Aboriginal Injustice: a Canadian Responsibility
An Algonquian perspective of Canada's criminal justice system

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A thesis submitted to the Department of History in conformity with the requirements for the degree of Master of Arts

Queen's University
Kingston, Ontario, Canada
August, 2001

The purpose of this study is to analyze the failure of Canada's criminal justice system in providing adequate levels of justice to indigenous Canadians. The argument focuses specifically on the Algonquian cultural group, comprised of the Cree, Ojibway, Mi'kmaq, and Blackfoot, among other nations, who share similar values and cosmologies, and provides a means of examining many nations in various regions of Canada. The nature of the relationship between the Algonquian nations and the British and Canadian governments is meant to elucidate a larger issue that touches each and every aboriginal nation in Canada. Through an investigation of the development of both the Algonquian and Eurocanadian systems, along parallel time lines but according to different conditions, this study will reveal the cultural relativity of Canada's system of criminal law. In the nineteenth century, when an 'enlightened' settler society believed 'progress' to be inevitable, English authorities professed the universal applicability of English law. From this point on Canada's Algonquian peoples were subjected to a foreign value system that judged them according to standards which they did not recognize. The federal government recognized the power of the law to shape native peoples' behaviours and consequently used law to criminalize specific aspects of Algonquian culture in an attempt to 'lift' them from their 'savage' state. At the same time, the tenets of scientific racism professed the innate inferiority of the 'Indian race.' Regardless of the government's intentions, the new ideas surrounding 'race' combined with the doctrine of progress validated the government's authority over the natives, and ultimately thwarted any possibility of forging a society in which native peoples were equal to their non-native counterparts. These self-perpetuating

philosophies, combined with the government's use of discriminating criminal laws, produced a Canadian society whose social fabric has been tainted by elements of racism. Canada's native peoples have therefore been let down by a system that, in its present state, is incapable of providing true justice to native Canadians.

Acknowledgements

I would like to thank my thesis advisor and friend Prof. Carson for all of his time and efforts. I can safely say that had it not been for his undergrad classes this thesis would remain a dream in waiting. I would also like to extend a thank you to my friend and fellow student Suzanne who answered more questions than she asked. I wish her luck. Thank you also to Colin who listened to my ideas and shared his, keeping me sane and, more than that, keeping me happy. Thank you Dad for your interest, and mom for your support. One final thank you to the staff in the History Department, the Library and especially to the man in the Public Archives who mailed me my research notes when I neglectfully left them behind.

Table of Contents

Chapter 1

Introduction: An Analysis of the Findings of RCAP's Report

In recent years, Canada's federal government has recognized the problems that native peoples encounter when they interact with the nation's criminal justice system. The government and Supreme Court together have made aboriginal persons' over-representation in the justice system the focus of their initiatives aiming to "break the street-to-prison cycle."[1] Statistics have overwhelmingly demonstrated that something remains amiss in Canada, be it within the justice system, or related to socio-economic hardships that have become native Canadians' reality. According to a recent report, although adult native people accounted for only 2 percent of the population 18 years of age and older in 1997-98, they made up 15 percent of the provincial/territorial sentenced admissions, 17 percent of federal admissions, and 12 percent of admissions to probation. Similarly, only 4 percent of youth aged 12-17 are aboriginal, but they make up 26 percent of youth admissions to secure custody, 23 percent of admissions to open custody and 15 percent of admissions to probation.[2] An even more staggering fact is that these numbers have been rising and are continuing to do so. From 1977 to 1993 the number of admissions

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[1] Quoted in "Banished to solitude: a Saskatchewan ruling reflects a new trend in sentencing Natives," Macleans' Toronto Edition v.108(6), (12 June 1995), 18.

[2] Shelley Trevethan, "Aboriginal Persons in the Justice System," Canadian Centre for Justice Statistics, January, 2000.

[3] John H. Hylton, "Financing Aboriginal Justice Systems," Goss, Henderson and Carter, Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference of Aboriginal People and Justice, (Saskatoon: Purich, 1994), 15.

to Saskatchewan correctional centres increased from 4712 to 6889.[3] Statistics have shown that aboriginal admissions accounted for 77 percent of this increase. In the early eighties, many politicians rejected predictions calling for such increases labelling them too extreme, when in some instances they have turned out to be conservative estimates, particularly in the case of female aboriginal offenders. With this in mind, it is lamentable to note that in some age categories, particularly youth aged 12 to 18, native offenders are projected to make up 40 percent of the population admitted to correctional facilities. One hopes this estimate ends up landing on the extreme rather than conservative end of the spectrum, otherwise it will be clear that Canada has made little progress in terms of its ability to provide justice to its native population.

The federal government's most recent initiative, and grandest in terms of its scope and its aims, was the establishment of the Royal Commission on Aboriginal Peoples (RCAP). Established by the government in 1991 the Commission of seven, including four aboriginal members, set out to examine the problems that have plagued the historic relationship between aboriginals and Canadian society in order to make recommendations to improve this relationship.[4] The result, five years later, was an encyclopaedic collection of reports detailing the Commission's investigation into the past and the present. RCAP dedicated a significant amount of time and space to a specific report, entitled *Bridging the Cultural Divide: A Report of Aboriginal People and Criminal Justice in Canada.* The report specified two causes responsible for the failure of Canada's justice system: It did not

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[4] David Stack, "The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom."

to take into account aboriginal understandings of justice, and within it there existed systemic discrimination directed against aboriginal peoples.[5]

The Court's failure to accommodate differences between aboriginal and Eurocanadian concepts of justice has been a powerfully persistent explanation for its failure to dispense justice equally. In 1991, Chief Justice McEachern invoked this argument in his judgement in the Gitksan and Wet'suwet'en case. "In my view," he proclaimed, "the Indians' lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have escaped."[6] Judge Murray Sinclair, however, argues that theories of culture conflict often locate the source of the problem within aboriginal culture. He does not believe that it is advantageous to focus attention on the qualities within aboriginal culture that need to change in order for native people receive justice. Judge Sinclair thinks that "the question should be restated as 'what is wrong with our justice system that Aboriginal people find it so alienating?'"[7] Carol La Prairie sees another limitation to an exclusively cultural explanation to the problems that hinder native justice. She points to socio-economic marginality as the main factor precluding aboriginal individuals from remaining free of legal infractions. La Prairie fears that if cultural versatility becomes the lone focal point for reformers of the system, the present-day social and financial hardships that natives face will

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Saskatchewan Law Review, 1999, 62: 472.

[5] Stack, "The Impact of RCAP," 474-75.

[6] Delgamuukw v. B.C., cited in Royal Commission on Aboriginal People, "Bridging the Cultural Divide: A Report of Aboriginal People and Criminal Justice in Canada," (Ottawa: Supply and Services Canada, 1996), 40.

[7] Murray Sinclair, "Aboriginal Peoples, Justice and the law," Riel's Quest, 175.

not receive the attention these issues deserve.[8]

RCAP recognized that native communities are disproportionately poorer than non-native ones, which directly contributes to a higher crime rate among their inhabitants. According to *Bridging the Cultural Divide*, in 1992-3, aboriginal people made up almost 75 percent of those jailed for fine default. In an attempt to lessen this disproportionately high number, the Manitoba government set up a fine-option program in its province to allow people without funds to do community work in order to pay off fines. The *Aboriginal Justice Inquiry of Manitoba* found that due to systemic problems the program did not come close to rectifying the dismal situation. The *Inquiry* reported that single-parent families and families where the mother is the primary care-giver to the children predominate in aboriginal communities making participation in community work program problematic, if not impossible for women who have little choice but to default on their fines.[9] Factors linked to poverty such as employment status, level of education, family situation all affect the sentencing process. Convicted persons who appear to have stability in their lives are much less likely to be sent to jail for borderline imprisonment offences, than unemployed, poorly educated transients.[10]

RCAP believed it was essential to point out the presence of systemic discrimination, but did not feel, as Carol La Prairie did, that the cultural void between the aboriginal and the Eurocanadian criminal justice system was a separate issue. Citing the wisdom of *The Report of the Osna/Windigo Tribal Council Justice Review Committee*, the

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[8] Carol La Prairie, "Native Criminal Justice Progams, An Overview," cited in "Bridging the Cultural Divide," 42.

[9] Aboriginal Justice Inquiry of Manitoba, cited in "Bridging the Cultural Divide," 43.

Commission linked the process of colonization to both problems which together taint the level of justice natives receive. According to the report, the arrival of the Europeans meant the loss of traditional lands and thus the marginalization of native people. The Committee argued that the land had provided both physical and spiritual sustenance for native peoples. The natives' displacement from it meant that they were "hopelessly vulnerable to the disintegrative pressure from the dominant culture." Without land, the Committee asserted, native existence was "deprived of its coherence and distinctiveness." As such, *The Report* asserted, natives suffered an impoverished existence contributing to "despair, poverty and powerlessness that manifest[ed] itself in alcoholism, substance abuse, family violence and suicide." Due to the nature of their existence, aboriginal people not only clashed with the law more frequently than non-native Canadians, but also faced a justice system that saw no reason to adapt its laws to suit a distinct but extinguishable culture.[11]

RCAP centred its proposed solutions upon advancing aboriginal perspectives in the Canadian legal system. In short, RCAP recommended that the court adopt a sentencing approach that would take into account "the disadvantages aboriginals face in the justice system, the historical roots that led to the disadvantage, and the need to heal the offender and his or her community."[12] In the 1997 case of *R. v. Hunter*, Judge Reilly closely followed RCAP's recommendations in deciding on an appropriate sentence for an aboriginal man who pleaded guilty to the assault of his common-law wife. He quoted extensively from the Commission's report detailing the discrimination and assimilation

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[10] Timothy Quigley, "Issues in Sentencing," cited in "Bridging the Cultural Divide," 46.

[11] Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee, cited in "Bridging the Cultural Divide," 49.

policies of the past and their effects on aboriginal communities and individuals. Judge Reilly's recognition of past injustice led to his decision to sentence the accused to a two year suspended sentence with probation, requiring him to attend a treatment program at the Tsuu T'ina/Stoney Corrections Society for alcohol abuse and anger management and to perform one hundred hours of community service work. During the appeal the court overturned *Hunter*, claiming that the sentencing judge placed too much emphasis on "special Aboriginal circumstances." The court held that victims deserved no less protection from aboriginal assailants than from non-aboriginal ones.[13] Although the Commission was more successful in influencing the law of sentencing in other cases, *Hunter* illustrates a component of the justice system that RCAP's report failed to address.

The Commission rightfully acknowledged the destructive processes that resulted in a perilous situation for aboriginal peoples. It consequently focused its recommendations on the need to acknowledge aboriginal peoples' special circumstances and cultural distinctness at all political levels suggesting that sentencing practices be tailored to natives' experiences by emphasizing communal healing over punishment and deterrence. Although RCAP's suggestions are important, there is a flip side to the situation it describes. British colonists immediately understood natives to be culturally inferior to Europeans, and as the years progressed the dominant culture came to accept the notion of the 'Indian's' racial inferiority as well. While First Nations communities have internalized their frustration, the racist attitudes that have caused this frustration have also been internalized. The success of the criminal justice system in its relations with aboriginal individuals and communities depends

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[12] Stack, "The Impact of RCAP," 477.

upon the acceptance on the part of the dominant culture in Canada that its attitudes are *directly* responsible for the discrimination experienced by native peoples. Tailoring sentencing procedure and treatment facilities to the needs of natives is the equivalent of bandaging a wound without curing its cause. With this in mind, society as a whole needs to face its attitudes, its actions and its antidote in order to free the natives from the discriminatory practices that continue to disable them from rising above their frustrations.

Using the Mik'maq of the East coast, the Ojibway of Ontario, the Cree of Ontario and the prairie provinces, and the Blackfoot of Alberta and Saskatchewan, all of whom belong to what anthropologists refer to as the Algonquian culture group, as examples of a native cultures whose ethical system for maintaining order clashed with the Eurocanadian system of law, it becomes clear that the result of such conflict affected not only the attitudes of natives who suffered discrimination, but also of colonists and Canadian citizens up until the present day. Dating back to the decades before confederation, the Crown exercised the authority of British law, demeaning and eventually criminalizing native behaviour that contravened its principles. As the Algonquian peoples came into increasing contact with the criminal justice system, the citizens, having been cultured to respect the law above all else, saw less and less reason to respect natives. Discriminatory criminal law, although aimed at 'lifting' the natives towards civilization, combined with the tenets of scientific racism to ensure that racial discourse became the norm. The process involved in creating the 'Indian race,' tells a story of one culture demoralized and dejected, while the other grew stronger and more assured by asserting its legal, cultural and racial superiority. In order to effectively combat

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[13] R. v. Hunter (1997), cited in Stack, "The Impact of RCAP," 478.

the issues that taint today's criminal justice system, it is essential to engage both elements of the equation in the solution. As much as the Algonquians, among many other native cultures, require redress and special consideration by the justice system, they are equally in need of the assurance that their children and grandchildren will be free to celebrate their culture, and to live without the racially afflicted abuse they have suffered in the past and which they continue to experience in the present.

This study employs an ethnohistorical approach to writing the history of the Algonquian peoples' relationship with Canadian, and before that British, criminal law. That is, the perspective of the Algonquian nations is considered first and foremost. The chosen methological approach ensures that the native viewpoint of events and documents, that typically support a Eurocanadian interpretation, is understood and valued. Focusing on the Eurocanadian representation of the facts ignores or misconstrues the opinions of the aboriginal people who came into direct conflict with the criminal justice system, but who rarely have an opportunity to share their story with mainstream Canada. The use of an ethnohistorical approach is an attempt to balance the traditional outlook towards native history with the aboriginal peoples' understandings of the issues. The untraditional historical concepts present in this study require flexibility and tolerance, in order to understand rather than judge its worth.

Chapter 2

The Algonquian Way

The Anishinaubae people trace the origins of their world to the Kitchi-Manitou, a supernatural being that realized its dream by creating the universe. According to the creation story, "the great mystery of the supernatural order," translated from the prefix "kitchi," had a vision in which it saw, heard, touched, tasted, and smelled the universe. So it brought the plants, the animals and human beings into existence. The creator included the presence of spirits, magic, mysterious essences, and divinities, among other incorporeal entities, which it called manitous, to fill the physical landscape. It then deemed the creation of the world complete. The maintenance of a peaceful existence upon Kitchi-Manitou's creation became the responsibility of men and women along with their plant and animal counterparts.[14]

The Anishinaubae believed that the manitous, which the creator had bestowed upon the earth, communicated with the people on a spiritual level through dreams and visions. Their beliefs required people to seek visions and listen to their dreams, and through these incorporeal experiences they were to realize their gifts and incorporate them into their reality. An individual's ability to respect and follow the teachings of the elders was essential for the fulfillment of this vision. In the Anishinaubae world, the achievement of making one's destiny a reality ensured a person's own spiritual soundness, which in turn

[14] Basil Johnston, The Manitous: the Spiritual World of the Ojibway, (Toronto: Key Porter Books, 1995),

ensured that harmony existed within the community.[15]

The Anishinaubae, or Ojibway as the nation is more commonly called, provided guidance within their community by establishing a code of ethics that strictly adhered to their cosmology. Because the Cree and Mi'kmaq belonged to the same Algonquian language and cultural group as the Anishinaubae, they organized their societies in accordance with similar values.[16] All three peoples believed Manitous, or M'toulin, as the Mi'kmaq called the spiritual entities,[17] were omnipresent in their societies, and individuals lived their lives knowing that they depended upon the spirits for help in their day to day lives. The three nations adhered to a justice system predicated upon the idea that peace was the natural state of a community's existence, that people were inherently good, and that misbehaviour meant simply that a person needed to learn and understand more.

Just as the fundamental purpose of the Canadian Criminal Code is to establish respect for the laws and the maintenance of a just, peaceful and safe society,[18] the philosophies of the Algonquian nations were devoted to the sustenance of harmonious relations within their communities. Rather than using the Canadian methods of deterrence, such as the public allocation of blame and punishment, to ensure that people acted in accordance with the country's laws, the Ojibway, Cree and Mi'kmaq nations focused on

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[15] Basil Johnston, Ojibway Heritage, (Toronto: McClelland and Stewart Inc., 1990), 119.

[16] The Algonquian family, comprised of nations with related linguistic dialects, includes the Bloods and Blackfoot on the prairies, the Cree across the Canadian shield, both on the prairies and in Quebec and Ontario, the Anishinaubae and the Eastern nations of the Maritimes including the Mi'kmaq and the Maliseet. See Tom Flanagan, First Nations Second Thoughts, (Kingston: McGill-Queen's University Press, 2000), xi. See also Richard White, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815, (Cambridge: Cambridge University Press, 1991), 14-15.

[17] Michael B. Runningwolf and Patrica Clark Smith. On the Trail of Elder Brother: Glous'gap Stories of the Micmac Indian, (New York: Persea Books, 2000), 42.

teaching the members of their society what they *should* do to lead productive and happy lives.[19] When transgressions occurred, the goal of teachers and healers was to renew the offending individual's spiritual balance, so that he or she could resume his or her meaningful contributions to the community. Restitution and compensation as well as ceremonies, dances and, above all, counseling through story telling, restored balance.[20]

The nature of the Algonquian cosmology necessitated the use of teaching tools and counseling, instead of earthly lawmakers and judges. The Anishinaubae understood that the Kitchi-Manitou created the world and all that was in it, and from this awareness they deemed themselves unworthy of taking absolute control of the Divinity's creation. The Anishinaubae people understood the interdependent nature of the earth's species. The plants and animals depended on each other and on the people to ensure that they did not multiply to a level that the earth could not sustain. Concurrently, the people depended upon the plants, animals and the seasons for survival, and ultimately relied upon the manitous whose essences were present in all aspects of life.[21] The spirits affected human beings on an individual level. Communal harmony with the manitous was not the immediate goal, but the result of the combination of balanced individuals. Only when people acted and thought in accordance with the natural laws of the spirit world would the individual hunters trap animals, gatherers find bark and berries, and children be healthy. Under the watchful eye of the benevolent spirits individuals were able to function in a way that benefited

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[18] R.S.C., 1985, c. C-46, Part XXXIII.

[19] Rupert Ross, Dancing with a Ghost: Exploring Indian Reality, (Markham: Octopus Publishing Group, 1992), 175.

[20] Ross, Dancing with a Ghost, 62.

[21] Johnston, The Manitous, xxi.

themselves and their community. The elders' role as community leaders was therefore to teach the young how to live in a way that was respectful of all of nature's attributes, within which the supernatural dwelt.

The Ojibway, Cree and Mi'kmaq used stories to teach their young to adhere to the laws of their society. The parables, fables and tales were not simply tools to foster social control, but were meaningfully tied to their cosmologies. The use of stories was grounded in the premise that in order to grow in spirit, or in other words, to gain spiritual understanding of the self, one must know what it means to live harmoniously with his or her surroundings. The elders' duty to teach was therefore assumed, on account of their spiritual maturation, for according to Algonquian belief only the spiritually sound reached old age. Those who were not in tune with the surrounding manitous were unlikely to survive the harsh winters and long famines, during which time good relations with the spirit world were necessary to sustain a person.[22] The old people's wisdom not only provided them with the tools to impart morals, but also fostered within them an appreciation for the need to teach the young in order to maintain a healthy community. The Algonquian peoples did not tell stories as a method of dictating rules to their youngest generation. According to Anishinaubae tradition, storytellers did not impose views upon their listeners. The learner drew inferences from what he or she heard, taking from the story whatever he or she understood. There were numerous levels of complexity to many of the stories, so that as a child matured she learned different lessons from the same tale. The idea was that the learner acquire understanding according to his capacity. Some learned quickly but with

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[22] Johnston, The Manitous, 5.

a narrow scope, while others learned slowly but broadly.[23] Regardless of the rate of a person's understanding, rules were never forced upon a person by another member of his community. People were responsible for their misbehaviours, and had to compensate anyone who they harmed when they did not follow the rules that were dictated by their cosmology. But they were never judged by anyone other than the spirits who decided what they had to pay for compensation. Collective groups of elders guided members of their communities towards the observance of the laws of their culture.

Because of their Algonquin connection Ojibway, Cree and Mi'kmaq stories shared similar themes, suggesting the presence of an ethic common to each nation. All three groups recognized the inherent goodness of people, as well as the importance of respecting plants, animals, women, men, and children. The underlying ethic of the stories was complex, for to understand why it is necessary to take no more than what a family needs for survival, or why one must give to those who are hungry when he is hungry too, is a difficult task. By attentively listening to the details of the stories as they were repeated by the elders, one was able to understand the reasoning behind the laws, and the need for following these teachings. The key to comprehending the ideas was to recognize the interconnectedness of the Algonquian way of life. Although one was to respect all beings and entities separately, she was also to realize that a failure to abide by one natural law, negated her ability to effectively follow other rules of behaviour. The spirits, although mostly benevolent in nature, expected people to act in accordance with the proposed ethic, meaning that if one learned and understood his community's wisdom he would act it out in

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[23] Johnston, Ojibway Heritage, 70.

all areas of life. Were his negative actions towards woman disharmonious with the positive manner he conducted himself in nature, the manitous would assume his life learning was incomplete. Stories therefore taught many lessons, but the morals culminated in one overarching principle: a man or women who shows respect to the manitous by respecting all that surrounds him or her, will find inner balance and contribute to communal harmony.

The Mi'kmaq Glous'gap stories emphasized a variety of different values that contributed to a common ethic. Glous'gap personified the interconnected morality that his people fostered in their communities. He was their spiritual teacher, ultimate warrior, medicine person, and occasional trickster. His admirers understood him to be a model for the way their people should approach life and requested his presence whenever their community was in need of help to regain its balance. [24] According to one story, Glous'gap was a twin. While he and his brother were in the womb, they discussed how they wished to be born. Glous'gap said "the usual way" while his brother Young Wolf preferred to burst out through his mother's armpit. Gous'gap knew his role was to lead the people, and he felt that by descending upon the earth like an ordinary child, he would be closer to them. His brother on the other hand felt himself to be too great to be born that way.[25] Glous'gap ended up killing his brother in self-defense, metaphorically demonstrating the defeat of a hierachical mode of governance in favour of communal maintenance of order. An old Mi'kmaq man from Barrington Nova Scotia says that the name *Glous'gap* came from

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[24] Runningwolf, Glous'gap Stories, 1-3.
[25] Runningwolf, Glous'gap Stories, 12.

keloose meaning "good", and *nedap* meaning "friend".[26] Glous'gap was a M'toulin, and capable of enacting harm upon beings whose actions proved harmful to the world's equilibrium. However, Glous'gap took the form of a human for his day to day activities, and his people thus considered him an equal to be emulated rather than revered.

Kitchi-Manitou, the spiritual guide of the Anishinaubae people, held a similar role among them to that of Glous'gap among the Mi'kmaq. Although the Ojibway divinity did not take the appearance of a person, its purpose as a leader of the people was to provide an example by which to live. Once it completed the creation of the world, Kitchi-Manitou granted the people freedom to seek and fulfill their visions as the spirit had done. The manitou taught people to emulate its actions by sharing goods, knowledge, experience and abilities with the less fortunate of their kin and neighbours. Its act was one of trust, not of generosity, for the Kitchi-Manitou had faith in the goodness of the people who called themselves the Anishinaubae.[27] Their name meant "the good being or beings," and the people understood their name to imply that human beings derived their goodness from their intent. According to Anishinaubae thought, men and women intended to do what should be done and what was of benefit.[28] The Kichi-Manitou did not demand its people to worship it as a superior entity. Instead the manitou only desired to be thanked by his peoples through their benevolent actions towards all of its creations. Like Glous'gap, the Anishinaubae Creator was equal to its human creations in terms of the intent to do good. It was the people's friend. The Kitchi-Manitou expected that people meant well regardless

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[26] Marion Robertson, Red Earth: Tales of the Micmac, (Nova Scotia: Roseway, 1969), 85.
[27] Johnston, The Manitous, 4.
[28] Johnston, The Manitous, 239.

of their occasional misbehaviour. It understood that at times human depravity pervaded good intent, and therefore placed manitous on earth to help the people by reminding them of the need to refine their actions through learning and understanding ways of the world.

