal social conditions facing aboriginal people, it is time to accept the claim by aboriginal leaders that there is a way to proceed based on indigenous processes of social control. In some cases those processes have been stifled by outside pressures but they remain largely intact and ready to be applied when recognized and supported. (Clark, 1989)

In recent years the discussions surrounding Aboriginal self-government have been increasingly characterized by the calls for a return to the traditional or customary ways of Aboriginal peoples. The citation above reflects what is becoming the overwhelmingly accepted model for Aboriginally controlled institutions, especially in the realm of criminal justice.

Specifically, customary methods of social control are featured prominently in the current literature that deals with Aboriginal peoples and criminal justice. Rarely, however, are these methods clearly described, nor is there any specific analysis of how they might be applied to the existing justice system. In the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution, it is stated that such description and analysis is vital for several reasons, among them the following:

First, if effective, community-based justice processes could be given their due recognition and instituted as a legitimate and complementary component of the wider system. Second, if encouraged and supported, effective indigenous justice mechanisms such as mediation and reconciliation could be adapted and instituted in other community settings, Native and non-Native (Clark, 1989).

Many examples of this attention toward the uses of customary ways can be found across the country in the reports of several recent Aboriginal justice inquiries, task forces, and commissions. Specifically, much attention has been paid to the vastly different conceptions of "justice" found in aboriginal customary law and so-called "white" law. This difference is used throughout these reports as the basis for many of the recommendations for improvements to the existing criminal justice system, as well as for new programs designed to facilitate the delivery of justice to Aboriginal peoples.

It may be argued, however, that there is some question regarding the extent to which knowledge of customary law continues to exist in First Nations communities. The purpose of the research to be described herein is to discover who holds knowledge of customary methods of dispute resolution, and whether the people in First Nations communities believe that these methods can and should be applied to specific instances of deviance.

A brief review of the literature dealing with customary law is first presented, followed by an overview of some of the recent recommendations made by government agencies and task forces calling for the application of customary methods to present-day problems. The specific research questions that were developed from an analysis of these recommendations are then described, followed by a description of the research methods employed. Briefly, selected reserve residents in Manitoba were presented with several detailed deviance "vignettes" and were asked what they thought the appropriate response to them should be. The assumption is that the responses will indicate first whether or not the respondent has knowledge of customary methods of dispute resolution. More

importantly, they will also indicate whether or not the respondent believes that customary methods are a viable response to real instances of deviance, as opposed to a set of norms that are no longer relevant in their communities today.

The research findings and analysis are then presented, followed by a brief description of their implications for future customary law initiatives, as well as for future research.

## CHAPTER ONE

### Literature Review

Since the time of first contact, much has been written about the customs and traditions of Canada's Aboriginal peoples. Perhaps the earliest such work came from the missionaries - mostly Catholic and Anglican - who first lived among the Natives. The Catholic missionaries produced thousands of pages describing the aboriginal people and their customs; one example of this documentation is the *Jesuit Relations and Allied Documents* (Kenton, 1954). While providing a great deal of information about customary methods of dispute resolution, the records are permeated with ethnocentric assumptions, and thus must be used with care.

Describing the apparent virtues of the Indians with respect to sharing and generosity, one writer appears surprised when he states that:

These little things...show nevertheless that these Peoples are not quite so rude and unpolished as one might suppose (Volume 10: 215).

This writer goes on to assert that the Indians are also not as lawless as they might at first appear:

..it seems to me that, in view of the perfect understanding that reigns among them, I am right in maintaining that they are not without laws (Volume 10: 215).

The missionaries go on to describe some of the specific instances of response to deviance that they have observed. A detailed description of the response to a murder provides an early indication of the importance of restitution and apology in the successful resolution of

a problem. The response to the act involved the giving of nine gifts to the family of the victim, which were:

put into the hands of the relatives to make peace, and to take away from their hearts all bitterness and desire for vengeance that they might have against the person of the murderer (Volume 10: 217).

The restorative aspects of customary law are emphasized in these descriptions, placing them in stark relief in comparison to the punitive aspects of the European law to which these missionaries were accustomed:

By these.. presents he signifies his regret for having killed him, and that he would be quite ready to restore him to life, if it were possible (Volume 10: 217).

It is notable that there is no mention of the proper penalty to be served for killing a person, nor of the need to punish the offender; only a concern for what has been lost.

The Jesuit documents, like many of the accounts written in this era, are an interesting mix of ethnocentric judgment of the 'savages' and respectful commentary on their seemingly effective methods of dispute resolution. A description of the system of laws used by the Huron are one example of this dichotomy. In describing their response to a murder, one of the missionaries noted that:

It would be attempting the impossible, and ruining everything, rather than affording a remedy, to proceed with the Barbarians according to the judicial usage of nearly all nations, by condemning the murderer to death: it is the public that gives satisfaction for the crimes of the individual, whether the culprit be known or not. In fine, the crime alone is punished, and not the criminal; and this, which elsewhere would appear an injustice, is among them a most efficacious means for preventing the spread of similar disorders (Volume 38: 275).

While referring to the Indians as 'savages' and 'Barbarians', there is at the same time this rather admiring description of a system of laws "quite as effective as our own, and even more so, since there appear, among conditions of extreme liberty, very few disorders" (Volume 238; 265).

Other accounts and descriptions of customary law from this early period follow a similar pattern of derogatory labels and assumptions mixed with qualified praise for these 'noble savages' (see, for e.g. Colden, 1775; Catlin, 1844; Harrison, 1887; James, 1894).

By the early twentieth century, the literature surrounding aboriginal customs and laws had moved from the colourful accounts of missionaries and adventurers to the more scientific approach of academics, primarily anthropologists and sociologists. These writers noted that while a great deal had been written about the Indians and their customs by various organs of the state and the churches, little of it was carried out in a systematic manner. Parker (1916) points out that:

Notwithstanding the immense effort that is put forth by missionary bodies and by the federal government to remedy the unhappy situation of the Indian, neither of these forces acts as if it surely knew the elements with which it was dealing (1916: 253).

William MacLeod echoed these sentiments when he stated that "the study of the law...of the peoples popularly called primitive has received little or no attention" (1932: 169).

Another sociologist writing in the early twentieth century period further points out that the existing research relied too heavily upon superficial observations:

It takes years of patience before you can begin to know an Indian and therefore before you can begin to get first-hand knowledge of the human unit of your problem (McKenzie, 1914:762).

These researchers began to not only recount observations, but to attempt to develop a deeper understanding of the values and norms that underlie the traditional responses to deviance. Bernard (1928) listed three major methods of social control in use in aboriginal communities. He notes that the most extensively employed was 'suggestion-imitation'. That is, young members of the community were to observe the others around them and thus indirectly learn the accepted modes of behaviour. This method of controlling behaviour was effective because "the behaviour patterns were already well established, [so] the technique used by the leaders was usually suggestion" (Bernard, 1928: 308).

The second method of control was a kind of public shaming that employed "the use of epithets, ridicule, sarcasm, etc." (Ibid: 308). This public ridicule method is noted in much of the literature surrounding traditional law. The third method noted by Bernard is force, which he notes is not often required.

Another aspect of customary law found in much of the early literature is the need for community participation in response to deviance. For example, MacLeod notes that among the Omaha the response to a murder involved the assembly of gifts for the family of the victim contributed "not by the relatives of the murderer, but by the tribesmen in general" (1934: 195-6). He also notes that there were no specific officials holding the power to make or enforce laws. Rather, he states that aboriginal society might be described as a "gerontocracy":

they are also characterized by a usually elaborate development of advisory councils of the upper age classes of the males of the community (MacLeod, 1932: 170-1).



Thus, the elders provide guidance through their councils, but the power to enforce laws is drawn from the community as a whole. Similarly, the police systems of the Plains Indians must be supported in their actions by the "whole camp", and it is understood that their authority is derived from the collectivity (MacLeod, 1937).

Another of the most common aspects of customary law described by the early twentieth century researchers was the need for public confession of deviant acts:

one of the distinctive features of the Saulteaux belief system is this: if one who is ill because of 'bad conduct' confesses his transgression, the medicine will then do its work and the patient will recover (Hallowell, 1941: 876).

Hallowell also points out that following the commission of a deviant act, the offender must "suffer the shame of self-exposure involved in confession. This is part of the punishment" (Ibid: 877).

There is another aspect of public confession that appears to be equally important to the healing of the victim and the offender, and that is public education:

Punishment aims at social prevention, and it is such prevention which is primarily the object of the elaborate public ceremonialization of the punishment (MacLeod, 1934: 227).

This author also speaks of "an elaborate public ceremonial of punishment apparently designed publicly to impress the people with the need to avoid crime" (MacLeod, 1932: 189); Hoebel notes that "ridicule and disapproval in 'public opinion' are effective goads to conformity" (1941: 665); and Hallowell sums this idea up most succinctly when he states that:

Confession, by making public the transgression committed permits the individual to recover. This is its ostensible purpose. But confession has a wider social function. It

makes others aware of disapproved types of conduct which act as a warning to them (1941: 880).

Thus, the need to lay out specific rules or laws to members of the community simply did not exist. By publicly discussing and responding to deviant acts, the rules were implicitly presented to young members of the community:

This public aspect of confession is one of the channels through which individuals growing up in Saulteaux society and overhearing the gossip of their elders *sense*, even though they may fail to understand fully, the general typology of disapproved patterns of behaviour. Children do not have to be taught a concrete panel of transgressions in Saulteaux society (Hallowell, 1941:878).

By the 1940's, the notion of restoration rather than punishment being one of the hallmarks of customary law was becoming more evident. The anthropologist E. A. Hoebel wrote a number of articles dealing with customary law, noting within them the focus on restoration. Hoebel here describes the use of song duels by the 'Eskimos':

they are judicial instruments insofar as they do serve to settle disputes and restore normal relations between estranged members of the community..however, the judgement bears no relation to the rightness or wrongness of the original actions which give rise to the dispute. There is no attempt to mete justice according to rights and privileges defined by a substantive law (1941: 681-2).

Thus, while a judgement is rendered in that a 'winner' is declared, the outcome is disassociated from the deviant act. The process used to settle a dispute or respond to deviance is not concerned so much with punishing a past sin, but with assuring a harmonious present and future for both the offender and the victim. 'Punishment', therefore, is "widely conceived of as expiation, not as retaliation" (MacLeod, 1934: 227).

Another of the central aspects of customary law noted by the researchers was the fact that it used an ad hoc approach to deviance and dispute resolution. That is, rather

than adhering to abstract rules in all cases, each incident was viewed in its context. All of the facts and circumstances surrounding the incident were considered in order to arrive at the response most likely to produce the desired outcome:

each organization, game, dance, feast, or custom filled some social need. They understood what they wanted and strove to meet that want (Parker, 1916: 258).

Another example of this contextualizing is found in the approach to property. In our society, if a person takes an item belonging to someone else, no matter how rich the owner, they are guilty of theft. In aboriginal society, the situation of both the victim and the offender would be taken into account. Nelson (1899) noted that:

if a man borrows from another and fails to return the article, he is not held to account for it. This is because if a person has enough property to enable him to lend it, he has more than he needs (1899: 304).

One final aspect of the literature from this period is that, while often praising customary and traditional methods, it also includes recommendations for the accelerated assimilation of Aboriginal peoples as the answer to their 'problems':

As rapidly as possible...the tribal organizations should be broken up and individual ownership of land and property encouraged and promoted (Blackmar, 1929: 655).

Similarly, McKenzie argues that to truly achieve freedom, the Native peoples must accept and internalize the ways of the white man, since it is the white way of life that is seen as being inevitable. As this writer puts it, "no one is free until he shares in the thought which controls his social life" (1914: 768).

This statement provides a natural transition point to the consideration of more recent research on customary law, for the statement above might characterize the tone of much of the current literature, albeit with a very different interpretation. While McKenzie

meant it as an argument to abandon custom and tradition, contemporary authors might see such a statement as a very strong argument for promoting First Nations customs and encouraging a return to traditional methods of social control and dispute resolution.

Recent customary law literature identifies the same principles and beliefs that were described in the earlier literature considered in the preceding pages. The main difference is that the inherently racist and assimilationist core that characterized the earlier literature is no longer evident; it has been replaced with active promotion of customary law as a means to improve the situation of First Nations peoples with respect to the criminal justice system.

The current literature regarding Aboriginal customary law differs little in substance from the earlier research discussed in the preceding section. The major tenets of community involvement, confession and apology, restitution and restoration of harmony, and the lack of a specific, codified body of common law are all prominently featured (see, for e.g. Coyle, 1986; McDonnell, 1992; AJI, 1991; Clark, 1991).

What is now being recognized is that while customary law is most often described with respect to its original context, recommendations are made for its application in a modern context. Hoyle notes that dissatisfaction with the current legal system has led many First Nations community members to assert that social control could be better maintained through the use of "traditional law" (1995: 150). At the same time, he points out that:

it can neither be assumed that 'tradition' is a satisfactory base for modelling a justice system or that every aboriginal community would want such a focus. Native communities vary tremendously in the degree to which customary practices have been retained, changed or forgotten. Many

aboriginal communities are characterized by fractious disputes over the role of 'traditional' values and practices in the ordering of daily life (1995: 152).

Similarly, McDonnell notes that there is little agreement among Cree people regarding customary law and its suitability for use in the contemporary context:

customary practices have a quite different place and importance in the minds of different people in contemporary Cree society...There are very few [Cree] who could give clear substance to these values and customs, and fewer still who, in doing so, would find broad agreement in the population as a whole (1992: i - ii).

It is this emerging issue that has prompted the research described here. While there appears to be general agreement regarding the general nature of customary law, there is little information regarding who continues to hold traditional knowledge. In addition, there is a lack of knowledge regarding what these laws might look like when considered in the contemporary context. In the following sections, some of the issues currently being explored internationally and in Canada with respect to customary law will be examined.

## CHAPTER TWO

### Current Issues in Aboriginal Customary Law

#### *2.1 - Aboriginal Customary Law in Other Countries*

The idea of applying customary law to the criminal justice system is being explored in several areas of the world to a much greater extent than in Canada. Australian Aborigines and New Zealand Maoris have much in common with Canada's Aboriginal peoples; as stated in the Report of Manitoba's Aboriginal Justice Inquiry:

All three nations suffer from a tragic over-representation of indigenous peoples in the adult and youth criminal justice system, including detention facilities. All three have few members of the indigenous population who work within the system as judges, lawyers, police or correctional officers. Aboriginal people in each country are making ever stronger demands upon the justice system to reform itself and to involve the indigenous community in its plans and operations (1991:299).

While the Australia Law Reform Commission (1991) has produced extensive reports describing Aboriginal customary law and examining the issue of establishing Aboriginal justice systems, recognition has not become implementation to any great extent.

