

Koqqwaja'ltimk: Mi'kmaq Legal Consciousness

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Abstract

This thesis examines the principles and concepts of Mi'kmaq folk law, and Mi'kmaq legal consciousness, chronicling the concepts, symbols, and methods, of Mi'kmaq justice over time, from early contact, through colonization, to the present. The main thrust of this research examines legal consciousness as a site of struggle and as articulations of Mi'kmaq identity, through an investigation of the local lived law of the Mi'kmaq. Social constructions of legal consciousness, referring to how people come to think about, understand, create, and act upon, formal and informal laws that define social relations in everyday life, were examined using field based ethnographic methodologies. Research indicates the Mi'kmaq have competing discourses ranging from, the utility of pre-contact social order traditions, to sophisticated power struggles over identity and treaty rights, to the validity of distinct and separate justice systems in fulfilling the goals of self governance. These discourses are framed in concepts such as authenticity, continuity, tradition, cultural appropriateness, distinctiveness, community empowerment, harmony, forgiveness, and healing. Additionally, the concepts and the discourses framing and articulated as Mi'kmaq legal consciousness, provide insight to the impact of colonization on Mi'kmaq culture. The stories told by the Mi'kmaq participants in this research illuminate all manners of conformity, contest, and resistance, as they combat the alienation and marginalization of their culture within and between their communities and the larger Canadian society. The constitutions of legal consciousness are historically situated, fluid and dynamic processes, often contested, within and between societies, as individuals and collectivities give meanings to their juridical experiences and beliefs, and thus provide information for analysis of the sources of solidarity, crisis, conflict and contradiction within the production of Mi'kmaq culture.

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Preface

On October 1st 2002, the Mi'kmaq Nation and the Province of Nova Scotia joined to commemorate the 250th anniversary of the signing of the 1752 Treaty of Peace and Friendship. In his annual address at Province House, Alex Denny, Grand Captain of the Mi'kmaq Mawio'mi stated:

Ladies and Gentlemen, respected Elders and Guests, today marks another landmark in the relations between the Mi'kmaq Nation and the Crown, representing the nation of Canada. Today we celebrate 250 years. Yes, 250 years ago the 1752 treaty of Peace and Friendship was signed It gives me great pleasure at this time to personally thank Premier Hamm and his government for finally attempting to address two long and outstanding issues. One being the steps taken most recently to return gasoline taxes collected from Mi'kmaq consumers. Second, along with the Federal government of Canada, the Province of Nova Scotia has initiated a process with the Mi'kmaq to tackle issues relating to lands and marine systems It not only pleases me that we are heading down this path, but it reminds me of the many who have brought us to this point in our history. It is important to remember, at this time, the people who have led us here. The Mi'kmaq know who they are and it is the Mi'kmaq that must not forget. A person that comes to mind is Donald Marshall Junior. Junior is without a doubt a figure that has marked our history with victories. Victory from a justice system that was blinded by racism. Victory in the form of reaffirmation of our fundamental rights as laid out by our forefathers in the treaty of 1760-61. As long as I have known Junior, not once have I seen a young man so dedicated to ensuring that we the Mi'kmaq do not forget the hundreds of years of pain and suffering encountered, yet stay true the words penned between the Mi'kmaq Nation and the Crown.

Historical processes of cultural production shape legal consciousness. Symbols and events, embedded in legal consciousness, are interwoven in the social structures and contextualize the networks of social relations in which the Mi'kmaq live and act. This thesis examines constructs and contests of Mi'kmaq legal consciousness from the early seventeenth century to the present. Legal consciousness represents the location of particular Mi'kmaq struggles and expressions of Mi'kmaq identity.

On a late August evening in 1991, a full moon was lighting up the sky in Riviere-du-Loup, Quebec. My mother and I stopped for the night at a country-side motel that had

a big pond, copious yard ornaments, and several varieties of animals meandering about. We were driving from Southern Ontario to Halifax, Nova Scotia, where I would begin my university studies in marine biology. The air felt charged that night and the moon was so huge and insistent in the sky, I could not avoid its attractive forces. It was unsettling.

I joined my Mom in the room, where she was watching the only English language channel available, on a remote-less television set. I asked her what was on and she replied, 'A depressing movie. A horrible story about a Native boy sent to prison for a murder he did not commit.' We suffered through the darkness of the film called "Justice Denied". It turned out to be a true story about the wrongful conviction of Donald Marshall Jr. a member of the Mi'kmaq First Nation from Cape Breton Island, Nova Scotia. The Canadian Criminal Justice System incarcerated Marshall eleven years for a murder he did not commit. His conviction was due in large part to the fact that he is Mi'kmaq. His identity disqualified him from due process, a fair and just trial. The movie showed how he survived prison riots, daily violence, inmate deaths, and how he endured years of proclaiming his innocence to no avail. He was trapped in a system that would not release him unless he said he was guilty and showed remorse. How do you do that when you are innocent? The film made clear his alienation from the legal system and his inability to correct the outrageous miscarriages of justice he lived with daily. It was rough to watch.

CBC was broadcasting the film to commemorate Mi'kmaq Grand Chief Donald Marshall Sr., the wrongfully convicted man's father. The Grand Chief, the traditional spiritual and political leader of the Mi'kmaq nation, had died a few days earlier. The Grand Chief and his wife Caroline had cameo roles in the film, reenacting the event of

their son's release. Donald Marshall Jr., the Grand Chief's namesake and eldest son, was sentenced to life in prison when he was just seventeen years old. It was a conviction that denied Donald Marshall Jr. the opportunity to complete the apprenticeship required for his potential ascension to the hereditary position as Grand Chief, when the time came, at the death of his father.

After the presentation of "Justice Denied", the news footage showed the Grand Chief's stately funeral attended by people from across the country. During the procession members the Grand Council wore their regalia, special status sashes and amulets, signifying the importance of the occasion, as they walked behind the casket, alongside the Marshall family, carrying their father, grandfather, godfather and husband. There were many First Nations' Chiefs wearing headdresses and formal ceremonial attire, venerating their leader. Warriors marched beating drums and singing honour songs. The Knights of Columbus were also there in their feathered caps and cloaks, representing the fact that the Grand Chief had crossed social boundaries between town and First Nation, making many friends from different culture groups. Hundreds of community members walked through the streets of Membertou First Nation honoring the late Mi'kmaq Grand Chief and his family.

I was fascinated by the procession, the sounds, colours and emotions, captured on the screen, and made more palpable by the movie just shown. I felt such sorrow, and then anger, that something so horrible could happen in Canada. I felt outraged at the failings of the justice system, that it could put innocent people in prison, that aboriginal people be so poorly treated. I realized justice is not blind or equal for all. I saw the terrible consequences of racism. It was overwhelming. I viewed all of it from a distance that day.

I was a stranger to Nova Scotia. About three weeks after that big bright moon shone in Quebec, and the viewing of the "Justice Denied", I found myself in the old 'Misty Moon,' a large venue for live acts in downtown Halifax.¹ I went to see Jeff Healey sing about 'Angel Eyes' and it is there where I met Donald Marshall Jr. From that moment my life changed. He had been out of prison almost ten years, and it was one and a half years after the release the infamous Marshall Inquiry Reports, a list of eighty-two recommendations derived from the Royal Commission on the Donald Marshall Jr. Prosecution, designed to prevent such miscarriages of justice from reoccurring. The Marshall Inquiry became the driving force and justification for judicial reform in Nova Scotia, a powerful political tool for the Mi'kmaq, and has important implications in the formation of Mi'kmaq legal consciousness and is a central theme of this thesis.