The Cree creation story affirms the Algonquian belief in the inherent goodness of humankind, and the benevolence of their leader. The story emphasizes that respect was not merely a necessity for the good of the community. According to the Cree view, regard for the earth, and kindness towards others came as the result of a genuine love for nature and humankind. The story describes the earliest man, Pointed Arrow, who gave the bow and arrow, knives made from the ribs of the buffalo, and hide-scrapers from leg bones to the Cree people. He made pots from clay, and bowls and baskets from birch bark among other tools necessary for the survival of his people. According to the myth, upon his departure from the Cree Pointed Arrow spoke to the people of the power of love, and of immortality.[29] Although he created the bare necessities of his people's existence, he left it to them to carry on his venture, not by telling them what they must do, but by relaying his own reasoning for providing for them. Pointed Arrow's desire to help his people survive came out of a genuine love and respect for them. He understood that his duty on earth had been to learn to respect nature and humanity so that he could impart his wisdom upon his people who would one day feel obliged to teach the wisdom of their experiences to the young who they cherished. Pointed Arrow knew that after a person's death, his or her soul would traverse the skies to the Green Grass world where it would live a carefree existence. He therefore understood the importance of engendering genuine emotions, rather than

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[29] Edward Ahenakew, Voices of the Plains Cree, (Toronto: McClelland and Stewart Ltd., 1973), 67.

using the threat of a wicked afterlife to establish order on earth. The fostering of an understanding of the power of love ensured a peaceful future for his community. Once Pointed Arrow had departed another teacher came to speak with the Cree people. According to the myth, this visitor said to the people, "I am sent to tell you that the spirit of man lives always. Use love, and work out your own future. Do what is right."[30] Rather than commanding laws to abide by, the Cree, like the Ojibway and Mi'kmaq peoples, grounded their ethic in human understanding of their own potential, expecting that compassion and selflessness would result.

An understanding of inherent human goodness provided the basis for acting in accordance with what the Algonquian peoples understood to be natural laws. However, legend did not simply allow the listener to develop his actions in accordance with what he deemed his potential to be. Storytellers guided their listeners towards behaviours that would harmonize with their accepted role as benevolent human beings, and their personal and communal needs. One was born with the expectation that he wanted to do good. But one needed stories to understand how he was supposed to actualize his innate morality.

Mi'kmaq stories emphasize the necessary balance that Glous'gap sought to forge during his creation of the world. He was constantly making sure that no being was endowed with more power or capabilities than were necessary for its role. Although he did not deny the fundamental goodness of his creations, he made sure that they realized that they had a defined role, and must remain within the boundaries of it so as not to upset the earth's equilibrium. Glous'gap came into contact with a beaver that he had created as big

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[30] Ahenakew, The Plains Cree, 57.

as a whale. The beaver set out to build a dam and wiped out an entire tract of forest. Glous'gap told the beaver to stop gnawing down trees, in fear that the whole world might drown in the dammed water. The beaver replied that he was building himself a lodge to suit his needs, and proclaimed, "no one is as important as I am!" Glous'gap explained to the beaver that he was not the only one who needed a place to live, and told him that there were many others whose needs he must consider. Glous'gap eventually halted the beaver's endeavor, for he would not tolerate the unwieldy animal's selfishness.[31] The beaver knew his role was to create dams, however he overestimated the magnitude of his role. His behaviour was not wrong, but his attitude towards others needed changing. Glous'cap tried to convince the beaver of his need to respect others, but eventually had to reduce the beaver's size to that of a regular beaver, so as to maintain the earth's balance. Allegorically speaking, Glous'gap realized that all earthly entities had a specific role to fill on earth. That of human beings was to live harmoniously with their surroundings. Although they, like the beaver, were born with the good intention of fulfilling their role, at times they stepped outside of it without realizing that their actions symbiotically disrupted the earth's balance. In such instances the M'toulin, or spirits, took on Glous'cap's role. They did not discipline transgressors for the sake of imparting fear in them so that they would not repeat the offense. Instead the spirits adjusted their capabilities, so as to restore balance to the community while they continued to learn and understand the nature of their place on earth.

Anishinaubae legend also emphasized the spiritual intervention of the manitous during times when the people were disrespecting the earth. The story of the spirit of

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[31] Runningwolf, Glous'gap Stories, 18-21.

Maundau-meen described the coming of corn to the Anishinaubae people. In it, the lesson of ignorance was emphasized. It was not that the Anishinaubae were aware that their actions were unfavourable, instead they had not yet learned that corn, like all of nature, needed to be respected in order to prosper. In the story, corn is personified as a stranger looking for someone who could prove that the Anishinaubaek were worthy of their name: "The good people." The stranger had come from afar, and during the journey it had dared many hunters and fishers to master it, promising them prosperity if they were successful. The Anishinaubae people did not like to do battle with strangers, but eventually they overcame their reservations and cultivated the plant he left behind. The fertility and variety of dishes, that the new seed offered, meant prosperity and happiness for the Anishinaubaek. They named the plant Maundau-meen, "the seed of wonder," or the wonderful food. After many good years, the harvest began to fail. The good life ended and the hunters and fishers returned to work. No one understood the crop's failure, so the people asked their spiritual leader to contact the manitous. The sage did as his people asked, and one day he received a vision during a dream quest. The Spirit of the Corn, Maundau-meen, told the man that it was aggrieved because men and women were wasting corn by feeding it to dogs, and throwing away uneaten portions. Unless the Anishinaubae people learned to have the regard for the corn that it deserved, there would be no more. The Spirit was not trying to punish the people for their misbehaviour by taking away their corn, but to alter their world until they learned to respect their new plant. The Spirit was waiting to be called upon by the people, in anticipation of their realization that the corn, like all else, contained a spirit who required respect. The Anishinaubae people asked the manitou of corn to pardon them,

and promised to care for the corn like it was their friend. Once the Anishinaubae arrived at this conclusion, replacing their ignorance with understanding, the cornfields bloomed and have done so ever since.

Instead of describing the spirits' ability to alter aspects of nature when they were not being used properly, a Cree story tells of the manitous helpful actions towards those who understood their role in nature. The story of winter hardships describes a family struggling to find food in the midst of winter in which game was scarce. They had killed all of their dogs and horses for food, yet the children were becoming skin and bones, and all were losing strength. One night, the son dreamt that someone came to him directing his party southward in order to save themselves. In the dream the boy looked south and saw the country was green, but to the north he saw only darkness. In the morning the boy recalled the dream to his father saying, "Maybe it is only hunger that made me dream." But his father replied, "Dreams count, my son. Try to go south, all of you; and if I cannot follow, leave me. I will do my best." As the party moved south, they first came across an "old man buffalo." The boy's brother gathered his strength and killed it. Then the women brought it back to the camp and made soup. The group regained some of its strength and continued on its journey, until one day the boy came to a big snowdrift with a pole at the top, from which a piece of cloth blew in the wind. After digging through the snow, he found hides that covered the meat of two buffalo, cut in pieces. He remembered his dream and was overcome with thankfulness to the spirits. When he told his father the news, the old man replied, "Dreams count, my son. The spirits have pitied and guided us."[32]

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[32] Ahenakew, The Plains Cree, 29-31.

The Cree story imparted within them an appreciation for the spirit's capacity to manipulate the natural world in favour of those who respected its power. Should the boy's father have suggested to his son that he ignore his dream, because the old man did not feel he could endure the journey south, the Cree understood that the spirits would not have helped the family. Instead the father attended to the words of the manitous, demonstrating his understanding of their ability to provide for humans who showed their regard for the fates. Like the Mi'kmaq and the Ojibway, the Cree understood that although selfish actions were the result of ignorance, they could be met with harsh consequences. In the same story of the harsh winter, the family met a traveling duo with five horses. The man and woman refused to give the family a horse to ease their hunger. The two perished on their journey northward. The manitous did not pity those who did not share, and in this case the people had no time to enhance their understanding of the natural laws.

The Algonquian way of life, prior to the arrival of the Europeans and for a many years afterwards, was predicated upon the need to survive. In the winter trapping conditions were harsh, and food was often scarce. A family depended upon the man's abilities to hunt, and the woman's capabilities in collecting berries and wood, and preparing the food and clothing for her family. An individual needed to be looked favourably upon by the spirits in order to be successful in the hunt or in the field, for all plants and animals contained spiritual attributes and were capable of manipulating a hunter or gatherer's level of mastery. In order for this to be the case men and women needed to respect themselves, the natural world, and members of the opposite sex. The Algonquian understanding of respect for nature meant that a person needed to keep his own importance

in perspective. If he was a hunter, his task was to provide food for his family, and those in need. If she was a gatherer, her duty was to hunt for berries and look after her children. It was a person's obligation, as he went about his daily activities, to keep in mind that he was neither more nor less important than his neighbours. He was not meant set aside his personal happiness for the sake of the group, for to do so would have contradicted the ethic of his people. An individual's balanced state translated into a balanced community. Therefore respect for the other was not necessary only for the sake of the community, or for the other, but for the sake of the self.

The Algonquian dependence upon the spiritually sound individual translated into the sphere of relationships between men and women. Members of both sexes understood that the other had a role to play, and that without the other, one would not be happy. Their understanding unfolded into a wider awareness of the need to respect the other sex for that which he or she does, rather than for how he or she looks. It was material, rather than physical, satisfaction that was necessary to ensure the emotional satisfaction of both partners. The stories of the Mi'kmaq, Ojibway and Cree all fostered within their people the importance of this form of respect. The Algonquians understood that humans could get sidetracked by their carnal desires. But they were innately capable of understanding that the fulfillment of such wants was not as gratifying as the satisfying of ones needs.

The Anishinaubaek story of the Spirit of Gawaunduk describes a young girl's journey towards understanding love. One night, Gawaunduk's grandmother tells her a story about two young women who asked each other, "If stars were men and could descend upon a summons, which one would you choose?" The girl who answered "the brightest red

star" awoke the next morning to find a handsome young man lying beside her. She married the young man. But within a short time she discovered that he was vain, and thought only of himself. She wished she had never laid her eyes upon him. The other girl answered "the whitest star," and woke up to find herself lying beside an old man. She was appalled that she had shared her bed with this man who was many times her age. When she found that she was married to him her heart sank, but she accepted what the manitous had bestowed upon her. During her lifetime she never had to go without, nor did she ever hear an angry word from her husband.

Gawaunduk did not take her grandmother's silly story seriously until she had to take part in *waugizih*, the marriage ritual. The rule was that the girl who pealed her husk to reveal a crooked discoloured ear of corn was promised to the old man who was the "prize." To her dismay, Gawaunduk unveiled the tainted corn, and resigned herself to her fate. The man she had fantasized about had always been young and vital, and Gawaunduk hated the old man, who made her dreams an impossibility. However, they shared three children whom Gawaunduk loved very much and gradually her grudge softened. When the old man became ill, Gawaunduk sat by his bed, and then his grave. Although she had never acknowledged her feelings of love, Gawaunduk knew that she could not survive without her husband. She died by his grave thinking of all that he had provided for her. The legend says that on certain days, the spruce trees infused with the spirit of Gawaunduk, shed a light mist of tears of love.[33]

Gawaunduk, whose name means "the guardianess," was an example for all

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[33] Johnston. The Manitous, 108-112.

Anishnaubae people, men and women. Her story cautioned listeners about the mistake she had made in holding such a grudge against her loving husband, by imparting in them the understanding that it was not the initial spark of romance that was important, but the lasting respect for one another that translated into provisions. The wise Anishnaubae understood that Gawaunduk guided people towards their fate, ensuring that if they respected their spiritual destiny provisions and peace for the family would be theirs.

Mi'kmaq men and women also learned that to value the other sex for his or her physical attributes alone, without thought to his or her role in the village, was disrespectful to the other and was also disruptive to the group. The story of the Painted Turtle describes a man who did not have a wife, but believed himself to be quite a ladies' man. He was handsome and smooth talking and would flirt with any woman. He stole wives away from husbands, girls away from their sweethearts, and made trouble for the entire village. Nothing was getting done in the village because men were afraid to go hunting and leave their wives alone, and women would not go out to gather plants or wood because they were afraid Painted Turtle would follow them into the forest. The Mi'kmaq therefore summoned Glous'gap to fix the problem. Glous'gap arrived in the village and transformed himself into a lovely young woman. She then proceeded to Painted Turtle's lodge. The vain man was in the midst of painting his face when his eyes made contact with the beautiful woman at his door. The two then journeyed into the woods where Painted Turtle hoped to seduce the woman with his physical beauty. Instead, Glous'gap outsmarted the man by casting a spell on him while they lay in the grass. Painted Turtle fell into a deep sleep and when he awoke he was clutching a log coated in fiery red ants. Glous'gap told the

man that because of the trouble he had caused, he would forever crawl on his belly. The hero then reminded the village not to act as Painted Turtle did. His message to "cherish women as sisters and friends, cousins and aunts, daughters and wives and mothers,"[34] spoken to the people of the small village, resonated in the ears of all who heard the story. The Mi'kmaq order depended upon people's regard for members of the opposite sex. Fidelity translated into an orderly society in which everyone felt free to go about his or her duties. Thus the wise linked fidelity with respect in order to foster the understanding that love was something that developed between two people who cared for each other, and who demonstrated their devotion by fulfilling their respective roles.

The Cree told a story that conveyed their agreement with the Mi'kmaq and Ojibway understanding of love. The myth professes the fulfillment of one's role, rather than physical attraction, as the basis for love. A handsome young man was journeying to meet some new people. He had lived only with his parents, and was lonely for interaction with others. Although he was warned of selfish people who lived in the direction he was traveling, the boy continued his excursion. Soon, he met a very ugly man with a hunchback wearing bear-skin breaches who challenged him to a wrestling match. The prize, the ugly man said, would be the two beautiful young women who lived near by. Although the handsome man hesitated, he finally agreed. Soon, the hunchback had the handsome man pinned to the ground where he jumped into his body, stealing his good looks. He put on his clothes, and gave the handsome man his bear-skin breaches. The two men then approached the lodge of the two women. The elder sister saw the men coming, and instigated a race

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[34] Runningwolf, Glous'gap Stories, 73-80.

between herself and her sister for the handsome man. Each time the younger sister was close to passing her, the older sister would seize her and throw her backwards. The elder sister reached the two men first and grabbed the handsome one, declaring him to be her husband. That night the four of them huddled in the cabin and ate. Berries were the only food the sisters had to offer. When morning came, the two men went out to find meat for their respective wives. The handsome man arrived home first, with one otter. When nightfall came, the ugly man came home with a chicken for his wife. Each night, the handsome man would arrive home first dragging an animal behind him, and the ugly man would arrive later with a larger one. With time, the younger sister started to approach her husband, who had at one time repulsed her. When he arrived home from hunting, she would bring him his moccasins and his dinner and call him her "husband." As the story was told, the younger sister had come to love her husband.

The Cree fostered the link between respect for each other's needs and love. The younger sister's husband, although he may not have elicited feelings of initial attraction from his wife, earned her admiration, and eventually her love, because of his hard work. He demonstrated that he respected and cared about his wife by always hunting late in order to bring her plenty of meat, and in return she took care to make him comfortable and prepare his food. Together they forged a bond that did not depend not on physical attraction, but on the satisfaction of material needs. The elder sister was quite jealous of her younger sister who always had more food to eat, and plenty of hide from which to make moccasins. The ugly man eventually thought up a plan and stole his good looks back from the good-looking man. The youngest sister kissed her husband, while her elder sister

would not go near her hunchbacked husband clad in bear-skin breaches, for she had never really loved him.[35]

The Ojibway, Mi'kmaq and Cree nations established order in their respective societies by forging in their people an overarching ethic of respect and interdependence. Their cosmologies imparted the ideal that people's well-being depended upon their relationship with the surrounding spirits as well as with each other. In order to fare well, one had to elicit guidance and pity from the manitous whose powers determined a person's ability to provide for his family and community, and survive harsh winters. By respecting the animals, plants and fellow people, men and women demonstrated that they understood their place on earth. Their roles were neither more nor less significant than those of the beings and entities, supernatural or corporeal, that surrounded them. Written laws, with punishment's elicited by the state, or community, did not exist in the Algonquian concept of order. The Algonquian prescription for justice required individuals to appease others who they had personally aggrieved through compensation or retribution. But no overriding institution imposed these sentences. When a man gave another a horse to compensate for a misbehaviour he had committed, it was to restore balance in the community by demonstrating respect for the individual whom he had aggrieved.

When misbehaviours went beyond what the Algonquians understood to be ignorant or impulse behaviour, to the realm considered evil, people turned to their understanding of spirits for an explanation. A story of a faithless woman demonstrates the Cree attitude towards people who they believed to be Wendigos, or evil spirits, disguised in human

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[35] Leonard Bloomfied. Sacred Stories of the Sweet Grass Cree, (Ottawa: F.A. A Acland, 1930), 130-142.

forms. There was a woman who had a husband and two children but who loved another man. She wanted to leave her family to be with her lover except she knew that abandoning her husband and children, went against all of her womanly responsibilities. Regardless, she fasted for many days, and eventually weakened and pretended to die. She had told her husband to build a scaffold upon which she would lay when she passed away. He followed her directions in sadness, believing her soul to be traveling to a new home. But the woman's lover soon arrived to rescue her from her deathbed. He fed her until she regained her strength, and together they began a new life. The woman always disguised herself as a man when in public. She had no problems with her identity until one day when she went hunting in the community of her family. Her son recognized her, and told his father who agreed that the hunter was his wife. The man approached his old wife, and tore off her ornaments shouting, "You are not human. You have no thought for your children, only for yourself." He then went to the woman's parents asking them for advice as to what he should do. "No one of us has ever done the like," they said to him. "Do with her as you will." And so he killed her.[36] The Cree believed that if a person proved him or herself beyond redemption by transgressing the limitations of his or her roles to a degree that seemed unfathomable, he or she was not human. Death was not punishment, but was a means of saving the community from a lurking Wendigo.

Storytellers did not preach punishment. Instead they taught the correct way to live life in the hopes that listeners would accept the ethic and live by it. The Anishnaubae cherish a story about Nana'b'oozoo. The young man, who some consider to be part

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[36] Ahenakew, The Plains Cree, 66.

manitou, meant well, but was too often prevented from fulfilling his intentions by the cruder side of his human nature. Although he was not evil in nature, his passions, drives, whims and emotions left him finding ways to save time and energy by taking more than he needed, and often led to his neglecting people who were important to him. Nana'b'oozoo represented people's weaker side. He stumbled along, sometimes achieving inordinate success, and other times feeling unwelcome in his own community.[37] In the days prior to the implementation of the Eurocanadian rule of law, the Algonquian peoples recognized that like Nana'b'oozoo, people were not perfect. Although they were inherently well-meaning, their base instincts and ignorance tainted the purity of their actions. But to have had a hierarchical imposition of the rule of law would have contradicted the ethic of equality upon which the Algonquian order rested. Storytellers guided listeners towards lives that benefited their internal soundness as well as communal order. Their methods melded with the message they sent: Learn to respect the animals, the plants, the people, the spirits and ultimately the stories, and individual happiness and communal order will necessarily exist.

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[37] Johnston, The Manitous, 244.

Chapter 3

The Eurocanadian Imposition of Law: Shawanakiskie's Case

In 1822, in the streets of Amherstburg Upper Canada, a member of the Ottawa nation killed a native woman "to revenge the death of a parent."[38] Among the Ottawa, when someone was wronged by a member of another household, the victim's clan was obliged to renew communal harmony through either retribution or a gift giving ceremony, each of which would restore the balance of the community.[39] The customs of the Ottawa peoples not only justified Shawanakiskie's act of violence against a member of the accused's family, but deemed it his duty. Despite the colonial courts' history of permitting 'Indian custom' to preside over crimes committed between native peoples, in Shawanakiskie's case the colonial court maintained that the murder fell under British criminal jurisdiction. During Shawanakiskie's trial, the judges exhibited doubts as to the legal validity of the native's subjection to colonial law without precedence. But, in the case of Judge Campbell, his reservations came second to his fear that "it might be extremely dangerous," to exempt the natives from the "laws of the land," especially in murder cases "or other atrocious crimes against the law of nature."[40] In the end, the imperial government

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[38] "Petition of Shawanakiskie, an Indian of the Ottawa Allied Tribe, to his Excellency Sir Peregrine Maitland," Lt. Gov., 5 1822, PRO CO 42/.370: 41-2, cited in Mark Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakiskie Case (1822-1826)," University of Toronto Law Journal, 46 (1996), 304.

[39] Mark Walters, "According to the Old Customs of our Nation: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847," Ottawa Law Review, 30(1998-9), 8.

[40] Justice William Campbell, "A charge to the Grand Jury, Sandwich," Autumn 1822, PRO CO 42/370: 28-31, Walters, "Shawanakiskie," 295.

issued a warrant for death or transportation to "one or other of the islands for and during the Term of his Natural life, or be imprisoned in some prison in...and kept there to hard labour for the same term."[41]

The predominant view amongst legal scholars is that Shawanakiskie's case marked a turning point in the natives' relationship with colonial and Canadian law. After the issuing of the warrant on 13 February 1826, natives living on land in the provinces of Upper and Lower Canada, whether ceded, reserved, or neither, became subject to the laws that had forever governed the British settlers.[42] Legal historians often assume that the most significant feature of the trial was the judge's delivery of the sentence. A careful examination of the judge's words, spoken in court, reveals a feature of the trial that is of equal, if not of greater, importance. In his grand-jury charge, Judge Campbell tells the jury that he considers it "highly reasonable and just" that "wandering Tribes of Indians" be exempt from the laws of Britain "for any occurrence purely amongst themselves," although he "cannot pronounce it strictly legal." Campbell's phrase "strictly legal" suggests that natives' immunity to crown law for crimes committed *inter se* beared some level of legality. But from a 'strict' or 'literal' reading of the pertinent legislation, Judge Campbell could not deem such an exemption legal.[43]

Judge Campbell's choice of words reflected the transformation in legal ideologies that had occurred in both Britain and Canada. A new confidence in positivist law, or the

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[41] "Warrant for the Execution of an Indian as Subject to British or Canadian Law, Feb 13, 1826," Canadian Indians and the Law: Selected Documents 1663-1972, Derek G. Smith ed. (Ottawa: McClelland and Stewart Ltd.), 24.

[42] Smith, Canadian Indians, xvi.

[43] Walters, "Shawanakiskie," 295.

notion that society could be transformed through legislation, grew to eclipse English society's older faith in Natural Law, grounded in the concept of a self-regulating morality governed by human reason. In the late 1820s, however, British colonial legislation remained scarce in terms of native policy. It did not reflect the day-to-day realities that distinguished natives on unceded or reserved lands from their colonial neighbours in terms of their governing traditions and laws. Legislation did not even emulate the imperial Indian Office's policies. When the crown enacted statutory laws to introduce British law they tended to be general and contained no exemptions for native people.[44] Regardless, from the time judges and jurists hailed positivist law as the preferred tool for maintaining order in the British empire, the statutes were the supreme governing agents regulating the activities of natives and non-natives alike.