The situation in New Zealand is not significantly different, although a special Aboriginal court system does exist. This system holds exclusive jurisdiction over property law such as the administration of Maori land holdings and estates, but has no criminal or civil authority. Maori communities are allowed to deal with some very minor offences such as public drunkenness and disorderly conduct, but the role of the communities in handling criminal justice continues to be very limited.

It is apparent that Australia, Canada, and New Zealand share a similar experience with respect to the situation of their Aboriginal populations in the existing justice systems. In all three countries there is increasing recognition of Aboriginal customary law, but little in the way of application to the administration of justice. There are, however, numerous examples of indigenous customary law existing side by side with Western legal systems; many of them may be found in African countries that once experienced colonization similar to that in the countries discussed above.

Perhaps one of the best examples of this mix of legal forms can be found in Botswana. The law of modern Botswana has many sources, including their current statutory law, Dutch and common law received in colonial times, and traditional or customary law. This country has been selected as an example due mainly to the fact that traditional law is still important in the day-to-day lives of many citizens and as a source of law actually applied in the country's courts (Barton, 1983:40). Modern Botswana has a rapidly growing industrial component, is becoming ever more urbanized, and an increasing segment of the population derive income from urban-industrial employment.

Botswana's government is a multi-party democracy modelled after the British parliamentary system. An interesting feature of the system is the House of Chiefs, made up of thirteen tribal leaders from across the country. The role of the House of Chiefs is very much like the Canadian Senate, giving comments on all proposed and amended legislation. The government is not, however, bound to follow their decisions.

The justice system consists of the Botswana Court of Appeal, the High Court (similar to Canada's Supreme Court), and Subordinate Courts (similar to provincial or

Queen's Bench Courts), and the Customary Courts. The customary courts have the same degree of autonomy as the Subordinate Courts and are located throughout the country. Until 1891, these courts dealt with all civil and criminal matters. Upon colonization, some cases were taken over by the formal courts - which also served as Courts of Appeal from the customary courts. After independence was gained in 1966, the Customary Court Act returned much of the autonomy that had been lost to the British. As one researcher noted "Today, the two systems of Courts work well together in providing the country with its necessary administration of justice" (Campbell, 1980:393).

Traditional law in Africa is localized - like most traditional law - but even more so due to the large number of separate languages and cultures. An emphasis on collective responsibility is also widespread, again like most traditional law. There are some distinctive features, however, such as the fact that rights are not found solely in groups. Rights are believed to inhere in statuses and role relationships, for example positions like 'father', 'wife', or 'chief' and the role expectations attached to each of them. The Tswana traditional courts are arranged hierarchically with progressively greater jurisdiction. The local court of each ward is the court of initial jurisdiction. Decisions may be appealed to the court of the village head, and thence to the court of the tribal chief, the highest level. In some cases, even the ward court was not utilized for dispute settlement. As Schapera notes:

There were other bodies apart from the regular courts which helped ameliorate disputes. Before a case was taken to the ward court an attempt was made to settle it in the court of the family group, which, evidently, was a kind of 'moot' (1985:15).



Although it is hazardous to attempt to compare the African indigenous experience to that of Canadian Aboriginal peoples too closely, this example shows that traditional legal systems can function in a nation that also applies Western-style legal rules and procedures. Clearly, not only has the existence of traditional methods of dispute resolution been proven, in some cases it is being extensively applied. What is now required in Canada is to determine who holds the knowledge of these methods, and of what these methods consist before any serious attempts may be made to apply them in the context of criminal justice. While it has been shown here that such information is rare in Canada right now, there are projects underway. These will be briefly described in the following section.

## ***2.2 - Current Examples of Aboriginal Customary Law in Canada***

In reference to the current state of knowledge of Aboriginal customary law, one author stated that we are faced with "...a situation where much is said about the validity of customary law but where little is provided by way of concrete exposition" (Clark, 1990:31). Since it has been acknowledged that there is considerable oral and anecdotal evidence of the continuing existence of aboriginal customary law, this section will be restricted to the few areas where more systematic evidence is available.

The Gitksan-Wet'suwet'en of British Columbia are currently carrying out a project aimed at preserving their customary laws for future generations. The task is proving to be a very difficult one, due to the problems found in attempting to translate an oral tradition to written, codified rules and laws. One of the major hurdles that had to be overcome was to find a suitable translation of the word "law" that would make clear to the Elders what was being sought. The term eventually settled upon was "*ada'awk*", which, roughly translated, means "social history" (Clark, 1990:8). In the past, succeeding generations of Gitksan were compelled to maintain historical continuity by acting in a manner consistent with their *ada'awk*. That is, in this society, social control was achieved through adherence to how things had been done before. In sociological terms, there is a detailed 'normative framework' in existence, ready to be stepped into during the process of socialization. It should be noted that while the members of the Tribal Council were able to define what their law is, the Elders still had difficulty speaking of these laws in the abstract sense; and thus focused on individual cases. Under traditional law, penalties for what are termed "criminal offenses" include physical force, ostracism, and shame. The research of the

Gitksan suggests that the latter two were "at least equally powerful" as physical force (Grant, 1987:260). In Canada today, however, there are few examples of formal use of such traditional penalties that are supported by an entire Aboriginal community. This "criminal" aspect of the justice process is left to the state courts, particularly for serious offenses such as murder.

In the Yukon Territory, the Teslin Tlingit First Nation has implemented several community justice programs under their Community Justice Initiative. The intent is to create justice programs that better meet the needs of community members. The leaders of each of the five Teslin clans serve on the Justice Council which functions as a tribunal and determines sentences for offenders convicted in the Territorial Court. The Justice Council "imposes sentences which are appropriate for the treatment of the offender and for the restoration of harmony in the community" (Griffiths, 1993:14). Once the sentence is passed, the clan leaders are responsible for ensuring that it is carried out.

There is an exception to be found, however, in the traditionalist Longhouse system at the Kahnawake reserve (Clark, 1990:43). Under this model, the Kaianerakowa, or Great Law of Peace of the Iroquois would be applied to all offenses - including murder. This traditional system uses the basic principles that have been applied for centuries. Disputants are pressed to accept responsibility for their roles in the matter, and to resolve it privately. An interesting aspect of this system is that while "accused" are pressed to admit the act rather than be presumed innocent as in Western law, they are also protected from overly harsh sanctions by the requirement that any decision is subject to their approval as well as that of the victim.

At this time, the models described above are two of the very few concrete manifestations of aboriginal customary law that appear to be operating in Canada. These examples of accepted and supported customary law could lead an observer to conclude that similar results can be produced in other aboriginal communities given sufficient time, resources, and effort. It must be borne in mind however, that the two groups considered above are very different from the aboriginal peoples of the rest of Canada, and specifically Manitoba. The Gitksan of British Columbia were traditionally a fishing people and the Mohawks an agricultural people. It has been suggested that the more stable sources of food and a social structure based upon large static villages necessitated the development of more clearly defined rules for social conduct (Ross, 1992:135). With agriculture, for example, comes the accumulation of property and thus the need for written laws to ensure protection of individual interests. Conversely, in a hunter-gatherer society, priority is given to the collectivity; dispute resolution mechanisms emphasized relationships rather than laws. While there were strong rules of conduct in existence, they would be found mostly within family relationships, rather than in general codes. In these societies, deviance by an individual (for example disruption of a hunt) could result not only in hardship for the community but also in serious damage to the offender's health. Thus, altruism and simple self-preservation provide a great deal of implicit social control. These very basic differences in survival imperatives could have significant implications for any attempt to locate and describe the customary laws of hunting-gathering societies. In addition, since Manitoba First Nations peoples are no longer dependent upon hunting and gathering for survival, there could be serious implications for attempting to apply methods

that were used in a vastly different economic and social milieu to the contemporary situation. This should not be interpreted as an argument against the use of aboriginal customary law as the basis for more culturally sensitive justice systems in the future. Rather, it is meant as both a caution and an encouragement for systematic research to complement the hopeful enthusiasm with which most plans for a return to traditional ways are proposed.

In recent years, numerous government agencies and task forces have also been examining the plight of Aboriginal peoples in the criminal justice system; the potential uses of customary law feature prominently in many of them. In the following section, a brief review of the findings of some of these task forces will be considered with respect to their relevance to the current research.

### ***2.3 - Overview of Recent Findings and Recommendations***

#### **Provincial Commissions and Task Forces**

In Nova Scotia, the *Royal Commission on the Donald Marshall Jr. Prosecution* (Clark, 1989) was charged with the task of investigating Marshall's wrongful conviction, but the findings and recommendations produced had a much broader focus. In general, it was concluded that the justice system not only failed Marshall, but the fact that he was Aboriginal contributed to this failure. The Royal Commission recommended, among other things, the creation of a Native Criminal Court and a Native Justice Institute. These recommendations have been accepted "in intent" by the Nova Scotia government, and the process of implementation has begun.

Manitoba's *Aboriginal Justice Inquiry* (1991) is one of the most comprehensive studies conducted to date, containing 293 recommendations. These include calls for the establishment of Aboriginal justice systems based upon an inherent right of self-government, taking Aboriginal culture into account in sentencing, and strengthening cross-cultural education programs. Currently, at the provincial level, the process of implementation has stalled at the "working group" stage.

In Alberta, the *Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Cawsey, 1991) investigated the impact of the criminal justice system on Aboriginal peoples in that province. Significantly, the task force found that one of the most serious problems is the lack of effective communication between Aboriginal peoples and service providers at all levels of the justice system. The recommendations made are numerous, but the main themes were improved cross cultural

training, the need to improve public education with respect to Aboriginal issues, increase education of Aboriginal peoples regarding the criminal justice system, and the need to increase the involvement of Aboriginal elders in all facets of criminal justice.

The Reports of the *Saskatchewan Indian and Metis Justice Review Committees* (1992) echoed those referred to above. In fact, this report specifically noted the profusion of studies of this nature, and perhaps more importantly, the lack of "any significant progress in implementation of those studies' recommendations". Major findings included what are now becoming familiar themes: increasing cultural appropriateness of programs, cross cultural and race relations training, and increased participation of Elders in the Youth Justice system.

### **Federal Commissions and Programs**

The Law Reform Commission's Aboriginal Peoples and Criminal Justice (1991) made numerous recommendations including improvement of delivery of justice to Aboriginal peoples by recognizing their cultural distinctiveness and incorporating these ideas into the criminal justice system where appropriate. Cross cultural training is also recommended for all participants in the justice system, as well as the incorporation of information concerning Aboriginal culture into law school programs. Significantly, the Commission emphasizes the need for research into customary law and its possible uses in future programs.

Owing to assimilation effects, some knowledge of "traditional" ways has been lost or is in danger of being lost. Given the interest in more traditional ways in some communities, the need for information about the past has become important (Law Reform Commission, 1991:38).

The need to address this concern is clearly stated in recommendation number six:

The federal government should provide funding for research into Aboriginal customary law (Law Reform Commission, 1991:64).

Response to the Law Reform Commission's report may be seen, whether directly or indirectly, in several other federal government programs. One such response was the creation of the Aboriginal Justice Directorate in April, 1992. The Directorate administers the Aboriginal Justice Fund, which supports research studies into Aboriginal criminal justice issues, the development of training programs and services, and creation of education and resource facilities.

Finally, the current *Royal Commission on Aboriginal Peoples* (1992) is examining all aspects of Aboriginal peoples and criminal justice. Commission documents once again underline the need for progress on many of the recommendations that have been listed above. In fact, Volume 3 of the National Roundtable on Justice Issues states that:

...outstanding recommendations can and must be addressed within the scope of the current constitutional framework. While implementation will require continued research and policy development, this must be accompanied by effective strategies for action which will translate political will into concrete change (1992: 46).

### **Analysis of Findings and Recommendations**

There are three broad themes that emerge from an analysis of the findings of these various task forces and commissions. First, and most obvious, is that the existing justice system is failing Aboriginal peoples and that change is not only long overdue, but critical to the maintenance of a truly legitimate justice system in the future. These facts have been



so widely recognized and documented that further expansion upon them would be superfluous. As Jackson states:

Statistics about crime are often not well understood by the public and are subject to variable interpretations by the experts. In the case of the statistics regarding the impact of the criminal justice system on Native People, the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away (Jackson, 1988:2).

The second theme is that of the necessity for recognition of traditional Aboriginal customs and methods, and their integration into the criminal justice system. Aboriginal spirituality, participation of Elders, restorative methods, and cross-cultural education are common to all of the Commissions and Task Forces reviewed above. All of these require more extensive knowledge of Aboriginal customary law and traditional methods of justice.

The third, and perhaps the most telling, theme to emerge from these studies is the lack of implementation of any of the more comprehensive recommendations. Clearly, there is some element vital to progress on these issues that is missing. Given that all of the responses to the reports clearly show concern on the part of Aboriginal peoples and governments alike, it must be concluded that one key missing element is a clear knowledge of where and how to begin. Specifically, it follows that in order to introduce Aboriginal custom to criminal justice, it must first be located and described. Owing to the nature of these customs, however, an outside researcher cannot simply enter a First Nations community and find "the laws." The community members themselves must describe and define customary laws from their own cultural perspective. Only then may the laws be brought out of their original context for cooperative attempts at contemporary application.

To this point, systematic documentation of Aboriginal customary law does not exist in a form ready to be applied in the modern context. The current research is intended to assist in guiding the process of implementation of the numerous and well-received recommendations that has thus far been stalled. It should be noted at this point that this research is not an attempt to catalogue and codify an exhaustive Aboriginal customary law system. Rather, it is intended to locate and gain an understanding of the essential elements of customary ways in order to prepare for more extensive work in the future.

In light of the enormous range of literature, research, and expertise that was drawn upon in the course of these inquiries, task forces, and commissions, it must be assumed that the opinions expressed in them reflect beliefs that are widely held in the Aboriginal, criminal justice, and academic communities about the future of Aboriginal justice systems. Certainly, aboriginal customary law must exist to some extent for it to be featured so prominently in many current proposals. For example, it is stated in the report of Manitoba's Aboriginal Justice Inquiry that native elders have preserved knowledge of cultural traditions "about which we heard so much in the course of our hearings" (1991:19). It was further stated that the role of elders in aboriginal societies is "still very important and many Aboriginal people go to them for advice, assistance, and treatment" (1991:20).

There is also, however, a need to explore to what extent knowledge of customary law continues to exist in an integrated form, and where it may be found. Further, if it can be shown where this knowledge exists, it must then be described in sufficient detail if it is ever to be applied. Put simply, there are three questions that must be asked: **"To what**

**extent does knowledge of customary law exist today?"**. Following this, the questions that follow are **"What does it look like?"**, and **"How may it be applied to the justice system today?"**. This research will not extensively address this last question, but will lay the foundation for its investigation in the future.