After a memorable year in Halifax, I moved with Donald to Cape Breton Island, to his home in the countryside along the Bras D'Or Lake, nestled between two First Nation communities. On my first visit to Waycobah First Nation, I drank homebrew and ate moose meat pie with some of the gentlest giants I had ever met. I transferred universities and switched disciplines from marine biology to anthropology, just as Donald and I began an eventful career in commercial eel fishing.

In my first two major anthropological projects with the Mi'kmaq, I avoided writing directly about Donald's life in prison or the impact of his wrongful conviction. My Honors thesis addressed the alienation and marginalization of the Mi'kmaq in the commercial eel fishery in Nova Scotia. The impetus for that paper came after Donald and I were charged with illegal selling of eels in 1993, a case which turned out later to be as significant a Supreme Court Decision for the Mi'kmaq Nation as the Royal Commission,

¹ The Misty Moon no longer exists but Jeff Healey still tours.

but for different reasons. When I wrote that paper we had just finished the first round of court, my charges were dropped, and Donald was carrying the treaty test case forward to appeal. The Marshall Decision of 1999 was years away. The outcome and consequences of that case far surpassed any that we imagined the day the agents of the Department of Fisheries and Oceans served the summons. My direct involvement in this case positively affected my status within the communities and opened further research avenues. I met many people while sitting for hours in court and in strategy meetings. Taken together, the Marshall Inquiry and the Marshall Decision are the two most significant juridical events to take place within the Mi'kmaq Nation during the last two decades; their places within Mi'kmaq legal consciousness are analyzed here.

My Master's thesis examined the changing roles of the Mi'kmaq Grand Council from the early seventeenth century to the present. As noted above, Donald's father was the Grand Chief, leader of the Grand Council and head of the Mi'kmaq Nation's traditional territories spanning the Atlantic Provinces. It seemed fitting to write up this important aspect of Mi'kmaq sociopolitical culture. I had never met Donald's father, and Donald himself was not a part of the Council, but accessing the people for the research was certainly made easier for the historical connections, as well as Donald's and his father's popularity in the communities. More people came to know me as Donald's friend doing her studies on something or other, and they were very generous with their thoughts and stories. I ran into some limited resistance about writing on what some people perceived as a sacred organization, once my purposes and methodologies were presented, people tended to feel more comfortable, and perhaps trusting, of my work. I made mistakes in my pronunciations of Mi'kmaq words and people began to correct me.

Regularly someone will point out my whiteness. Several people start off interviews by saying they don't want their children taught their traditions by a blonde haired, blue eyed, white woman, indicating a caution against appropriation. However, once they make clear that there are differences between us, and that I remain an outsider, they usually proceed to generously share with me their thoughts and concerns, their memories and interpretations, of what has happened in their communities, and what they would like to see happen in the future.

As a person studying anthropology and trying to do ethnography of the Mi'kmaq, I am in a very privileged position. Being Donald Marshall's partner opened numerous doors, as well as offered certain challenges. I am certain my relationship with Donald, the fact that I am of European ancestry, and female, influenced how people talked with me, what they chose to articulate or silence. Donald is well known across the country, particularly within the Mi'kmaq nation. The very public process of overturning his wrongful conviction, the Royal Commission, and the newsworthy shattering of the hegemony of the Canadian Criminal Justice system as infallible, as well as the momentous Supreme Court Decision on fishing rights, make him easily recognized. He is often lauded as a hero, a champion of the underdog, and a symbol of the injustice Mi'kmaq people endure, on a daily basis, as they struggle, within and against, non-indigenous societies for freedom, equality, and respect. The enormous media attention has made some people resentful and jealous of him, and others are misinformed, knowing him only from what they read in the papers, or see on television. In Mi'kmaq communities however, his story is well known, told often in the public school system, and by Mi'kmaq justice workers, who use his story as a way of framing their approaches

as they struggle to implement meaningful juridical practices in opposition to those imposed upon them from the larger society. In almost every interview, Donald's experiences with the justice system emerged, explicitly and implicitly stated, sometimes solicited by me, but most often spontaneously by the respondents. In talking about justice with the Mi'kmaq, it became clear that Donald's wrongful conviction, and the more recent Supreme Court Decision on fishing rights, have direct, lasting, and significant impacts within the Mi'kmaq nation as manifested in their articulated legal consciousness(s).

Living with the consequences of Donald's wrongful conviction for the past decade, hearing the horror stories of eleven years in jail, seeing the long term effects of both the experiences and the impact of a prejudiced justice system, I am compelled to write this thesis not from a distance. In preparation for this dissertation I have thoroughly examined the historical events of Mi'kmaq justice production. I have worked with Mi'kmaq justice programs since 1992. I assisted Donald in preparing for his role as a board member on the CLIF Demonstration Project, and then the Mi'kmaq Justice Institute. I was a consultant and proposal writer for the Mi'kmaq Justice Institute. I was the research coordinator for the forensic evaluation of the Mi'kmaq Justice Institute, and I am the program evaluator of the Mi'kmaq Young Offender Project. I am the co-founder and co-director of the Grand Chief Donald Marshall Aboriginal Youth Camp, a cultural survival camp aimed at helping Mi'kmaq youth in trouble with the law reconnect with their cultural traditions, and values, as an alternative to crime. I have witnessed, and documented, the pain and loss resulting from the accumulating consequences of colonial processes, and the severely negative impact the Canadian justice system has had on many

Mi'kmaq individuals, communities, and culture. I have also witnessed the challenges and obstacles faced by Mi'kmaq First Nations, as they go head to head with government and justice officials in their struggle to gain control over their lives and implement culturally oriented, community based justice programs.

Sadly, Donald is not alone in his experiences of judicial discrimination; however, his case stands out as an extreme and horrific example. His story is symbolic of the ongoing marginalization, systemic discrimination, racism, and social inequality, the Mi'kmaq face daily. His unfaltering determination is also emblematic of the Mi'kmaq resilience and resolve to overcome these obstacles as they fight to establish their own justice systems in a framework of self-governance. That they have to fight at all is a daily reminder that things are not yet right in Canadian society. However terrible, Donald's Marshall's very public experience with the Canadian Criminal Justice system, and the resulting Royal Commission, have brought about significant changes in the ways Mi'kmaq people articulate their juridical discourses and practices. I believe that fuller awareness of the consequences of an imposed and foreign system of justice in indigenous communities, are needed in order to facilitate positive change, to end the assimilative trends of colonization, and generate social equality, to reduce over representation of aboriginal peoples in the mainstream system, and to avoid more wrongful convictions. I hope that the data in this analysis may help in the creation of sustainable justice processes that are culturally derived, community centered, and meaningful. In short, Mi'kmaq community based justice offers a path toward empowering and healing a nation that has endured centuries of persecution and discrimination, and that formerly had no options but to comply with an imposed, oppressive, and unequal system of justice. I am hoping that

the stories that I have gathered for this dissertation will lead others toward an understanding of the dynamics of Mi'kmaq culture, in order to help build relations of cultural acceptance, rather than mere tolerance, or rejection. Perhaps a deeper knowledge of the past, and what it means today, will foster productive and cooperative approaches to creating just societies outside of colonial domination and will move injustice toward koqqwaja'ltimk, the concept of being treated justly. With this objective in the forefront, this thesis addresses legal consciousness as a site of struggle and as articulations of Mi'kmaq identity by examining historical and contemporary constructions of juridical discourses and practices in Mi'kmaq society. This thesis asks how are juridical experiences culturally defined, enacted, and negotiated? How are ideas about justice shared and disputed, within and between culture groups, in the production of legal consciousness?