Native peoples' subjection to colonial law in 1826 was but a link in a thoroughly developed chain leading, in the minds of the colonizers, to 'civilization.' By the nineteenth century, positivist thought was in the process of development in the minds of British philosophers. The eighteen thirties marked a distinct change in the nature of paternalistic notions in government, derived from the positive ideal of a scientific society. Along with the natural rights of the enlightenment era, man was imbued with duties to lift the 'mob' and the 'noble savage' from the depths of 'barbarism.' The assimilation of the native peoples into the wider Canadian society became a goal of the governing classes, which had grown unsatisfied with the deleterious state of the empire's aboriginal peoples. The scientific and philosophical revolutions taking place in Europe, and the problems plaguing

[44] Walters, "Shawanakiskie," 289.

England as a result of industrialization contributed to Canada's political transformation. These foreign developments, in combination with political instabilities close to home necessitating native cooperation, conveniently led Canada to become a legislative breeding ground for paternalism. The eighteenth century notion of sovereign native nations, existing along side the British, folded into the past as the settler colony grew to require more land and to acquire more power. The natives' long standing system for maintaining order, grounded in a well developed ethic espousing the need to maintain spiritual harmony, no longer governed those actions that transgressed colonial laws. What distinguished the English system from that of the aboriginal, was the colonial belief in the absolute superiority and universality of its legal and political traditions, when in fact, its processes had developed in accordance with the distinct and changing British people, in the same way that Algonquian governance developed in accordance with the unique beliefs and modes of subsistence its peoples.

The supremacy of aboriginal law within Canada did not simply dissolve with the introduction of European institutions. From 1763, when New France was renamed Quebec and delivered to England by the Treaty of Paris, until approximately 1826, the British recognized the sovereign rights of the native peoples. Nations like the Cree, Mi'kmaq and Ojibway were able to retain jurisdiction over their affairs, due to a combination of practical motivations and a growing confidence in the ideals promulgated by Enlightenment philosophers. The most obvious of the Crown's motivation was the need to appease the native people, who were used to the relationship they had shared with the French. New France's native inhabitants had generally characterized this relationship in terms of

friendship and alliance. When, in 1715 with the French cession of Acadia, the British attempted to persuade the Mi'kmaq to swear allegiance to the British Crown, the Mi'kmaq declined, stating that the French could not have surrendered their rights since they had always been independent peoples, allies and brothers of the French.[45] In 1752, under similar circumstances, the Abenakis reaffirmed their independence during negotiations with a representative of the governor at Boston. "We are entirely free; we are allies of the King of France, from whom we have received the Faith and all sorts of assistance in our necessities; we love that monarch, and we are strongly attached to his interests."[46] In theory the French were no more benevolent than the English in terms of their desire to assert sovereign control over the native peoples. The French Crown's issuing of the royal commission in 1603, extended the King's authority as far as possible, and confirmed his right to subdue the local inhabitants. But at the same time, it acknowledged native peoples' independence and their capacity to conclude treaties of peace and friendship.[47] Thus, in practice the French often settled for alliance or simply neutrality.

Similarly, the French colonizers' recognition of native jurisdiction over their affairs was mainly the result of the practical impossibility of establishing colonial institutions among a native population that far outnumbered the French settlers. In 1618, two Montagnais killed two Frenchmen in Quebec. The French wanted to try the accused under French law. A debate on the topic ensued. They eventually decided to accept the children

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[45] The Royal Commission on Aboriginal Peoples-Final Report, (Ottawa: Minister of Supply and Services, 1996), http://www.indigenous.bc.ca/v1?Vol1/Ch5s2to3.4.asp, hereafter cited as RCAP.

[46] Cited in Cornelius J. Jaenan, "French Sovereignty and Native Nationhood During the French Regime," Native Studies Review, 2 (1986), 100.

[47] RCAP, vol.1, ch.2.

offered by the Montagnais peoples as reparation for the deed, largely because the natives vastly outnumbered the French.[48] But by 1644, the French colony in Quebec had grown in size and stature. In April of that year, the French colonial government met with the chiefs of its allies to tell them that violence and murder would be subject to the penalties of French law.[49] Regardless of the French colonial government's intent to subjugate natives, their ideals were only realized in the east where favourable demographics allowed them to exert their power over the native minority. In the west, gathering furs and allies to aid the French in their fight against the Iroquois were ultimately more important, and beyond that, were often irreconcilable with controlling native affairs. The French recognized the importance of the alliance, because without native support the fur trade would vanish. Canada would be vulnerable to Iroquois attacks, and England, allied with the Iroquois, would control the continent.[50] The Europeans were thus in no position to command the Algonquians, who often required appeasement and gifts to ensure their loyalty.

Murders were abundant on fur trade terrain, but neither French nor Algonquian cultural rules fully governed such criminal activity. Interactions between the two groups formed a middle ground upon which the ideas of the French and the natives coincided, neither one supreme nor without compromise. On 25 April 1723, a French soldier spoke impolitely to a warehouse keeper, named Perillaut, who responded by stabbing him with his sword. The French tried Perillaut and condemned him to death for his transgression.

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[48] A.G. Bailey, ed., The Conflict of European and Eastern Algonquian Cultures 1504-1700, (Toronto: University of Toronto Press, 1969), 94.

[49] Christie Jefferson, Conquest by Law, (Ottawa: Corrections Canada, 1994), 16.

[50] Richard White, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815, (Cambridge: Cambridge University Press, 1991), 28-30.

His sentence disturbed the Illinois, an Algonquian group, who had had many dealings with the Frenchman. In response three chiefs of the Kaskaskias, a band of the Illinois, traveled to plead the French for Perillaut's life. The chiefs appealed to the symbol of peace and alliance, the calumet, and told the French of times when Kaskaskias had been killed to avenge the French, and reminded them that those warriors remained unavenged at the request of the French. With the reminder of a potential retaliation for the unavenged deaths fresh in their minds, the French officials set Perillaut free. The French proclaimed that the Kaskaskias who had died to avenge Frenchmen would "cover the body of the one who has now been killed."[51] Cultural compromise characterized the years of French rule in Canada, which abandoned absolute notions of justice for the sake of peace and power in the colony. When it was possible, as in Quebec or the Maritimes, disputes between Frenchmen and natives fell under French law. But even under these circumstances, the Mi'kmaqs and other nations never considered themselves to have surrendered jurisdiction over their territory. Their relationship with the French, largely based on mutual need, always maintained a component of friendship and alliance, and the natives remained, for practical purposes, responsible for delivering justice in disputes between members of their nations.[52]

In February of 1760, with Quebec captured by the British, and the Seven Years War at an end, Canada fell to the English. With the exception of Acadia, which had been under British imperial jurisdiction since 1713 by the Treaty of Ultrecht, the French colony

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[51] White, The Middle Ground, 92.

[52] James Youngblood Henderson, First Nations' Legal Inheritance, (Winnipeg: University of Manitoba Press, 1991), 38-9.

was, for the first time, in British hands. Not only did the bitterness of the French settlers make this transformation difficult, but the eastern Algonquian nations were resentful of English rule which dictated that they treat with their former enemy. The British General Jeffrey Amherst believed that victory over the French terminated the Europeans' need to appease or indulge the natives. Accordingly, Amherst's policy rewarded the 'Indians' when they were good, and punished them when they were bad. Amherst sought to transform the aboriginal population into children of the British crown, whose duty it was to learn the ways of their English father. Thus the Algonquian peoples' means for maintaining order within their own communities become obsolete, as the empire's political supremacy gained ground in the "pays d'en haut." Above all, the General's policy sought to eliminate the gifts that were central to the French's approach to native relations. Amherst wrote, "when men of what race soever behave ill, they must be punished but not bribed," demonstrating an ill understanding of the gift exchanges between the natives and the French.[53] Regardless of the French ideal, in practice, gift giving established the autonomy of each group implying that neither one controlled or commanded the other. In British terms, the opposite was true, both in theory and practice. The English were conquerors, and the 'Indians' subjects, whose primary role it was to maintain the prosperity of the fur trade.

British officials who shared Amherst's ideology did not realize that by 1763 law in Britain's new colony, to a large extent, would depend upon the nature of native peoples' relationship with the French. Between the fall of Canada and the official cession of the

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[53] White, The Middle Ground, 256-8.

colony to Britain, disgruntled Algonquian nations demonstrated the bitterness they felt towards the new European power with whom they shared their land. With the elimination of presents, stealing increased within the trade. Violence became commonplace between English traders and native peoples, and alcohol flowed freely. Sir William Johnson, acting as Superintendent of Indian Affairs, worried about the precarious nature of native-English relations. As a long time friend of the Iroquois, he was aware of the importance of gift giving traditions. Although he acceded to the idea of the eventual subordination of the native peoples, Johnson felt that for the benefit of everyone involved, the process needed to be gradual. He warned Amherst that the "French spared... no labour or Expence to gain their friendship and Esteem," telling the General that his policies had been "as of late...rather premature in [their] sudden retrenchment of some necessary Expences, to which [the natives] have been always accustomed."[54] Amherst foolishly ignored such warnings, leaving the new British colony in a state that was ripe for a rebellion. In 1763, Pontiac, an Ottawa war leader, aroused the emotions of the surrounding Algonquian nations. Feeling nostalgic towards French rule, and desiring to form a separate Algonquian nation, he stressed the need to rid the colony of the British. Despite support from the Ottawas, Ojibway, Wyandots, Senecas, Weas, Miamis, Mingos, and Delawares, the revolt resulted in a military stalemate. Amherst returned to England and his successors General Thomas Gage and William Johnson began to repair the damage done by Amherst's policies.[55] They realized the need to return to the ways of French, who had governed the natives through acts of reciprocity. The Algonquian peoples residing in Canada, used to

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[54] "Johnson to Earl of Egremont, May 1762," cited in White, The Middle Ground, 258.

this method of maintaining order, were more easily appeased when the British, however crass in their intent, learned to abide by it.

The British colonial government recognized the need to emulate French practice, but there existed an insurmountable difference between the two European policies. The population of the French colony had remained small. Its settlers planted themselves along the St. Lawrence River, in an area that the Iroquoian peoples of Stadacona and Hochelaga had either abandoned or disappeared from after Jacques Cartier brought disease to the towns in 1608. Traders ventured inland in their quest for furs, but never with the intention of securing land from the native peoples. By contrast, according to British policy, the native peoples occupied potentially valuable land which the Crown hoped to procure for settlement and agriculture.[56] The dissonance between English and Algonquian understandings of land use and private property translated into violence. Although, by 1763, English colonial officials recognized the need to model their policy according to the French system, the English goal of expanding its settlement ultimately prohibited the English from doing so on more than a superficial level.

In response to Pontiac's revolt in the summer of 1763, and the tensions that were mounting between the settler colonies and the native peoples, the Crown issued a Royal Proclamation introducing unilateral British policies. In an attempt to pacify Quebec's native peoples and suppress the rising tide of rebellion, the proclamation confirmed that "the several nations or tribes of Indians, with whom [they were] connected, and who live under [their] protection, should not be molested or disturbed in the possession of such parts

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[55] White, The Middle Ground, 289.

of our dominions and territories as, not having been ceded to, or purchased by us, are reserved to them, as their hunting grounds." In the spirit of this decree, the Crown document prohibited colonial officials from granting "warrants of survey" or "patents for any lands" that were not within the boundaries as they were outlined in the Proclamation. Land beyond these confines was to be reserved for the native peoples and alienable only by the crown.[57]

The most significant feature of this document was the manner with which it separated the settlers from the aboriginal peoples in its policy. The King directed the new colonies, including Quebec, to set up representative assemblies as soon as possible. The governors, together with their councils and assemblies, were thus given the power to makes laws "for the Public Peace, Welfare, and Good Government" of the Colonies. But, until such representative assemblies could be formed, British subjects could "confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England."[58] For Quebec, this provision repealed the existing laws derived from the French system. The separation between ordinances directed at the English subjects, and those guiding native relations, attests to the British crown's view of the native nations as distinct from English and French settler colonies. The Crown recognized their internal laws and customs, and was to treat with them according to the rules that governed negotiations between separate sovereign entities. Implicit within the document was the understanding that eventually the native peoples would be "induced by degrees, not only to be good Neighbours to Our

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[56] RCAP, vol.1, ch.2.

[57] "The Royal Proclamation on North America, 7 October 1763," Samuel Eliot Morrison ed., Sources and Documents illustrating the American Revolution 1764-1788, (Oxford: Oxford University Press, 1965), 2.

subjects, but likewise themselves to become good Subjects to Us." A few months after the issuing of the Proclamation, with its goals in mind, the King instructed the governor of Quebec to "appoint a proper Person or Persons to assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship... and delivering them such Presents."[59] The motive for such benevolence was echoed in the writings of William Johnson. In a "Memoranda Concerning Indians," the superintendent of Indian affairs explained that "such Indians," who were friends of the British, should "be kindly used," it being in their interest to be so, until the British were "better able to do without them, otherwise they may turn [to] enemies before spring."[60]

In 1764, the Algonquian nations of the Great Lakes entered into a treaty with the Crown symbolizing their acceptance of the Royal Proclamation. William Johnson met with the nations' representatives at Niagara, where they exchanged presents to certify the binding nature of the promises made. The British confirmed the existence of the "Great Covenant Chain" that signified a multiparty alliance of two groupings of members, neither one giving up its sovereignty. The natives used a two-row wampum belt to demonstrate their understanding of the treaty's policies. The two blue rows on a field of white shells symbolized peace and friendship between the two sides, which indicated to the natives that neither nation would interfere in the other's affairs, but that they would work together as 'Brothers' on issues of mutual interest.[61] To Johnson, the meeting extended the "Royal

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[58] "The Royal Proclamation," 2.

[59] "Instructions to Governor Murray of Quebec, 7 December 1763, article 60," cited in RCAP, vol.1, ch.2.

[60] "Johnson, Sir William Memoranda Concerning Indians," (Nov. 10, 1763), cited in The Papers of Sir William Johnson, (Albany: The University of the State of New York, 1921-1965), 4: 235-236.

[61] John Borrows, Aboriginal Legal Issues: Cases, Materials & Commentary, (Toronto: Butterworths, 1998),

Protection" to "Indian Allies," and emphasized the aboriginal title to land that had not been ceded to the crown.[62]

In September 1764, the British enacted another treaty at Detroit with the Ojibway that characterized the Ojibway signatories as "subjects" of the crown, and stated that the natives were to recognize the crown's sovereignty over their land. The purpose of such statements opened the door for the British to impose their laws.[63] Chief Wabbicomicot objected to this language, and insisted that the 'Brothers' metaphor, to which his people were accustomed to, be utilized. Despite William Johnson's agreement with the Chief's response, the presiding British officer, Colonel J. Bradstreet insisted that "nobody (sic) were to be admitted into the aforesaid mentioned Submission and Articles of Peace, but such as acknowledge themselves Subjects and Children of the King." Wabbicomicot acknowledged that his people required the Crown's protection from settler encroachment. He had no choice but to concede.[64]

William Johnson maintained that the treaties enacted between the natives and the Crown should remain Treaties of "Offensive and Defensive Alliance[s]." In his view, it was crucial that England have the right to claim the natives' assistance, expecting that the

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[62] See "Treaty of Niagara, 17 July to 4 August 1764," The Papers of Sir William Johnson, cited in Walters, "According to the Old Customs of our Nation," 15.

[63] "Congress with the Western Nations' Detroit, 7-10 September 1764," cited in Walters, "Shawanakiskie," 278.

[64] "Treaty of Detroit, 7-10 September 1764," cited in Walters, "According to the Old Customs of our Nation," 14-15.

[65] "William Johnson to Thomas Gage, 19 February 1764," The Papers of Sir William Johnson, 3: 31.

[66] "Johnson to Gage," The Papers of Sir William Johnson, 3: 32.

[67] Mark Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws And Government In British North America," Osgoode Hall Law Journal, 33 (4), (1995), 800.

natives would hardly ever desire that of the English for anything more than "Arms and Ammunition," which, Johnson stated, "would be in [their] interest to give them in a war with one another."[65] Johnson knew too well the repercussions of fostering hostile relations with the natives, but, ultimately, he too foresaw a colony governed by English law. In a letter to General Thomas Gage, Johnson went so far as to advocate a shift in criminal jurisdiction. wrote that "every nation for the future shall on our requisition properly made deliver up, such of their people as may be guilty of Robbery or Murder, that they may be tried according to the English Laws." He recognized the fact that such policy was "contrary to the original Covenant," yet believed it to be "a very necessary point to push."[66] Johnson was not motivated by a desire to 'better' the native nations, but to gradually assert the supremacy of British rule in the colony. He was aware that in the past most colonies expressly placed native people under the protection of colonial law in instances where settlers committed criminal acts against native individuals. But he also knew that when natives offended against the person or property of settlers many colonies recognized native jurisdiction over the offender. The absence of statutory control over internal native disputes implicitly acknowledged a tacit acceptance of native jurisdiction over their private affairs.[67]

Preventing discord between the natives and the colonists for the purpose of advancing British sovereignty grew increasingly important, as Britain's southern colonies threatened her control over the dominion of Quebec. Rather than enforcing English law,

Sir William Johnson and his successor and son, John Johnson, found themselves continuously appeasing their native allies to ensure their loyalty. On 3 January 1775, the "Plan for the Future Management of Indian Affairs," determined the status of native peoples under British criminal law. It stated that "for maintaining peace and good Order in the Indian Country," meaning beyond the boundaries of the colonies, "and bringing Offenders in criminal cases to Punishment." commissaries were empowered to judge disputes "between Indians and Traders, as between one Trade and another."[68] Nowhere in the act did the Crown deem its jurisdiction supreme in regulating native peoples' internal affairs. Both inside and outside the colony's boundaries, British law ruled disputes between natives and non-natives. But in both places, it continued to acknowledge the natives' right to govern disputes amongst their own nation.

The Crown's principle of accommodation in recognizing the persistence of aboriginal jurisdiction over their own affairs proved important in 1776 when the imperial power required the aid of the native nations. According to the Anishinaubae nation, when the "King's Colonies to the South" declared their independence, the Anishinaubae peoples remembered their commitment to Britain. They respected the agreement that had been maintained between independent nations, and trusted the Covenant Chain of friendship, alliance and protection. The Anishinaubek, and other native nations, fought along side Great Britain in an attempt to prevent the rebel colonies from winning their independence.

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[68] "Plan for the Future Management of Indian Affairs, Referred to in the Thirty-Second Article of the foregoing Instructions to Governor Carleton, January 3, 1775," Smith, Canadian Indians, 8.

On 3 September 1783, the Americans signed the Peace of Paris with Great Britain and achieved their independence.[69] Though the war between the British and the American colonists was at its close, native hostilities, aimed at the Americans, festered. In April 1783, a committee report to Congress recommended suspending offensive action against the native peoples and informing them of this decision to prepare for peace. Despite its feeble efforts, beneath the surface the committee believed that the natives had been on the losing side of the war. By right of conquest, they could be treated as conquered nations and their lands could be taken from them. Even without acknowledging the right of conquest, the committee believed that the United States deserved compensation for the 'atrocities' committed by Indians during the war.[70] While Great Britain was in a state of peace with the United States, the aboriginal nations in Upper Canada and the northern states continued to fight their own wars against the Americans for the next decade. The signing of the Jay treaty in 1794 secured the rights of the British and the native peoples to trade freely with the citizens of the United States in the respective territories of all parties, "to promote a disposition favourable to friendship and good neighbourhood."[71] The Americans opted for the pacification of its surrounding native nations because knew that their blossoming States could not sustain native hostilities, nor could their bankrupt federal treasury.

The Crown also recognized the importance of remaining at peace with the native inhabitants of British colonies, and beyond its borders. It did not want to risk losing its

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[69] Francis P. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts: 1790-1834, (Massachusetts: Harvard University Press, 1962), 32.

[70] Prucha, American Indian Policy, 32-33.

[71] "Jay's Treaty of Amity, Commerce, and Navigation, November 19, 1794 (Extract)," Smith, Canadian Indians, 16.

native allies to the United States who, it feared, had ambitions of staking a claim to all of North America. In 1786 John Johnson reaffirmed the Chain by presenting a belt to the Anishinaubae chiefs. The native people understood the renewal of the chain to signify the continued existence of two sovereign peoples who, like each circular link, retained their complete identities and the ability to conduct their internal affairs without interference.[72] In 1793, Simcoe, the Lieutenant Governor of Upper Canada, reavowed Britain's relationship with the sovereign native nations. He addressed them as "Children and Brothers," asserting Britain's recognition of their sovereignty as brothers on equal footing with the colonists, while at the same time affirming the King's rule over the colony. The natives were well acquainted with the father-child metaphor because it coincided with their own traditions represented by the caring hand of the "creator." Lt. Governor Simcoe assured his audience that "the documents, records and Treaties between the British Governors in former times and [the natives'] wise fathers...all establish the Freedom and Independency of [their] nations." He affirmed his statement by telling the Anishinaubek "no King of Great Britain ever claimed absolute power or sovereignty over any of [their] lands or territories that were not fairly sold...by [their] ancestors at Public Treaties." Of these treaties, he said that they would prove that the Anishinaubeg's "natural independency has ever been preserved by [their] predecessors and will establish that the rights from such independency have been reciprocally and constantly acknowledged."[73] The British Colonial Office was decades away from implementing William Johnson's suggestion regarding aboriginal peoples' total subjection to British law.

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[72] Anishinabek Nation, On Relations, (Nippissing First Nation: Northbay), www.anishinabek.ca, 3.

In the last decade of the eighteenth century the natives remained separate political entities, free from the constraints of British criminal law, unless they desired its protection of their own free will.[74] Their relations with the British were still largely grounded on the economics of the fur trade. But, by 1797, the North West and the Hudson Bay Companies had replaced individual traders. The transformation within the trade's power structure translated into new aims directed at the native peoples. Maintaining peaceful social relations had been the long time means of ensuring the natives' cooperation. The company was, however, unsatisfied with the product of such relations, and wanted to replace their antiquated attitudes with an emphasis on sales over gift exchange. It wanted its trading partners to be treated as customers rather than relatives. But as the trading companies tried to transform the native peoples into capitalist workers with elastic demands, the natives remained content with fulfilling their immediate needs. Cost had little effect upon the amount of furs they supplied, or the number of products they purchased. Despite traders' attempts to use credit and rum to increase the native demand, the beneficiaries usually treated the free goods as gifts. The Crown, in the interest of maintaining its alliance, protected the natives from the creditors wrath by ensuring there was no means to collect their debt. In this way, the natives continued to benefit from the trade. Through gifts, theft, and crediting, without the existence of a recourse for punishment, the natives continued to prosper, and to remain independent of the capitalist restraints and British law.[75]

Native power and sovereignty in Eastern North America reached its height during

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[73] Anishinabek Nation, On Relations, 4.
[74] Eric Wolf, Europe and a People Without History, (Berkeley: University of California Press, 1982), 21.
[75] White, The Middle Ground, 479-80.

the war of 1812. But the wars end, only two years after it began, threatened the natives' political and legal independence, culminating in its complete demise. Only then were Britain and the United States willing to expend force to collect debts and suppress theft.[76] After the signing of the Treaty of Ghent in 1815, the natives were no longer of military use, because America had restored its peaceful relations with both the British and the natives.[77] How quickly the empire forgot the natives' prowess in war that had been crucial in sustaining British power in Canada. For the most part, the fur trade had moved westward, outside the Canadian boundaries. The family farm, being the primary form of settlement, neither necessitated cheap labour as did the plantations in the American South, nor were there enough natives to provide a worthwhile market for Canadian manufacturers. Realistically, the Empire's only economic interest to do with the natives was the peaceful transfer of their land title to the Crown so that the colonists could advance their own economic pursuits.[78] 'Indian Policy,' once on the top of the military authorities' agenda, became the responsibility of civil authorities. With this transfer of responsibility, policy makers began to initiate social schemes aimed at integrating the native population into the burgeoning settler society.[79] Acquiring land and political control replaced waging war as the goal of native policy.