The lack of substantial knowledge in "white" society about customary law is a problem that has existed since the time of first contact between Aboriginal peoples and European settlers. While much has been learned about customary law in general, as evidenced by the literature reviewed earlier, there continues to exist a lack of agreement regarding the role customary law and tradition might play in contemporary First Nations communities. It is this lack of consensus that led to the development of the specific research questions to be outlined in the following section.

#### ***2.4 - Development of Research Questions***

The preceding section was intended to describe some documented examples of customary law being applied in the contemporary context. The brevity of the Canadian section might also underline the **lack** of substantive knowledge of this subject. Even where customary law is presumed to exist, there has been little or no systematic description of what it contains. Furthermore, the research cited here and in other sources has often concentrated on the knowledge held by the **Elders** in Aboriginal communities. It can be well argued, however, that it is at least as important to assess the state of knowledge of customary law among the younger generations, for it is they who will be charged with the task of improving the current situation of Aboriginal peoples with respect to the criminal justice system.

In preceding sections, it was noted that there is a severe lack of knowledge regarding Aboriginal customary law among the very officials who are promoting it. This lack of knowledge is not, however, restricted to the non-Aboriginal population. In fact, the knowledge gap was observed firsthand by this researcher while attending community meetings at several Manitoba reserves over the summer and fall of 1992. During the course of these meetings, great uncertainty about who holds this traditional knowledge was expressed. Among some members of the communities, there was a strong desire to apply customary methods of justice, and a firm belief in their potential for improving the current situation. Among other members, however, there was a lack of certainty regarding which members of the community continued to possess this knowledge, and whether these traditional ways even fit with their existing perceptions of criminal justice.

The majority of the differences in opinion that were observed seemed to reflect age and gender differences. McDonnell describes the pursuit of a traditional system in one First Nations community in this way:

At best...the whole process amounts to a partisan promotion of views that are clearly situated somewhere within native societies and just as clearly do not represent the diversity of views that now exist in every native society (1992:312).

This lack of consensus regarding traditional law and its role in the modern justice system prompted the research being described here.

There exists an additional lack of consensus regarding the definition of that which has been referred to here as "customary law". By its very nature, customary law eludes a simple definition. Even the use of the word "law", with all of the European cultural baggage that accompanies it, is not a wholly satisfactory term. Researchers have noted that attempting to discover a system of laws discrete from other aspects of social life is to impose a view of social order that does not exist in Aboriginal society (Gordon & Maggitt, 1985; Grant, 1987). Kane (1984) summed up the key questions that must be considered when attempting to define customary law:

What is the difference between distinctions such as Indian traditions (and customs) and 'customary law'? Are traditional Indian religious practices part of customary law? When is a customary practice not a customary law? (1984: 16).

While the search for a satisfying definition of customary law continues, the definition first developed by Hoebel will provide the model for this research:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting (1954: 28).

There are two limitations inherent in this definition that will be addressed through minor modifications. First, physical force is the only response to deviance recognized by this definition. A new definition should allow for sanctions other than force such as ostracism or enforced restitution. Second, the use of the word 'privilege' in Hoebel's definition is perhaps not the most accurate choice. Under a Hohfeldian scheme of legal conceptions, the word 'right' would be used in place of 'privilege' since the jural correlate of a *right* is a *duty* (Hohfeld, 1916: 30). This assertion, made only in the context of the current research, is based upon the assumption that the offender must have a duty to accept the sanctions decided upon by the 'individual or group' if the response is to be called 'customary law'.

Thus, the following modified version of Hoebel's definition will be used here:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force, ostracism, or the placing of any other duty upon the violator by an individual or group possessing a socially recognized right of so acting.

Having defined "customary law" as it will be used for the purposes of this research, the specific research questions to be investigated will be presented in the following section.

There is sufficient evidence to suggest that the assumptions made about Aboriginal customary law need to be examined; specifically with respect to differences among generations:

The fact that young people, the elderly, hunters, administrators, men, women and so forth may all have quite different views on what is important regarding customary practices is, or should be, of crucial concern to the development of any policy that imagines these practices might be constructively incorporated in a future justice system (McDonnell, 1992: ii).

It has been established in the preceding chapters that there are gaps in current knowledge of Aboriginal customary law, and that there are differences of opinion regarding its contemporary application. This situation provided the impetus for the development of the research questions below.

It was assumed that some knowledge of customary law does indeed exist among Aboriginal peoples. The main research question thus became:

- (1) *To what extent does knowledge of Aboriginal customary law exist among Aboriginal peoples in Manitoba?*

In addition, it must be ascertained which specific segments of the Aboriginal population hold this knowledge. Thus, a subsidiary question of this main question will be:

- (1a) *How is this knowledge distributed by demographic factors? That is, how are age, sex, and geographic location related to knowledge of Aboriginal customary law?*

There is a second major research gap that is subsequent - not subsidiary - to question (1). The simple location of knowledge of customary law is certainly a **necessary** precursor to any attempts to apply them. It is not, however, sufficient. Establishing the existence of any given thing guarantees neither understanding of it, nor the ability to apply it toward an end. Therefore, this research will also seek to determine of what these customary laws consist. Thus, the second central research question will be:

- (2) *What is the content of Aboriginal customary law?*

The subsidiary questions that spring from research question (2) are numerous, but by far the most important is to determine how these traditional methods may be used to

improve the current situation of Aboriginal peoples with respect to the criminal justice system. For example, the Hollow Water First Nation in Manitoba is attempting to apply customary methods to cases of sexual abuse in their community. The aims of the initiative appear to be consistent with the main tenets of customary law that were described in the literature review: restoration of harmony, public apology, and the involvement of both the victims and the community. Another example is the Community Justice Initiative being undertaken by First Nations people on Vancouver Island. Offenders are asked to apologize for their acts and ask for the community's forgiveness. The traditional potlatch ceremony is employed to promote reconciliation and healing of the victims, the offender, and the entire community (Griffiths & Belleau, 1995).

Obviously, the range of potential uses of this knowledge is enormous, and an exhaustive determination of possible applications is beyond the scope of any single research project. It is possible, however, to identify a general framework that may be adapted to particular communities and situations, and that will facilitate the application of customary law to the contemporary situation. Thus, the results of this stage of the research might be used in assisting the development of local justice plans, and a "grassroots" public legal education and information programs.

Having specified the main questions that this research endeavours to answer, it is now necessary to describe how they were empirically investigated. The following section will first outline some of the problems that are encountered in research of this kind, followed by a detailed description of the methodology that was employed in an attempt to minimize them.



## **CHAPTER THREE**

### **Methodology**

#### ***3.1 Methodological Issues***

Prior to a description of the specific methods employed in conducting this research, there are several issues related to this type of research that must be identified. When conducting research among any population, it is the responsibility of the researcher to ensure that no harm is caused them as a result of that research. When the population being studied is in any kind of disadvantaged or subordinate position relative to the larger society, it is especially incumbent upon the researcher to be sensitive to that fact, and to exercise caution in both the collection and the presentation of the data. Canada's Aboriginal peoples have historically been politically and economically disadvantaged relative to the larger population. Furthermore, research of this kind is especially sensitive, since it also deals with justice issues. The results of this research could have implications for future policy that could affect the lives of not only those members of the sample population, but all Aboriginal communities in Canada. Thus, it is necessary to establish a high level of trust and rapport with the population being studied in order to ensure the full cooperation and candour of the respondents. In the case of this research, the researcher has been working for several years in Aboriginal communities and such a relationship has been established, allowing a degree of access to the sample population not available to most researchers.

A related issue is that of the dangers inherent in any research that involves the study of a culture different from that of the researcher. It is well known that there is a tendency to judge a different culture's customs and practices by the standards of one's own culture. This danger is not rare in sociological research, and the use of proper research methods coupled with a recognition of this danger are usually sufficient to mitigate the potential for misunderstanding. However, to further reduce the possibility of misinterpretation, wherever possible the active participation of Aboriginal organizations, communities, and individuals was sought in order to ensure that the data obtained were not simply taken from Aboriginal peoples and interpreted incorrectly by a non-Native researcher.

A second issue that bears upon the research methodology is one that has begun to become more apparent in recent years. As noted in the previous chapter, the use of traditional legal methods is becoming a widely suggested route to improvement of the position of Aboriginal peoples within the criminal justice system. However, it has also been noted by some researchers that traditional methods have experienced varying degrees of "erosion" (Dickson-Gilmore, 1992) due both to the direct efforts of governments as well as the simple passage of time. If the degree of this loss of traditional knowledge becomes too great, it is argued that attempts at reconstruction of legal traditions may actually lead to the *invention* of tradition (Dickson-Gilmore, 1992; Hobsbawm, 1983). Certainly, many Aboriginal persons recognize that funding of future programs is contingent upon the perception by government that traditional methods are existing and appropriate. Thus, it might be argued that some respondents would feel compelled to

supply the answers that they feel will maintain this perception. While this possibility must be recognized, the methods employed for this research should avoid collection of invented data. If invention were being undertaken, it is likely that it would be done by the more politically aware members of the communities. In that case, the broad base of the sample being used would serve to identify it since it is highly unlikely that the entire population could provide consistent invented information. The other possibility is that invention is taking place on an individual level. If that were the case, it should again be obvious since it would then be unlikely that patterns and common accounts would emerge from the data collected.

A third issue that is inherent in the study of a different culture is the possibility of language barriers. In the current research, language can be a major problem, especially with the older respondents. In early meetings with Elders, very few who spoke no English were encountered, and most spoke fluent English. The language problem surfaced when the Elders wished to speak about issues from the past or those that were rooted in tradition or Aboriginal spirituality. As conversations moved from routine matters to deeper issues of deviance and traditional responses to it, the Elders began to speak in their native tongue much more frequently. It is this researcher's opinion that some concepts, especially those relating to the past, are simply not amenable to quick translation to English. Since it is these very issues, traditional perceptions of deviance, that hold the essence of the data this research seeks to find, the use of Aboriginal translators is vital. Further, these translators must be somewhat familiar with the issues being discussed if they are to be able to impart the accurate meaning of the respondents' words to the

interviewer and thus reduce the likelihood of misinterpretation by the researcher of culturally-bound ideas expressed by the respondents.

A final issue that must be addressed is that of the significant differences that exist among Aboriginal groups within this country. While this research refers to "Aboriginal customary law", it must be recognized that Canada's Aboriginal people are by no means a completely homogeneous group. Of the communities being studied here, half report their tribal affiliation as Ojibway and half as Saulteaux. Differences even exist within single tribes; for example the Swampy Cree of Manitoba and the plains Cree in Saskatchewan exhibit subtle differences in social characteristics. Despite these differences, it has been noted that Aboriginal peoples share many beliefs about deviance and law:

These similar characteristics are examples of Aboriginal ethics or rules of behaviour. Aboriginal ethics or rules of behaviour are present in some form in all tribes of North America (Brant, 1990:534).

Thus, this research will not be simply an ethnography of specific communities; the results will be relevant to the knowledge and application of Aboriginal customary law across the country.

### ***3.2 Research Methodology***

The questions outlined in the previous section were investigated primarily through in-person interviews. The data collected during the interviews were supplemented by the knowledge and rapport gained through several years working with Manitoba Aboriginal communities. The researcher was able to derive the benefits from attendance at various community and Elders' meetings, justice and policing workshops, and sacred traditional ceremonies. Following is a description of the specific methods employed in conducting this research.

The research began with a preliminary review of the available literature dealing with Aboriginal customary law. As noted in the previous chapter, the review began with an examination of early historical records dealing with customary law and continued to the present state of knowledge of this subject. The review concluded with an examination of the current state of knowledge of Aboriginal customary law including any criminal justice programs that are attempting to incorporate it.

The next phase of the research involved consultation with several Elders and employees of First Nations organizations. Informal meetings were held with Elders and a First Nations cultural education worker. These discussions confirmed that, unlike most law, customary laws are neither explicitly set out in any sort of code, nor are they thought of as separate from other aspects of social life. Owing to this fact, it was decided that direct questions such as "Can you tell me what your customary laws were?" would not be suitable. The question outline used to guide the interviews was refined at this point in

light of the insights gained from these consultations with the Elders. This outline will be described in detail in subsequent sections.

### **Research Location**

The research sites for this study were the member-communities of the West Region Tribal Council (WRTC). The WRTC is a political and administrative organization representing eight reserves in Western Manitoba, ranging in population from approximately 40 at the smallest to approximately 1500 at the largest. Following is a brief description of each of the WRTC communities in which the research was conducted.

**Gambler First Nation** is the smallest of the WRTC communities, both in terms of geographic area and population. The First Nation, population 65, consists of five discrete land parcels in close proximity to each other totalling 420 hectares. Police service is provided by the RCMP detachment in Russell; there are no official community justice programs operating.

**Keeseekoowenin First Nation**, population 480, is directly adjacent to the town of Elphinstone and covers 2,122 hectares. The major land use is agricultural. Police service is provided by the RCMP detachment in Elphinstone; there is one Band Constable employed on the reserve.

**Crane River First Nation**, population 321, is located in the Westlake region, approximately 130 kilometres northwest of Dauphin. The reserve covers 3,523 hectares, most of which is used for agricultural purposes. Police service is provided by the RCMP detachment in Ste. Rose du Lac; there is one Band Constable employed on reserve.

**Pine Creek First Nation**, population 1026, is located approximately 110 kilometres north of Dauphin on the west shore of Lake Winnipegosis. The reserve covers 9651 hectares, most of which is forest or bog. Police service is provided by the RCMP detachment in Winnipegosis.

**Waterhen First Nation**, population 614, is located on the southwest shore of Waterhen Lake, approximately 125 kilometres northeast of Dauphin. The reserve covers 1856 hectares, most of which is agricultural land or forest. Police service is provided by the RCMP detachment at Winnipegosis. The band employs one Band Constable.

**Valley River First Nation**, population 638, is located adjacent to Duck Mountain Provincial Park, approximately 72 kilometres west of Dauphin. The reserve covers 4668 hectares, the majority of which is agricultural land or forest. Police service is provided by the RCMP detachment at Roblin.

**Rolling River First Nation**, population 495, is located 6 kilometres southwest of Erickson. The reserve covers 5775 hectares, most of which is agricultural land or forest. Police service is provided by the RCMP detachment at Minnedosa.

**Ebb and Flow First Nation**, population 954, is located on the west shore of Ebb and Flow Lake, approximately 83 kilometres east of Dauphin. The reserve covers 4668 hectares, most of which is agricultural land or forest. Police service is provided by the RCMP detachment at Ste. Rose du Lac. The band employs one Band Constable.

## **Selection of Respondents**

One of the research questions concerned whether or not different generations of Aboriginal people would have different levels of knowledge of traditional methods of social control. Thus, this study was generational in nature; that is, respondents were selected from three different age groups. The age divisions selected are somewhat arbitrary, since there is no rational method by which to define three age groups with respect to traditional knowledge. The "young" age group was defined as 18 to 35 years, the "middle" age group as 36 to 55 years, and the "older" age group as 56 and over.