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For JR

Kesalul Donald Marshall
Iapjiw Mikwite'lmulten

Chapter One: Introduction

Koqqwaja'ltimk exemplifies the concept of being treated justly in Mi'kmaq culture. Conceptualizations of justice shift and change over time and place, and are mediated through experiences. These experiences are contextualized in individual legal consciousness, and embody culturally derived meaning making processes. As culturally constituted, legal consciousness instructs conflict, confrontation, solidarity, and identity formation. Throughout time, Mi'kmaq people, individually and collectively, express and enact their legal consciousness in various discourses and practices. After contact and during colonization, legal consciousness shifts in relation to increasing social inequality between Mi'kmaq and foreigners. As those relations became increasingly marked, the Mi'kmaq experienced alienation from both their traditional juridical practices, and from the imposed legal consciousness of the colonizers. In response to colonial processes and a perceived lack of koqqwaja'ltimk, at the hands of their oppressors, Mi'kmaq discourses and practices oriented around opposition and survival strategies that manifested as changing legal consciousness. In this thesis, I argue that the productivity of culture increases at historical moments of heightened resistance, because the valued components of culture are challenged, threatened from outside, and so must be articulated inside, each individual identifying with or against relevant components (Smith, G.1999:57). What are the relevant components of Mi'kmaq legal consciousness and how do Mi'kmaq people articulate their identity with them? It is within historical moments of rupture, contradiction and change, that Mi'kmaq agency is analyzed in order to document the creative processes of legal consciousness construction and contestation, illuminating expressions of Mi'kmaq identity and resistance, the central objective of this thesis. I use

the term legal consciousness as an analytical tool. I do not argue that Mi'kmaq legal consciousness represents an internal coherence, or represents Mi'kmaq legal thinking as a cultural whole, on the contrary, legal consciousness is a tool to understand differentiation within and between and against Mi'kmaq culture and Mi'kmaq actors.²

The following research has evolved from my prior anthropological projects on Mi'kmaq resource use, and analyses of the political roles of the traditional government, and through my professional and personal association with various Mi'kmaq justice programs and staff. In consideration of my intimate, and privileged, location in this field, I have made great efforts not to forgo academic rigor. My field research for this dissertation included eighteen months of fieldwork, three six-month stints, living both in and near Mi'kmaq communities in Cape Breton. I conducted one-to-one, taped, unstructured and semi-structured interviews with eighty-five Mi'kmaq persons on the subjects of community, identity, justice and legal consciousness. All interview participants consented to contribute to this study.

The interview cohort, generated through purposive or judgment sampling, and snowball and convenience sampling, consisted of roughly equal numbers of grass roots and elite peoples.³ Grass roots people are those who live in Mi'kmaq communities but do not hold any paid positions within the band councils, social services, or justice programs.

² In a collection of essays on differentiation, Gerald Sider and Gavin Smith (1997) suggest that differentiation is the keyword that allows us to focus on ruptures, contradiction and change within a society. Their emphasis, which I embrace here, is to recognize that there are many different histories and these are contested against and within official constructions of history. These contests produce disputes, which sometimes silence and sometimes commemorate but can never fully represent culture as a coherent whole.

³ I used H. Russell Bernard's (1994) research methods in anthropology as a guide for interview methodology. In judgment sampling I decided the purpose I wanted an informant to serve. For example, I wanted to learn about centralization, so I selected people who lived during that time. I used snowball sampling to help find people who might know about the law ways of the past and about traditional healing and justice practices.

There were eleven elders, twenty-three persons aged twenty to fifty, and six youth interviewed in the grassroots group. The elite sample consisted of frontline justice workers and political figures. The gender breakdown was also roughly equal, with forty-six of the eighty-five participants being male. I interviewed seventeen justice program staff, eight people who work in health and wellness programs, four Mi'kmaq police officers, six First Nation Chiefs, six other political figures, and four Mi'kmaq lawyers, for a total of forty-five frontline workers. I tried to balance the numbers between grass roots [40 interviews] and front line workers [45 interviews] evenly, realizing that there is a paucity of information from the community, or grassroots cohort. These numbers exclude two focus groups, and conversations with youth at conferences, and at Donald Marshall's youth camp, and general, day to day discussions.

Sixty-three of the eighty-five research participants represented in the research sample speak Mi'kmaq. I conducted the interviews in English. I called on Bernie Francis, a Mi'kmaq linguist, Donald Marshall, and Mrs. Caroline Marshall, to explain and translate particular Mi'kmaq words and concepts that came up in some conversations. Most interviews took place in the participant's home or at their places of employment. I interviewed several people more than once, for example, the senior directors of the Mi'kmaq Young Offender Project, and Membertou First Nation, were consulted five times, and three times, respectively, because of their specialized knowledge in the field of Mi'kmaq justice. I held two focus groups. One group involved interviewing a family, including a mother, father, son and daughter who participated in a Mi'kmaq justice circle, where I asked questions about the process and their experiences. I conducted the other focus group with three executives of the Membertou First Nation, including the Chief, the

Chief Executive Officer, the Senior Advisor, and Donald Marshall, who holds no band council position but has remained an active community member. At that meeting we discussed the direction of the band's mandate for community justice, by-laws, enforcement options, and cultural constructs of justice. I interviewed three non-Mi'kmaq persons, a legal aid lawyer in Sydney, who holds the Mi'kmaq case load, the co-director of the Native Council of Nova Scotia, and the director of operations for a Cape Breton First Nation band. All together, the interviews resulted in over one thousand pages of transcript, which I personally transcribed for use here.

I chose the Cape Breton communities of Membertou and Waycobah⁴ as the primary research locations. I believe they offer a sound comparative framework because while they are similar in size and population, Waycobah is a rural community in contrast to the urban Membertou. Through a historically situated ethnographic study, I critically examine, within the discourses of the anthropology of law, colonialism, and power, the formal, informal, local and extralocal circumstances of the cultural productions of Mi'kmaq legal consciousness within these two communities. From these locally situated findings I make general observations about the larger Mi'kmaq nation.

In total, the interviews have provided me with a range of ideas and explanations regarding the production of Mi'kmaq legal consciousness. We talked about the past, present and future, and about how Mi'kmaq justice practices and ideas have changed over time. We discussed personal and public problems, conflicts and dispute management, as well as perceptions of crime, the criminal justice system, and the potential for local programs.

⁴ On the map Waycobah is noted as Whycocomagh. Waycobah is the Mi'kmaq name for their community.

Additionally this research has been informed by data collected in one hundred assisted community surveys called, 'Justice Concerns and Issues', that Professor Don Clairmont, of Dalhousie University, and I administered in mainland and Cape Breton First Nations, in the process of evaluating the Mi'kmaq Justice Institute.⁵ The evaluation was a collaborative project with Mi'kmaq organizations, namely the Union of Nova Scotia Indians, and the Confederacy of Mainland Mi'kmaq, and the federal and provincial governments, which together make up the Mi'kmaq Tripartite Forum. I received permission from the Tripartite sub-committee on justice to utilize this data set for my dissertation. The project dealt with community residents' perspectives on priorities for justice and how best to achieve them. I designed several open-ended questions for the survey to facilitate my question of what is Mi'kmaq legal consciousness. Professor Clairmont generously provided me with access to a group of interviews he conducted, as part of this same evaluation, with non-Mi'kmaq government officials. These interviews included discussions with representatives from the provincial and federal Departments of Indian Affairs, the Department of Justice, the Aboriginal Justice Directorate, and two judges, on the topic of aboriginal justice and specifically Mi'kmaq justice.