The most devastating of the new projects for Upper Canada's Algonquian natives was the altering of the colonial immigration policy. British authorities were unsatisfied

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[76] White, The Middle Ground, 484.

[77] See "Treaty of Ghent, December 24, 1814," Smith, Canadian Indians, 21.

[78] L.F.S. Upton, "The Origins of Canadian Indian Policy," Readings in Canadian History: Pre Confederation, Francis, Douglas R. and Donald B. Smith eds., (Toronto: Harcourt Brace Canada, 1994), 375.

with their inability to defend their colony without the natives' help. They desired the presence of a powerful force that would remain loyal while at the same time would permit the colonists to effectively colonize the land. Neither Americans nor natives could fulfill both of these qualifications. Thus Britain opened its doors to the Canadian colony. Floods of new settlers, the majority coming from Ireland and Scotland, thereby reduced the natives to demographic insignificance.[80]

Of equal importance and effect were native land sessions to the United States along its northern border. Through a series of peace treaties and land cessions the American government forced native nations that occupied the border regions, to remove from the lands adjacent to the Canadian frontier. The Americans further demanded that Britain stop cultivating friendships with the natives living within the United States. Although the Crown was reluctant to extinguish its commitments to loyal native nations in the south, it eventually succumbed to American pressures due to its desire to maintain peaceful relations with them. Aboriginal groups were thus divided, with aboriginal peoples in Upper Canada, in many instances, being separated from their kin and friends to the south. The consequences of these divisions, in combination with the devastating effects of mass British immigration, were seen in seven major land cession agreements in the decade following the war of 1812, seeing Approximately 2.8. Million hectares of native land changed hands.[81] The scene was set for the natives' subjection to British law.

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[79] RCAP, vol.1, ch.6.

[80] Robert J. Surtees, "Indian Land Cessions in Upper Canada, 1815-1830," As Long as the Sun Shines and Water Flows, Ian A.L. Getty and Antoine S. Lussier eds., (Vancouver: Universityof British Columbia Press, 1983), 65-67.

[81] Surtees, "Land Cessions," 66.

Throughout the eighteenth and into the nineteenth century ideas born in Britain and France traversed the Atlantic having some effect on the colonial government's criminal policy in Upper and Lower Canada. Scientific scrutiny of 'the Laws of Nature,' previously considered universal and binding on all people because they were the laws of God, enabled the proliferation of new ideas surrounding the origin of law. In the eighteenth century philosophers began to cast seeds of doubt towards the existence of divinely inspired 'Natural Laws' that had been the foundation of British order for centuries. The hierarchical regime sustained by peoples' certainty in the divine right of kings faltered as new thinkers professed the existence of a God given universal human faculty for reason. Philosophers questioned the stagnancy of the old order that dictated that peasants required guidance from above to reach eternal salvation, and could undoubtedly never reach earthly deliverance. Although Christian morality remained vitally important, philosophers reasoned that peoples' ability to think rationally, rather than to live blindly according to a divine plan, would ensure that societies grew and changed along a similar course, progressing at different speeds but towards a common end. British criminal law was, of course, considered to be the only system of order fit to govern humanity in its final stage: the civil society. Egalitarian principles, understood in terms of 'natural rights,' challenged the old order grounded in duty, deference, and dependency. Any government that autocratically eclipsed man's rights to liberty, property, and happiness was unfit to rule. Ideas expounded in this era, known as the Enlightenment, provided hope for colonial officials abroad. They were comforted by the knowledge that one day native societies, who shared humanity's common ability to reason, would inevitably join civility and desire the

protection of the laws of England.

In the early decades of the nineteenth century new ideas began to counter enlightenment reasoning. In Britain and in France, faith in unfettered progress declined. Intellectuals who witnessed the state of decrepit state of the human condition in industrial England and in France grew increasingly skeptical. They were unconvinced by enlightenment thinkers' declaration that through conflict the strong would absorb the weak and utopic civility would arise. The notion that a society required state guidance gained acceptance. Divine morality remained as important as the Enlightenment's emphasis on man's capacity for reason and natural rights. However philosophers, like the Frenchman Auguste Comte, did not trust social order to manifest without aid from a governing elite. Comte believed that society required the implementation of a Positivist polity. He proclaimed that, like all sciences, society could be understood through observation, and could thus be manipulated by the educated elite for the betterment of all people. Understanding society in terms of Positivism translated into the need to write down law, and to strictly adhere to it. In this way the state would be able to guide its charges towards civility rather than leave their destination to chance.

By 1826, criminal law in the Canadian colonies had changed in accordance with both the political circumstances in Upper Canada, and the new tides of European thought that had emerged. The idealism of the enlightenment's avocation of a self-regulating society dissipated as ideas professing the importance of state guidance gained acceptance. Accordingly, positivism emerged as the ideology, which allowed, if not demanded that, Britain unilaterally extend its jurisdiction over the empire's native populations. The goals

of British governance did not change, in that the protection of natural rights remained vitally important. But the people whose feet were being trampled on road to preserving liberties became increasingly worthy of attention. Rather than haphazardly absorbing the native population as the tenets of progress dictated, the British Parliament came to believe that it was important to extend their laws in an orderly manner in order to quickly ensure that the natives came to understand their place in the colonial society.

When Shawanakiskie faced the judge on trial for the murder of a woman in the streets of Amherstburg, he was not confronting a lone authority whose personal morality governed the courtroom according to the laws of nature. Shawanakiskie stood in front of a judicial system developed over centuries in response to distinct social needs and desires. Whether or not Judge Campbell thought Shawanakiskie was morally right or wrong, when he committed murder in accordance with his traditions, was irrelevant. New waves of thought had made an impact on British Parliament. Positive legislation systematized the 'laws of nature' so they could not fluctuate when exceptions arose. Thus, because there existed no statute or treaty exempting the natives from British jurisdiction, the dictates of natural law, as they were written, held true. No longer would the governing elite permit the natives, or any people whose morality was offensive to it, fester in their supposed backwardness. The British were bent on progress, and were no longer content to leave the immoral behind. Shawanakiskie's sentence was executed for the benefit of all natives, who were to learn that the British system was not arbitrary or adjustable, but was rather the only system of law suitable for the governance of humankind.

Chapter 4

The Roots of Racism: Scraping High's Case

In 1895 on a Blackfoot reserve nestled on the prairies of the North-West Territories (present day Saskatchewan and Alberta), a frustrated Blackfoot named Scraping High took the life of his reserve's rations issuer. Scraping High's son had recently died of an illness, and during the boy's final days Frank Skynner, an official from the Department of Indian Affairs, had, as was his habit, refused the young Blackfoot boy extra meat. The local newspaper reported the incident, indirectly blaming Skynner's harsh behaviour towards the boy for his own death. The Commissioner of Indian Affairs, however, was not satisfied with the report. Skynner represented the Western ideal living among the Blackfoot in order to provide services that the federal government refused to entrust to the natives. His role on the reserve, to the public eye, was but a microcosmic version of the federal government's relationship with Canada's native inhabitants. An unwavering faith in its cultural supremacy, and a determination to progress the native peoples towards civility, meant that Frank Skynner, an individual personifying an ethic, required absolution for his sin. Regardless of the legitimacy of Scraping High's reasons for the killing, it was the native's behaviour that was targeted as ruthless. Even in the face of surrounding Eurocanadian inhabitants' agreement that Skynner was an insensitive brute who regularly tormented his Blackfoot charges, the government held fast to its conviction that the "crazy Indian" deserved the condemnation. The Department subsequently deemed the rest of the Blackfoot nation

"crazy," for it was their ethic that permitted murder for the restoration of balance in the community, and their beliefs that needed to be dispelled.

The nature of the Department of Indian Affairs' inquest into the case reflected over a half century of Eurocanadian legal dominance. During the nineteenth century, the Enlightenment belief in the perfectability of man gave way to the belief that building a democratic utopia required state guidance. Although the numbers of natives were dwindling, and there still existed a sense that the 'Indians' would eventually die out, Canada, like its mother country, took its commitment to morally uplift its' indigenous inhabitants seriously. Ridding the 'Indian' of its cultural values and foreign ethic had become the primary goal of the government's 'Indian' policy. By criminalizing features of 'Indian' culture, and by interpreting criminal cases on the basis of the Eurocanadian legal system became popular avenues for policy makers to lead the natives towards inhabiting Canada's civil society on equal terms with Eurocanadians.

Despite the government's intent to aid the natives, its actions, combined with prevailing racial discourse centered on innate differences between the 'light and dark races,' produced an ominous result. Scientific investigation deemed members of the 'Indian race,' who were already targeted for the cultural 'savagery,' innately weaker than the 'white race.' No matter what the government set out to accomplish by legislating the 'Indians' path towards civilization, its intended result was in no way achievable when coupled with the notions of their permanent racial inferiority. The two popular agendas, one grounded in the natives' cultural inferiority, the other interested in setting the 'races' apart physically, stacked the odds severely against indigenous Canadians. Already

implanted with the seeds of racism, the government's use of law to enact change solidified and legitimized the public's racist feelings toward their native neighbours. Rather than dismantling the barriers between the native communities and Canadian society, the government's legal intervention in the lives the indigenous peoples who inhabited Canadian soil racialized the 'Indians,' leaving them culturally distinct yet disrespected and discriminated against on the basis of both their ill-understood values and their skin colour. Prejudicial and ethnocentric attitudes, grounded in a century of ethical clashes and racial tensions prevented Canada's natives from receiving untainted levels of criminal justice.

During the 1850s and 60s, racial ideology shifted in terms of its purpose and its products. In earlier decades studies of race aimed to determine how different 'races' of peoples could share a single origin or creator in keeping with biblical doctrine. But with the new emphasis on scientific investigation came new ways of studying racial difference. No longer was it sufficient to suggest that temporal and climatic conditions affected the distinctions between the different species of man.[82] The rejection of the biblical assumption, and the incorporation of a static racial hierarchy into a dynamic evolutionary sequence, meant that the 'savage' came to occupy a new place of importance in anthropological theory. His role took on a new meaning as African and American 'Indian' societies came to represent contemporary equivalents of the societies of the past out of which European civilization spawned. Although still united in origin, scientific racial theory dictated that dark-skinned savages were inferior in terms of culture and capacity. Unlike white savages, who were in the process of acquiring superior brains in the course of

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[82] Audrey Smedley, Race in North America: Origin and Evolution of a Worldview (Colorado: Westview

cultural progress, Africans and 'Indians' came to occupy the status of missing links, between the ape and the white man, on the evolutionary chain.[83]

In the newly born Canadian nation, the colonial mind set continued to hold the belief that the disappearance of the 'Indian race' was inevitable as the natives' numbers rapidly dwindled. But, in so far as Britain had committed itself to the principle of lifting the 'savages,' Canada too felt obliged to 'civilize' its native 'wards.' By 1867, however, racial theory had begun to have a real effect on the dynamics between the settlers, and the native population. While Eurocanadians expected the 'Indian race' to expire as a cultural entity, Canadian scientists attempted to justify the 'Indian's' physical extinction by undertaking the job of empirically defining the 'Indian' as an innately inferior being. They speculated about distinctions that could be made between humans, with the intention of proving the preeminence of the 'white race' physically as well as culturally.[84] Researchers combed Canada studying various native populations anxious to demonstrate the value of scientific investigation. They measured head length, head width, face height, nose height, nose width, facial angle, stature, eye colour, hair colour and form, thickness of lips, and beard characteristics.[85] Researchers' fixed presence among indigenous nations eventually provoked the Inuit to coin the joke: "the ideal family in the arctic consists of a husband and wife, four children and an anthropologist."[86]

Press, 1999), 227.

[83] George W. Stocking Jr., Victorian Anthropology, (New York: The Free Press, 1987), 185.

[84] Constance Backhouse, Colour-Coded: A Legal History of Racism in Canada, 1900-1950, (Toronto: University of Toronto Press, 1999), 5.

[85] Backhouse, Colour-Coded, 43.

[86] Minnie Aodla Freeman, "Living in Two Hells," Northern Voices: Inuit Writing in English, Penny Petrone, ed., (Toronto: University of Toronto Press, 1988), 241.

To the Canadians who maintained the power to shape policy, race became an important and acceptable category of analysis. It was neither considered taboo to discuss the 'Indians' as one race, despite the existence of the numerous nations that made up Canada's indigenous populations, nor was it inappropriate to speak of the white man's superiority over the 'Indian.' In fact, until 1951, the Indian Act defined a 'person' as an "individual other than an Indian." Upon the Indian Act's inception in 1876 it also defined the term 'Indian' as "any male person of Indian blood reputed to belong to a particular band."[87] The Eurocanadians in charge of administrating fiscal and 'fatherly' relations with the native peoples had come to understand race in terms of blood content. Racialized doctrine had infiltrated the minds of the policy makers thwarting their attempts to use law to 'lift' the 'savages' by bringing to society's surface the physical, mental, and social characteristics that distinguished the 'Indian' from the 'white man.'

The early acts pertaining to native affairs, namely the Enfranchisement Act of 1869 and the first consolidated Indian Act of 1876, were both littered with racial discourse, and affected by racial motivations. The fourth clause of the 1869 Act included a blood quantum proviso mandating that "no person of less than one-fourth Indian blood born after the passing of this Act, shall be deemed entitled to share in any annuity."[88] Such acts set the tone for further policy initiatives which would come to define the relationship between the aboriginal communities and the federal government. Policy makers outwardly intended the

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[87] "An Act to amend and consolidate the laws respecting Indians, April 12th 1876," http://www.landclaimsdocs.com/stat/html/ia1876.htm.

[88] "An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act (31st Victoria, Chapter 42 June 22nd, 1869," http://www.landclaimsdocs.com/stat/html/ia1869.htm.

Enfranchisement Act to be a means for the 'Indians' to free themselves from the federal government's trusteeship. The native peoples' ultimate happiness and independence appeared to be the government's first priority in providing them with a road to citizenship.

Beneath the benevolent surface, however, paternalistic corollaries prevented the Enfranchisement Act from fulfilling its apparent intentions. The government granted individual 'Indians' enfranchisement only after they could manage the "ordinary affairs" of the "white man." According to the 1869 Act, the Governor General in Council could grant land and the rights of citizenship to "any Indian who from the degree of civilization to which he has attained, and the character for integrity and sobriety which he bears appears to be a safe and suitable person."[89] Hector Langevin, the Secretary of State of Canada from 1867 to 1869, expected that large numbers of 'Indians' would choose to become enfranchised. But his expectations proved off the mark when only one 'Indian' relinquished his status according to the Act.[90] Apparently the government overestimated the value of Canadian citizenship to the 'Indian' who, by the tenets of the Act, was forced to choose between enfranchisement and maintaining his or her ties to his or her band. The Act declared that those who obtained enfranchisement were "no longer [to] be deemed

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"An Act for the gradual enfranchisement of Indians, 1869," http://www.landclaimsdocs.com/stat/html/ia1869.htm.

[124] "Indian Affairs," (27 April 1869), Debates of the House of Commons of Canada (Canada: Parliament), 83-85.

[125] "An Act for the gradual enfranchisement of Indians, 1869."

[126] "The Indian Laws," (4 April 1876), H. of C. Debates," 1038.

Indians within the meaning of the laws relating to Indians."[91] The government's intentions clearly exceeded a simple desire to free the natives from their status as wards of the nation. Removing their 'Indianess' in the process was an important, if not an essential, part of its plan.

By 1876 it was apparent that the 'Indian Legislation' required attention. The government had declared Enfranchisement, as a policy, a failure, thus much debate that took place in the House of Commons centered upon this issue. During one round of debates a minister quoted the words of David Laird, the Minister of the Interior, to remind everyone that enfranchisement was important and that "every effort should be made to aid the *red man* in lifting himself out of his condition of tutelage and dependence."[92] Skin colour had clearly come to define the 'Indian' and his status as a dependent had become a 'condition.' The racialization of the 'Indian' was evidently not a neutral process. By amalgamating the many native nations into one 'Indian race,' and devaluing these people as individuals, the federal government demonstrated its inability to remain objective while debating the advantages and disadvantages of enfranchisement. Definitions assumed negative connotations thereby propagating the idea that the disappearance of the 'Indian,' as a distinct cultural and physical entity, was in the best interest of natives and non-natives alike.

Members of Parliament clearly understood that the natives' disapproved of the government's policy. Yet, as a result of their acceptance of the 'Indian's' status as a member of a lesser race, they had little respect for their opinions on the matter. During one

set of debates on the topic of enfranchisement, honourable members of the Opposition declared that the certain 'Indians' were too shrewd and intelligent to accept of the enfranchisement offered under the Act...of 1869." One member suggested that the government "offer them such inducements as would make it worth their while to ask for." Furthermore, he added that the government should "first decide what land they should have, and let them feel that this land was theirs forever, but do not give them the power to alienate it to white men, and as soon as they knew exactly what they possessed they would look for enfranchisement."[93] The minister recognized the natives' reluctance to submit to the policy due to the fact that it required the band to divide their reservation land into allotments some of which could be sold to non-native Canadians. More importantly, his words detail the extent to which the government was willing to go to shrewdly force the natives to assimilate regardless of their individual or communal desires.

At least one minister made public in the House the potential for the Enfranchisement Policy, as it stood, to be detrimental to, rather than advantageous for, the aboriginal population. John Schultz, another member of the Conservative opposition, made clear that "Indians, no matter how wealthy, intelligent or well-educated, must continue to be without civil rights, unless they comply with rules which...would have the effect of breaking up the whole system of Indian management, thus depriving them of the protection they have hitherto, enjoyed." He went on to explain that it was doubtful that 'Indians' would comply since it was well known that the policy was created "with the view to breaking up the tribal system and enabling the white man to get possession of the lands

of the Indians." Schultz, for one, understood that the Act would be "inoperative, in fact a dead letter," except, he declared "in so far as [it] will deprive a large number of very deserving people...of civil rights, and a well-to-do Indian will still have the mortification of seeing his white labourers voting at elections, while he, the son of the soil, finds himself in an inferior position, branded in fact as an outlaw, and unfit to share in the common privileges of the white man." He concluded that the Act would "have the very opposite effect to that which was no doubt intended. Instead of imbuing the Indians with a sense of self-respect, and leading them to feel that...they are to stand on equal footing with the white man, it will have a tendency to degrade them in their own eyes and in the estimate of those around them."[94] Though Schultz agreed that advancing the 'Indian' towards 'civilization' was a valid goal, he also recognized the contradictions within government policy that inhibited it from having its desired effect. Schultz understood the detrimental effects that would detract from the natives' agency. More than that he knew that the native peoples would be viewed, and would perceive themselves, as a lesser 'race' if treated that way, and would thus be disabled in their pursuit for equality within the civil society. Laird did not heed Schult's warning. The Liberal government passed the Indian Act Bill, complete with the Enfranchisement clause, effectively 'racializing' the 'Indian' in a piece of legislation that would come to define native affairs in Canada.

A series of amendments to the Indian Act took place between 1876 and 1882, but it was not in 1884 that the federal government, under the leadership of Sir John A. Macdonald, began to use criminal law to protect the 'Indians' from themselves and from

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[93] "Indian Laws," (4 April 1876), 1038.

'white' encroachment. Mainly in response to disturbances in the North-West by the Métis and the Cree, the government made "incitement of Indians to riot" an offense under the Indian Act. During the debates of 24 March 1884, Macdonald commented that "the government found they [could] get along very well with the Indians, if the Indians [were] left alone."[95] The first clause of the new legislation, enacted in April 1884, declared anyone found guilty of having "incited to riot three or more Indians, non-treaty Indians, or half-breeds," was to be imprisoned for no more than two years.[96] The second clause, also aimed at reducing the tension in the North-West, authorized the Superintendent-General to prohibit "the sale, gift or other disposal" of any "fixed Territories ammunition" or "ball cartridge" to the Indians of Manitoba and the North-West territories.[97] The next clause of the 1884 amendment had nothing to do with the conflict brewing in the North-West. Parliament included the prohibition of the potlach ceremony on the coast of British Columbia for the sake of protecting the 'Indians' from their own 'savage' traditions, which a Catholic Priest, writing to the government, had declared "utterly incompatible...with all progress and civilization."[98] Sir John A. Macdonald remarked, " the Indian festival is a debauchery of the worst kind....At these gatherings they give away their guns and all their property...and even...their wives."[99] This time the Conservative government had no reservations towards using its legal system to both advance the 'Indians,' and to prevent

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[94] "Indian Laws," (4 April 1876), 1038.

[95] "Indian Act Amendment Bill," (24 March 1884), H. of C. Debates, 1063.

[96] "An Act to further amend 'the Indian Act,1880'," (19 April 1884), Statutes of Canada: Acts of the Parliament of Canada, (Canada: Parliament, 47 Vic, c. 27), 107.

[97] "Indian Act Amendment Bill," (17 April 1884), H. of C. Debates, 653.

[98] "G. Donckele to W.H. Lomas (Indian Agent)," (15 April 1884), H. of C. Debates, 623.

[99] "Indian Act Amendment Bill," (24 March 1884). 1063.

them and the 'white men' from doing damage to each other.

During the amendment process, however, Liberal member George Almon expressed his disagreement with policy in an attempt to illustrate the hypocrisy and ineffectiveness inherent within the government's proposed prohibition of the potlach ceremony. Almon suggested that the government "be very careful" before it interfered with the "religious rites or even the superstitions of the Savages." Almon presented an analogy to the house to demonstrate the discriminatory nature of its proposed policy: "Supposing a savage were to go to England, and visit Buckingham Palace, and see a number of highlanders dancing a sword dance in the garb of old Gaul, would he not say that that was as crazy as any potlach he had ever seen? We can imagine him saying 'you people put down our potlaches, yet you dance in petticoats over naked swords." Almon did not really believe that the English and the 'Indians' were equally 'savage,' yet he understood that the natives would fail to understand the 'savagery' of their own traditions if the government simply banned them. More than that he recognized that leaving them frustrated by *ordering* them to live according to the ways of the 'white man' would serve only to prevent Canada's governing body from enjoying a harmonious relationship with its native peoples.[100] Members of the House, however, allowed the clause to stand declaring, in the words of Minister Henry Kaulback, that the government must "do away with a custom which certainly ought not to exist in a civilized province in the present day."[101] Even in the face of Almon's relatively sound advice, the government, without seriously considering the conflict that could result, called for the prohibition of the potlach, and eventually extended

[100] "Indian Act Amendment Bill," (15 April 1884), H. of C. Debates, 625.

its policy to include the Sun Dance and many other native dances and ceremonies.