At the time that this research was being undertaken, the WRTC was conducting a survey funded by the Solicitor General's Aboriginal Policing Directorate, dealing with policing issues in WRTC communities. The research being described here was conducted in conjunction with this project. The WRTC's policing questionnaire was relatively short; approximately twenty to thirty minutes for an in-person interview. For the purposes of this research however, a longer form of the interview was completed by a subsample of the respondents. This longer form included a section dealing with Aboriginal customary/traditional law. One hundred research questionnaires were randomly distributed among each community's questionnaires, so that approximately one in twenty contained the long form. Interviewers administered the longer questionnaire to the respondent who was being interviewed at the time that the long form surfaced.

Based upon this researcher's previous work in the WRTC communities, it was anticipated that the response rate would be quite low, given the reluctance of many Aboriginal persons to answer questions in a formal setting. Compounding this problem is



the fact that most Aboriginal interviewers will not normally attempt to persuade a respondent to reply. Non-native researchers are usually instructed to increase participation rates by politely pointing out the importance of the research, assuring confidentiality, etc.. Among Aboriginal peoples, however, it is considered extremely rude to attempt to persuade someone to do something that they have declined to do (Ross, 1992: 12-26). Thus, the total of one hundred long forms distributed was quite high, owing to the expectation that a response rate of only twenty to thirty percent might be obtained.

During the preliminary meetings with Elders and Tribal Council employees, it was learned from several sources within WRTC communities that residents of reserves south of Riding Mountain differ in many aspects from those to the north, including culture and traditional activities among other things. Since geographical location could be a factor affecting knowledge of customary law, the research sample was drawn from all eight communities in order to provide respondents from relatively remote reserves (e.g.. Pine Creek, Crane River), as well as from reserves situated adjacent to a town (e.g.. Rolling River, Keeseekoowenin). Thus, this sampling of **all** member communities was intended to provide as wide a range of respondents as possible.

At the conclusion of the interviewing stage, individual interviews had been conducted with six "older" respondents, eight "middle-aged" respondents, and seven "young" respondents. Four of these were from Gambler First Nation, five from Ebb & Flow, and three each from Crane River and Waterhen. In addition, five Elders participated in a group question and answer session based upon the question outline used

in the individual interviews. Limited resources and the impediments to interviewing a First Nations population mentioned above did not allow a greater sample to be contacted. However, it must be noted that this is exploratory research and is not intended to be definitive; the conclusions reached are intended to inform further customary law research carried out in the future.

### **Interview Format**

Deciding upon the type of questions to be asked in the interviews posed some substantial problems. As noted in previous chapters, customary/traditional methods of social control are not the codified, abstract kind of laws found in non-Aboriginal society. In fact, "laws" as non-Natives refer to them were not even considered to be a separate institution in traditional Aboriginal society. Rather, the initial meetings with the Elders indicated that the overall approach to social life simply contained laws implicitly. Given these facts, it was clear that interviewers could not simply go into the communities and ask people to tell them about traditional laws. It was decided that a less direct route must be found to obtain information about customary social control methods.

Preliminary discussions with WRTC staff and Elders indicated that cases of deviance were dealt with on an *ad hoc* basis; that is, no one rule applied to all offenses of a certain type. Rather, all of the facts surrounding any incident of deviance were taken into account in determining the response to it. The "laws" are situation-specific - and thus, the response to any incident of deviance may vary greatly depending on the specific elements of the case. The only way to obtain a general picture of the workings of customary law,

therefore, was to obtain as wide a cross section of specific responses to deviance as possible. Thus, the interview questions devised were "vignettes"; five detailed descriptions of hypothetical instances of deviance.

In light of the assumptions made regarding the situation specific nature of responses to deviance, the vignettes were not only varied by type of crime, but by age and sex of offender, the seriousness of the offence, and the person/group being victimized. Offenders include a young boy, middle aged men, a middle aged female, and an older man. Offenses include a minor break and enter, a more serious break and enter, a murder, repeat drunk driving, and embezzlement of public funds. It is very dangerous to attempt to label these offenses as "serious" or "minor", since such a judgement would be based solely upon the non-Native researcher's opinion of such matters. However, it will be assumed that a break-in by a young boy is less serious than an instance of murder. The victims were varied to provide situations where a crime was committed against property, against an individual, and against the community in order to determine if there are differences in response based upon who or what is victimized. The specific scenarios used are reproduced below.

(1) A 10 year old boy is out with his friends one night and they are passing a local store that has closed for the night. The boy goes to the back of the store and kicks in the door. The boy takes a radio and some clothing, and leaves the store. The store owner, who lives next door, sees him leaving, and he knows who the boy is.

(2) Three men are walking down a road on the way home from a fishing trip. They are passing the home of a man who cuts lumber and sells it to people in the community. Seeing that the man is not at home, they break into his house and take two chainsaws and some gasoline. The men are later found in possession of the saws by the man who owns them.

(3) Two men have been at a bar for several hours and both of them are drinking heavily. An argument breaks out between them and they begin to fight. One of the men pulls out a knife and stabs and kills the other man. There are several people in the bar who have seen the whole thing. The community constable arrives and arrests the man with the knife.

(4) A woman is stopped by the local police for speeding on a main road in her community. She has been stopped three times before in the past year for speeding on the same road and was given a warning each time.

(5) A man is elected by the people of his community to be their leader and to handle all of the business affairs of the community, including money paid in taxes by all the residents. This money is held in a fund and used for public expenses such as road repairs, community buildings, and services to the residents. A year later it is discovered that the man has been using this money to buy things for himself and his friends.

Each hypothetical situation was followed by the simple question "How do you think this problem should be handled?". The presumption was that the responses would indicate first whether the respondent has knowledge of customary methods, and if so, of what these methods consist. Following the initial answer to this question, probes were then made regarding what action the respondent felt was required by specific actors. In addition to these hypothetical cases, broader questions such as "Do you remember a time when problems were handled differently?" were asked, followed by appropriate probe questions to determine whether the respondent believed such methods might be useful today.

### **Interviewers**

A total of thirteen interviewers were hired through advertisements posted at each of the WRTC communities. At this point, it must be noted that the interviewers were not selected by the researcher. Interviewers were selected by the Chief and/or Band Council

of each community and their names submitted to the researcher. All interviewers were required to attend a one-day training session designed by the researcher, despite the fact that most had some previous experience in questionnaire administration. Half of the training session was devoted to a presentation by the researcher giving a brief overview of interview research methods. Topics covered included initial introductions, handling refusals, answering commonly asked questions, neutrality, accurate recording of responses, the use of probe questions, and ethical issues. The second half of the training session was devoted to interview practice where the interviewers took turns interviewing each other and the researcher.

The minimum requirement was at least one interviewer hired from each community in order to allow respondents to be surveyed by members of their home community. In fact, two interviewers were hired for each of the five largest communities, and one hired for each of the remaining three communities. As noted in the Methodological Issues section, this hiring protocol was intended to maximize the benefits gained from the increased trust normally given to a fellow community member.

Although it was expected that all interviews could be completed within two weeks, one month was allotted for the data collection stage in order to ensure that the sample size (and thus the validity of the data) was not compromised by interviewers being rushed to complete their work. Despite all the above attempts to ensure the accuracy and validity of the data, results obtained from one of the communities were suspect and thus were not included in the analysis.

## **Method of Data Analysis**

Since this research is exploratory in nature, selecting a certain methodology to be applied is somewhat difficult. It is clearly not possible to study customary methods of social control in any quantitative way; by their very nature custom and tradition in Aboriginal societies are not strictly codified or even thought of in any explicit way. This research was, therefore, qualitative in nature. When conducting research of this type, the normal research steps of data collection, analysis, and formulation of hypotheses are not discrete operations. Rather, analysis begins shortly after the data collection stage begins. Field notes are reviewed in order to identify any emerging themes or commonalities that may be further investigated in subsequent interviews. Owing to financial constraints and the physical distances involved in this research, the method above was only employed for the older respondents and one key informant. The fact that saturation was reached relatively quickly in the case of the young and middle age groups compared to the older age group suggests that this will not have any significant effect upon the quality or validity of the data obtained.

Four of the Elders interviewed agreed to follow-up interviews with the researcher where initial impressions and emerging patterns were further explored. Throughout the data collection process, the cultural education coordinator of the WRTC, a respected medicine pouch carrier, acted as a key informant to clarify and expand upon information gained from the Elders.

The responses to the deviance vignettes were analyzed by breaking the deviance-response into three components. First, there is the action to be taken; for

example punishment, restitution, counselling, etc. Second, the person(s) or agency that is to carry out the action or ensure that it is carried out was identified. Third, it was determined from where the authority to decide upon and carry out the response comes. Following identification of the action, persons involved, and locus of authority, each respondent's views could be classified as customary or non-customary. This process of data analysis will be described in greater detail in the discussion of the findings.

## **CHAPTER FOUR**

### **Interview Research Results**

#### ***4.1 Interview Findings***

This section is intended to provide only a very brief summary of the data (broken down by age group) obtained from the interviews. No attempts to analyze or interpret the findings will be made in this section; rather it is simply intended to familiarize the reader with the overall results obtained prior to any categorization or analysis.

#### **Older Age Group**

When asked what should be done about an incident of deviance, one of the most frequently mentioned responses was that all the people in the community must be made aware of the situation immediately. It was often stated that talking must take place in order that everyone in the community (Elders, the offender and his family, the victim and his family, the people of the community) is aware of what happened and is involved in the response. Incidents of deviance were not seen as isolated matters involving only an offender, a victim, and a criminal justice agency. Respondents stated that since the incident has implications for all community members, it should be discussed until some sort of consensual response is obtained. Most respondents indicated that it is vital that the offender be involved; they cannot be a passive element in the process, or nothing will be achieved. It was also noted that one person alone cannot decide how to deal with such a problem.



Another of the most common responses to the hypothetical deviance scenarios might be broadly described as the "socialization imperative". While such answers did not answer the "what should be done about this?" question directly, they do provide valuable information about how Elders view deviance. Most respondents noted that the community Elders must be involved with the children on a regular basis if they are to behave "well." Early socialization is viewed as being vital to the future behaviour of a person. It was noted that the community members "know" and agree about how people need to behave. Most respondents indicated that in the past, the Elders were constantly talking to the children of the community. The two purposes of this talking were first to teach and socialize the children in the ways of commonly accepted behaviour, and second to let the children know that the Elders are always watching them. From the interviews, it appears that this "watching" is not meant to be a restricting, control-type measure, but rather to show the children that the Elders have an interest in what the children do and how they are developing. The Elders interviewed believe that children will always try to gain the approval of the people that observe their actions. One female Elder summed up this idea as follows:

We walk around and we talk to the kids all the time to see how they are doing. You have to talk to the kids and show them that you are watching if you want them to be good. When the kids see that the Elders are interested in them then they always try their best. I go out and watch them when they go skating. They say "watch this kookoo [grandma]" and then they try to do something hard. Even if they fall down, you keep watching and tell them that they are doing good, and they will try again until they do it right. And you can see on their face that they are so happy. They don't know why an old bird like me would go there to watch...but you can see on their faces that they want me to watch.

Another respondent indicated that young people recognize the need to know what is an acceptable way to act, and that they **want** to be taught. He also noted that when young people stop wanting the **Elders** to teach them how to act, there is a serious problem. If young people no longer feel that the Elders of the community should be the ones to tell them how to live, then they won't feel that "good" behaviour is desirable. Several respondents indicated that they feel that this is currently the case, and is responsible for the trouble that young people in the community are having.

A third common theme in the Elders' responses was the necessity to make restitution for the deviant act. The most obvious reason for the importance given to making restitution is to simply return or replace the commodity that was affected by the deviance. In some cases, the commodity is simply an object that was destroyed or stolen. In some cases, however, the commodity is an intangible such as earning potential, a personal relationship, or even a feeling of safety. In the case of the former types of commodities, restitution simply involves returning the object in question or, if that is not possible, paying for the item. In the latter case however, restitution is more complex. If for example, a family breadwinner was killed, the killer would be responsible for providing a similar service to the family. Respondents indicated that while restitution was an important aspect of the response to deviance, the accompanying apology process was even more important. That is, Elders indicated that the tangible replacement of lost commodities was simply the physical manifestation of the honest expression of remorse.

It should be noted at this point that calling police was mentioned by only one of the respondents, for the murder scenario. In addition, it was not mentioned as the best

option for dealing with the incident, but rather as a last resort since the respondent indicated that he couldn't think of what else might be done.

### **Middle Age Group**

The responses given by the middle aged segment of respondents to the deviance scenarios were markedly different from those of the older generation, and were remarkably consistent within the group. The vast majority of respondents indicated that most of the hypothetical instances of deviance required some police intervention, however this response was often qualified by a desire to handle sanctions within the family. Significant differences in recommended responses to deviance were found depending upon the perceived seriousness of the offence and the characteristics of the offender. In order to make these differences clear, responses to each of the hypothetical situations will be presented here in order.

In the case of the young boy breaking in to the store, all but one of the respondents indicated that while the police should be informed of the incident, the boy's parents were responsible for ensuring that the matter was addressed. Ensuring that restitution was made and that the boy apologized to the store owner were the most frequently mentioned actions that respondents believed should be taken by the parents. Other responses included having Elders talk to the boy; having Elders discuss the matter with police; and having the boy make a public apology. The one respondent that did not recommend any police involvement stated that the store owner should go to the boy's parents who should

then confront the boy with what he did and ensure that the items were returned and an apology made to the store owner.

In the case of the men who steal the chainsaws, again all but one respondent indicated that the police should be involved. Qualifications were again attached to several responses, but not to the same extent that they were in the case above. Two of the respondents called for restitution to be made, and two said that the men must apologize to the owner for what they did, while three felt that the matter should be entirely handled by police. The respondent who did not recommend any police involvement indicated that first the items must be returned to the owner, and an apology made. He stated that the owner should then praise the men for returning the goods and accept their apology.

In the case of the killing in the bar, responses were much more homogeneous. All but one of the respondents indicated that it was purely a matter for police. One respondent did add that the community should meet to discuss the incident, but only for public education purposes, not to become involved in the offender's disposition. Another respondent stated that whatever the outcome of the formal legal process, "when the man gets out of jail for his crime, don't let him back in the reserve because he could do it again". The one respondent who did not recommend police involvement stated that "It would be best that the community handle this situation, because problems stem from that community and problems arising in the community can only be really resolved by the members of that community. The community has to try and find the causes of these situations".

In the case of the woman who is stopped for a third speeding offence in a community, respondents unanimously indicated that the woman should simply not be allowed to drive anymore. Only two respondents mentioned police laying charges.