The research record revealed that there is no one archetypal Mi'kmaq legal consciousness; rather, there are competing, contradictory, and conflicting consciousnesses. Legal consciousness is varied, contingent, and as such, always changing. Thus, with this data I examine legal consciousness in particular moments and places in the ongoing histories of the cultural productions of the Mi'kmaq nation. In order

⁵ By assisted I mean I hired local research assistants in each of the three communities to administer each of the one hour surveys in person. The Cape Breton data was carefully collected and the researchers offered valuable advice on the technique and in interpreting their experiences. Special thanks to Rara Gould, Carol Sylvester, Elisabeth Marshall, and Agnes Gould.

to understand current manifestations of Mi'kmaq legal consciousness, I traced cultural patterns of law ways from the early contact period to the present. In the historical section I address Mi'kmaq juridical practices prior to colonization. By listening to oral retellings of Mi'kmaq history, origin stories, and mythology, and by asking people what they thought justice was like before colonization, I assembled a historical context connecting current understandings. I also drew upon archival information, and the writings of the early visitors to Mi'kma'ki [the name for the Mi'kmaq territory] for clues to the legal ontology of the early Mi'kmaq. I then discuss the impact of colonization on Mi'kmaq law ways. I examined numerous primary and secondary resources to make sense of the experiences of colonization in Mi'kma'ki, and have provided an abbreviated version here to demonstrate the impact of colonization, the legalization of domination, and the criminalization of Mi'kmaq culture, on Mi'kmaq legal consciousness. In understanding these processes, my goal is to comprehend Mi'kmaq resistance and survivance by examining the events that shape Mi'kmaq legal consciousness, particularly treaty making, centralization and residential school.⁶

In the contemporary section, I recount the wrongful conviction of Donald Marshall Jr., as it is one case that stands out as having significant impact on legal consciousness according to the data collected in the field. I studied court transcripts, documents, correspondence, newspaper articles, archival information from Mi'kmaq political and juridical organizations, and employed personal conversations and experiences to represent, as accurately as possible, the event and its consequences.

⁶ I take survivance to mean a combination of survival and resistance and use it here as an indication of Mi'kmaq empowerment. Gerald Vizenor defines survivance, "in the sense of native survivance, is more than survival, more than endurance or mere response; the stories of survivance are an active presence survivance is an active repudiation of dominance, tragedy, and victimry (Vizenor 1998:15).

Following Marshall's exoneration, there was a flurry of cultural justice production as the Mi'kmaq used the Royal Commission as a means to counter domination, and justify their demands for self-governance. I chronicle the rise and fall of Mi'kmaq justice programs post-Marshall inquiry, including the challenges they faced internally, and in their dealings with provincial and federal governments' officials. Within these programs, the political structures, the intricate family and social relations, of Mi'kmaq communities reflect in the power configurations of the local organizations. Through my research I was able to learn something about the variety of visions of Mi'kmaq justice, and the divergent strategies for operationalizing it, and the perceived obstacles, to creating community owned and controlled justice programs. This analysis examines why some strategies worked and others failed, and discusses these in relation to Mi'kmaq legal consciousness.

Current manifestations of Mi'kmaq legal consciousness within two Mi'kmaq communities emerge from my interpretations of my field notes, and interview data, to provide an ethnographic snapshot of community life, including example conflicts and their management. I look at some of the formal and informal justice practices, utilized and talked about to address individual and community problems. In addition to interviews, I utilized participant observation information collected at justice program meetings and a variety of conferences. An Elder / Youth conference in Halifax, for example, gave me the opportunity to hear members from across the Mi'kmaq nation speak about their relationships with each other. Elders presented their fears and concerns about today's youth. One elderly couple discussed their experiences of having recently survived a brutal home invasion perpetrated by several youth. Young people expressed their feelings regarding surviving their suicidal friends, their boredom, substance abuse,

employment opportunities, their public image, as well as their desire to connect with their elders, culture and traditions. Finally, I draw conclusions and argue Mi'kmaq legal consciousness is a valued component of Mi'kmaq cultural production that helps define Mi'kmaq identity in relation to others. As anthropologist Laura Nader suggests, "We must research the internal and external analyses at the same time in order to know how sets of cultural meanings came about" (Nader 2002:99).

My interpretations of Mi'kmaq communities are informed by my relations with Donald Marshall, his family and our friends, and through the many different forms of interaction and participant observations I have had within these communities over the past ten years, and from my training as an anthropologist. From eel fisher, to godmother, from program evaluator, to mourner at funerals, to a friend having tea, or a stranger trying to get an interview, I have met hundreds of Mi'kmaq people. Sadly, I have witnessed more funerals than I ever thought possible. I have attended weddings, birthday parties, powwows and sacred ceremonies. I have spent time in every Mi'kmaq community in Cape Breton, and in a majority of the communities on the mainland. In addition to the eighteen months of fieldwork, I lived next to Waycobah First Nation over four years, visiting daily. I have lived in Membertou, just outside of Sydney, Nova Scotia, for brief and sporadic periods of time ranging from a couple of weeks to several months.



First Nations Communities of the Maritimes

(Prosper 2002).⁷

⁷ Whycocomagh on the map is the location of Waycobah First Nation.

Chapter Two: The Theoretical Frames

This chapter sets out the theoretical framework and defines the key concepts. I outline my justification for using legal consciousness as an analytical tool in the study of Mi'kmaq cultural expressions of identity and resistance and situate this work in the field of the anthropology of law.

This thesis is a historically situated ethnographic study of ongoing community processes, Mi'kmaq resistance to colonial domination, and an examination of the diversity of community viewpoints on justice developments in Mi'kmaq society from early contact to the present. The Mi'kmaq are not some historical artifact; rather, they are participants in ongoing projects of survival, identity formation and cultural production. The Mi'kmaq nation is not a homogenous entity. The internal complexities and divisions among their peoples and communities shape their struggles within, and against, the larger societies in which they are located. These internal differences, that shift and change over time, generate the social processes that shape Mi'kmaq histories which are in opposition to, and partly separate from, the history imposed upon them by the dominant society (see Miller, B. 2001).

Using Mi'kmaq justice as a framework for my analysis, I focus on the struggles the Mi'kmaq fight with the dominant society in order to survive as individuals, communities, and as a nation. Law has multiple jurisdictions within and between culture groups. These culturally reproduced and challenged jurisdictions, emerge within various spheres of power in a hierarchy of power relations. As Laura Nader suggests, "Law is not a neutral regulator of power but instead the vehicle by which different parties attempt to gain and maintain control and legitimization of a given social unit" (Nader 2002: 117).