In the years after the 1884 amendments to the Indian Act it became clear that, although Canadian society remained focused on the goal of 'lifting' the 'heathen,' the notion that the 'Indian' was innately inferior permeated the social landscape. There remained a sense that the 'Indians,' like the "Picts and Scots, the Celts and Gauls," and the Germanic tribes, would eventually rise from their 'uncivilized' state. In his 1889 book The Indians, Their Manners and Customs, John Maclean of Toronto explained the similarities between the 'Indians' and Europeans' ancestors. He proclaimed that "Germans, Hungarians and other nations placed a price on the head of their friends, who were slain." According to Maclean, "the Indians follow[ed] the same law. 'A scalp for a scalp,' or a certain number of horses as a compensation for an injury or the loss of a friend." The author described an instance when an Indian criminal had died in the penitentiary. The Blood 'tribe' subsequently asked "what compensation the government was going to give them for their loss." He remarked that "as the Indians are at present day, the Germans were inveterate gamblers, drank liquor to excess, feasted when they had abundance and fasted when their food was gone; prized liberty above everything, paid great respect to their war-chiefs, yet recognized no king...the Germans scalped their enemies and observed marriage customs similar to those of the Indian tribes."[102]

At the same time as John Maclean compared the native peoples to 'pre-civilized' Europeans, he made it clear that 'white' society did not perceive the Indians in the same way it may have perceived its European ancestors. "The red men" he stated, "know that the

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[101] "Indian Act Amendment Bill," (15 April 1884), 656.

white people do not love them, and there exists a feeling of animosity between them. There is such a striking difference between the civilization of the two races that unity of sentiment and aims becomes an impossibility." Although Maclean did suggest that the "culture" of both races "should be studied and admired as honestly as the other," he admitted that the common perception of the 'red men' is that they belong to an inferior race.[103]

Canadian travel digests provide further evidence supporting the popular view of native peoples, specifically in the North-West territories (present-day Alberta and Saskatchewan). "For the most part," the author of one such digest wrote, "The Indians of the North-West are a degraded and dissolute race. Some bands lead a shiftless and vagabond life; though a few have rewarded government care of them by forsaking their nomadic habits and following agricultural pursuits."[104] When interpreted alongside the travel digest, Maclean's popular work elucidates a truth that existed within Canadian society. The racialization of the Indian had infiltrated the mainstream, preventing its members from seeing the 'Indian' as anything less than a member of a lesser race. The effects of the oppressive legislation, validated by the discriminatory discourse, were far reaching, and would taint civilian and governmental relationships with the native peoples, thereby having the opposite effect of that which was intended by the special laws directed at natives. The 'Indian' would, for the next century, be an entity separate from the mainstream and treated as such, irrespective of his desire to abandon his 'savage' traditions in favour of joining 'civilization.'

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[102] John Maclean, The Indians, their Manners and Customs, (Toronto: W. Briggs, 1889), 277-8.
[103] Maclean, Manners and Customs, 276.
[104] Adam G. Mercer, Canada, Historical and Descriptive, From Sea to Sea, (Toronto: W. Bryce, 1888), 46.

From 1891 to 1895 the Department of Indian Affairs enacted policy with the hope of increasing the self-sufficiency of the 'Indians' in the West. But its legislative acts were no less discriminatory and paternalistic then past initiatives. By following a program of closer supervision, reduced rations, and financial aid towards bands that employed democratic methods of government, the Department hoped to force natives to become self-reliant.[105] In the early 1890s, however, tensions arose within the Department due to variation between the various officials' priorities. It became clear that consolidating departmental authority and protecting Indian interests were difficult goals to reconcile with the concurrent aim of promoting self-improvement among the 'Indians.' For example, in March 1892, Indian Commissioner Hayter Reed requested that legislation to compel 'Indian' children in the North-West Territories to attend school be enacted. Superintendent General Dewdey, however, considered these 'Indians' insufficiently civilized "for such drastic measures." He surveyed the consequences of compulsory school attendance, concluding that despite the likelihood that such a measure might better prepare 'Indians' for integration with 'white' society, it may also lead to 'white' exploitation of 'Indians' who are not suitably familiar with the ways of the 'white man.'[106]

In 1895-96, after five years of struggling with policy, attitudes in Parliament remained focused on driving Canada's natives towards 'civilization' by any means possible. The government did not abandon coercive laws, but instead demonstrated renewed enthusiasm in strengthening them. The Department of Indian Affairs extended

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[105] The Historical Development of the Indian Act, (Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs, 1978), 95.

[106] "Vankoughnet to Reed," (19 April 1892), cited in The Historical Development of the Indian Act, 96.

section 114 of the 1884 Indian Act, criminalizing the potlach in coastal British Columbia, to include all festivals, dances and ceremonies, "of which the giving away or paying or giving back of money, goods or articles forms a part," and all ceremonies or dances "of which the wounding or mutilation of the dead or living body of any human being or animal...is a feature,"[107] The new provision sought to end ceremonies such as the Grass Dance, known as the "Giving away dance" of the North-West Territories, the Sun Dance, and the Thirst Dance of the prairie Algonquins. Although Liberal Minister Almon protested the amendment once again, proclaiming, "if the Indians wish to take up dead bodies and like to eat them, all right, so long as they don't ask me to dine with them." He said that he once questioned a gentleman, saying "Friend, I saw you eating grouse all over maggots, and you say that is the proper way it should be eaten." "Yes, it is the way grouse should be eaten," was the man's reply. "Left to men's tastes," Almon remarked, "these things will cure themselves."[108] Directly after Mr. Almon expressed his opinion, the House agreed to the clause, and in so doing demonstrated its propensity for coercing the aboriginal nations across Canada to join the 'civilized' mainstream.

An examination of the precarious state of ceremonies and dances in the North-West Territories, just prior to the amendment of section 114, elucidates the Department's zeal for using criminal law to direct 'Indian' progress, without regard for the repercussions of enacting discriminatory legislation. In an 1895 report to the Superintendent General of Indian Affairs, detailing the progress made by the 'Indians' in the North-West Territories, A. E. Forget, the assistant commissioner of Indian Affairs, wrote that despite "a tendency

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[107] "An Act further to ament the Indian Act," Statutes of Canada, (c.35 s.6.), 114.

on the part of some of the bands...to return to the observance of their ancient rite of sun-dancing..." only in one instance was an attempt successful. Agents firmly and effectively resisted ceremonies and dances on all except for the Piapot Reserve of the Cree nation.[109] The Piapot Reserve had been the site of Cree resistance for decades, and had been especially active since the Department decided that Indian agents should dissuade the natives from taking part in their traditional ceremonies. In 1892, Commissioner Reed expressed his condolences to the Superintendent General on the part of the agent on the Piapot Reserve who "was compelled to allow the Sun Dance to take place." At the same time, the agent "elicited a promise that this should be the last dance of such a nature." Reed added that 'Indians' congregating for a dance "lose at least from four to six weeks of the time, in which they should be at work repairing their fences, and breaking new land, and summer fallowing."[110]

Although members of the Department of Indian Affairs clearly saw the dances as evidence of the natives' regression, the Crees understood their ceremonies to be similar to Christians going to Church. In an article printed the a local newspaper in reference to the Sun Dance on the Piapot Reserve, a Cree Chief stated, "the white man kneels and prays his God, we dance before Manitou. It is our church and our preaching." For the purpose of thanking the Manitou "for all things that grow," and so that all "may be made well" the Cree dance the sun dance.[111] While the Crees did not hesitate to compare their sacred

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[108] "Indian Act Amendment Bill," (3 June 1895), H. of C. Debates, 194-5.

[109] "A.E. Forget to Superintendent General of Indian Affairs, 20 September 1895," Sessional Papers, (59 vic, no. 14, 1896).

[110] "Hayter Reed to Mayne Daly, 21 June 1892," PAC, (RG10155, vol. 3876, File 91 749).

[111] "Sun Dance, undated," PAC, (RG10155, vol. 3876, File 91 739).

traditions to those of the Christians, members of the Department were incapable of equating an 'Indian' tradition to a Christian one. Difference was clearly not the sole predicate for the government's attitudes towards native ceremonies. Its vehement reluctance to concede to similarities between Cree and Christian methods of prayer was largely due to prejudicial attitudes and policy that had come to define all aspects of the 'Indian race' as inferior to those of the 'white race.'

Despite Hayter Reed's assurance that 1892 would mark the final Sun Dance on the Piapot Reserve, in 1895 he remained frustrated with the Cree's continuing resistance. On 8 June 1895, Reed addressed Assistant Indian Commissioner Forget regarding another Sun Dance on the Piapot reserve. He remarked that "if the newspaper accounts" were correct then the "making of 'braves,'" involving the controversial piercing ceremony, "seemed to have been a more prominent and objectable feature of the Dance than for some years past." Reed expressed his disdain with the Indian Agent's inability to convince the Cree to "forego at least that part of the performance."[112] In subsequent correspondence the Indian Agent for the Piapot reserve was asked to defend his reasons for not having put an end to the display. In reply to such demands, J.B. Lash explained that the "Indians would not listen to any inducement held out to them to give up the dance. They claimed it was a religious ceremony in accordance with their belief and refused to argue the matter." Lash explained that the reporter, who had written the newspaper article referred to by Reed, had exaggerated his account of "making braves," saying that he was "informed that the so

[112] "Hayter Reed to A.E. Forget, 8 June 1895," PAC, (RG10155, vol. 3876, File 91 739.

called making of braves was a regular farce as compared with the old time sun dances."[113]

There appeared to be a great deal of tension between the departmental officials in various positions. On the one hand, Commissioner Reed wanted the dances and ceremonies to vanish in order to forward government policy of integrating the 'Indians' into the Christian mainstream. Parliament had not anticipated the levels of resistance demonstrated by the Cree on the Piapot Reserve and had thus hoped the local agents could persuade the natives to abandon their traditions by appealing to Christian values. Based on the perspective of Agent Lash, the local administrator, the dance did not seem to be nearly as offensive to Christian morals as high level officials assumed it to be. Lash ended his letter of 25 June 1895 by stating how pleased he was that the Indian Act had since been amended "making the objectionable dance illegal."[114]

From the display of conflicting opinions, one could conclude that Lash was merely covering his tracks to convince his superiors that his inability to arrest the Sun Dance had not resulted in extreme debauchery. But, perhaps more accurately, Lash, a government official who lived his life in closer contact with the Cree than any of his superiors, took less offense to the ceremonies because the dances, as they were performed in 1895, were a great deal less offensive to Christian values than they had at one time been. Lash was perhaps content with the 'progress' that had been made, or he recognized that criminalizing the Sun Dance would only precipitate violence or tension between the Cree and the government. Having an intimate understanding of both the Sun Dance and of the Cree society, he

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[113] "J.B. Lash to A.E. Forget, 25 June 1895," PAC, (RG10155, vol. 3876, File 91 739.

understood that it was necessary to let the Cree integrate at a their own pace. Lash's use of the relatively neutral term "objectionable," to describe the Sun Dance, rather than a commonly used value laden word such as "abhorrent" or "barbarous," provides support for this interpretation. Lash's tone implies that that his being "pleased" with the government's initiative was more out of frustration with its extreme demands, than with the continuation of the dances themselves. Based on this interpretation, one is led to question the reasons for the government's determination to end the dances. The Department's lack of cultural understanding, and disdain for the 'Indian race,' likely contributed to immediate its desire to rid Canadian soil of 'Indian' ceremonies. By legislating discrimination, the government not only satisfied its own unsubstantiated yearning for a 'whiter' Canada, but also perpetuated the racialization of the 'Indian' whose sacred traditions would not be tolerated in Canada.

When, in 1895, the federal government initiated an inquiry into the killing of Frank Skynner, Scraping High, the Blackfoot assailant, became the target of an inquiry undertaken by authorities who had been naturalized towards the acceptability of racially infused discourse and legislation. The correspondence between departmental officials, throughout the inquiry, betrays the Department's intent to ensure that the 'white' ration distributor was relieved of all blame for inciting frustrations in the 'Indian.' Authorities were quick to emphasize the fact that Frank Skynner had been killed by a "crazy Indian."[115]

Having received word about the murder, Superintendent General Reed proclaimed that "the only thing connected with the most lamentable occurrence which tends to... relieve its

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[114] "J.B. Lash to A.E. Forget, 25 June 1895," PAC.

aspect (sic), is the consideration that...the wretched perpetrator of the crime was not in sound mind." Otherwise, he remarked, the murder "would suggest the existence of a state of feeling between the wards and the employees of the Department which would be most deplorable, and point to something radically wrong about their mutual relations."[116] Weeks later Reed's confidence in the peaceful relationship between the Blackfoot and the Department was tested when the local newspaper printed an article centered around Scraping High's frustration with Skynner's refusal to provide his dying son with food. The Department was unprepared to heed the incident as a message that Skynner's behaviour while working among the Blackfoot had been unacceptable. Instead, Reed declared himself unsatisfied with the manner in which the murder had been reported, stating that the article's portrayal of the event could "only be regarded as anything but satisfactory."[117] Reed was also "thoroughly dissatisfied" with the Indian Agent's report on the matter, as Agent Begg's letter did not adequately account for Scraping High's actions, except in his statement that Scraping High "was crazy since he lost his son...At the time he said that if the boy dies, Skynner...will die also." Despite Begg's assertion that the "Indians [were] all satisfied with the killing of Scraping High and [had] considerable respect for the few white men and the Police who killed him," Reed remained frustrated with Begg's insinuation that Skynner, for whatever reason, had been a target, rather than an accidental victim.[118]

Begg's report exhibited considerable evidence demonstrating that the agent had

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[115] "W.H. Harper to Hayter Reed, 4 April 1895," PAC, (RG10197, vol. 3912, file 111 762).
[116] "Hayter Reed to A.E. Forget, 6 April 1895," PAC, (RG10197, vol. 3912, file 111 762).
[117] "Hayter Reed to A.E. Forget, 27 April 1895," PAC, (RG10197, vol. 3912, file 111 762).
[118] "Reed to Forget, 27 April 1895," PAC; "Magnus Begg to Hayter Reed, 6 April 1895," PAC, (RG10197, vol 3912, file 111 762).

developed a racialized understanding of the 'Indians' and treated them accordingly. The Agent's bias was perhaps responsible from the inadequacy of his report, as he may not of attached a great deal of importance to the conflict, naturally assuming the 'Indian' was responsible. He explained to Reed that Scraping High had been buried by four Indians, adding that they "were paid by the Police," and "the expense of doing so amount[ed] to $4." Begg described Skynner's burial, explaining that "three Policemen and three civilians [were] pall bearers." Furthermore, Begg "drove Skynner's brother who came up to the funeral and assisted him in every way. Skynner's funeral, according to Begg, "was attended by Inspector Macpherson and all the whitemen in the vicinity and by about 100 Indians from the Reserve..."[119] Not only did Begg classify the individuals who attended Skynner's funeral into racial categories, but he also demonstrated his racial bias in his remarks surrounding the two burials. Begg did not hesitate bring up the cost for burying the 'Indian,' and did not feel compelled to discuss a funeral, if indeed there was one held. Skynner's burial, however, did not merit a discussion of finances, likely because it would have been disrespectful to discuss the death of a 'white man' in such terms. Begg's report revealed his racialized views, which were likely representative of those held by other Indian Agents whose jobs centered on the maintenance order, and the promotion of advancement among the 'Indians.' Authorized to invoke the government's agenda defined as promoting the advancement of the 'Indians' by excercising control over them, Agent Begg had little chance of escaping his fate: he was bound to view his charges as lesser beings who were destined to flounder in the untamed badlands forever unless he, as an

[119] "Begg to Reed, 6 April 1895," PAC.

essential part of the Department of Indian Affairs, interceded. According to the theory adhered to by the government the 'Indian' was merely a 'less advanced' version of the 'white man' capable of integration with the mainstream. In practice, however, as society grew to emphasize the distinctions between the races it became increasingly difficult for government officials so avoid sharing the racially infused public opinion that, in actuality, legitimated their unlimited control.

Reed was, of course, not concerned with the discrepancy between Begg's treatment of Scraping High and of Skynner in his report. The Superintendent General needed to ensure that the Department did not appear coercive or overbearing to members of the public who were meant to perceive the federal government's actions towards the 'Indians' to be in the spirit of humanitarianism. For this reason, Reed demanded that an inspector "be at once sent up to obtain a full and succinct [report] of all the circumstances together with explanations of the Agent's failure to have made one" that satisfied the Superintendent's requirements.[120]

Indian Inspector Alex McGibbon collected many statements from Blackfoot and Eurocanadians on the North Blackfoot Reserve. Almost every testimonial substantiated the claim that Frank Skynner was unfit to work as issuer of rations to the Blackfoot before his death. A local farmer, W.M. Baker, who had taken over Skynner's position as ration issuer for a short time,remarked that "the position of issuer required tact, judgment and firmness, and Mr. Skynner possessed none of these qualities. He would not always follow given instructions with regard to better rations in case of sickness." Baker explained that

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[120] "Reed to Forget, 27 April 1895," PAC.

"written orders presented by Indians were not only not complied with, but Mr. Skynner ...cut the rations below the quantity which would have been given under ordinary circumstances; simply because he considered such orders an interference with his prerogative." Baker told of an incident that had taken place in 1893, when Mr. Skynner while issuing rations seriously hurt the wife of Little Calf. While returning the ration bags Skynner "shoved them against the woman so roughly that she fainted." According to Baker, "this occurred in the forenoon and she remained in a swoon for a couple of hours. Little Calf thought she would not recover and awaited the result with his gun--he subsequently told [Baker] that if his wife had died he would have killed Mr. Skynner." Furthermore, Baker stated that "on the 17th of August 1893 the Hon Mr. Daly and Commissioner Reed visited the reserve and the Chiefs spoke strongly to them of the advisability of taking Mr. Skynner away with them and said there would be bloodshed on the reserve sooner or later if this were not done." After this visit Mr. Baker took over for Mr. Skynner for a period of months, but eventually Skynner returned to his duties. In Bakers opinion, "the final and direct cause which led to the fatal act is the fact of [Skynner's] refusing good rations to sick Indians." He also firmly believed that "Scraping High was not in any way crazed until he had committed the deed."[121]

John McCrea, who acted as farmer on the Blackfoot reserve while Baker was acting as issuer, corroborated Baker's statement, agreeing that Mr. Skynner "was totally unfit for the position." McCrea said that "if any of the Indians came with notes for hides or heads [Skynner] would abuse them and swear at them and put them out." He explained that

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[121] "Statement of W. M. Baker to Alex McGibbon, 1 June 1895," PAC, (RG10197, vol. 3912, file 111 762).

Skynner would "yell at them at the top of his voice. He could not speak the language and seemed to think that by shouting at them they were bound to understand." McCrea's testimony also confirmed Baker's claim that Mr. Skynner did not treat sick Blackfoot fairly. He stated that if he or Mr. Begg gave "an order to an Indian for extra beef or fat on account of sickness, [Skynner] would do the reverse and give them less than they were entitled to on regular issue." McCrea explained that Skynner "always claimed that he gave them extra." But, in one incident, McCrea did not believe Skynner when he said this so he went to the ration house and waited outside until two Blackfoot, who he had given an order to, came out. He took their meat "and weighed them before Skynner and found they were under the regular issued." Skynner "claimed that they had made away with it before they gave it to [McCrea]." But "that was impossible as [McCrea] had met them at the door as they came out." From that day until Skynner's death McCrea had made any Blackfoot who had an order for extra rations come directly to him instead of to Skynner and he would give "them any choice meat there was left...and found them easily satisfied." McCrea explained that Agent Begg had scolded Mr. Skynner for his treating the 'Indians' harshly, informing him that the 'Indians' "had as much right [in the rations house] as he had." McCrea explained that Begg's

warning "stopped him only so long as Mr. Begg was present."[122]

The two men agreed that Mr. Skynner's treatment of the Blackfoot people was abhorrent, thereby supporting the position that Skynner's death was not a case of accidental violence, but of anger towards a certain individual. Also of utmost importance are the

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[122] "Statement of John McCrea to Alex McGibbon, 31 May 1895," PAC, (RG10197, vol. 3912, file 111 762).

men's claims that both Commissioner Reed and Agent Begg were aware of Skynner's tactless and abusive behaviour, yet he continued to be employed as issuer on the North Blackfoot Reserve. In this light, Hayter Reed's reluctance to concede the possibility that Skinner's death resulted from his own incompetence, seems unsubstantiated. Based on Baker and McCrea's testimonies, the evidence certainly pointed to Skynner's tactlessness as a motive for his murder. Yet for Reed or Begg to concede to having been aware of the presence of an inept employee in their charge would have been akin to having condoned the perpetuation of such behaviour. Neither Reed nor Begg could have risked the public's scrutiny of Indian Affairs, because their livelihood depended upon the agency's supposed benefit to the Canadian 'Indians.' More than that, supporting departmental officials was the safest way to ensure that 'Indians' continued to comply with the Department's authority. Despite outward appearances, there was no room for equity or justice when it came to the Canadian 'Indians.' The 'white man' needed to solidify his own superiority, regardless of the true nature of his actions, for to have proclaimed otherwise would have thwarted the government's plan to forcefully guide the 'Indians' towards their own cultural demise.