In the case of the Chief embezzling funds from his community, responses tended to lean more toward the need for a community response than any of the other scenarios. All but one respondent indicated that the community should be involved in whatever action was taken in response to the Chief's actions. Of those who advocated community involvement, half felt that it was up to the community alone to handle the problem; as one respondent stated "It should be handled by the community and Elders because they are the people that elected him and their money is stolen. They should be the people to have the final say in how they will punish him for his crime". The other half felt that while the community should play a role, the police should be involved as well. One respondent's comment was quite representative of this group: "This situation should be handled by the Elders in the community because this hurts everyone. The police should also be involved to get the money back".

### **Young Age Group**

Again, the overall feeling of this age group was markedly different from the two presented above. The young respondents overwhelmingly indicated that incidents of deviance should be handled by the police, regardless of who is involved or what the offence was:

Arrest the man, charge him with attempted murder, and send him until his court is up to date [sic]. The police should be involved.

The police and courts should handle the situation.

Call the police, the men should be charged with possession of stolen goods.

She should be charged and given a fine [for drunk driving].

Police should handle the situation and the courts to decide the fate of the [embezzler].

The police should handle this situation. The man should serve time for killing another person.

None of the respondents in the young age group indicated that there was a situation of deviance where the police should not be involved. In all cases, respondents felt that the incident should be handled by the police and courts. There were minor qualifications, however, for two of the scenarios. In the case of the boy breaking in to the store, five of the seven respondents in the young age category said that after police were called, the boy's parents should be informed and they should talk to him about what he did. The second case where qualifications were made dealt with the killing in the bar. Four of the respondents indicated that in addition to the formal justice process, the community should take some action in response to the crime. Of those four respondents advocating community action, two stated that the community should meet and discuss what had happened. The other two said that the community should meet; but also that the community members should be allowed to make a statement to the court regarding their thoughts about the incident.

These, briefly, are the results of the in-person interviews of the three generations of WRTC community members. As noted above, there are substantial differences in the responses to deviance suggested by members of the three different age groups. In the

following chapter, these differences will be examined more closely in an attempt to fit them into some sort of sociological framework.

## ***4.2 Discussion of Findings***

Thus far, responses to deviance have only been reported here as they were described by the interview respondents. However, a deviance-response is not a single, unitary entity. For the purposes of this analysis, an attempt will be made to break the deviance-response into its smaller parts. A response to an act of deviance might be viewed as consisting of three major components. First, there is the action that is to be taken; for example punishment, restitution, or counselling. Second, we must know who is to carry out the action or ensure that it is carried out. For example, who delivers the punishment, who ensures that restitution is made, or who provides the counselling. Third, we must know from where the authority to decide on and carry out the response comes. That is, someone might decide upon action to be taken and attempt to see that it is taken, but those involved will not necessarily comply. Thus, if there is an assumption that the decided upon action will indeed be carried out, then there must also be an assumption that sufficient authority exists to back it up.

### **Action Required**

In the case of the older respondents, the actions most often suggested in response to deviance were restitution, apology, and public discussion. The need for discussion is not really separate from the other two since it involves public discussion of the deviant act, as well as the requirements for restitution and/or apology. In most cases, the act of restitution involved working for the victim in some way, and usually in full view of the public. The process of making restitution appears to serve to ensure that everyone in the



community finds out what has taken place, since it usually involved publicly working for the victim and/or making a public apology rather than simply buying an item to replace an item. One respondent explicitly stated that in the case of the boy who broke into the store, the reserve residents should "...ask him what he did if they see him out there" performing his act of restitution. Elders indicated that in this way, the community members could not only learn what had happened, but in addition the offender would be subject to the approbation of his community. This ensures that the offender is aware that his or her act is now public knowledge. Knowing that the community members are aware of the act, and that those members agree that it was wrong, is believed by the older people to be what prompts the offender to mend his or her ways. The implication, then, is that any individual in the community views the community collectively as their reference group. The older respondents believe that the community is the group by which individuals define themselves, and thus they will not want that group to disapprove of the things that they do. If the group disapproves, then it follows that the offender should disapprove of his own actions, and will then want to do whatever is necessary to atone for the incident and to make sure that it does not happen again. The "whatever is necessary" then becomes obvious - a process whereby the collective views of right and wrong are reaffirmed, or in the case of a young person, where these values are initially taught.

Similarly, when apology was the requirement, most older respondents specified a public apology. It seems that the purpose of a *public* apology is threefold. First, it serves the practical function of keeping the community informed about what happened and how it is being dealt with. Second, it serves the symbolic function of forcing the offender to

recognize the public disapproval of the act committed. Third, it reinforces the idea that the offender has not only affected the victim of the act, but the community as a whole.

Discussion of the deviant act includes all three aspects of the response to deviance, but due to its obvious importance in the accounts of the Elders, it will be considered here separately. All of the older respondents said that following an act of deviance, everyone in the community had to gather to talk about it. It appears that this "discussion imperative" serves several purposes. First, and most obvious, discussion ensures that everyone knows what is happening in their community. The very fact that the older respondents believe they need to know supports the idea that any deviant act affects everyone. Second, group discussion of the action to be taken ensures that the deviance-response is (or at least appears to be) sanctioned by all in the community. Third, it once again reinforces the idea that the collectivity is united in their disapproval of the act.

The process of breaking the middle aged respondents' deviance-response suggestions into the three components yields somewhat different results from the older age group. As was briefly noted in the previous section, the actions to be taken in response to deviance usually involved formal police intervention, but sometimes included informal measures as well. The informal responses to deviance that were suggested varied greatly between the case of the break-in by the young boy and the murder scenario; the only two for which informal measures were supported. In the case of the young boy, the most common response other than calling the police was for restitution and apology to be made to the store owner. Thus, the first action to be taken was return of the items stolen, payment for them, or having the boy work for the store owner in lieu of payment.

Following restitution, the only other action required was an apology to the store owner. In this group of respondents, unlike the older group, only one indicated that a public apology should be made. All of the other respondents indicated that any restitution and apology were between the store owner, the boy, and the boy's parents. In the murder case, the only action other than that taken by police that was recommended was one respondent's suggestion that the killer be banished from the reserve regardless of any punishment decided upon by the formal justice system.

The young age group was nearly unanimous in answering "call the RCMP" to each of the questions. Analyzing the components of a police-based response is relatively simple since the three components are clearly defined. The action taken in most cases is arrest, charging, and court appearance. When probes were attempted and respondents prompted with suggestions for additional measures, several stated that in the case of the boy the parents should be informed by the police of what happened. None, however, called for any action on the part of the parents other than "talking to him about what he did". Similarly, in the case of the homicide, when prompted to think about what action the community might take, two respondents advocated allowing the community members to make statements to the court regarding their opinions of the incident.

It is significant that, while young respondents saw some room for non-police responses to deviance, they were always secondary to formal legal measures and only mentioned after prompting. When the desirability of parental involvement was conceded, no concrete action was suggested as it was in the older and middle age categories. In addition, it is significant that the respondents suggested that *the police inform the parents*

of the incident, suggesting a lack of the focus on the victim and the community or family based response that was found in the other two age groups. When the desirability of community involvement was conceded, it only involved making a statement *to the court*, again suggesting that the focus of the young age group is on neither the community nor the family but upon the state. Overall, the responses of the young age group suggest that they have accepted the mainstream, non-Aboriginal conception of deviance-response. It is clear from their responses that the young respondents believe that action in response to deviance should be formal charges. However, the fact that *some* traditional responses were mentioned should not be ignored; a sample of non-Native youth might not have even considered such alternatives. Thus, there may be sufficient evidence to consider the existence of some vestiges of customary knowledge in the young generation.

### **Who is Responsible for Taking Action?**

The action that the Elders said needed to be taken in response to deviance also contains the answer to who they think is responsible for taking the action. The concrete action of deciding upon a course of punishment is the responsibility of the Elders in most cases. Ensuring that the sentence is carried out is the responsibility of the victim, the Elders, the offender's parents, and the community members as a whole. The deviance-response process includes restitution, public apology, and group discussion of the incident. Thus, the implication is that *everyone* is responsible for taking action:

What we would do before was the Chief and the Elders would sit down with the man and the families and they would decide what had to be done. They would make sure he stayed straight, and no more drinking.

You have to help him get better. Everyone in the reserve has to help, nobody wants a guy like that running around so everyone would watch him.

The people and the Elders in the reserve should decide what the kid needs to do. Because they know their abilities and what the boy is like. They are the only ones who know the best thing to do. They decide what things are okay.

In the case of the boy, the middle aged respondents clearly indicated that it was the parents who are responsible for seeing that the matter is resolved. Again, this is quite different from the older respondents, where it was the community that was responsible for ensuring that action was taken to address the situation. In response to the remainder of the deviance scenarios, the middle age group had fewer qualifications to go with their feeling that the police should handle most of the situations. In the case of the break, enter, and theft by the men, two respondents said that restitution should be made, two called for an apology, and one said that both restitution and an apology were required. They did not, however, indicate who was responsible for seeing that the restitution and or apology were made, nor did they indicate what authority would back up these requirements. In sum, it appears from the data collected that for the middle age group, the focus of the deviance-response is on the family in cases that are not perceived as being very serious. In all other cases, the focus of the deviance-response was upon formal police-based action.

The answers given by the young age group regarding what action should be taken include the answer to who is responsible for taking the action. If a police response is suggested, then it is obviously the police and the courts who are responsible for taking the action.

## Locus of Authority

This final point leads naturally into discussion of the third major component of deviance-response; locus of authority. From the above, it is becoming more apparent that, for the older age group, the locus of authority is found in the perception of one common moral outlook held by the entire community. In the interviews with the Elders, it was simply assumed that offenders would comply with whatever decisions were made simply because they were backed by the legitimate authority of the collectivity. The following two interview excerpts help to illustrate this point:

*What if something a little more serious happened? What if some men broke in to another man's house and stole his chainsaws that he used to cut wood to sell for a living? What do you think should be done?*

I can tell you about that. When I was younger, the people in the reserve would borrow things from each other all the time. If we needed to use something we could just go and take it. I could go in the guy's house and get something if he wasn't there. Sometime you wouldn't get stuff back...[shrugs] but that's okay. This guy [indicates another Elder across the room] used to take my stuff and not bring it back sometimes...but he needed it to use. We could do that then. But this guy need his bucksaw to make money. Those guys gotta give all the stuff back to him right now.

*What if they won't give it back?*

He would get the RCMP to go get them.

*What if there wasn't any RCMP; how could he get them back?*

If the people in the reserve knew, they would go with him and tell those guys. They would give him the saw back.

While not immediately apparent from a typed transcript, the tone of voice used by the respondent in the last sentence left no room for doubt. It was apparent from the simple finality of the statement that the men not returning the saw was simply not a possibility. A female Elder, responding to the same question, showed the same belief about the authority of the collectivity:

If somebody was going to give trouble the Elders would see it and they would get them to stop. We didn't have trouble like that before.

*But what if...*

They would have to give the stuff back. Everyone in the reserve would know and they would have to give it back.

Once again, the idea that the men would not comply with a group demand to return the stolen property was quite inconceivable to the Elder. Given the information above, it is becoming clear that the focus of all three aspects of the deviance-response suggested by the older respondents is the community as a whole. Community members as a group work toward socializing the children, so it follows that group values define for the child what is considered to be acceptable behaviour. In the event of a breach, the community members must ensure that collective disapproval is evident to the offender. The assumption that the offender shares the values of the group leads to the assumption that he will now want to admit to the community and to himself that he has done something wrong. Finally, it is assumed that group values are further reinforced through participation of all members in whatever action is taken in response to the deviance. The entire process as described by the older people hinges upon the assumption of the presence of "group deference" in the

offender. In early, traditional Aboriginal society, this might have been a safe assumption. Today, however, it appears that this assumption cannot always be made given the data obtained from the middle aged and the young respondents to be presented below.

The middle age group indicated that the authority to carry out the "sentence" is found in the family relationship between parents and child. In the case of the store break-in, it was clearly indicated by the respondents that the family has the legitimate authority to ensure that the boy complied with the conditions of whatever solution was reached. The process described in the boy's case by the middle aged respondents clearly hinges upon the presence of "family deference" in the offender. While this might be a safe assumption in many families, it will be shown, in the section dealing with young people's responses, that this is not always the case.

It was briefly noted in the previous chapter that most of the young respondents indicated that deviance-response was the responsibility of the police. The majority of the young respondents answered very briefly to the initial questions about how each of the deviance scenarios should be handled. Respondents stated that any action should be carried out by the police and the courts; this action is obviously backed by the authority of the state. The homogeneity of responses, as well as the quickness of the young age group's responses, further suggests that this age group views the state as the only legitimate authority with respect to handling deviance-response.



## CHAPTER FIVE

### Conceptualization of Findings

The findings presented in the previous section suggest that there are great differences in approaches to deviance between the young, middle, and older generations in the First Nations communities where this research was carried out. Initially, it might appear that traditional methods are simply fading away and being replaced by more contemporary methods of deviance response. There is, however, an alternative way of looking at this situation. That is, what might be emphasized is the remarkable fact that traditional methods have survived at all. Since first European contact in what is now Canada, government policy has served (both intentionally and unintentionally) to undermine Aboriginal culture and tradition through economic, political, and cultural marginalization.

The effects of colonization on the social organization of indigenous populations cannot be underestimated. An influx of explorers, traders, and settlers from a new and dominant culture will inevitably act to destabilize the culture into which they are introduced. In a stable society, the members of the group are bound together by a shared set of internalized norms. The existence of shared norms allows interaction to be well organized and predictable. The colonizers bring a new set of norms and priorities, and what was once clear becomes confused. For example, the colonized populations of Africa saw their once strong set of shared norms being attacked by an invading culture:

Traditional mechanisms of tribal social control were broken  
by the rapid process of urbanization and industrial change.

The tight web of tribal values and norms was torn asunder. Integrated tribes were transformed into disintegrated ethnic groups (Pfohl, 1994:201).

Beginning as early as first European contact, but especially with the advent of the reserve system, the traditional Aboriginal way of life was attacked in precisely the same way. The indigenous peoples found themselves in the middle of a European culture, characterized by the pursuit of personal wealth and the maximization of individual freedom. One of the most common results of colonization globally was the dissipation of the power of traditional beliefs, values, and norms. African colonies that experienced rapid change and the ensuing social disorganization were characterized by "physical deterioration, high rates of adult crime, alcoholism, poverty, unskilled labour, poor education, disintegration of traditional family structures, and a decline of social control" (Pfohl, 1994:201). Sadly, this description could apply to many of Canada's indigenous communities. The social disorganization and ensuing normative breakdown resulted in problems for the older members of the community and painted "a stark picture of the inability of one generation to successfully socialize its young" (Pfohl, 1994:204).