Law is not a separate entity but operates within social and cultural organization, and must be considered within political, economic, social and spiritual frameworks of power. Dispute resolution ideologies as dominant legal models, have long been used for the transmission of hegemonic ideas, particularly in the context of colonization and in the perpetuation of indigenous subjugation, and as such, provide a useful framework for demonstrating how hegemonic ideas are challenged and changed. Following Gramsci, hegemony is about the assumptions of existing order that are accepted by dominated and dominant alike. It is the clusters of belief that circumscribe that which is considered natural; the way things are and should be. Hegemony is about obtaining consent and legitimacy, about dominance and subordination, both constraining and enabling (in Nader 2002:119). Counterhegemony is the conquest of hegemony by subaltern classes, in this case the Mi'kmaq, as they fight for recognition and legitimation of justice practices outside of the frame of the mainstream legal system.

This thesis inquires into law and its relation to Mi'kmaq culture and society, to reveal the hierarchy of values hidden in legal notions. I challenge legal idealizations, particularly those that value harmony over conflict, confrontation, or adversarial activities, or which reject mainstream approaches to dispute management in favour of those deemed more culturally appropriate (see Nader 2002:125). What processes do the Mi'kmaq participate in to construct legal meanings and practices? How and why have they changed over time? How does Mi'kmaq interaction with mainstream society impact their juridical experiences as culturally conceived, enacted, and made meaningful? How are ideas about justice articulated, shared and disputed, within and between culture groups? In order to address these questions, I examine early contact justice practices of

the Mi'kmaq, the impact of colonization on those practices, and contemporary expressions of Mi'kmaq legal consciousness. In these three sections, I seek out what legal and extralegal methods of social control are valued and contested within Mi'kmaq communities, as they work toward establishing their own justice system in the move toward self-governance, and autonomy. I use legal consciousness as an analytical tool to locate what historical events shape Mi'kmaq identity and their resistance to mainstream domination.

Social constructions of legal consciousness refers to how people come to think about, understand, create and act upon, formal and informal laws that define social relations in everyday life (Comaroff and Roberts 1981, Conley and O'Barr 1990, 1998, Merry 1990, 1992, Miller, B. 2001). The constitutions of legal consciousness are historically situated, fluid and dynamic processes, often contested within and between societies, as individuals and collectivities give meanings to their juridical experiences and beliefs. This thesis examines the symbols, events, crises, and conflicts that contribute to the production of legal culture in Mi'kmaq society.

Constructions of legal consciousness are influenced by multitudes of local and extralocal sociocultural processes that are understood and expressed, in various ways, by individual actors, and by groups. Forms of legal consciousness may be sources of solidarity, crisis, conflict, and contradiction. According to Jean and John Comaroff (1987), consciousness is produced by a person's interpretation of the cultural messages provided by discourses, an active process in which the person uses cultural categories to construct awareness of self (in Merry 1990:9). These cultural categories inform legal consciousness, and are expressed in kinship patterns, class structures, ethnic identities,

social control mechanisms, ideas of right and wrong, and within aboriginal communities, may be influenced by imposed processes of colonialism, hegemony, dependency, resistance and sovereignty, to name only a few. These processes are interconnected with daily political, economic, social and spiritual fields of culture that are historically situated.

Conceptually for this study, forms of legal consciousness and the cultural contexts in which they are produced are inseparable, each continually defining and reshaping the relationships through which they are created, contested, perpetuated and altered. It is necessary to examine these fields together. According to Sally Engle Merry, the way law constitutes social relations is a complex process, related to the nature of interactions between individuals and the legal system.⁸ Merry sees law as a product of culture, historically formed and locally distinct (Merry 1992:211). In order to unravel the complexity of Mi'kmaq forms of legal consciousness, I examine and analyze the alterative discourses surrounding pre and early contact practices of social justice, the impact of colonialism on such constructs, and present manifestations of current legal sensibilities in Mi'kmaq First Nations of Nova Scotia.

Recent studies interested in how to ascertain processes of legal consciousness production examine the various discourses through which consciousness may be articulated. Merry suggests that daily talk by ordinary people contributes to defining what law is and what it is not. What is shared, how it is understood to affect lives, expectations and senses of rights, are all components of legal consciousness (Merry 1992:210). Conley and O'Barr (1998) consider the linguistic and social aspects of discourse, arguing that the

way people talk about something, is intimately connected with the way they think and ultimately act (1998:7). Following Foucault (1977), they look to discourse as a locus of power because the dominance of one discourse reflects the power structures of a society, and the repeated playing out of dominant discourse reinforces those structures. By examining the dominant discourses in Mi'kmaq society, the events and symbols that are important to Mi'kmaq legal consciousness will become evident. The relationships of sets of social discourses are emphasized in this thesis rather than the linguistic aspects of discourse.

Micro and macro level discourses of Mi'kmaq legal consciousness are examined historically, and represented here, in order to place emphasis on the multiplicity, and complexity of legal discourses as fields of asymmetrical expressions of power. According to Jane Collier and June Starr, "historical analysis thus becomes a dynamic aid in understanding the role law plays in changing asymmetrical power relations among social groups, and how that role is limited" (1989:1). By focusing on historical power differentials, and examining the relationship of law in Mi'kmaq society with the larger Canadian society, the analysis of who uses what legal resources, when, how and why, will lead us to notions of legal consciousness. In understanding differing expressions of the meaning of justice, how those meanings are shared or not, in Mi'kmaq society, can be determined. By making such determinations we can learn about identity formation and its cultural manifestations.

Culture is interpreted here as something that is continually produced and reproduced by social actors who construct and articulate, in a myriad of ways, multiple

⁸ Merry is discussing the Western (as in North American) legal system here. I suggest that other forms of laws and legal systems occur in non-Western societies are also products of the cultures from which they

meanings of what they consider valuable in identifying themselves to others, and the reciprocal interactions of this process. Cultural constructions, local and extralocal, are unevenly negotiated, and yet these identity claims are often expressed as elements of social regulation. According to Gerald Sider and Gavin Smith (1997:13):

We need to develop ways of seeing 'culture', and in particular the splits, tensions, and antagonisms within a culture, not simply in history but as history: the continual formation of culture and cultures through the assertions, rejections, and necessarily incomplete acceptance of the forms of knowledge and ways of being that power creates.

Following Gavin Smith, I argue that the productivity of culture increases at historical moments of heightened resistance because the valued components of culture are challenged and threatened from without, and so must be articulated within, each individual identifying with or against relevant components (1999:57). It is within historical moments of heightened resistance and acquiescence, that an analysis of Mi'kmaq agency is undertaken to document creative processes of legal consciousness construction, and adaptation, in the production of culture, as the central objective of this thesis.

By comparing early contact, colonial, and contemporary, periods of Mi'kmaq juridical history, I examine changing discourses concerning the formal and informal principles that define social relations in everyday life, paying particular attention to social inequality and power relations. I examine the shifting processes by which Mi'kmaq law ways have been, and are, developed, contested, and embedded, in cultural, social, political, economic, and spiritual institutions, as Mi'kmaq legal ideologies and practices. How and why certain legal discourses get reified and others get silenced are political processes, special attention is paid to examining the impact of colonization on Mi'kmaq

emerge and are always historically situated and locally distinct.

juridical experiences, the development of harmony ideology, and Mi'kmaq strategies of resistance to domination. Further analysis focuses on how contemporary forms of Mi'kmaq legal consciousness operate on the ground, in terms of relations with mainstream justice systems, the recent developments in indigenous justice practices, and issues of self-government or, Mi'kmaq justice as identity productions.