The Blackfoot individuals who were questioned during the coroner's inquest and by Inspector McGibbon typically gave vague statements, or at any rate, statements that were far less criminalizing than those of Baker and McCrea. When asked by the coroner about the murder, Head Chief Running Rabbit stated, "I do not know why Scraping High killed Skynner I think he alone knew." He then said, "I did not see Scraping High for some

time...I was afraid to go near him as I know he would have killed me too."[123] High Eagle replied to McGibbon in a similar manner saying, "I don't know cause for anger of Scraping High. Probable cause was his (Skynner's) being cross at issue of rations." High Eagle then added that he also "complains of the poor beef issued," stating that "this particularly refers to recent issues. Four days rations are only enough for three and three for two."[124]

The Blackfoot were less adamant then the two 'white men' in their suggestion that Skynner's misbehaviour provoked his murder because unlike the Eurocanadian tradition, Blackfoot history did not include standing as witness over their fellow human beings. Chief Running Rabbit did not feel that he was supposed to know the reasons for another human's actions, for to assume one could know what went on in another's head would have been considered presumptuous. In the Anishinaubek tradition, the highest compliment a person could pay to a speaker was to say of him or her 'w'daeb-wae', taken to mean that he or she is 'right,' 'correct,' 'accurate,' or 'truthful.' According to Anishnaubek author Basil Johnson, it is a phrase that approximates the English word for truth, but it really means "one casts one's knowledge as far as one has perceived it and as accurately as one can describe it, given one's command of language. Beyond this one cannot go."[125] That which McDonnell, Begg, and McGibbon regarded as uncertainty on the part of the Blackfoot respondents reduced the impact of their evidence by lessening their credibility. But High Eagle really felt no personal uncertainty about what he saw, heard, or believed. Instead, he had learned, over thousands of years, to acknowledge the philosophical possibility that

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[123] "Statement of Running Rabit to Alex McGibbon, 3 April 1895," PAC, (RG10197, vol. 3912, file 111 762).
[124] "Statement of High Eagle to Alex McGibbon, 3 June 1895," PAC, (RG10197, vol. 3912, file 111 762).

things may have occurred differently from the way they perceived them. To have presumed to know what went on in the head of Scraping High, or to have insisted that another witness's interpretation of the events was wrong would have been seen as an insult to the other and as counter to their teachings.[126]

Due to a lack of understanding of Blackfoot culture on the part of the government officials, the nature of the Blackfoot individuals' responses affected their legitimacy in their minds. McGibbon apparently asked R.G. MacDonnell, who had traded with the Blackfoot for fifteen years and had helped the police with their inquest, to submit a report detailing the events surrounding the murder as he understood them. Despite stating candidly that "Skynner was...a thoroughly unqualified man to be placed in such a position," he claimed that "of his honesty and purity of motive in discharge of his duties" he could not "but speak [of Skynner] as this entire community do (sic), except in the highest terms." MacDonnell then asserted that "the evidence given by the Indians both at the inquest and in [McGibbon's] presence as to the motive of the murder etc. [was] utterly unreliable being given, as in all such cases, with an immense amount of mental reservation."[127] Agent Begg responded in a similar manner to the Blackfoot's apparent reluctance to discuss the murder stating that the 'Indians' "were willing to have the matter drop. They said they did not wish to speak about it any more, as one white man had died also one Indian."[128] Inspector McGibbon subsequently remarked in his final assessment, addressed to Commissioner Reed, that "he found the Indians very unwilling to give any information. They did not want

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[125] Rupert Ross, Exploring Aboriginal Justice, (Toronto: Penguin Books, 1996), 70.
[126] Ross, Aboriginal Justice, 71.
[127] "R.G. MacDonnell to Alex McGibbon, 29 May 1895," PAC, (RG10197, vol. 3912, file 111 762).

to refer to the murder at all." He added that he "had to drag what little [he] did get by the best means [he] could adopt."[129]

Based on the white men's deleterious deductions, McGibbon concluded that although "the feeling existing between the Indians and Mr. Skynner was bad," the death of Scraping High's son "had nothing to do with the murder beyond that the death caused Scraping High to brood over it and then he got desperate and, Indian like, wanted to relieve himself by doing something brave." Even after completing his thorough investigation, revealing that Skynner's behaviour had been abusive in nature, McGibbon could not escape from his biased understanding of the 'Indian' as the cause of the conflict. The inspector blamed Scraping High's 'Indianess' claiming also that "some sudden impulse must have seized him...and probably having a grudge against Mr. Skynner thought he would then take his revenge."[130] McGibbon was not alone in his belief that Skynner's murder was a "revenge" killing. In an earlier letter, the Deputy Superintendent General of Indian Affairs explained to the Governor General that "Scraping High shot Mr. Skynner with no motive other than revenge for the death of his son, whose death he doubtless laid to the Whites, and after the manner of the savage Indian, sought vengeance by taking the life of a white man."[131] In a Eurocanadian context, in which murder contravened 'natural law,' it was clear that Scraping High was at fault, and according to such an ethic Scraping High's subsequent death at the hands of the police officers was his just reward. In the eyes of the

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[128] "Magnus Begg to Alex McGibbon, 5 June 1895," PAC, (RG10197, vol. 3912, file 111 762).
[129] "Alex McGibbon to Hayter Reed, 7 June 1895," PAC, (RG10197, vol. 3912, file 111 762).
[130] "McGibbon to Reed, 7 June 1895," PAC.
[131] "Deputy Superintendent General of Indian Affairs to The Governor General, 4 May 1895," PAC, (RG10197, vol. 3912, file 111 762).

federal officials, examining the situation through a Eurocentric veil, the notion of a revenge killing remained a heathenish concept that, to the general public, greatly outweighed Skynner's rudeness. Targetting the Blackfoot culture, rather than just the individual, not only absolved Skynner of blame but also validated the federal government's civilizing agenda.

Perhaps McGibbon and the Superintendent believed they had reason to suppose that Scraping High had taken Skynner's life to avenge the death of his son, for as Superintendent W.R. Haynes explained "the Indian idea [was] when they lose one of their children, to get even by killing someone to go with him to the happy hunting grounds." But Haynes, a friend to the Blackfoot, subsequently emphasized that "only the very exceptional ones go to extremes by killing another."[132] The Department's interpretation of Scraping High's motivation suited its own needs, but clearly did not reflect the depth of the Blackfoot culture. Like the ethics common to the other Algonquian nations, that of the Blackfoot was grounded in the principle of preserving order by maintaining a balance in the community between the people, animals and nature. Emulating the acts of Glous'gap and the Kichi-Manitou, Scraping High took the maintance of a harmonious community into his own hands. Perhaps envisioning Frank Skynner as a 'wendigo,' or evil spirit, whose actions were too harsh to be deemed human, Scraping High felt it was within his right to kill Skynner in order to restore communal balance. It would have been rare that communal disorder would require such a drastic remedy, nonetheless, Scraping High was not only abiding by an ethic that had succeeded in maintaining order for centuries, but was fulfilling

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[132] "Statement of W.R. Haynes to Alex McGibbon, 27 May 1895," PAC, (RG10197, vol. 3912, file 111 762).

his duty to his community.

The Department was satisfied with its conclusion that Scraping High had, as any Blackfoot would have, 'savagely' murdered the rations issuer out of a senseless desire for revenge. In Inspector McGibbon's final report he claimed that he still did not fully understand "what motives the Indians had in committing such an awful crime which was a stain on the Blackfeet which would be a long time a slur against them."[133] Along a similar vein, Agent Begg stated that he "wished the Indians to understand that *they* could not commit such acts without prompt punishment."[134] To McGibbon, Scraping High was a Blackfoot and as such his actions represented those of the Blackfoot nations. Without having sufficient understanding of the intricacies of the Blackfoot system for maintaining order, departmental officials labeled the foreign ethic senseless, erratic and uncivilized.

As the twentieth century neared native Canadians grew increasingly separate from the Eurocanadian mainstream. The noble savages of the Enlightenment era no longer existed. The eighteenth century romantic brave and untamed maiden, together representing the innocence of the wilds, had been supplanted by the new, less celebrated, 'savage' 'Indian race.' The infusion of scientific racial jargon into the public and political minds not only validated the government's role as authoritative father figure of the childlike natives, but also fashioned racially charged connotations to the laws and regulations that the government implemented. Ruthless in its faith in its own superiority, the federal government ignorantly guided the public mind towards understanding Canada's native inhabitants as one subordinate race. Either they needed to adapt to the ways of the 'whites,'

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[133] "McGibbon to Reed, 7 June 1895," PAC.

a difficult feat to achieve in the face of racial discourse propagating their inferior faculties, or they deserved to be judged as second-class citizens still clinging to primitive values, and abiding by an ethic that legitimized murder.

[134] "Begg to Reed, 5 June 1895," emphasis added, PAC.

Chapter 5

The Historical Consequences: A Review of the Twentieth Century

The early part of the twentieth century can be defined as a time in which the government had great faith both in its 'Indian' programme, and in the assumptions upon which it was based. In his departmental report for 1909, Superintendent General Frank Oliver did not hesitate to affirm that certain 'Indians' have for the most part "been in sufficient touch with the superior race" to experience the benefits that come from "a more intimate and prolonged familiarity" with 'white' culture. With regard to 'Indians' "both individually as communities or as a race," he continued, "if there is no progression there must inevitably sooner or later come retrogression." Oliver did find it strange, however, that the 'Indians' failed "to recognize the benefits likely to accrue from the adoption of the white man's methods in government," often desiring the return of their "old tribal form of government."[135]

Oliver's message to the public was clear: if the 'Indian' did not change, he would surely die out. The Superintendent General could not comprehend the reasons for a 'race' of people to choose to deteriorate rather than to thrive in a 'civil' society. Having already grown accustomed to the idea that the 'Indians' were second-class members of society, the government's ill understanding of native Canadians' needs and desires inevitably propelled citizens' lack of acceptance towards them well into the twentieth century. By 1951, when

the government pledged to change its methods of dealing with the natives, the damage to the nation's social dynamic had already been done. Woven into the Canadian world view was the notion that the 'Indian' was somehow less, somewhat lazy, and sometimes violent. The portrait Canada painted of its aboriginal inhabitants since before the nation's inception has tainted the level of justice they have received. Frustrated with a set of laws that has aimed to control all aspects of their lives, and with the racism inherent within these laws, the Algonquians, among many other nations, trudge on. They can only hope that one day soon Canada will look backwards to find the error in her ways in order to save future generations from the mistakes of the past.

The First World War forced the government to reevaluate its attitude towards the 'Indians.' No longer could it outwardly disrespect the natives, so many of whom had fought bravely for the nation. By 1920, the Department, once again under the leadership of Duncan Cambell Scott, had begun to refer to the 'Indians' as members of separate nations. In Ontario, for example, the Department's yearend report made mention of the 'Ojibway tribe,' "the largest subdivision of the great Algonkin stock." Rather than condemning their 'savagery,' or celebrating their newly acquired 'civilized' ways, Scott emphasized with pride that the Ojibway were the "descendants of the warriors who fought so valiantly in the war of 1812 under their great leader Tecumseh." He then remarked that the "enlistment average during the late war was exceptionally high and many of their bands sent practically all their eligible members to the front." In his discussion of Alberta, Scott's praise of the "warlike riders" who had not lost the "intrepid spirit of their ancestors," and thus "gallantly

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[170] "Report of the Department of Indian Affairs, 31 March 1909," Sessional Papers, (Edward. VII, no. 27,

represented the Canadian Expeditionary Forces," seemed to contradict all that the Department had previously stood for. Scott also spoke proudly of a Blood 'Indian,' "who held a commission as lieutenant, and who was badly gassed upon three different occasions" and subsequently died of consumption. According to Scott, the funeral that was held for him in Calgary would long be remembered "as one of the most impressive ceremonies that ever took place in that city. So many desired to attend the service that it was necessary to issue tickets of admission to the church.[136] The natives who fought in the First World War appeared to have earned a newfound respect for the 'Indian' past and present.

Changes in the government's attitudes were, however, short lived and far more apparent than real. Underlying assumptions surrounding the 'Indian race' continued to guide government policy and popular opinion. The government continued to prohibit behaviour that it considered immoral, or that had the potential to thwart natives' progress. The 1927 Indian Act amendment criminalized the "operation of pool rooms, dance halls and other places of amusement on Indian Reserves." The act also made it illegal for any 'person' to accept money from an 'Indian' for the advancement of an 'Indian' claim. By this amendment, no native individual or band could hire a lawyer for the purpose of laying claim to money or to benefits which they believed they were due.[137] These laws, like those enacted in prior years, were aimed solely at 'Indians' and did not differentiate the various native nations from each other. The government decided that 'Indians' required stiffer regulations than their surrounding 'white' neighbours who were free to make there own

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[136] "Department of Indian Affairs, Duncan Cambell Scott to Arthur Meighen," Departmental Reports, (George V, 1920), 14.

choices regarding entertainment or the pursuance of individual or group claims.

In the same year, a Department of Indian Affairs report recalled that the "typical Canadian indian" clad in "buckskins and beadwork and feathers," was rarely seen "except in pageants and on holidays when the superior race must be amused by a glimpse of real savages in war-paint." Duncan Cambell Scott went on to claim that "the aboriginal hunter [was] supreme no longer in his own craft; gone is the fiction that he is superior in these pursuits. The white man equals him as a trapper, and holds his own on the trail and in the canoe." Scott then remarked that it was "even difficult to find the Indian of pure blood." He stated, "there has been through all these years a great interfusion of white blood...legally a man may be an Indian with but a small trace of native blood."[138] Not only was the culture of the 'white' man superior in its own right, according to Scott, once the 'white' race took on the, once 'savage,' cultural practices of the 'Indians,' hunting and trapping became noble pursuits. Many of the native people inhabiting Canada in 1927 continued to live by their traditional means while others lived according to Western norms but still identified themselves as belonging to a native nation in accordance with the traditions of their past. But, as the tenets of scientific racism predicted, their diluted blood content meant that, in the minds of the mainstream, the native people had been transformed into a 'vanishing race.'

Regardless of the surface changes in the government's attitude, by the 1920s, the 'Indian' had become a member of a second-class race. In 1923, *Saturday Night* magazine

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[137] "An Act to Amend the Indian Act, 31 March 1927," Statutes of Canada, (17 George V, c.32), 157.
[138] "Department of Indian Affairs, Sir Duncan Cambell Scott to Charles Stewart, Nov 1, 1927" Departmental Reports, 7.

reported that the Mississauga Indians were seeking redress for what they declared to have been a grave miscarriage of justice. They charged that "a party of whites had shot and wounded two of their tribe, and that when the guilty ones were taken before the police magistrate at Lindsay, Ont., one only was fined and the sum extracted was $20." The reporter remarked that "while it only costs $20...to shoot an Indian, it cost $200 when you give an Indian a drink. It seems to be a case of undervaluation on the one hand or overvaluation on the other."[139] The reporter's witty tone beguiles the reader from the seriousness of the injustice that was committed. It is not surprising, however, that the justice system's treatment of natives should be entertaining, considering the absurdity inherent within the reporter's conclusion. The government, intent on advancing the 'Indians' state, treated the aboriginal peoples as children by punishing those who gave them alcohol. When it came to providing them with justice as it did for all other Canadians, the system deemed them next to worthless.

In 1930, another article in *Saturday Night* revealed the presence of overt racism towards aboriginal people lurking in Canadian culture. The story centered on Chief Justice Anglin, who had recently been sworn in as administrator. While taking a ride on a steamer, the boat stopped to pick up some cargo. The skipper called out from the bridge to his mates, asking "how many men have you got handling the stuff?" "Four white men in the hold, sir," answered the mate, "and five Siwashes on the dock." The author pointed out that the natives had "long been known as 'Siwashes' to avoid the necessity of differentiating among the many tribes." It so happened that one of the natives working was the district

[139] "What is an Indian Worth," Saturday Night, 23 June 1923, 1.

chief, and was aware that Chief Justice Anglin, "a big tyee" from the east, was on board. "What for you call me 'Siwash'?" he demanded of the mate. "You know what Siwash mean, eh? Siwash mean 'savage,' and me and my men not savages. You call me Siwash and we no work." So as to relieve the tenseness of the situation the captain promptly spoke harshly to the mate, who explained that he had meant no harm. The 'Indian' chief grunted and went back to work, but not before gazing at the passengers and asking them: "How you like it suppose I call you?" He paused a moment and then went on, "suppose I call you Whitewash!" The native chief was clearly enraged, yet again the article was written with a slight wit. There was a sense that the 'Indian' had taught Chief Justice Anglin "something few people knew about Indians."[140] Namely, that they were people, equally sensitive, and deserving of the respect accorded to non-natives.

In 1951 the government instigated what was intended to be a complete overhaul of the Indian Act due to the 'dependence, retreat, and hostility' towards the government that existed on the part of the Indians. Despite the exhaustive report on the more than one hundred agencies across Canada that submitted by a special committee, the conclusion simply stated the obvious: "all proposed amendment to the Indian Act were designed to make possible the gradual transition of Indians from wardship to citizenship and to help them advance themselves." Though the government publicized the Act as a 'New Deal' for the 'Indians,' an examination by *The Canadian Forum* showed that "the means by which democracy and full citizenship [were] to be attained [were] in essence authoritarian." Accordingly, "the end envisioned is full citizenship for the Indians if they [became]

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[140] "Chief Justice Anglin," Saturday Night, 12 April 1930, 3.

Canadians, i.e., form typical Canadian municipalities, governed by Canadian customs." The act showed no democratic tolerance, which would have potentially allowed cultural differences and ethnic diversity.[141] The government clearly did not understand the factors that were fueling the 'Indian Problem.' Over a century of 'wardship,' although perhaps benevolent in intent, was severely detrimental to the native nations that had once been comprised of dynamic and thriving peoples.

In recent decades, natives encountering the criminal justice system continue to confront inequity. In 1971, a Nova Scotia court wrongly convicted seventeen year old Donald Marshall of the Mi'kmaq nation of the murder of his friend Sandy Seale. According to the findings of the Royal Commission he was found guilty "in part at least, *because he was a Native person.*"[142] In 1989, Cree woman Yvonne Johnson received a first degree murder conviction for her role in a drunken brawl that ended in the death of Charles Skwarok. Based on the lack of evidence for the conviction, Clayton Ruby, one of Canada's most respected criminal lawyers said of Johnson's case; "I think this is a shocking ruling, and an outrageous miscarriage of justice."[143] In the summer of 1995, Dudley George of the Stoney Point band was shot dead by an Ontario Provincial Police officer while taking part in an unarmed demonstration to reclaim a sacred Chippewa burial ground in Ipperwash provincial park. An Ontario court sentenced his killer to serve 180 hours of community service, and so far Premier Mike Harris has refused to succumb to the

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[141] "The New Indian Act," The Canadian Forum, March 1952, 273.

[142] "Royal Commission on the Donald Marshall, Jr. Prosecution, *Commissioners Report: Findings and Recommendations,*" (Halifax: Province of Nova Scotia, 1989) I: 15.

[143] Rudy Wiebe and Yvonne Johnson, Stolen Life: The Journey of a Cree Woman, (Toronto: A.A. Knopf, 1998), 419.

George family's demands for an inquiry into the case. Andrew Orkin, a lawyer for the George family, said that the government has treated the George family unfairly given that it quickly called an inquiry into another violent police confrontation with anti-government demonstrators at the Ontario legislature. "The only way I can explain that differential treatment," Orkin said, "is race."[144]

Outwardly, Canadians deny the racial injustices that take place in the country they cherish. During a lecture given at Queen's University by Pierre George, Dudley's brother one spectator prefaced her question about the nature of the shooting with the phrase "come on, this is not Russia, there must have been some reason."[145] The fact is that there were many reasons for a police officer to shoot a native in 1995 and there still are. Alcoholism, poverty and abuse plague aboriginal communities across Canada to a greater degree than in the rest of the country. The undeniable perception that such desperate situations reduce the level of respect native peoples have for laws of a country seems to increase non-native authorities' persecution of the First Nations peoples. A law professor at the University of Saskatchewan writes that aboriginal people are under more scrutiny than the average Canadian from the police and the legal system. "In our cities," he explains, "the police tend to patrol the streets where poor people hang out. When a disproportionate number of aboriginal people are poor, it is no surprise that they are more often apprehended for infractions than middle class urbanites who may also be violating the law."[146] But the root

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[144] "Police Officer charged in death of aboriginal man an Ipperwash," Canadian Press Newswire, 23 July 1996.

[145] "Lecture by Pierre George," (Queen's University, 10 March 2000).

[146] Tim Quigley, "'Is Saskatchewan Alabama north?' Locking up aboriginal people has too much in common with the racism exhibited in the southern US," Briarpatch, April 1997, 26: 3.

cause of each of these undeniable problematic issues can be found in Canada's history of racializing the 'Indian.' A system cannot function effectively when each of its components is marred by centuries of ill-informed mindsets and ill-aimed treatment of its natives. Although Canadians may seek a 'good' reason for the shooting of a peaceful demonstrator, the fact is that there is not one. In its place exists traditions of ethnocentrism and racism, judging natives in accordance with values that are not necessarily there own, while clinging to racial predjudice.

One would assume that a scrutinizing public would be leery of a case in which the court sentenced a seventeen year old boy to life in prison for the murder of his friend, when the only article in the provincial paper provided no answers as to why the court convicted Donald Marshall Jr. in the face of his adamant denial. The headline of the cramped article on the ninth page of the 6 November 1971 Halifax Chronicle Herald read "Youth sentenced to life term, weeps in court."[147] Donald Marshall Jr.'s plight did not merit a media review of his court hearing or of the events preceding or following it. According to Nova Scotia journalists, and the public whose desires they sought to appease, the alleged murder of a black youth by his Mi'kmaq friend was worthy of only two paragraphs of description. Beyond a superficial narration of the event, the article reported that Marshall "denied throughout his trial ...that he stabbed Seale." The apathy of the larger Nova Scotia community towards the native killing of a black man points to its general detachment from its minority peoples. In the words of the Commissioner's Report on the Donald Marshall Jr. Prosecution: "A Native person in Sydney [Nova Scotia] in 1971 was a member of a

[147] "Youth sentenced to life term, weeps in court." The Halifax Chronicle Herald, 6 November 1971, 9.

severely disadvantaged minority." The Report points out that it was unknown in Sydney for natives and whites to socialize on an equal footing. The police went so far as to actively discourage white girls from "fraternizing" with native boys. The Commission was thus "left with the impression that many people in Sydney in 1971 believed Natives were not worth as much as Whites. Because a Native 'troublemaker' would be worth that much less, Marshall's story scarcely merited consideration."[148]

While in prison in 1981, Marshall accidentally learned that Roy Ebsary, a fifty year old man who he had met in the park on the night of the murder, had admitted to having killed Seale. On the basis of that information, Marshall's new lawyer, Stephen Aronson, asked police in January 1982 to reopen the case.[149] Despite the fact that just ten days after Marshall's conviction, a witness had come forward to tell police that he had seen Ebsary stab Seale, eleven years later the RCMP conducted a professional investigation of the case.[150] In the end, the Court of Appeal acquitted Marshall, inexplicably blaming him, rather than the Nova Scotia justice system, for the wrongful conviction. According to the Reference Court, Marshall's conviction in 1971 was "unreasonable" and "not now

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[148] "The Royal Commission on the Donald Marshall, Jr. Prosecution," 41.

[149] "Edited version of the Royal Commission on the Donald Marshall, Jr. Prosecution,*Digest of Findings and Recommendation*," (Nova Scotia: The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989), 4.

[185] "Edited version of the Royal Commission on the Donald Marshall, Jr. Prosecution," 3.

[186] "Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia" John Burrows, Aboriginal Legal Issues Cases, Materials and Commentary, (Toronto: Butterworths, 1998), 870.

[187] Note: The Royal Commission believed that Marshall only admitted to the stabbing because the RCMP officers suggested to Marshall during their interviewwith him in Dorchester Penitentiary that unless Marshall told them that "there was something else going on in the park other than just a casual walk through the park to catch a bus," they would leave and never come back. Therefore, Marshall was forced tocorroborate Ebsary's version of events—that the stabbing had occurred in the course of an attempted robbery. In "Edited version of the Royal Commission on the Donald Marshall, Jr. Prosecution," 4.

supported by the evidence." Parenthetically, the court reported that nonetheless any miscarriage of justice was "more apparent than real."[151] Rather than admitting to any fault of the justice system, the Court produced inadmissible evidence to prove Marshall guilty of a robbery with which he was never charged. The Court concluded that Marshall had committed perjury during his trial by omitting the fact that he and Seale were attempting to rob Ebsary at the time of the stabbing. His dishonesty, the Court claimed, disabled the judge from adequately delivering justice.[152] "The Marshall Inquiry," however, found that the Court's ascription of blame amounted to "a defense of the criminal justice system at the expense of Donald Marshall Jr., in spite of overwhelming evidence that the system itself had failed." The Report to the Canadian Judicial Council of the Inquiry Committee asserted that it "cannot be seriously argued that the conviction of an innocent person, let alone one who was at the time an adolescent, who was then unfairly incarcerated for more than ten years, was anything but a blatant miscarriage of justice."[153]

A minister from Quebec's St. Andrew's United Church suggested that there was a reason that Marshall, if he indeed did attempt to rob Ebsary, perjured himself in court. He contends that Marshall, a member of a "neglected and dejected minority," would have found it difficult to tell the simple truth if it were to implicate him in any wrong doing. "When you feel the odds are stacked against you," the Reverand writes, "fear and panic

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[153] "Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia," Burrows, Aboriginal Legal Issues, 870.

often rule the will and for the sake of sheer survival the temptation to lie and deceive which is wrong, can indeed be very strong."[154] There is another explanation for Marshall's behaviour in court. As a Mi'kmaq youth, the ethic he followed may not have prepared him for the Eurocanadian style court hearing that he faced. Like the members of the Blackfoot nation who, during the inquiry into the killing of Frank Skynner, provided little evidence, Marshall's may also have had little to say in court, and when he did it may have been false. Rupert Ross suggests that it is "common knowledge" that aboriginal defendants are easily "led" during cross-examinations. For similar reasons to those that made the Blackfoot men and women seem uncertain about Scraping High's actions, when asked "Isn't it possible that X happened?" aboriginal defendants are much more likely that non-aboriginal witnesses to agree. According to their ethic, they simply do not feel that the 'truth' is necessarily comprised of the facts as they perceived them.[155] Fighting prejudice that assumed his guilt, and dealing with a set of values that did not advocate that he assert his innocence, the odds were not in Marshall's favour.