Economically, the Aboriginal peoples have been marginalized to such an extent that their pre-contact economies have ceased to exist and been replaced with dependency upon the state. A description of the economic marginalization of Aboriginal peoples might not at first seem relevant to the study of customary law. However, the assault on the indigenous economy was closely connected to the attempts at extinguishment of indigenous religion, culture, tradition - and thus customary law. For this reason, the economic policies of the colonial powers is worthy of brief consideration here.

Prior to European contact, the Aboriginal peoples of what is now Manitoba maintained their existence through hunting, fishing, trapping, and harvesting of wild plants. Trade was carried out amongst themselves as necessary. Thus, imposition of government control over the harvesting of these natural resources not only removed control of the indigenous "economy", but of the very basis of their existence. The arrival of European capitalists seeking to exploit the vast resources led to the development of what is referred to by dependency theorists as a "hinterland-metropolis" situation. The metropolis exploits the periphery through either the direct extraction of profits or the monopolistic control of trade.

An example of this development of underdevelopment may be found in the harvesting of wild rice. Long a staple of the indigenous diet, wild rice was to become (through European interference) "...a full-fledged agricultural industry" (Lithman, 1983:46). As a result, indigenous control over this resource was steadily eroded:

The reasons why the euro-Americans have assumed more and more control over wild rice are related to the fact that they have acted on behalf of and with the backing of vast institutions, from the Hudson's Bay Company in earlier days to major food companies today (Lithman, 1983:46).

Ironically, the very people who had shown the arriving colonizers how to survive in their new environment were now being subjugated through hunger:

The new Indian Commissioner quickly sought to use rations as a means of getting control over the Cree. In the fall of 1879 he announced that rations were to be provided only to Indians who had taken treaty (Fisher & Coates, 1988: 194).

Some might argue that the economic takeover by European interests was a necessary step in expansion of what was previously a subsistence economy. A structural functionalist

argument might stress the benefits to both parties under such an arrangement. The metropolis is seen as contributing to the 'development' of the more 'primitive' hinterland by bringing 'advanced' arts, science, and technology to the backwards indigenous peoples. On the other hand, a more realistic view is taken by the conflict theorists, who view such a situation very differently. They would argue that the relationship forces the economy of the periphery to become heavily specialized in producing those materials that are needed by the metropolis, for example furs and wild rice. As a result, dependency upon the metropolis for goods that are no longer produced locally leads to

political powerlessness, retarded or even reversed industrial development, and the erosion of indigenous culture and its replacement with a mass culture that either justifies or obscures the whole arrangement (Hagedorn, 1983:347).

This description of the economic impact of colonization is analogous to that regarding the effects on customary law. Some might view the replacement of traditional law with English common law as a civilizing influence on the seemingly lawless natives. It is more accurately described, however, as the means by which the troublesome Natives might be better assimilated into the white society:

the imposed system of social control...has distributed benefits to the colonists and the burdens of 'pacification', of being a subordinated people, upon the Indigenous nations (Havemann, 1985: 129).

With the process of economic marginalization well under way, the state and its institutions were able to direct some attention to the cultural marginalization of the indigenous peoples. Again, since customary law is obviously one facet of indigenous culture in general, a brief consideration is warranted here. As with the economic changes discussed above, a structural functionalist view of the erosion of indigenous culture might

point to the natural assimilation of a "primitive" culture into an "advanced" society.

However, the presence of direct and intentional efforts to destroy indigenous culture and traditions supports a more conflict-oriented argument.

In the late 1800's, an official of Indian Affairs, Duncan Scott, wrote of the problems associated with the "...slow process of weaning the Indian from his primitive state" (quoted in Bowles et al., 1972:111). One of his main concerns was that the Aboriginal ceremonies followed the seasons; specifically the summer solstice. Scott noted that the banning of the Sun Dance was necessary to ensure that agriculture would not be compromised:

It may seem arbitrary on our part to interfere with the native culture. The position of the department, however, can readily be understood, and it is pointed out that Indians will spend a fortnight preparing for a sun-dance, another fortnight engaging in it, and another fortnight to get over it. Obviously, this plays havoc with summer planting (Scott, in Bowles et al, 1972:111).

Similarly, the west coast potlatch and the associated giving of gifts was seen as another impediment to the civilization of the indigenous peoples, especially with respect to ensuring their economic assimilation:

The giving away of gifts on a lavish scale was one of the most prominent features of the pot-latch. Before the advent of the White man this plan undoubtedly served a useful purpose and was adequate to the needs of the people. Obviously, however, with the introduction of the new money system of economics, the engagement of Indians as wage earners in industry, the effects of the pot-latch, if the practice were unchecked, would be disastrous (Ibid).

Simply banning indigenous cultural practices appeared satisfactory for the adult population, but to ensure its extinction the government recognized that the new generations must be educated in the ways of the colonizers. Missionaries of the various

churches, through the use of the residential school system, sought to achieve this end.

The teachers in these schools were non-Native, and represented the white, middle-class values that the government wanted to instill in the Natives. This approach was not new, but had a long history in the pursuit of colonization:

It is a typical colonial pattern, one that has existed in all other imperialist systems of the world, for churches to be given control of education of native people...This is definitely a feudal arrangement, as well as being colonial, and it seems that the situation is never going to be rectified by the government working through its own policies (Adams, in Bowles et al., 1972: 101).

The task of the residential schools was to eradicate the primitive language, tradition, and values of the young Aboriginal students. It was thought that the best way to accomplish this was to remove the children from the influence of their culture (the farther away the better) so as to better imbue them with the new and superior culture of the colonizers:

Any policy which invites the Indian to become an individual and brings him into the honest activities of civilization and especially into the atmosphere of our agricultural, commercial, and industrial examples, assures to him mental, moral and physical development into independent manhood (The Canadian Indian; from Bowles et al, 1972:142).

The scope of the effects of the residential school on indigenous culture is currently becoming better understood in non-Native society. In 1971, an Ojibway initiate to the United Church observed that:

I came at last to see that the churches have been guilty of what amounts to cultural genocide. By considering everything Indian as heathen and pagan, and by demanding that native peoples renounce all that their fathers and forefathers cherished, they were in fact asking them to deny their past. But once you deny your past you have no link with your history and, therefore, no identity (Dumont, in Bowles et al, 1972:97).

It has been shown that indigenous culture in Canada has been systematically attacked through both legislation and control of education. Clear and concerted attempts

were made both by the government and the churches of the dominant culture to eradicate the traditional ways of the Aboriginal peoples. The third and final assault on the traditional ways of the indigenous peoples to be discussed here is the imposition of a European system of justice.

In order to ensure that the economic and cultural marginalization discussed above is formally enforced, the rule of law has been an important factor in the situation of First Nations peoples today. As early as 1670, the colonial powers were beginning to impose a new system of laws on the indigenous peoples. In that year, the Hudson's Bay Company was given the "exclusive right to rule over an area that encompasses most of what is now the western part of Canada" (Smandych & Linden, 1993: 1). This company law was being applied to the Natives even before their eventual inclusion under English common law.

Despite resistance to the imposition of these foreign systems of law, by the mid-1800's:

the indigenous people of western Canada were clearly beginning to have their culture and traditional social institutions, including institutions of dispute settlement and social control, replaced by those brought by the Hudson's Bay Company (Smandych & Linden, 1993: 29).

There is considerable evidence to indicate that this imposition of Hudson's Bay Co. private law, and later English common law, has led to the current dismal situation of Aboriginal peoples with respect to the criminal justice system.

It has been shown that throughout history, overrepresentation in the legal system characterizes the relationship between colonizer and colonized (Griffiths, Yerbury, and Weafer, 1987; Verdun-Jones & Muirhead, 1980). It has also been shown that this relationship usually involves political, economic, and social dislocation. This exploitation is made possible through the use of the legal system in maintaining the position of

dominant political and economic groups. James describes this situation when he states that "the criminal justice system exists to preserve the basic values of **our** culture" (James, 1979:461, emphasis added).

It may be argued that the problems faced by Natives can be traced to the considerable upheaval caused by the early contacts between white and Native culture. The suggestion is that unequal commitment to the norms of the dominant capitalist culture create conflicts which are manifested in what is defined by the powerful as crime. Donald Cressey states that interpenetration of conflicting norms can occur "when colonization brings imposition of one group's criminal law upon another" or when "one cultural group migrates to another area" (Cressey, 1972:324). Both of these factors are involved in the conflicts existing between Natives and non-Natives in Canada today. The laws of the dominant, white society have been imposed upon a people that did not possess a subjective understanding of the values upon which they were based.

Verdun-Jones and Muirhead (1980) point out that most studies of Natives and the law are of two basic types, cultural and structural. The cultural explanations highlight the conflicting values held by the Native and non-Native population. Native culture lacks many of the traits valued by the dominant culture, and includes traits that are not understood by non-Natives. The structural explanations focus upon the nature of the relationship between an unskilled minority group and an industrialized economic society. This relationship is viewed as the cause of conflicts between the two groups. Supporters of the structuralist perspective assert that the laws in effect in Canada are simply instruments of formal social control. They serve to support and maintain the existing



socio-economic system by controlling those groups, in this case Natives, that would challenge the interests of the state. The historic roots of this structurally deprived position are described by Griffiths, Yerbury, and Weafer (1987:277) as 'neocolonialism':

...North American researchers have focused on a form of internal domestic colonialism that differentiates natives, their land and resources, and their sociopolitical position from all other national citizens. Neocolonialism is a special form of political-economic subjugation within a capitalist democracy.

There appears to be sufficient evidence to support the claim that Aboriginal communities were, and are, characterized by a high degree of social disorganization. This disorganization has been brought about largely by the competing and conflicting values to which younger generations were exposed through the process of economic, cultural, and legal marginalization. It could be argued (based upon the findings of the current research) that the end result of this disorganization was the creation of an instant generation gap. This gap was not of the normal sort where there is a gradual shifting of values and priorities over a generation; rather it was the violent and swift imposition of a completely new set of rules. Furthermore, with a regular generation gap, the shifting of priorities is more of a superficial adjustment to what are relatively stable and widely accepted cultural values. In the case of the colonized, it is not simply the outward manifestations of values that are being replaced, but the very core beliefs themselves: "the moral gulf which separates [parents] from their children is dug deep by the rush of rapid social change" (Pfohl, 1994:172). The result of this cultural invasion is not simply parental head shaking and tongue clucking, but a realization by the older generation that in this new milieu they are simply unable to exert social control over their members.

From the results of the present research, it appears likely that the differences found between generations with respect to their responses to deviance are the result of social disorganization brought about by the assimilationist efforts of the state. Given the rapid influx of Europeans into what is now Canada, it is not surprising that the Aboriginal peoples experienced extreme social disorganization similar to that experienced by colonized populations in other parts of the world. Neither is it surprising that the locus of social control in the socially disorganized communities shifts toward that of the dominant culture. However, the question of why this decrease in knowledge of customary law has only appeared in the current generation must be considered. While it is true that the assault on tradition and custom has been under way for over a century, Aboriginal communities still remained relatively isolated until the 1970's. Improvements in communications and mass media distribution over the last two decades have brought non-Native culture and values to First Nations communities in a volume and intensity not seen previously. It seems very likely that this situation has led to the acceleration of loss of traditional knowledge and beliefs in recent decades.

The results of rapid social change and colonization described above mirror the findings of this research with respect to knowledge of customary methods of social control. Knowledge of Aboriginal customary law does continue to exist among the older generation interviewed in this study. Knowledge of and belief in customary law decrease when the middle age generation is considered. Knowledge and belief decrease to nearly zero when the youngest generation is considered. As noted at the outset of this section, however, this does not imply that customary methods of social control are destined for

extinction. Rather, given the evidence of direct attempts to eradicate all traces of such knowledge and belief, it must be concluded that the existence of *any* amount of knowledge of customary law proves the importance of these values to Aboriginal peoples. That customary methods have survived in the face of the economic, religious, political, and legislative onslaught that sought to erase them is testament to both their importance and their durability.

To conclude this section, it may be stated that with respect to the demographic factors contained in research question 1(a), knowledge of Aboriginal customary law is strongly correlated with age. No evidence of correlation between knowledge of customary law and either sex or geographic location were found in this research. Having established the *existence* of knowledge of Aboriginal customary law, the final research question, "what is the *content* of Aboriginal customary law?" remains to be addressed.

## CHAPTER SIX

### Aboriginal Customary Law

Having now explicated the differences in deviance-response among the three generations, an attempt will now be made to describe and classify that which is being referred to as customary law. The previous section has shown that there is evidence of existing knowledge of customary methods of dealing with deviance. In this section, an attempt will be made to describe this information in greater detail, and to categorize the essential elements in a more systematic manner. It has also been shown that this knowledge resides mostly in the older age group of respondents. Thus, it is this group that will be relied upon for the majority of this section.

It was noted in the Methodology section that it was expected that traditional approaches to deviance would be very situation-specific. The field research has provided ample evidence to confirm this expectation. The fact that few of the older respondents gave a clear, specific response to any of the hypothetical instances of deviance gives implicit testimony to the accuracy of this assumption. Several of the Elders pointed out that it was very difficult for them to answer the researcher's questions, and that they would have to discuss the situation with other Elders. This would seem to indicate that there are no abstract rules for dealing with any given situation; even fairly specific situations. For example, in his response to the stabbing scenario, one Elder replied that the response to this situation would mostly consist of determining motive:

"You have to talk to the guy that did it. Now the RCMP come and they just throw him in jail."

*What would you talk to the guy about?*

"You have to know why he did it. There is something that makes things like this happen..."

Not only was there an implicit indication of the lack of abstract rules for deviance-response, there was one example of a respondent stating explicitly that there could be no simple answer to the questions being posed.

*What if something serious happened in your community - say one person kills someone else. What should be done?*

I don't know about that...the Elders would have to meet and talk about it. They could decide what to do. It never happened to me so I don't know.

*Did you ever hear of something like that happening?*

I know it happened sometimes...I don't know what to do about it. I never heard what the Elders did for something like that. If there was a reason...I know there was a guy when I was a kid, everyone said he did something and he got sent away. They told us "you don't get sent away if you're good". I don't know if the cops took him or what. He was gone and we never saw him again. It's not easy...you don't know what to do sometimes about these guys. You have to think about it, and talk to the others about it...you don't just know what to do.

*What kind of things would you talk about - to figure out what to do?*

I don't know how to answer that. If you're there, you know what happened...you talk about that [long pause]. A few years ago I got an electric stove. Before that I always went outside every day and built a fire to make my tea. Every day...I built a fire to make my tea. Then I got the stove and I just turn a little knob. I couldn't get used to that, just turning the knob and I have tea. So now I go outside and build a fire again. You want me to turn the knob for you. That's what the cops do..."you did this - pay a fine".

Those guys, they never built a fire or worked in the bush...Did your Dad show you how to build a fire?

Yes...