The Anthropology of Law and the Current Conundrum

Debates and projects within the discipline of anthropology have a long held a focus examining indigenous law ways. Ideas about customary law, conflict, origins of rules, structures of social order, crime and punishment, were of interest to early researchers whom often understood culture as a uniformly shared set of ideas, a homogenous pattern of living, understanding and behaving. People studying indigenous law and justice practices tended to examine these societies based on assumptions and principles derived from Eurocentric, paternalistic, and elitist ideologies of colonial superiority.

It is inappropriate to study law in isolation, or as a closed system, separate from other aspects of culture (Nader 1969:9). Generalizations derived from legal positivistic approaches fail to capture the fluid and diverse natures of the social aspects of legal consciousness. Most early legal studies did not consider individual, or collective, agency as constituting legal social relations. Misinterpretations of indigenous life ways as based solely on static customary practice, without consideration of agency, or local diversity, helped to justify colonial pursuits of paternalistic assimilation, elimination and conquest. They presented aboriginal practices in bounded and static categories, setting up (false) dichotomies based on ideas of primordialism, and primitiveness, within an evolutionary

framework. The portrayals suggested that within the evolutionary scale, indigenous societies were primitive, traditional, irrational, underdeveloped, unchanging, and uncivilized; a presentation that contrasts and elevates modern, technologically advanced, bureaucratic, and civilized nations.⁹ These binary modes of analyses have contributed to ongoing social inequalities, perpetuated by colonial dichotomies, and used to control and assimilate the 'uncivilized' toward 'civilization'. From a Eurocentric perception, indigenous cultures exist as societies without law, a characterization that has contributed to stereotypical ideas that aboriginal peoples lived in a state of simplistic harmony, and thus, did not require any dispute management or have any legal consciousness.

Additionally the application of Eurocentric understandings of property as the analytical base for indigenous justice, is a problem, as indigenous cultures had alternate and often non-comparable, conceptions of property stemming from their communal lifestyles, and the integration of their spiritual, political, economic, and social practices., If discovered at all, indigenous justice practices were misunderstood through such interpretive lens. Other researchers following similar approaches deemed kin based indigenous societies as without law, and thus inferior, because their social organization was unrecognizable.¹⁰ These portrayals supported the hegemonic dominance of western legal systems, provided justification for colonization, and thus remain in the colonial consciousness of many non-indigenous minds. Colonial legal consciousness continues to manifest today and the political, economic, and social consequences for First Nation

⁹ I am thinking of Maine and Morgan's evolutionary frameworks here. While contributing greatly to the foundations of legal anthropology, these works are often criticized for their shortcomings today. I argue that they should not be summarily dismissed as they are indicative of the interpretation practices of that era and form a base from which to make perhaps more successful analyses of Indigenous juridical processes.

¹⁰ Evans-Pritchard argued that the Nuer had no law because they had no institutions of authority or bodies enforcing social control (1946:6).

peoples are serious. These shortcomings are critically addressed here because new sorts of problematic binaries are emerging from ongoing misinterpretations of indigenous experiences in mainstream courts, and their resistance to these experiences.

The current conundrum is that many recent projects (usually outside of the anthropology of law) examining aboriginal justice, continue to place it in a framework that is largely oppositional, dichotomous, and not ethnographically situated. Using generic notions of primordial tradition, employing ahistoric analyses of custom, and models of homogenizing pan-Indianism, to highlight basic differences between native and non-native concepts, these studies fail to represent the tremendous variance present within each First Nation community (for example Silverman and Nielsen 1996, Ross 1996). Consideration of the impact of these approaches, particularly in terms of their failure to address power relations, as manifested in perceptions of local justice, and legal practices, in moments of rapid sociocultural change, is needed. A critical eye must also be cast upon the reasons such notions of categorical distinctiveness have persisted and to what ends.

This thesis attempts to counter this conundrum by examining legal consciousness as a component of cultural production, and as the topic of analysis, rather than trying to find evidence of reified categories of universal aboriginal justice concepts. It also provides an exposition of the problems and consequences of applying generic justice practices and categories without considering internal contexts. By examining legal consciousness, what people say and do, the local diversity and relations of power, in action, are the reality of everyday life, rather than some idealized vision of what aboriginal justice must be. Through Mi'kmaq legal consciousness, my goal is to come to

some understanding of the social consequences of imposed justice systems, and the various responses those impositions generate, within and between Mi'kmaq communities, as the Mi'kmaq adapt, accommodate, and resist.

This study locally contextualizes Mi'kmaq legal consciousness by examining Mi'kmaq innovations, and cultural malleability, within their legal institutions. Following Bohannan, I use indigenous terms where possible because they reveal the organization of indigenous thought (1967). Following Gulliver, I examine dispute management as procedures, actions and sequences, in order to analyze legal phenomena in its own context, and to understand social processes and ideas at work (1969). This strategy dispenses with binary oppositions and we/ they dichotomies that have proven problematic in the development of local justice programs (see Barsh 1991, Culhane 1998, Hendersen 1997:23, Vincent 1990).

It is important that studies of indigenous legal consciousness be ethnographically informed. Efforts to avoid the naive primordialism that reifies and romanticizes indigenous cultures as static, and homogenous, are made by engaging in analyses of conflicts and contradictions within changing indigenous communities (see Miller, B. 2001, Monture 2000, Sider 1993, Warry 1998). Historicized theories of power are part of a relatively recent development in the field of legal anthropology and I attempt to embrace them here (Conley and O'Barr 1998, Ewick and Silbey 1998, Merry 2000, Miller 2001, Starr and Collier 1989). Further works emphasize colonial imposition and power relations within political, and sometimes comparative, historical frameworks, and contribute greatly to the ethnography of law (Lazarus-Black and Hirsch 1994, Just 2001, 1992, Moore 1998, Nader 1990, 2002, Vincent 1989). Rather than seeking generalizing,

universal claims, static and homogenizing, concepts of culture need critique, and diversity within and between cultures expounded (Geertz 1983, Povinelli 1993, Sider 1993, Smith, G. 1999). Through an analysis of the intersections of the production of culture, and Mi'kmaq juridical discourses, and their various competing manifestations as cultural expressions of legal consciousness, cultural diversity and change are expounded, not flattened.

Current legal studies examine the significant pragmatic developments in First Nations' communities in Canada, and around the world, as indigenous rights issues, land claims, sovereignty, and identities, are challenged within political, economic, social and legal spheres ¹¹ (Asch 1997, Culhane 1998, Deloria and Lytle 1984, Fienup-Riordan 1994, Miller, B. 1995, 1996, 2001, Monture 1995, 1999, Pommershiem 1995). Debates around legal pluralism are questioning universal ideals of liberty, equality, impartiality, as products of European modernity, colonial law, and processes of capitalism (Abel 1981, Depew 1996, Jackson 1991, Nader 1990, 2002). Law is looked to as a site of contest and resistance, and in terms of asymmetrical relations in the every day, lived experience, of members in a given society (Lazarus-Black et al 1995, Moore 1998, Warry 1998). Important questions about the symbolic manifestations of power, authority, legitimacy, are interspersed with conceptions of continuity, persistence, and ruptures, as the discipline shifts to examinations of legal discourses and ideologies as manifested in relationships between individuals, families, communities, states, nations, and global networks (Merry 1992, Conley and O'Barr 1990, 1998). These questions are addressed

¹¹ According to Benedict Kingsbury (1998), there was a shift from the early 1970s when indigenous peoples transformed from a prosaic description without much significance in international law and politics, into a concept with considerable power as a basis for group mobilization, international standard setting, transnational networks and program activity of intergovernmental and non-governmental organizations.

here as Mi'kmaq participate in juridical reform and shifting restorative justice movements.