The Royal Commission on the prosecution of Donald Marshall, Jr. established in 1986, was set up to "make recommendations" to help prevent such tragedies from happening in the future. The Commission recognized that Marshall was the victim of a failed system, but asked the question "why Marshall came to be wrongfully convicted and imprisoned in the first place. *Was it because he was a Native? Was it because he was*

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[154] Rev. W.R. Hussey, "The court failed, says minister," Halifax Chronicle Herald, 14 February 1984, 7.
[155] Rupert Ross, Returning to the Teachings: Exploring Aboriginal Justice (Toronto: Penguin Books Canada Ltd., 1996), 73.

poor?"[156] During the first days of the Marshall Inquiry, the Commission had no intention of including racism as a predisposing factor in Marshall's wrongful conviction. When counsel for the Union of Nova Scotia Indians (UNSI) asked Rob Ebsary, Sandy Seale's assailant, what his views on 'Indians' were, the Chairman of the Commission declared that his views concerning 'Indians' were "totally irrelevant." During the probing of the alleged "eyewitness" Maynard Chant, council for the UNSI, questioned Chant about his earlier statement that he (Chant) and "the law" were enemies "just like cowboys and Indians." Frustrated, the chairman called this the "silliest cross-examination [he had] heard in 30 years."[157] Nevertheless, by the end of the inquiry, the commission had undergone a change in mindset, and consequently attributed Marshall's fate, in large part, to his 'race.' Overwhelming evidence forced the commission to conclude "the system does not work fairly or equally" and that "justice is not blind to color or status."[158]

The evidence unearthed during the 1986 inquiry pointed indubitably towards race as a contributing factor in the justice system's inability to provide Marshall with a just trial. The inquiry found Sergeant of Detectives John MacIntyre to have used "oppressive tactics" in his questioning of the key juvenile witnesses, who later admitted to perjury. In his attempt to build a case against Marshall, MacIntyre brought John Pratico, a mentally unstable sixteen year old to the murder scene, and persuaded him to accept his version of the events. Fourteen year old Maynard Chant was under probation at the time of his interrogation, and frightened of being sent to jail if he failed to corroborate with

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[156] "Royal Commission on the Donald Marshall, Jr., Prosecution," 16.

[157] Bruce H. Wildsmith, "Getting at Racism: The Marshall Inquiry" Saskatchewan Law Review, 1991, 5: 98.

MacIntyre's story.[159] The Commission asked why MacIntyre focused so quickly and intently on Marshall as a suspect and concluded: "[*T*]*he fact that Marshall was a Native* is one reason why MacIntyre singled him out so quickly as the prime suspect without any evidence to support his conclusion. We are convinced that if Marshall had been White, the investigation would have taken a different course."[160]

Marshall's defense counsel also failed to demonstrate professionalism in its "inadequate" pursuit of justice. His original attorneys C.M. Rosenblum and Simon Khattar had access to whatever financial resources they needed. Under such conditions, however, they conducted no independent investigation, interviewed no Crown witnesses and did not ask for disclosure of the Crown's case against their client.[161] The Commission recognized the inadequacy of the defense and thus acknowledged the opinion of Bernard Francis, a court worker in Sydney in 1971. Francis testified that Rosenblum "did not work as hard for Native clients." Further evidence suggested that Rosenblum and Khattar believed Marshall was guilty while defending him. The commission rightfully questioned whether their feelings influenced the amount of effort they put into mounting Marshall's defense. The Commissioners' Report concluded, "Given the reputation for competence [Rosenblum and Khattar] enjoyed in the Cape Breton legal community and the totally inadequate defense they provided to Marshall, the irresistible conclusion is that *Marshall's race did influence the defense provided to him.*"[162]

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[158] "Royal Commission of the Donald Marshall, Jr., Prosecution," 193.
[159] "Edited version of the Royal Commission of the Donald Marshall, Jr., Prosecution," 3.
[160] "Royal Commission of the Donald Marshall, Jr., Prosecution," 41.
[161] "Edited version of the Royal Commission of the Donald Marshall, Jr., Prosecution," 3.
[162] "Royal Commission of the Donald Marshall, Jr., Prosecution," 77.

The Mi'kmaq in Nova Scotia have felt little improvement to their situation since the proposal of the Marshall Inquiry's recommendations.[163] Although the federal and provincial governments had lofty plans to "indigenize" the system, meaning to place more natives in positions of authority within the justice system, in actuality little real change to the power structure has occurred. Nova Scotia has appointed two native justices of the peace, but the federal government refuses to give them power under the Indian Act to handle even minor criminal cases on reserves. Furthermore, the province set up a program to help young Mi'kmaqs work towards law degrees at Dalhousie Law School in Halifax. However in 1994, none of the university's ten Mi'kmaq graduates since 1989 were able to find a permanent position at a Nova Scotia law firm.[164] It is unlikely that either racial discrimination or prejudice towards the cultural differences between the natives and the rest of Nova Scotia have been broken down so as to assure that prospective aboriginal authority figures are on equal footing with their white counterparts.

Unlike Donald Marshall, Yvonne Johnson committed murder. Even so, her story is one of racial injustice and social despair, both culminating in a tragic life for her, and the many native women who suffer in similar ways. In September 1989, Johnson let her desperation get the best of her, when she took part in a drunken brawl in Wetaskiwin, Alberta that led to the brutal murder of an acquaintance. While the other three guilty parties received sentences ranging from aggravated assault with a one year prison term to second degree murder with a ten years in prison, Johnson received a twenty-five year life sentence

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[163] "Evaluating the results of the inquiry into conviction of Donald Marshall Jr.," Canadian Press Newswire, 5 November 1994.

[164] "Evaluating the results," 1994.

for first degree murder. Acclaimed Canadian author Rudy Wiebe studied Yvonne Johnson's journals and court records in order to co-author, with Johnson, her award-winning life story Stolen Life: The Journey of a Cree Woman. In the same way that Donald Marshall suffered at the hands of the system, Wiebe and Johnson make it clear that Johnson's first-degree murder charge was highly questionable, and was undoubtedly affected by racism both directly and indirectly. Since the book's publication many people have come forward to publicly express concern over the fairness of Johnson's treatment. It is well known in legal circles, Wiebe reports, that Wetaskiwin, with its deep and long standing rifts between natives and non-natives, is one jurisdiction where native people routinely receive tougher sentences than non-natives.[165] "You'd have to be living on another planet not to see the racism in the court system against natives," says Kim Pate executive director of the Canadian Association of Elizabeth Fry Societies, a nonprofit advocacy group for federally sentenced women, who trained as a lawyer and lived in Alberta for many years. She and many others note that, in this country, crimes of a similar nature to Johnson's routinely receive the lesser sentences (like the two white men involved in Swarok's murder) and convictions of second-degree murder or manslaughter.[166] Consider the case of Calgary socialite Dorothie Joudrie, who shot and severely injured her husband in 1995 while under the influence of alcohol, and who with the aid of psychiatrists and high-profile lawyers to defend her, argued successfully that her history of abuse and alcoholism were mitigating circumstances. She was not found criminally responsible and

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[165] Wiebe, Stolen Life, 315.

[166] Moira Farr, "Aboriginal Sin," Chatelaine, September 1999.

was institutionalized under psychiatric care.[167] Unlike Johnson, she is now a free woman.

Ten years after Chuck Skwarok's death, Johnson remains "somber and remorseful;" she takes responsibility for the violence that she was a part of. "It was horrible," she says. "Nothing justifies it."[168] But she denies that she had any premeditated intention of murdering Skwarok. The fact is that the four killers drank heavily on the night of the murder. Each man and woman recalled the events, but great disparities existed between the stories they told. The incongruity is understandable because there were four people punching, kicking, strangling and screaming in the middle of the night while heavily intoxicated. Under such conditions, no member of this group would be a responsible witness. Nonetheless the RCMP chose to 'strike a deal' with Johnson's cousin Shirley Salmon. Although when interviewed by Wiebe, Salmon was hesitant to admit to her deal, the result of it was that she was dealt a one year sentence while Johnson received twenty-five years. Salmon was clearly under pressure to present a ring leader to the court, so she elected to point her finger at Johnson who owned the house in which the fight took place, and had a motive to kill the man to protect her kids from Chuck who was an alleged child molester. It was true that Johnson was especially angry because of her own personal experiences with child abuse. She admits this. But her role in the actual killing of the man remains contestable. Salmon's witness account depicted Johnson as having "forcibly confined" Skwarok to the basement by kicking him when he tried to leave, despite the fact that the others punched, kicked and held the man down during other escape efforts. Salmon also painted Johnson as the one who sodomized Skwarok, despite Ernie Jenson's

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[167] Farr, "Aboriginal Sin," 1999.

admittance, in a taped 'cell shot' by an undercover officer, to having committed this crime. The Court deemed the tape inadmissible because the officer did not receive the information on it voluntarily.[169] Somehow, despite being under a fuzzy alcoholic veil during the murder, Salmon, with an obvious agenda to reduce her own sentence, was able to prove to the jury beyond a reasonable doubt that Johnson was deserving of a first degree murder conviction.

The terms of Johson's conviction do not seem to fit the crime. Regardless of who did what in the killing, the circumstances were not conducive to basing evidence on the testimony of a member of the guilty party. The members of the white jury in the middle of the "deeply conservative... Bible belt of Christian practice and morality" in Alberta showed no compassion to the desperate native woman who drank, fought, and failed to abide by Christian doctrines. Instead they blamed her for her plight and punished her for being a 'drunk native' even though the facts did not add up. Wiebe writes "Native people rarely accept jury duty, especially when a Native person is one of the accused. Generally speaking, they do not wish to sit in judgment on one of their own people." Making judgment upon their own people is not a part of the Cree culture, yet they are forced to conform in order to receive a fair trial. Like Donald Marshall and the Blackfoot respondents during the 1895 inquest, Yvonne Johnson was judged by an institution that did not understand her culture. Johnson's lawyer admitted to Wiebe in an interview that the reason that he did not want Johnson to testify was that "Yvonne [did] not present well, [she did] not look good." In response to the lawyer's comment, Wiebe writes, "a Wetaskiwin

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[203] Wiebe, Stolen Life, 287.

jury would have been unsympathetic to the kind of woman [Yvonne] presented herself as."[170] Making oneself look like a respectable member of society is clearly important, when being judged by a Eurocentric jury whose members equates material well being with mental stability. To herself, Yvonne was another "Indian face to judge and sneer at, she say or do nothing anyway."[171] Yvonne likely knew how the game worked, but her culture did not ingrain in her a need to "look good" to be judged as "good." Furthermore, at this point in her life, Yvonne felt that her 'race' was enough to poison her appearance, so she did not even bother to try.

Yvonne Johnson's treatment under Canada's criminal justice system reveals a world of injustice, grounded in legal and political systems wholly incompatible with the country's Algonquian population. Wiebe suggests that Johnson's story illustrates what is true for the majority of native Canadian women: the horrors they endure as children influence their adult lives. "This simple [idea], you commit a crime, you're responsible for it, out you go--this is not justice," Wiebe insists. "We have to understand where this person comes from."[172] Making an attempt at comprehending the workings of a native woman like Yvonne Johnson requires a great deal of historical investigation.

Dating back to the nineteenth century, white women's virtues of domesticity, piety and purity comprised the Canadian ideal, and the native 'squaw' objectified its complete

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[169] Wiebe, Stolen Life, 287.
[170] Wiebe, Stolen Life, 319.
[171] Wiebe, Stolen Life, 318.
[172] Wiebe, Stolen Life, 8.

opposite.[173] In 1885, the government painted Cree women as "active participants in violent and brutal acts against white soldiers."[174] Settler women taken captive by native groups during war or rebellion also grew popular in terms of society's representations of 'white' women. Portrayals of such women typically fell into three types depending on the time period: "the colonial survivor, the revolutionary-era Amazon, and the frail flower of western expansionism."[175] Captivity conjured a different picture when referring to aboriginal women. When the Gros Ventre captured a Blackfoot girl named Old Calf Woman, she stabbed her captor with his knife, scalped him, then cut off his right arm, stole his gun and horse, and successfully evaded her pursuers. The Blackfoot council subsequently rewarded Old Calf Woman with the trophies of the warrior and gave her a seat in the council.[176]

Representations of the 'squaw' usually centered on her immorality, brutality and her slave-like work ethic. By the latter part of the nineteenth century she had also earned the title of 'bad mother,' uncivilized and uncivilizing. Industrial or residential schools, and later foster or adoptive families raised aboriginal children in the place of their 'inadequate' mothers.[177] In 1889, a correspondent of *Graphic*, a magazine in London, England, was a girl "with not a drop of Indian blood in her veins' among the Alberta Blackfoot. In response, the *Macleod Gazzette* called on the Canadian government to rescue her from "the

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[173] See Sylvia VanKirk, The Custom of the Country: An Examination of Fur Trade Marriage Practices (Ottawa: Canadian Historical Association), 1974.

[174] Sarah Carter, Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West, (Montral: McGill-Queen's University Press, 1997), xvi.

[175] Carter, Capturing Women, 27-8.

[176] Carter, Capturing Women, 27.

horrible fate that is surely in store for her...even if it brings every Indian in the North-West Territories about their ears." The New York *World* then sent agents to save the "flaxen-haired captive," the "waif of the plains." The western world clearly demonstrated its determination to ensure that the corrupt 'Indian' race did not taint her purity. A few days later headlines in the *World* blared: "The Supposed Captive White Girl Turns Out to Be a Half-Breed;" "Papoose after All;" "Her Mother a Squaw."[178] When reporters discovered that the child was rightfully in the care of her parents their use of racial jargon made sure that that the public perceived the child's lot as infortuitous. In an 1894 report from an 'Indian Industrial School' in Regina, the principle concluded by mentioning that "Lucy, a sweet faced orphan Indian girl, about six year of age, was adopted into a comfortable home in Ontario. She was quite willing for the change, and now removed from every Indian influence, her education will be continued under very promising conditions."[179]

Aboriginal women were not considered suitable parents, or even proper women. In addition to these unfortunate realities, native women declined in status even among their own clans or nations. The Indian Act of 1869 presumed aboriginal women to be dependent on, and the property of, their husbands, in the same way that 'white' women were. Based on this assumption, the act denied 'Indian' status to native women who married non-native

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[177] Anne McGillivray and Brenda Comaskey, Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System, (Toronto: University of Toronto Press, 1999), 31.
[178] Carter, Capturing Women, 40.
[179] "A.J. McLeod to The Superintendent General of Indian Affairs, 14 August 1895," Sessional Papers, (Vic. 59, no.14, 1896).

men, and granted status to non-aboriginal women who married aboriginal men.[180] Native women suffered harsh discrimination for being 'Indian,' but at the same time endured the difficult reality of being nineteenth century Canadian women. Like other women, their morality was constantly under scrutiny, but unlike white middle-class women, it was assumed to be naturally lacking. As Colin Sumner argues, colonialism sparked the clash of both cultures and legal regimes. Unequal power relations naturally resulted both between and within those cultures. The 'modern' Western legal regime came to dominate, displacing traditional modes of maintaining order and regulating behaviour, and converting "attempts to preserve the old ways, resist the new order and accommodate to its hardships...into criminal behaviour."[181] Accordingly, class-biased, and sexist definitions of crime, already inherent in the criminal justice system, were further complicated by colonialism and race, resulting in a perilous situation for native women.[182]

Yvonne Johnson's heritage did not prepare her to embrace the world, strive for goals, or to fight the system. Even before she was born, history ensured that she would not be given a fair chance at succeeding in the confines of the Eurocanadian society. As is the case with many native women fighting the odds, Johnson learned to survive, and was scathed at every turn throughout her childhood. Sexual abuse and alcohol plagued Johnson's life, turning her world into a fearful hole in which the only safe place, as a child, was the basement corner, sneaking upstairs through an old gas vent to use the bathroom or

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[180] "Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act (31st Victoria, Chapter 42), 22 June 1869," http://www.landclaimsdocs.com/stat/html/iahtm.

[181] Colin Sumner, cited in Joan Sangster "Criminalizing the colonized: Ontario native women confront the criminal justice system, 1920-1960," Canadian Historical Review, March 1999, 80: 33.

eat when her father was not around. She tells of the sexual abuse she encountered, from the age of four, from her ninety year old grandfather, father, family "friends," strangers and later her youngest brother, and stepfather. Of her troubled life, Johnson writes, "Predators and victims. That's why my family drinks to excess. Drugs and booze suck up hopes, every little dream you have, as easy as opening your mouth and just lift your hand and pour it down. Abuse happens and down it goes into you, down to hid in the mucky silence...Living like we do, it'll happen again and again, and we take it. It just goes with the territory."[183] During her teen-aged years Johnson added her fists and wits to her list of weapons that had previously consisted of alcohol and silence. She drank and fought but this did not stop her from being raped numerous times on Winnipeg's skid row. Johnson's actions in the murder, although indisputably wrong, sprung from twenty-nine years of surviving in her own chilling life.

"There's no doubt about it. Study after study shows that the Canadian justice system fails aboriginal women, and fails them dramatically," says Kathleen Mahoney, a law professor at the University of Calgary and chairperson of the International Centre for Human Rights and Democratic Development in Montreal.[184] Tragically, the colonization process, as Johnson's great grandfather Big Bear said in 1876, "tied a rope" around the native peoples' necks, and was pulled doubly tight around those of native women, creating the despair that sparked the cycle of alcohol and abuse. The aftermath of the crippled society continues to oppress its women, but paradoxically, when they seek help, these

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[182] Sangster, "Criminalizing the colonized," 34.
[183] Wiebe, Stolen Life, 24.
[184] Farr, "Aboriginal Sin," 1999.

women encounter the same body that conceded to their colonized existence in the past, and that continues to do so.

Johnson's crime merited rehabilitation, and awareness of the circumstances in a native woman's life that led her to commit a drunken murder while asking the victim continuously: "Do you know what it's like to be raped?" implying that she knew well what the experience was like. Recalling her hellish days at Kingston's Prison for Women, Johnson tells of the attempted suicide of another inmate who had been severely abused throughout her childhood. Johnson remembers looking at the bloodied body of the young woman being taken out on a stretcher and thinking to herself, "I don't want to go out that way. I don't want a bunch of people standing over my grave going 'Why? Why?'...People want to know why—I want it on my epitaph: read the book!"[185] Yvonne's sentence disregarded the strength it took for her to survive her past, considering that "registered Indians" aged fifteen to twenty-four have suicide rates that are four to five times higher than for the total population.[186] Her conviction reflected the racist insensitivity of the world around her. Jury members did not place themselves in Yvonne's shoes, because to have done so would have been to cross a racial boundary: to equate people who were not deemed equal in the eyes of judgment. The Canadian justice system merely discarded Johnson with many other natives whose crooked lives have led them to the inside of a penitentiary, rather than learning from her experiences and implementing change.

Labour Day weekend 1995, in the midst of the Stoney Point Band's unarmed

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[185] Wiebe, Stolen Life, 410.

[186] Shelley Trevethan, "Aboriginal Persons in the Justice System," Canadian Centre for Justice Statistics, January 2000.

protest, an Ontario Provincial Police officer shot and killed Stoney Point native Dudley George. The circumstances surrounding the demonstrator's death point to racism's continuing effects on the Canadian legal system even into the twenty-first century. The Ontario court charged Sgt. Kenneth Deane with criminal negligence causing death and sentenced the killer to one hundred and eighty hours of community service. Birke Stonefish, convicted felon and community counselor in the Swan River First Nation read about Deane's sentence in his local paper, and disagreed with the judge's apparent notion that justice had been served. Stonefish was serving time in the Edmonton correctional facility when he read the details of Deane's sentence. He was awaiting the chance to appeal his own conviction on the charges of possession of a handgun and assault with a weapon. A Court of Queen's Bench judge handed Stonefish an eighteen month sentence, despite letters written on his behalf by several influential people in the reserve community where he had taken up residence. The letters explained that Stonefish was performing a vital service to the community by teaching young people how to avoid living lives plagued by substance abuse. Unlike Deane, Stonefish was not allowed to remain free, to continue to work and live among his friends and loved ones even though his reputation was one of a helpful and important member of his community. Birke Stonefish was charged after pointing an unloaded gun at a man who threatened to "beat the hell" out of him in a bar washroom. "That made him wonder," he said, because unlike Deane, Stonefish was not a convicted killer.[187]

The Ipperwash dispute revolved around the possession of a sacred Stoney Point

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[187] Paul Barnsley, "Justice system or 'just-us' system," Windspeaker, October 1997, 15: 6.

burial ground that the province had annexed, to create Ipperwash provincial park, despite the fact that the federal government had relinquished this unceded territory through the Indian Act in 1927. In 1942 the Canadian government invoked the War Measures Act and removed the Aazhoodenaang Ejibaajig - the Stoney Point People - from their unceded territory. From 1942 until 1946 the Federal government used the Stoney Pointer's territory as an Advanced Infantry Training Center, Camp Ipperwash, to train soldiers for fighting in WWII. Despite having promised to return the land after the war, the government used the territory as a summer camp for military cadets for the next thirty-two year. In 1990, after fifty patient years, the Stoney Pointers began moving home, for "self-determination," to bury Dudley's grandfather Daniel R. George, Sr. in the sacred Aazhoodena burial grounds: "buried as a warrior, defender of [their] home." Three years later the natives decided to make Stoney Point a permanent place to live. They set up tents and trailers on the firing ranges of camp Ipperwash. Pierre George told of a ceremony held 21 June, 1993 during which the natives "buried the hatchet under a tree of peace, to help guide [them] in the future, returning home." According to Pierre, there would be no guns in reclaiming the territory, but the Stoney Point natives would never give up their right to defend their land and family. After enduring two years of harassment by military personnel, surviving two winters on the shooting range, the Stoney Pointers eventually moved into the military barracks and the remaining military personnel vacated in July of 1995, having "shaken hands" with the natives of Stoney Point.[188]

There are many areas of dispute surrounding police activity at the Ipperwash

[188] George, "lecture." 2000.

shooting, some of which are grounded in well-documented media reports that call into question the professionalism of Ontario's provincial government and the Ontario Provincial Police, and others of which are based on witness accounts of the Ipperwash scene in the days before, during, and after the shooting of Dudley George. Although the OPP erred in its own right, it should not be seen as an entity unto itself. The George family and the Liberal opposition have specifically directed their attention towards Premier Mike Harris's part in the police violence. According to the "Ontario Legislative Discussion on the Ipperwash (Stoney Point) Inquiry," Premier Harris held a meeting the night before the shooting, where he is believed to have said: "Out of the park only—nothing else," thereby insinuating that the OPP were to remove the natives by whatever means necessary without negotiation.[189] Mike Harris denies that the meeting ever happened but the Conservative government continues to refuse an inquiry into the case, which leads some, including the George family, to "believe that [the provincial government] is hiding something."[190] The details of the case are so convoluted that it is difficult to discern exactly who is to blame for the violence launched against the Stoney Point activists. Many people, including the average Canadian, whose mind has been trained over centuries to remain apathetic towards the plight of its natives, are responsible for the injustices surrounding the death of Dudley George.