Then you know what I'm telling you. [gets up and leaves]

It appears from this passage that the Elder is stating that there can never be a quick or easy answer to the questions being posed. He also appears to be contrasting the "white" justice system and its universal approach with a traditional method and its completely *ad hoc* approach. It appears that the Elder is saying that no instance of deviance can ever be so simple as to suggest an immediate course of action in response to it. The fact that he cannot even provide a broad idea of what the deviance-response might be suggests that the process is even more situation-specific than was suspected at the outset of this research.

The nature of the responses to deviance suggest that "customary law" cannot be viewed simply as a set of rules to be applied to an incident of deviance. Rather, it appears to be a set of conduct norms that are applicable to all aspects of life. This idea is illustrated by the very inexactness with which the respondents answered the interview questions. Reading the interview transcripts might initially give the impression that the older respondents were not answering the questions, but merely discussing abstract issues. For example, when the scenario of the boy breaking into the store was presented to a female Elder and she was asked what an appropriate course of action might be, she answered:

That kind of thing was happening a lot in our community...all these kids running around, they don't know what to do. So my friend Cecelia and I go to the school almost every day and we talk

to the teachers all the time. The teachers know what kids are getting into trouble and what kids are starting to get into bad things. We walk around and we talk to the kids all the time to see how they are doing. You have to talk to the kids and show them that you are watching if you want them to be good.

*What would you do with the boy who broke into the store?* -

When the kids see that the Elders are interested in them then they always try their best. I go out and watch them when they go skating. They say "watch this kookoo [grandma]" and then they try to do something hard. Even if they fall down, you keep watching and tell them that they are doing good, and they will try again until they do it right. And you can see on their face that they are so happy. They don't know why an old bird like me would go there to watch they come up and say "kookoo, why are you here - it's cold and you should go inside" but you can see on their faces that they want me to watch.

It seems that in this example the question posed was not addressed at all. But rather than dismissing these kinds of answers as unresponsive or irrelevant, they must be given the credit that they deserve. These are the answers that the respondents chose to give, and as such they are legitimate; they must be examined for what information they contain, not ignored for what they do not contain.

There is a considerable amount of literature describing an Aboriginal world view that would predict the types of responses that are discussed above. That is, that Aboriginal peoples do not separate crime and law from any other aspect of social life. In the report Justice for the Cree: Customary Beliefs and Practices (1992), McDonnell notes that Cree social life was based upon a relatively stable set of obligations and expectations. Encouragement in support of conformity in the customary setting was continuously reaffirmed through behaviour. This socialization process did not "...take the form of a

rule-based listing of 'shoulds' and 'should nots', rather it took the form of a whole range of mutually supportive practices that were comprehensively and subtly embedded in Cree social life" (1992: 48). This description is consistent with the findings of the current research. For example, one of the respondents spoke of "rules" in the following way:

*But how would someone know if what they did was against the rules?*

When the Elders talk to them they will know these rules. They don't say 'this is the rules' like when the police come now. The kids have to figure it out for themselves. They will know what they should do. If they listen to the teaching, they don't do anything bad.

*What about the rules we have now? The 'white' laws that the police talk about, are they any different from the rules you followed?*

I don't know many of the laws...I haven't been nailed yet, but...[shrugs]

*Are you saying that you break the law?*

I live right. I don't hurt no one and I have respect. That's the way I was taught to live and I do that. But the laws...I don't know.

In this example, it seems that the respondent does not equate the existing formal law with the rules by which he lives his life, even if they are not very different.

In spite of the foregoing, however, there were several broad principles that emerged during the field research that might be referred to as the core elements of a traditional "law". First, and most obvious, of these principles was the idea that things must be returned to the way they were prior to the offence. Nearly all of the older respondents indicated that the first course of action must be for the offender to make



restitution to the victim. If property was stolen or damaged, it should be paid for. If that is not possible, the offender would be compelled to perform some service for the victim until such time as the debt was worked off. If the offence was serious, for example a murder, the offender clearly cannot restore the situation by bringing the victim back to life. He can, however, fill many of the roles held by the victim - and in that way approach a restoration of the pre-offence circumstances as closely as possible. For example, in the hypothetical case where a man was murdered, one of the Elders stated that the offender must now stand in the victim's stead. He stated that in the old days, the killer would become responsible for taking care of the dead man's wife and family. He took their provider away, so he must do whatever he can to replace him. If the killer ran or was arrested and jailed, the responsibility for taking care of the family would fall upon the community until such time as the widow remarried. From this statement, it might be concluded that simply repairing the damage is the priority, rather than *making the offender* repair the damage. Clearly, the preferred method is to have the offender attempt to restore the status quo, but that is not the primary aim.

The second principle to emerge from the field research is the need for intensive socialization and normative guidance. This principle is more important for its role in preventing deviance than it is in the deviance response. Many of the Elders spoke of the need for "talking" from the Elders, and how the lack of talking led to deviance. It was stressed that socialization of children was an ongoing process, with the Elders using any opportunity to speak to the children about standards of behaviour. In addition, the process of reinforcing community norms and values can be seen in several of the

prescribed responses to deviance by youths. Many of the Elders suggested that the offender be made to perform some sort of community service work such that the offender would be exposed to several influences. First, the youth would be in a situation that guaranteed access by an Elder. If the youth were working for the Elder, the Elder would have the offender's attention whenever he wanted to pass along some teaching. Second, the work was always to be performed in a public setting, to ensure that the offender was subject to public approbation - thus reaffirming the societal norms and the condemnation of the deviant behaviour by the community. Finally, the ritual component of the responses that were prescribed - usually the sweat lodge and the teaching lodge - have both manifest and latent functions. Both of these rituals are ostensibly used for cleansing and teaching, however they also serve to reaffirm the norms and values of the community.

A third broad principle to emerge from the field research is the importance of an admission of guilt by the offender. The use of the word "guilt" in this case is inappropriate since the idea of assigning guilt is not of prime importance. Acceptance of responsibility is perhaps a more accurate term for this imperative. Many of the respondents stated that telling the truth about the incident is vital to the healing process that is to follow. It was pointed out that the offender would continue to suffer as a result of his actions if he failed to accept responsibility for them. For example, one Elder responded to the killing scenario in this way:

About twenty years ago my son was shot like that. The guy who shot him was his friend; the whole family were like my brothers. I could go there anytime and go in the house, eat with them...it was like it was my house. The guy was drunk and he shot my son. He didn't want to do that - he was drunk.

*Was it an accident?*

It was...[long pause] they were friends but he was drinking and he got mad. If he wasn't drinking he wouldn't do that. Some of these guys they're drinking all the time and they do things they don't want to do.

*So what happened wasn't his fault?*

It was his fault. He shot my son...the RCMP came and got him and they took him. When he sobered up, he knew what he did. He's gonna suffer the rest of his life. He knows what he did and he said it. You gotta say it or you can't live with it.

*I want to make sure I understand what you mean...what if the guy didn't admit what he did?*

You gotta come clean. If you hold anything back you'll suffer for the rest of your life. But he said everything that he did and I forgave him. I forgave the whole family...if I don't forgive them I just hurt myself. Am I not gonna go to their house anymore? I have to go there...they are like my brothers, all of them.

A fourth major theme that emerged from the data is the need for group decision-making in any response to an instance of deviance. As noted at the beginning of this chapter, this need for group consultation was so powerful that it hindered the reporting of specific strategies for dealing with deviance. When the *ad hoc* method of dealing with deviance is considered, the discussion imperative is hardly surprising. When there are no abstract rules to be applied to any given offence, it would be very difficult for one individual to devise a response strategy. Most of the older respondents mentioned this need for group decision-making in their responses to the deviance scenarios:

"I don't know what I would do myself. The people and the Elders in the reserve should decide..."

"...the Elders would have to meet and talk about it. They could decide what to do."

"If you talk about it right away...Elders, both guys' families...I don't think he would do it again."

"It's really hard...I usually talk with the others and we decide together."

The fifth major theme that emerged during data analysis is the need for apology and forgiveness. Most of the respondents indicated that the deviance-response process would not be complete until the offender apologized to the victim and to the members of the community. Contrary to what is considered normal in the formal justice system, an apology is not simply a desirable addition to the resolution of an incident of deviance - it is a *requirement* for resolution.

"...they have shown a lack of respect for the man. They must help themselves by apologizing and doing whatever is necessary to gain the victim's forgiveness."

"...if he was remorseful and wanted to make things right, the police could be left out of it."

The respondents further indicated that a sincere apology from the offender should be followed by forgiveness from the victim. It appears that the respondents believe that if ill-feelings are harboured by the victim, then the incident has not been resolved. This point underlines the theme of restoration that appears throughout this research. Without forgiveness, the deviance continues to be an outstanding issue, since something in the community has been changed:

You gotta come clean. If you hold anything back you'll suffer for the rest of your life. But he said everything that he did and I forgave him. I forgave the whole family...if I don't forgive them I just hurt myself.

The law doesn't forgive anyone...they take something from you and that's it...they say 'you did this and we take something from you' and that's it. They don't do anything.

He's a criminal - the law made him a criminal. They look in that book there and they see his name and they say 'that guy is a criminal'. They don't forgive him. I forgave him...you have to forgive him or it hurts you.

During the latter stages of the field interviews, the main themes identified were beginning to become apparent and an attempt was made to classify them with several Elders and the key informant. Through discussion, the following qualities were agreed upon as comprising the core of what had been discussed: knowledge, honesty, respect, forgiveness, and sharing. While these terms were decided upon solely in the context of the discussion of deviance, they bear a striking resemblance to the seven traditional values of the Ojibway: wisdom, love, respect, bravery, honesty, humility, and truth (AJI Report, 1991:21). These values, in turn, are also very similar to those represented by another group of central Native values, the *Four Directions*.

The Four Directions are representative of a belief in the interconnectedness of all things natural and supernatural, sacred and profane. There is a belief in the circularity of all things; the four points of the compass, the four seasons, and the four stages of life; all of which are affected by the values that are embedded in the Four Directions philosophy. For example, the North represents wisdom and strength. A comparison might be drawn

between this value direction and the importance of wisdom and transmission of knowledge that was mentioned by the Elders so often in the field interviews.

The concept of circularity and the prominence of the number four was found in other aspects of Native life during the field research. One specific instance where this framework was most in evidence was during the ceremonies that the author was allowed to attend in the sacred teaching lodge. The teaching lodge was held for a full day as the culmination of four days of ceremonies that included Sun Dances and Sweat Lodges. The theme of fours is repeated in nearly every aspect of the ceremony. There are four openings in the lodge; doors are located at the east and west ends with smaller openings on the north and south sides (see Figure 1). There is a large fire burning in the centre of the lodge, with four smudge fires - one at each point of the compass. During the ceremony, pipes are circulated in fours; there are four speakers and four drumming songs; four bowls of water are passed prior to the meal; the participants dance around the fire four times and the outside of the lodge four times at the conclusion of the ceremony. Perhaps the most interesting mention of the 'four' theme was made by an Elder following the ceremony. He stated to the researcher that the teaching lodge was constructed from forty-four poles, to represent "the 44 natural laws that our people lived by". Unfortunately, he could provide no further information regarding what those laws might be. The centrality of the number four - and of the Four Directions - in the religious, political, and social life of the Ojibway people implies a continuity between these spheres. That is, it implies that there cannot be one approach to religion, another to crime and law, and so on.

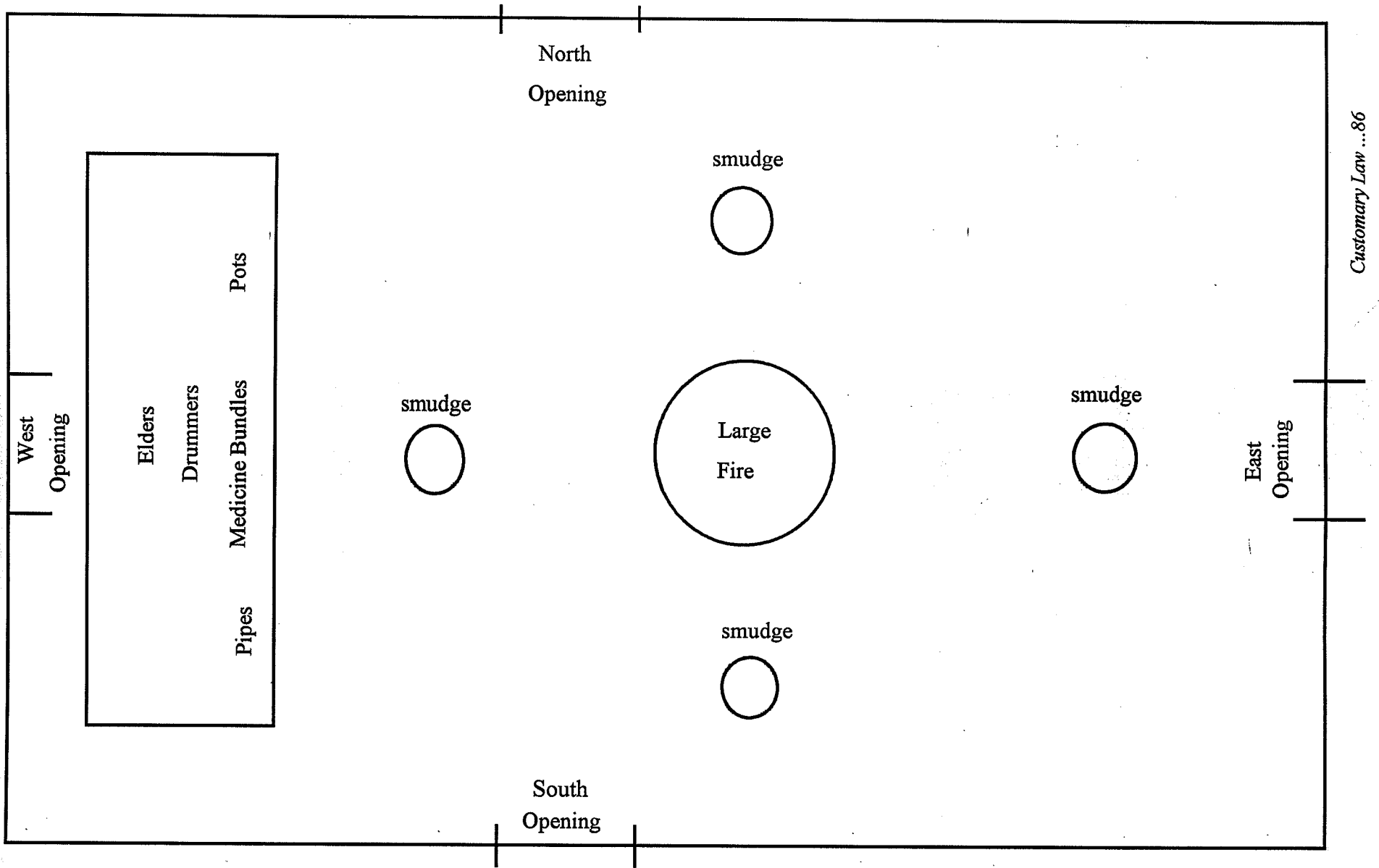


Figure 1: Ojibway/Saulteaux Teaching Lodge

While it seems that it is difficult, therefore, to describe or classify the customary system of law, there is sociological theory that is relevant to the findings of this research. The work of Max Weber in the sociology of law contains a typology of the basic forms of law and legal thought. The typology is based upon two distinctions with respect to legal thinking. The first contrasts "rational" legal thought with "irrational" legal thought. The second distinction involves the contrast between "formal" legal thought and "substantive" legal thought.