Conclusion

The key area of inquiry that theoretically frames this work is the intersection of culture, history, and changing manifestations of legal consciousness in Mi'kmaq juridical discourses and practices. This project historicizes Mi'kmaq juridical experiences through an analysis of law relations embedded within social processes and practices. I explicate my understanding of the construction of local legal discourses through an empirical ethnographic approach, looking at Mi'kmaq agency, and adaptations of Mi'kmaq justice over time. I then interpret the place[s] of these cultural productions in the formation and articulation of Mi'kmaq identity, in order to highlight the connection between cultural constructs, historical events, legal consciousness, power relations, and resistance, as they manifest in Mi'kmaq justice programs, and Mi'kmaq justice culture.

This thesis examines the ideas people find compelling, and on which they base their conduct, rather than focusing solely on the rules constructed, by themselves, and others, to control behaviour. It also looks to ways of understanding the hegemony of ideational control, and its interaction with social institutional constructions within Mi'kmaq communities (see Conley and O'Barr 1990). Sally Engle Merry (1990) sees law as an ideology with hegemonic characteristics dependent on legitimacy and consent. Laws and systems of justice can shape meanings and values, organize the social world, and then, in turn, contribute to maintaining power relations through its interpretive framework. The relationship between law, state power, and cultural dimensions of law, become particularly significant during moments of heightened cultural and social change,

such as during colonization, or assertions of sovereignty, situations and moments of crisis which are particularly salient in Mi'kmaq country.

The social construction of meaning is an effective avenue for understanding justice. Legal meaning is symbolically produced in culturally specified templates, which we need to explicate and translate, in order to understand local knowledge (Geertz 1983). How does culture penetrate law, and how law pervades culture, are the central questions for this interpretive framework.¹²

The methodological framework examines Mi'kmaq legal consciousness historically, within the context of Mi'kmaq institutions, discourses, and practices. This framework delineates the cultural legal infrastructures at the local level, and locates them in the larger national contexts, as they relate to issues of power, and to struggles against social injustice in Canada. How Mi'kmaq legal consciousness is constructed and contested within Mi'kmaq society, and negotiated between the larger societies, will be examined to reveal underlying political processes and power differentials which are framed in discourses of custom, tradition, colonialism, sovereignty and legal pluralism.

These themes are critically explored with special attention given to their oppositional nature with respect to mainstream justice ideologies, and the effects dichotomous and outward looking strategies have on the construction of legal consciousness within Mi'kmaq society. These strategies tend to flatten local diversity and fail to consider questions of legitimacy, authenticity, accessibility and efficacy internally. My research strategy seeks to challenge the discourses that reify western categories classifying values and behaviours that uncritically contribute to false dichotomies, and hierarchical

¹² Lawrence Rosen for example looks at the nature of case law in modern Morocco courts to understand how law pervades culture and culture informs law (1989:303).

ordering, thus obscuring what is really going on - on the ground - in the formation of Mi'kmaq legal consciousness. Other critical areas of inquiry involve the concepts of communitarianism, and cultural distinctiveness, as they pertain to the politicization of these legal discourses (Crawford 1992, Depew 1996, LaPrairie 1996, Warry 1998, Webber 1993).

How are new ideas introduced in legal consciousness? Which are accepted and rejected, how are they articulated and re-articulated? Pertinent issues to be examined through these questions involve the creation, legitimation, and adaptive strategies, utilized by the Mi'kmaq as they develop ways to combat daily problems. Further to these are the arguments they construct to validate those methods and values, deemed traditional, within contemporary processes. The main thrust of this research examines legal consciousness as a site of struggle and as articulations of Mi'kmaq identity. Relevant juridical events and actions, and how various social actors, within Mi'kmaq society, interpret them, are presented. Examining formal and informal conflicting practices, how they are talked about, and acted upon, help delineate what factors shape and influence the construction of legal consciousness. The contests, presentations, and transformation of legal consciousness, and the processes by which they are transcribed and enacted, as discourses and ideologies within Mi'kmaq institutions, are constitutive of identity formation and as Mi'kmaq culture.

Important to this discussion is the concept of folk law. According to Bruce G. Miller, "folk law is most closely constrained or excluded regarding contentious problems that are internal to the community, engage incompatible or irresolvable concepts, and concern family survival (especially the vexing problem of the allocation of resources)"

(Miller, B 1995:142).¹³ In order to understand contemporary Mi'kmaq conceptions of justice I consider the changing significance of traditions, symbols, and performances, comprising Mi'kmaq justice culture as it relates to changing legal consciousness over time. Taken together, the aboriginal, colonial, and contemporary, expressions of Mi'kmaq legal consciousness provide the basis of analysis of Mi'kmaq justice discourses, and the processes that facilitate their constructions. The relationships between Mi'kmaq legal consciousness and their political, economic, and social facets will be drawn to locate these discourses within larger sociopolitical contexts, namely Mi'kmaq cultural institutions, and Canadian institutions, and the various fields of power within which they operate.

¹³ Miller also suggests that the term folk law is better used to describe uncodified, lived law in use or previously in use at the local level than the term customary law. Customary law refers to elements of indigenous law codified by a colonial administration for its own benefits and purposes (Miller 1995: 141-142, see also Falk Moore 1986 and Nader 1990).

Chapter Three: L'nuwey Tplutaqan (Mi'kmaq Law)

Introduction

In this chapter I examine early social organization and the place of law in Mi'kmaq culture. Mi'kmaq culture was, and as will be argued later, remains, constituted by formal and informal practices designed to direct relations between members of society. Socially constructed expectations and standards around which these practices were created, acted upon, enforced, challenged, and changed, are based upon underlying principles of Mi'kmaq justice and legal consciousness. Expressions of these practices and ideas occurred in daily interactions, reflecting the interconnectedness of Mi'kmaq physical, social, and spiritual realms. Justice was not a separate or self-contained system, nor was it differentiated from other social systems and processes. Aboriginal Mi'kmaq justice was about relationships. The following sections examine Mi'kmaq juridical culture in the socioeconomic, political and spiritual organization of every day life during the early contact period.

During early contact, Mi'kmaq law ways generally facilitated the necessities of subsistence, survival, and getting along. As new incidents, environments, and institutions emerged, Mi'kmaq laws also emerged, within a complex web of patterns, to address disputes, and to regulate social, spiritual, political, and economic interaction, in ways that were meaningful, made palatable to the community, and fit with their value systems. Social discipline was a function of the existence and continual renewal of ties of kinship and responsibility (Barsh 1991). The premises of Mi'kmaq justice were both spiritual and practical, and focused on the wellbeing of the community, with the goals of reinstating

wrongdoers into the community, or finding alternative solutions to problems.¹⁴ Law was not a neutral regulator of power, but instead, the vehicle by which different parties attempted to gain and maintain control and legitimization of a given social unit (Nader 2002:117). Mi'kmaq law ways reinforced the power structures within their society and enabled them to prosper culturally. They developed legal strategies for resource extraction, cohabitation, geopolitical alliances, and day to day living that facilitated their collective survival, and their ability to identify themselves as a group. Laws help create and invoke social identities reinforced daily in situations of conflict and contest, within and between, Mi'kmaq society and other cultural groups. During this period of early contact the Mi'kmaq constituted separate and sovereign peoples subject to their own law ways.