According to Pierre George, the province's failure to research the validity of the Stoney Pointers' claim that the land in question was a sacred burial ground, which the

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[189] "Ontario Legislative Discussion on Ipperwash (Stoney Point) Inquiry: Hansard Transcripts," 20 August 20 1997.

federal government acknowledged within a week of the shooting, was a determining factor in the outcome of the standoff. Pierre George recounted the details of a Western University professor's report of an Ojibway child's skeleton found partially unburied in 1950 by the wife of a Sarnia superintendent. Apparently the Sarnia woman is still alive. Natives and non-natives, alive when Ipperwash park was a Stoney Point burial ground, continue to live in the vicinity. The point was that the land repossession was certainly valid and that the information needed to legitimize it was available. The government just did not care to pursue the land claim, but rather acted to preserve its precious park.[191] Had the government taken time to acknowledge the facts it could not have justified the OPP's use of force in extraditing the unarmed natives, and would not have sent Canadians the message that Ipperwash provincial park is more important to Ontario than justice for its native peoples.

The magnitude of the force used against the unarmed Stoney Point natives is another area of dispute. Questions remain as to whether or not the government and the OPP were aware that the Stoney Pointers were unarmed. The OPP's chief commissioner Thomas O'Grady stated, after ten months of silence, that he is confident that his officers "acted in good faith in the performance of their duty." O'Grady noted that in August 1993, a military helicopter was fired on at the military base adjacent to the park; and in July of 1995 a school bus was driven into a military jeep, pushing it back 50 feet into a drill-hall door. These incidents, he said, gave the OPP "every reason to believe that an armed

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[190] Wendy McCann., "Two years since Dudley George gunned down, still no inquiry" Canadian Press Newswire, 5 September 1997.
[191] George, "lecture," 2000.

occupation of Ipperwash Provincial Park...was a very real possibility."[192]

Jim Moses, a member of the Six Nations of the Grand River First Nation who acted as an undercover police and government informant, claimed that OPP and the provincial government were aware that the Stoney Point occupiers had no guns. Moses made three trips to Camp Ipperwash to gather information. He said he saw a bandoleer, which held 12-gauge shotgun shells, but no guns. He also said that on one occasion, after spending the night at the camp, he witnessed a visit by a police officer who arrived to deliver a message to the protesters at the camp. Before walking to the camp entrance to see what the officer wanted, one of the natives hid a baseball bat nearby in case of trouble. "That made me think, 'Maybe they had no guns'," Moses said. He passed the information on to the OPP and the Canadian Security Intelligence Service.[193] Despite the OPP's policy to "negotiate a peaceful resolution without the use of force," and having access to Moses' information, the police arrived armed and ready for a brutal retaliation that did not come.[194] The Toronto Star reported that the provincial police brought snipers, riot squad members with full body armor and heavily armed members of the force's tactical response unit.[195] A year after the incident occurred, however, the provincial police admitted that they asked the army for help in confronting the natives. Fifty gas masks with carriers, fifty pairs of night vision goggles, equipment for intercepting cellular telephone calls, and one hundred bullet

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[192] James Rusk, "OPP Chief breaks 10-month Ipperwash silence" The Globe and Mail, 25 July 1996, A6.
[193] Paul Barnsley. "Informant comes in from the cold" in Windspeaker, July 1999, 17: 1-2.
[194] Rusk, "OPP chief," 1996.
[195] "Provincial police admit big buildup before clash with aboriginals at Ipperwash: Toronto Star interview with Chris Coles," Canadian Press Newswire, 31 March 1996.

proof vests were put on standby in case the OPP needed backup.[196] The OPP force likes to convey the image that it acted in accordance with Canada's reputation for peaceful negotiations, but in reality the police, or the government, or both feared confronting the natives without the use of force. Jean Koning, a London resident involved with the Aboriginal Rights Coalition, a national group that supports native land claims, pointed to the most important question that Commissioner O'Grady left unanswered: "why anybody believes that the best way to deal with native peoples in Canada is with guns."[197] Either the government and the OPP did not take Moses's word seriously or, more likely, a history of racism led them to draw conclusions based on prejudice rather than fact. Whether or not the natives were armed or not, in the minds of the authorities, they were a violent threat, and thus the use of force was morally justified to the public.

On the night of the Dudley's death the OPP placed Pierre and his sister Carolyn George under arrest for attempted murder as they stood outside near their dying brother's stretcher. Rather than standing beside the dying man during his final moments, the police forced Pierre and Carolyn to raise their arms with their faces up against the brick wall. "I want to see my brother," Carolyn said trying to pull away. "Who am I supposed to have murdered?" demanded Pierre. The response they received from the female OPP officer was: "They just told us to hold you." Despite their innocence, Carolyn and Pierre spent the night in the Strathroy OPP jail unable to contact the hospital where Dudley lay dying. That night the police said that shots directed at them came from a white car in Ipperwash park. Carolyn and Pierre arrived at the hospital in a white car and were thus charged. Despite the

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[196] "Police asked for army's help, paper says (Toronto Star)" Canadian Press Newswire, 12 May 1996.

fact that the natives adamantly denied the use of weapons, the public statement issued by police the day after the shooting said shots were fired at police from a school bus in the Park.[198] Two years later during Kenneth Dean's preliminary hearing into the affair, Judge Hugh Fraser rejected the police testimony that claimed that the OPP officers had fired in self-defense. Fraser cast out Deane's fabricated story that claimed that George had been firing a rifle at police riot-squad during the clash at Stoney Point.[199] Pierre George believes that the OPP went so far as to authorize tampering with autopsy reports to eliminate the shot to Dudley's chest, which Pierre and his sister witnessed. According to the official autopsy with the missing wound Dudley would have been capable of throwing the rifle he supposedly held, which would explain why no gun was present at the scene of the accident.[200] Judge Fraser also rejected the testimony of Constable Chris Cossit, who told the court that he had seen aboriginal demonstrators shooting at police and throwing a molotov cocktail.[201] The OPP concocted a version of the events in, what Judge Fraser called, "an ill-fated attempt to disguise the fact that an unarmed man was shot."[202]

Although they refused to admit it, the commanding officers involved in the Stoney Point conflict knew that the actions of his force would be inappropriate prior to the confrontation. During the "Ontario Legislative Discussion on the Ipperwash (Stoney Point) Inquiry" Liberal MPP Gerry Phillips—whose 1999 private members' bill

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[197] Rusk, "OPP chief," 1996.

[198] Peter Edwards and Harold Levy, "Race for life failed to save Indian," The Toronto Star, 26 July 26 1996, A10.

[199] Tom Blackwell. "Policeman guilty of negligence in aboriginal death," Canadian Press Newswire, 28 April 1997.

[200] George, "lecture," 2000.

[201] Blackwell, "Policeman guilty," 1997.

demanding a public inquiry into the Ipperwash shooting was defeated— attempted to force Premier Harris to admit that he had ordered the armed OPP invasion of Stoney Point. In following up the Premier's comment that "this was left entirely in OPP hands," Phillips quoted from a conversation between the two commanding officers about an hour and a half before the shooting death. He emphasized that the officers were "commenting on the action that the government was taking, the injunction the government decided - not the OPP, the government." The Commanding officer said that the injunction surprised him because the one "they were going for was different. They went from that regular type of injunction, which the OPP wanted, to the emergency type." He went on to say, "Which you know really isn't in [the OPP's] favour." "We want a little bit more time, but they've gone for that. That's why these papers must come down tonight." He continued by saying "This is typical, where we get caught and the ball's gonna be in our lap."[203] The initiative for the forceful police raid clearly did not come directly from within the ranks of the OPP, but from a higher authority.

Under normal circumstances the OPP answers only to the Solicitor General's ministry, but in this case evidence has led the George family, the opposition party, and portions of the general public, to believe that the Harris government was to blame. The Liberal opposition refers to the minutes of a meeting with Deb Hutton, a top Harris aide, and the senior civil servants, in order to prove Premier Harris guilty of initiating police brutality. The notes indicate that Hutton had been speaking with Harris on the night before the conflict and that his wishes were to get the natives "out of the park and nothing else."

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[202] Blackwell, "Policeman guilty," 1997.

When questioned on the accuracy of Hutton's statement, Harris repeatedly dodged the question, finally replying that he "can't recall whether there was a meeting." The Premier claimed that there were "no records of the meeting. It may have been a phone call; it may have been in passing; it may have been a briefing." To which Rainy River MPP Howard Hampton aptly replied "The last public official who tried this line of defense, that he can't recall, that he doesn't have any records, was someone named Richard Nixon. Do you remember Richard Nixon?"[204] Mike Harris said that he did remember Nixon, but still, in December 1999, Harris continued to find "legal loopholes" to avoid giving testimony in the wrongful-death lawsuit that the George family launched against the provincial government in 1996.[205] The George family agreed to drop the lawsuit if a public inquiry was called, but as of yet the Harris government is no closer to calling an inquiry and revealing its role in the Ipperwash shooting than it was four years ago. One might question the legitimacy of a democracy when the governing power keeps the facts from its constituents.

As horrific as it might sound, a democratic government can only push the boundaries so long as the majority of the population remains apathetic to its actions. Although various coalitions, such as the Coalition Against Racist Police Violence, have expressed their disdain towards the actions of Premier Harris in the Ipperwash dispute, the fact remains that the silent majority allows the government to remain safe from the wrath of the oppressed minorities and their supporters. If Dudley George had not been killed it is likely that this incidence of police brutality would have gone unnoticed. The public,

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[203] "Ontario Legislative Discussion," 1997.

[204] "Ontario Legislative Discussion," 1997.

[205] Richard Brennan. "Ipperwash inquiry ruled out," The Toronto Star, 10 December 1999.

although supposedly an outraged observer, continues to be a contributing factor to the injustice that occurred at Ipperwash. When prominent columnist David Frum writes a racist editorial in the Financial Post, applauding Premier Harris's conviction in demanding that the Stoney Pointers be removed from the park, one must question the overriding attitudes of the powerful members of Canadian society. Frum writes: "Ordinarily, if a group of squatters takes over public property, it's the responsibility of the government to remove them. If those squatters are carrying deadly weapons, they will be confronted by police carrying equally deadly weapons." He adds that "if, in the course of defying police orders to disperse, a squatter is killed, the normal reaction would be to breathe a sigh of relief that it was one of the law breakers who lost his life, and not a policeman."[206]

It is easy to attack the media's ability to control public opinion. It is more difficult, however, to admit that media is controlled by its audience. Weekly columnists write to attract followers: people who enjoy their editorials, and will thus continue to buy the paper. An unpopular columnist will not remain in his position for too long. David Frum's suggestion, that a "normal" public would rejoice when a "squatter" is killed in the name of the law must, therefore, not be as obscure as an offended reader may think. Frum graduated from Yale with a B.A. and M.A. in history and from the Harvard school of law. He is clearly a member of the educated elite and thus appeals to such an audience. The impact of the views of the elite members of society, which are reflected in, and reinforced by, racist media squabble, is far reaching, considering that this level of the social hierarchy tends to dominate all realms of society, greatly affecting public opinion. David Frum ignores the

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[206] David Frum. "Harris was right in refusing to be bullied over Ipperwash: premier served notice that the

Stoney Point natives' inherent right to the land that they occupied, which the federal government promised to return to the band after the war. Frum is not alone in his misconstruction of the facts in order to fulfill his own agenda. The majority of Canadians have been taught to ignore the reality of the complex situation in which the natives in this country exist, in order to justify their existence on Canadian soil. A letter from a Stoney Point lawyer, who supported Mike Harris's aim refers to the occupiers as "hooligans" and claims that he was upset by the events at the park because it was "the first place that his parents took [him] camping."[207] His sentiment adequately reflects that of the public, which claims to be despondent when tragedy strikes, but is unwilling to sacrifice even a corner of a provincial park, in order to provide justice for its natives.

Canada prides itself on its reputation for equal treatment of its citizens regardless of colour or class. The events surrounding the Ipperwash protest demonstrate that, in fact, justice is a relative concept, and one that is ultimately controlled by society's powerful authority rather than any unbiased criminal justice code. It is not the legislation that is in desperate need of an update, but the attitudes of those members of society who execute and influence the making of the rules. The police, the government, the courts and the media all played an active role in determining the fate of Dudley George and Kenneth Deane. What we must not forget is that each of these institutions reflects and reinforces the prejudice inherent to Canadian society. We must not look at each group as a separate entity, but as a piece of a puzzle, that when assembled resembles an oppressive force whose racism,

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use of violence would not be tolerated in land dispute in Ontario," Financial Post 7 November 1997, A12.

[207] Paul Barnsley. "Family outraged by minimal sentence," Windspeaker, August 1997, 15: 4.

fueled by a century-old tradition, propels racial injustice into the twenty-first century.

Chapter 6

Conclusions: A Look to the Future

Since 1971, when Court falsely accused Donald Marshall of murdering Sandy Seale, real change in the deliverance of justice to Canada's native population has been minimal. In the past thirty years, there have been many recommendations advocating changes to the criminal justice system. On one hand there have been thrusts to 'indigenize' the system by integrating indigenous people into the current justice system at all levels.[208] The recommendations put forward by the Donald Marshall inquiry were grounded in this idea that real change would result if their were more natives in authoritative positions within the justice system. However, what resulted from this line of thought was a mainstream society that did not recognize the need to change within itself. Some aboriginal people found places within the system, but since 1983, when such initiatives were undertaken, little has changed with regards to Eurocanadian overrepresentation in the

[208] See Paul Havemann, "The Indigenization of Social Control in Canada," Indigenous Law and State, B.W. Morse and G.R. Woodman eds., (Dordrecht: Foris, 1988).

power structures of the justice system.

Yvonne Johnson did not feel the results of these programs in her courtroom where a non-native jury delivered her first-degree murder conviction. A skeptic may argue that native peoples, who chose not to execute the role of juror, were at fault because their choice left no alternative but to have a non-native jury passing judgment upon Yvonne. But the Eurocentric system makes no allowance for native culture which deems the very construct of judging another human being as counter to traditional teachings. The cyclical nature of this cultural conflict confounds the problem as natives grow increasingly disenchanted and less likely to corroborate with a system from which they feel alienated. These facts point to two shortcomings with the concept of 'indigenization.' Firstly, such programs do not demand systemic change, only peripheral ones. Ethnocentric constructs, like passing judgment and issuing punishments, inherent to the Canadian system remain in place. Aboriginal faces are merely added to the equation with the feeble hope of facilitating cultural exchange, when no real accommodation of native differences has been made. Secondly, unless change comes from beyond the system itself, it will never affect the lack of trust that natives feel towards the system whose components remain tarnished by racially infused mindsets. Even the seemingly simple precept of enhancing the native presence in the justice system is wrought with conflict since, as Paul Havemann has written, "the social and psychological distance between the affluent, well-integrated Indian field -worker and the self-destructive, transient alcoholic, is as great as the distance which exists between their white counterparts."[209] Because 'indigenization' does not accommodate native

[209] Havemann, "Indigenization of Social Control," 1988.

cultural difference, when a native joins the system, he or she adopts Western precepts, to which his or her people are not accustomed to.

By the early 1990s the trend shifted towards advocating the creation of separate justice systems for native peoples. Canada's constitutional recognition of natives' inherent right to self-government inspired this change in opinion. On the surface, the notion of separate justice seems like the only answer to the perpetual injustice that continued to plague the native population after 'indigenization' attempts failed to bring positive change. The Law Reform Commission of Canada reported that from the aboriginal perspective, "the criminal justice system is an alien one, imposed by the dominant white society. Wherever they turn or are shuttled throughout the system, aboriginal offenders, victims or witnesses encounter a sea of white faces. Not surprisingly, they regard the system as deeply insensitive to their traditions and values."[210] However, for various reasons, mainly long term, and in sexual assault cases, the idea of community run justice is problematic.

First of all, a Stoney Point court, if it were to have existed, would not have been able to correct the injustice that Dudley George suffered. Separating the justice systems only encourages segregation, thereby propagating fear and racism towards the alien group. No one is asked to take a good look at him or herself in order to change his or her racist attitude. Separate systems may provide justice in the form of fairer sentencing, but it will not enhance general levels of social justice for natives. Thus governments and police will continue to confront native activity with fear that breeds disrespect and violence, rather

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[210] Brooke Sittler, "The Way to Live Most Nicely Together: Possibilities for Aboriginal Criminal Justice," Saskatchewan Law Review, 1995, 59: 131.

than an understanding that can only be developed through accommodation and learning on all sides.

Yvonne Johnson describes her fight for justice against her brother Leon who she charged with three counts of rape. Although the Eurocanadian system failed her here too, it is doubtful that an aboriginal system would have been any more effective in delivering justice. In the native culture, the family is sacred, and rightfully so. But, when an estimated seventy five percent of the population in certain communities has been sexually assaulted and thirty percent are victimizers, one is led to question the sanctity of the family since it permits the cycle of abuse to continue. Much of the Saanich Indian community, who took part in a nationally recognized native justice project spearheaded on southern Vancouver Island, criticized the new system. Native social workers, elders, women and court workers said that their leaders were using the B.C. government's money to keep assault charges within the community, that corruption and bribery were rampant, and that the women who were sexually abused ended up "doubly victimized." Although, under the regulations of the system, the Tribal Council only became involved in sexual assault cases when the victim consented to it, Mavis Henry, a native social worker for the Pauquachin band, explained that there was no way to ensure that victims on reserves were not coerced into giving that consent. "The men involved in the abuse often hold positions of power in band councils, families, and traditional institutions," said Henry. She knew of "several cases where powerful families pressured women to use the alternative system rather than bringing sexual assault charges."[211] "Two months in the longhouse," said one critic "is not

[211] Holly Nathan, "Native justice system abused, critics charge," Eye Opener, 1993.

long enough to straighten out some of our people." Native women's agency is severely limited by the patriarchal order that rules their communities. Yvonne could not depend on her mother's love, or her sisters' support, unless she dropped the rape charges against her brother Leon. Until real changes occur outside of court, critics argue that abused women and children may be treated unjustly under separate aboriginal community justice systems.

When aboriginal healing works together with the current justice system the results seem to be positive. Hollow Water is an Ojibway community that tackled its sexual abuse epidemic by creating a Community Holistic Circle Healing Program (C.H.C.H.). They promote and respond to disclosure in a way that the Canadian criminal justice system does not. The community developed a Healing Contract, designed by people either involved in or personally touched by the offense. If and when the Healing Contract is successfully completed, a Cleansing Ceremony is held to "mark a new beginning for all involved" and to "honour the victimizer for completing the healing contract/process." Although the program is susceptible to the same criticism as in the Saanich community, the program at Hollow Water has been positively received by its participants. Perhaps this is because criminal charges are laid as soon as possible after disclosure. The victimizer can either proceed on his or her own through the criminal process, or with the healing support of the team. For the latter, he or she must accept full responsibility for his or her acts and enter a guilty plea at the earliest opportunity. Virtually all of the accused have requested the team's support, with the result that trials are rare.[212]

The position of the C.H.C.H on incarceration reflects the values of the Ojibway

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[212] Rupert Ross, "The Hollow Water Approach," (Ottawa: Department of Justice, 1993).

culture, but its precepts should not be limited to the Ojibway community, or even the aboriginal one. The idea of restorative justice is gaining headway in the mainstream, as penitentiaries are increasingly being deemed unfit for even the most serious offenders, such as the Kingston Prison for Women, which was recently closed. The 1993 C.H.C.H position paper on the issue of jail speaks to the unilateral benefits of their healing process: "The use of judgment and punishment actually works against the healing process. An already unbalanced person is moved further out of balance." Furthermore, the paper suggests that, rather than protecting society from the offenders, the threat of incarceration simply keeps people from coming forward and taking responsibility for their actions. In reality, "the threat of jail actually places the society more at risk." The C.H.C.H aims to break the cycle of abuse by making the victimizer accountable, and then offering him or her the support he or she needs to get well. The paper concluded with the statement, "the legal system, based on principles of punishment and deterrence, as we see it, simply is not working. We cannot understand how the legal system cannot see this."[213] As the Royal Commission on Native peoples acknowledged in 1996, aboriginal peoples require a system that is accepting of cultural pluralism in order to accommodate native values, and perhaps learn from them. Any other solution will disjoin this country, enhancing the divide between the mainstream and the native peoples, thereby increasing the ignorance and racism that remains at the root of the problem.

Brad Enge, a native solicitor for aboriginal clients in Edmonton, expressed his rage towards the criminal justice system during the recent forum on native justice. He

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[213] Ross "Hollow Water.".

contended that implicit in police and court procedure is the concerted effort to force aboriginal people to adopt Eurocanadian values by "using a sledge hammer to make law abiding citizens."[214] If it were up to him, he remarked, he would prefer if his clients did not have to "depend on the English common law system." But Donald Worme, a native solicitor from Saskatoon, approached the disheartening situation from a different perspective. For him, the seeds of the problem within the system lie outside of it, on the playground where his children play. The solution, he said is to change the social climate so that his children can play as equals with non-native children, for it is the underlying respect of one person towards another that creates the strong foundation upon which justice should be based. Worme does not believe that hoping for a change in the social dynamic will enable his children to grow up feeling at ease with the mainstream and its institutions. He feels that government intervention is needed to advance social awareness of the gravity of the hardships natives have faced and continue to confront in order to remind all Canadians of their responsibility to change their attitudes and actions towards the "deliberately marginalized underclass."[215]

James Waters, a native ex-gang member who has been in and out of jail since he was a child, fears that his culture, already severely diluted by a century of cultural cleansing, will cease to exist. Waters explained that according to tradition, elders always think seven generations ahead whenever they make a decision in order to understand the long term consequences of their actions. His generation, he sadly remarked, is the seventh

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[214] Brad Enge, "Edmonton Native Justice Forum," Canadian Political Channel (CPAC), 26 July 2001.

one dating back to the elders who the Europeans first encountered during their explorations of the New World, and he sees in the people of his generation a real lack of respect for their culture. Water's greatest fear is that someday the children of his generation are going to get older, and "if they're not learning right now, what will they tell their grandchildren."[216] For many native youths, the only place where they are able to learn to appreciate their culture is in prison. Isabel Anger, a native elder working in a federal penal institution in Edmonton, explained that the "boys" she works with "don't learn their values out there, and don't respect their own laws." Yet she emphasized that they are "all good," they just "need a lot of help."[217] Resentful of the government, which has stripped them of their identity, these men have little respect for Eurocanadian laws, and have been denied the right to adhere to their own system of law. In the spirit of the Kitchi-Manitou's teachings, Isabel teaches her "boys" the lessons they need to learn in order to revive the values that will help them to straighten out their lives. Like Glous'gap she hopes to restore balance in the communities of those she councils, by implanting in each individual a seed of understanding that will grow to help him to respect himself, his surroundings, and all Canadians. Although she alone cannot implant all Canadians with the values they need to sustain a multicultural system of justice, she hopes that, as a link in a long chain, her work will enhance native individuals' level of self respect, thereby transforming the justice system's dynamic from one comprised of oppressor and victim to peoples inhabiting an equal plain. The 'Indian,' now a member of an ill-regarded race defined as such by a

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[216] James Waters, "Edmonton Native Justice Forum," Canadian Political Chanel (CPAC), 26 July 2001.
[217] Isabel Anger, "Edmonton Native Justice Forum," Canadian Political Chanel (CPAC), 26 July 2001.

century of discriminatory actions and discourse, requires the reassurance that he or she inhabits a nation in which freedom and flexibility allow for difference to thrive without relegating it to a separate place beyond universal tolerance.

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