Rationality, as defined by Weber, is "the reduction of the reasons relevant in the decision of concrete individual cases to one or more 'principles', i.e., legal propositions" (in Milovanovic, 1988: 44). That is, the criteria for making decisions are the same in all cases. The concrete manifestation of rational legal thought therefore is predictability. Irrational law, on the other hand, could result in similar cases having different outcomes, with no way to predict what the outcome might be.

Formality, according to Weber, depends upon the source from which legal decisions are derived: "law is 'formal' to the extent that...only unambiguous general characteristics of the facts of the case are taken into account" (Ibid.). That is, the legal system itself contains the principles and procedures that are to be applied to any given case. In contrast, a "substantive" system might rely on principles other than those found in a formal legal system. For example, in a substantive system, an adjudicator might be guided by moral or political standards in reaching a judgement - standards that are external to a defined legal system. These two dimensions, each with its two possibilities, yielded Weber's four ideal types of law and legal thought.



*Formally irrational* legal thought, as the name suggests, relies upon detailed rules that are internal to the legal system. However, the outcome of a case cannot be predicted or controlled by the intellect. Weber said that this type of law is exemplified by the procedure of using oracular pronouncements to decide cases. It is formal in the sense that "oracular techniques for resolving disputes typically require meticulous observance...of very detailed rules regarding the formulation of the question to be decided by the oracle" (Kronman, 1983:76). At the same time, it is irrational since the rulings of an oracle cannot, by their very nature, be predicted.

*Substantively irrational* legal thought is a purely *ad hoc* approach, where cases are decided on an individual basis. A mixture of legal, political, moral, or even emotional considerations might be employed in reaching a decision, with no one of these always being any more or less important than another. Thus, it is irrational in that no general rule is applied; each case is decided on its own merits with consideration being given to the unique factors that separate it from other cases. It is substantive in that this approach does not distinguish between legal and extra-legal grounds for a decision. Weber said that this type is exemplified by what he refers to as "khadi justice". Presumably the reference is to the Muslim *qadi* (judge) applying *sharia* (law) that is derived from the Koran and the Sunna. Since the Koran deals with all aspects of social life (law, religion, culture, and politics), the *qadi* would render a decision not based solely upon legal factors, but upon extra-legal considerations as well.

*Substantively rational* law is somewhat more complex than the previous two. This approach to law does not recognize a distinction between law and ethics. Rather, this

approach attempts to realize ethical, political, or religious ideals. As Weber stated, practitioners of this type of law aim for a "material, rather than formal, rationalization of the law" (Kronman, 1983:78). At the same time, however, fixed rules and principles would be adhered to. Weber calls his example of this type of legal approach a "patriarchal system of justice". He gives the specific example of "legal teaching in seminaries for the priesthood" (Ibid:77). This legal form is rational in that there are fixed rules, for example those found in the Bible, but it is substantive in that the application of these rules may be moderated by extra-legal factors. In Weber's words, although such a system "can well be rational in the sense of adherence to fixed principles, it is not so in the sense of a logical rationality of its modes of thought but rather in the sense of the pursuit of substantive principles of social justice of political, welfare-utilitarian, or ethical content" (Rheinstein, 1954: 264). While Weber's phrasing is somewhat obscure, and his use of the terms 'rationality' and 'formality' is somewhat sloppy at times, the basic thought is relatively clear: this type of law is "rational, though not juristically formal" (Ibid: 205).

Finally, *formally rational* law is based upon clearly stated rules and procedures, and these rules are applied identically to similar cases. The abstract rules are the only criteria applied in arriving at a legal decision; they are internal to the legal system and no external factors are considered. Weber said that this type of law is exemplified by the modern codes that were derived from Roman law. They are based upon "the logical interpretation of meaning" (Ibid: 64), and are highly systematic.

Clearly, Weber's second form of legal thought - substantive-irrational - bears a great resemblance to the customary law described in this chapter. The ideal type appears

to accurately mirror the process by which cases are decided in the customary setting that was described by the respondents in the field interviews. There is, however, in Weber's work, an implicit suggestion that this approach to law is a 'primitive' form. One can see the course of European history reflected in the four ideal types, from oracular to formal-rational. It is probably safe to assume that the substantive irrational approach is viewed as an underdeveloped approach to law; one step up from the primitive consultation of oracles. Similarly, it is apparent in Weber's work that he viewed formal-rational law as the most advanced of his ideal types; its superiority is found in the fact that it is logical and predictable. The high degree of formal rationality found in the legal codes developed from Roman law, Weber claims, are the result of the fact that they are based upon "the logical interpretation of meaning" and they are highly systematic (Kronman, 1983:78). Weber further states that they adhere to his five postulates:

First, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions;...fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof, since the 'gaplessness' of the legal system must result in a gapless 'legal ordering' of all social conduct (Rheinstein, 1954: 64).

It is clear that Weber places a great deal of importance on the ability of a legal system to deliver a logical, predictable outcome in its proceedings. With respect to responses to deviance - or what is usually referred to as 'criminal law' - however, Weber's perception of

which of the ideal types is best able to deliver a predictable outcome might be somewhat inaccurate.

It is certainly true that the specific disposition of any given case may be much more easily predicted in the more "advanced" systems, especially the formal-rational system. The response to deviance in similar cases should always be the same since general rules are applied logically. Under a customary (or substantive irrational) system of law, the specific course of action to be taken in response to deviance might very well be difficult to predict. However, what **can** be predicted under customary law - that the response to deviance will seek to reverse the effects of the deviance - is far more important. For example, under a formal-rational system of law the offense of theft might be punishable by a \$1000 fine. The rule is present and an act has been committed, so the offender receives the fine regardless of any other considerations or circumstances. It is obvious that if the offender is rich, this response will have far less meaning and effect than it would if the offender were poor. Furthermore, the situation of the victim of the deviant act is not taken into consideration. Again, the meaning and effect of the act with respect to the victim is much different between rich and poor; the formal-rational response will not recognize this reality. The customary law approach, on the other hand, will recognize both of these distinctions and the response will be decided accordingly. Thus, while the specific response to deviance is not predictable, it may be well argued that it is arrived at more logically than it would have been under a formal-rational system. As Hoebel notes:

the judicial song contest is above all things a contest in which pleasurable delight is richly served, so richly that the dispute-settlement function is nearly forgotten. And in the forgetting the original end is the better served (1941: 682).

Assuming that the function of law is to address the problems caused by an act of deviance, that function will be better served by customary law than by formal-rational law.

It must be recognized that the accuracy of this last statement is contingent upon the customary responses to deviance being applied in a customary setting. While some of the customary responses to deviance might very well be suited to use in First Nations communities, it cannot be denied that Aboriginal society has changed significantly since the time when customary methods were the only law. The values, institutions, and culture of the capitalist society are becoming increasingly relevant in First Nations communities; it is clear that approaches to law must take these factors into account. In the following chapter, consideration will be given to this and other issues relating to how the findings of this research might apply to the future of Manitoba First Nations.

## CHAPTER SEVEN

### Summary and Suggestions for Future Research

The research findings presented in the preceding chapters represent a first step in the exploration of Aboriginal customary law in Manitoba. As noted earlier, this is exploratory research and thus has not provided definitive or exhaustive answers to the many complex issues surrounding customary law. This is not meant to imply that the findings of this research are not valuable. The subject of customary law has for too long been defined by assumptions and hopeful speculation. That is, numerous suggestions and strategies that have been put forth call for the use of customary methods of social control and dispute resolution. None, however, give any evidence of the existence of usable customary law, nor any description of the law itself. This research *has* found evidence of the existence of customary law in the First Nations communities studied.

The research findings have also allowed an initial description of the content and operation of customary law. The description of customary law in the previous chapter is obviously not an exhaustive listing of specific laws or anything approaching a codified set of "laws". Rather, it is a description of responses to various examples of deviance that together provide a better understanding of the values and goals that underlie that which might be referred to as "customary law". This is an important first step in the exploration of this subject, since an understanding of the philosophy behind traditional methods is necessary to gain a complete understanding of the laws themselves in the future.

The findings of this research indicate that investigation of Aboriginal customary law should be carried further. It was found that knowledge of customary law resides mostly in the older generation, with knowledge decreasing toward the younger generations. As demonstrated earlier in this paper however, this situation should not be interpreted as a natural process of modernization. Given the efforts by the state to eradicate Aboriginal culture and tradition, even its limited existence is testament to its durability and importance. The question that now must be considered is how the investigation of customary law might be continued in the future. Some suggestions for future research will be presented below.

**Increase depth and scope of interviewing.** The simplest way to advance this kind of research is to conduct more in-depth and multiple interviews with respondents. It was noted in earlier chapters that several of the older respondents indicated that it was difficult for them to answer the interview questions right away. They indicated that they needed to think about the hypothetical deviance situations before giving an answer, or that they wanted to discuss the situation with other Elders first. This desire for discussion was prominently featured in the findings section, and has been recognized as a cultural imperative by other researchers:

When Native people use the phrase "consensus decision-making" I believe they are referring less to the fact that everyone agreed in the end than to the fact that the process of arriving at the decision was communal. It is akin to a process of "joint thinking" as opposed to one where competing conclusions are argued until one prevails (Ross, 1992:23).

Thus, the future investigation of customary law should involve multiple steps whereby respondents have the opportunity to ponder and discuss the issues before giving opinions to the researcher.

**Investigate the "forty-four natural laws".** The statement by the Elder referring to a finite number of 'laws' by which his people lived is an obvious area for future research. If such a set of laws could be located and catalogued, it would be a significant step toward something resembling codification of customary law. This would by no means, however, be a simple endeavour. The Elder who referred to these laws could not tell the researcher what they were, nor could he think of anyone living who could. If specific knowledge of these laws still exists, it might not for much longer. During the course of the current research, two of the Elders with whom the researcher was to speak passed away. Time is of the essence if investigation of these laws is to be successful.

**Conduct mock "trials" in First Nations communities.** Panels of Elders could be assembled to deal with hypothetical instances of deviance. The actual performance of deviance response might provide information and insights into customary law that were not captured by interviews. It seems likely that, given the implicit nature of customary law and traditional deviance-response, many aspects of customary law would only be visible through an analysis of the actual process. For the Elders, participating in the application of customary law might prompt recollection or recognition of principles and practices that were not consciously thought of previously.

This last suggestion might also prove useful in addressing another issue uncovered by this research; the loss of customary knowledge in the younger generations. Attempts



are currently being made to educate First Nations children in the ways of their ancestors. If it is true that it is best to learn by doing, observing and participating in these "moots" could be a valuable aid in the revitalization of customary law. Lest the reader develop a negative opinion regarding the survival of customary methods, it should be noted that First Nations youth are already interested and involved in learning. At the teaching lodge attended by the researcher, at least half of the approximately forty people in attendance were young or middle aged. The firekeepers who tend to the smudges and the needs of the presiding Elders appeared to be in their late teens or early twenties. There were at least six children under the age of ten who were not only participating, but also valiantly attempting to protect the ignorant researcher from any serious faux pas. After decades of attack from outside culture, customary methods appear to be gaining in strength and recognition among members of all generations.

There is a third reason for promoting the actual application of customary law to simulated acts of deviance - it might lead to the real thing. Thus, while collecting data and educating the young, the foundation might also be laid for a traditional Aboriginal justice program. The initial simulations could be improved by the participation of actual offenders, even if the decisions were non-binding. Successful trial runs could lead in the future to actual functioning community justice circles working alongside the mainstream justice system. Diversion and alternative sentencing are rapidly becoming popular ideas in the Canadian justice system; they could be advanced and a culture recognized at the same time. While many observers dismiss the idea of a viable parallel justice system for Aboriginal peoples, this kind of cooperation has a history in Manitoba:

Manitoba's Aboriginal people have known three different justice regimes. The first, a product of custom, negotiation and experience, developed before the arrival of Europeans during the centuries in which only Aboriginal people inhabited this part of the Americas. The second, which commenced with the arrival of Europeans in the 17th century, did not end Aboriginal law, but merely added English, Scottish and French complements in parallel with it. The third began with Manitoba's entry into Confederation in 1870. Although it has remained essentially unchanged to the present, this third regime has had a devastating impact on Manitoba's Aboriginal people during the last four decades (Aboriginal Justice Inquiry, 1991:50).

A planned, multi-staged attempt to recapture the cooperation of the complementary approach to justice might do a great deal to repair the damage done to Aboriginal peoples by this past century of Canadian "justice".

There can be little doubt that problems will be encountered in any attempt to formally apply Aboriginal customary law in the future. First Nations communities today bear little resemblance to those existing when customary law was widely recognized and practised.

Advances in transportation and communications technology have brought non-Native values and culture to these communities with great force. Their culture and social organization has undergone significant change. This does not, however, mean that customary methods have become irrelevant. Rather, as implied in the citation above, a system composed of elements of both Native and non-Native approaches to deviance could be beneficial for all parties. As one researcher stated:

I really think what you've got more of is a kind of innovation and adaptation. If people attempted to reconstruct tribal justice, it could be a form of justice that would incorporate quite a few traditional values and concerns and themes of native culture, but the actual form would have to mesh with what life is like now (Brown quoted in Comeau & Santin, 1990:133).

In fact, the non-Native population is beginning to recognize the value of Aboriginal-style customary law in dealing with modern justice problems. Community based policing, community service orders, victim compensation, mediation - all the 'new' approaches to justice that are now being promoted - have at their core the values and procedures found in this study of Aboriginal customary law. Having said that these methods can be beneficial in non-Native communities, why would we not promote their use by the very people who have used them for centuries in their own communities? If there are aspects of customary law which are no longer relevant to the present-day First Nations community, that fact will become apparent in the development process. The Elders who participated in this research remember and recognize the old ways, but they are neither deluded nor naive. They would be the first to recognize inconsistent or anachronistic elements of customary law and not attempt to apply them.

This research has found evidence of existing knowledge of customary law among the Aboriginal people of the West Region Tribal Council communities. This research represents the first step in describing and defining the content of that law. It is now time for this research to be continued, not only for the pursuit of knowledge, but to promote the practical application of this knowledge. There is, in the continuation of research into Aboriginal customary law, an opportunity to improve what is widely recognized as a dismal relationship with the Canadian justice system. This opportunity should not be missed.

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