In Mi'kmaq culture, law was not a separate, written, codified, self contained system, nor was it differentiated from other societal systems and processes. Justice practices were orally transmitted, evident in the spiritual values and principles within the political, economic, and social interaction of the individuals and communities constituting the cosmos of Mi'kmaq culture. Justice was conceptualized as involving issues of survival, power, and identity. It also concerned conflict, wrongdoing, dispute, as well as the prevention, and balancing, or management of these problems when they occurred. The various management of conflicts depended on the context in which they

¹⁴ According to Nash archaeological evidence indicating increasing complexity is apparent in settlement patterns (1988). Archeological research is fairly recent in Nova Scotia and yet more than 300 sites have been recorded and indicate long occupancy (more than 10,000 years) with high population densities.

occurred.¹⁵ The constitution of wrongdoing, and responses to it, were culturally constructed.

The following depictions are not meant to be representative of the entire Mi'kmaq nation for a given period, but are meant to give the reader an idea of how life was 'lived right', and how these ideas were communicated in Mi'kmaq society, and what happened when things went wrong. In other words, I explore early Mi'kmaq legal consciousness and juridical practices. Legal systems do not necessarily need a separate space, conceptual or physical, culturally or institutionally, to exist (French 1996). Law ways and justice do exist without lawyers, codes, courts and cops.¹⁶ The Mi'kmaq had rules for making sure society worked in an orderly way. Orally transmitted, these law ways persisted in some degree, over generations. They had ways of enforcing the rules and ways of dealing with people who did not follow them. These rules and their applications manifest as leadership, law, social control and decision-making.¹⁷ Where possible, I include descriptions of stories, cases, or juridical events, as a way to illustrate how Mi'kmaq legal consciousness was constructed through the experiences of day to day living, and in efforts to manage relations between individuals, the community, and the

¹⁵ See Paul Bohannan (1967) who argues that there are two forms of conflict resolution: administered rules and fighting; law and war.

¹⁶ See Malinowski (1966) *Crime and Custom in Savage Society* and Hoebel and Llewellyn's (1941) *The Cheyenne Way* for early anthropological analysis of rule making and breaking in cultures without western legal characteristics.

¹⁷ This is a framework utilized by Fienup-Riordan (1994) in her work with the Yup'ik in which she challenges the denial of indigenous legal systems by scholars who failed to recognize particular social practices as being legal in nature. In her work with the Dene, Joan Ryan made four assumptions that assist analyses of traditional indigenous juridical knowledge (Ryan 1995). The first assumption is that indigenous peoples had rules for making sure the society worked in an orderly way at all times. The second is that these rules were orally transmitted from generation to generation. The third assumption is that there were ways of enforcing the rules. Fourthly, indigenous peoples had ways of dealing with individuals who did not follow the rules. Along with these assumptions, aspects of traditional governance including leadership, social control and decision making come together to form an approach to understanding the law ways of Mi'kmaq peoples prior to colonial encounters (see Fienup-Riordan 1990).

spirit world. Justice is part of a meaning system, framed by culture, where symbols, rituals, and language, facilitate the creation of commonsense understandings that legitimate core values of the community, and the actions needed to protect and support those values. These law ways are informed by Mi'kmaq spiritual belief systems, and their political and economic social organization practices.

Primary, secondary, ethnographic, and archival sources provided the data to delineate traditional Mi'kmaq juridical processes. The Mi'kmaq relied on oral tradition to transmit information individually and collectively over time and space. While there are no written Mi'kmaq accounts describing their ways of life prior to first contact with Europeans, there are rock drawings and various tree markings that communicated different types of information that guided travelers, marked territories, and maintained tribal records (Roberston 1973, Schmidt and Marshall 1995). The Mi'kmaq used Wampum belts made from coloured shells to record intertribal alliances, wars, trade, and other significant historical events.¹⁸ There are also various oral narratives that reflect what contemporary Mi'kmaq persons believe pre-contact life may have been, as well as stories and symbols, passed down over generations.¹⁹ These constructs of the past are evident in contemporary expressions of legal consciousness.

Written records about early contact with the Mi'kmaq began around 1600, more than one hundred years after the Mi'kmaq first encountered European fishers. Priests,

¹⁸ Wampum belts were used by the Mi'kmaq and other Algonquian peoples. Belts were made from beads fashioned out of purple and white shells, which were sewn into patterns and symbols depicted events and alliances. For example the calumet is interpreted as a symbol of peace. See Whitehead 1982, Henderson 1997.

¹⁹ See Julie Cruikshank's work *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (1998) for a discussion on how story telling mediates between social action and local knowledge and the potential for translating distinctive cultural meanings to diverse audiences. She argues that Indigenous knowledge continues to be presented as an object for science rather than as a system of knowledge that

explorers, traders, and then colonial officers, recorded some of their interactions and observations of the Mi'kmaq. These accounts are helpful, but contain authors' biases. Unfortunately they do not explicitly describe the nature of aboriginal justice practices, or traditional and informal dispute management processes. Indeed the early explorers, settlers, and missionaries, did not readily accept, nor recognize that the Mi'kmaq in fact had juridical processes.

Mi'kma'ki: Subsistence Technologies and Social Organization

Mi'kmaq peoples occupied Mi'kma'ki, the vast and ecologically diverse territories across what are now the Atlantic Provinces, Gaspé Peninsula, and New England States. According to Wicken, "we do know that beginning around 2500 BP, the people living in the Maritime region of Atlantic Canada began slowly to develop an identity distinct from other people to the west of them" (2002:26). Oral histories suggest several differing origin stories entailing migration from the southwest to the northeast, and others implying a time immemorial connection to the place through ancestral ties to an originating supernatural being (Paul 1993, Rand 1894, Whitehead 1988). Just how long the Mi'kmaq lived in the region is not definitively known, but certainly they have been a vital part of the eastern landscape for a very long time. Linguistically, Mi'kmaq are part of the Algonkian language group, and are included in the Eastern Woodlands cultural designation. This work focuses generally on the Mi'kmaq in the territory of present day Nova Scotia, and on Mi'kmaq residing on Cape Breton Island specifically.

The early Mi'kmaq fished, hunted and collected. Their subsistence practices were governed by the concept of netukulimk. Within the concept of netukulimk were practices

could inform science and cautions anthropologists to examine the ways Indigenous peoples confer meaning within the context in which narratives are produced.

aimed at co-existence. These practices reflect the holistic interconnectedness of Mi'kmaq life ways embedded in their tribal consciousness, and governing their behaviour, particularly in relation to establishing means for survival, such as sharing, providing, and honouring skills. Ntu lwo, means to hunt, and netukulimk denotes the proper customary practice of seeking bounty provided by the Creator for the self-support and well-being of the individual, and the nation, and thus is intimately tied to traditional jural rights both individually and communally. One's ntu lw'mi, or one's place to hunt and fish, taken in its broadest sense, is the tract on which one practices netukulimk (Chute 1999:524 n.58). Special resource extraction rituals and rules, combined with political and economic organization, divided up and protected the resources in Mi'kmaq territories along family lines, facilitating enduring relationships with the land, seas, and sky, and with the intangible worlds of the Mi'kmaq spiritual belief system. The Mi'kmaq named places, crafting their tribal history, and celebrating their connections to the land, by implanting cultural meanings within collective memories, as knowledge is shared across generations, through use, stories about use, and recognition of ancestors' use (see Basso 1996, Cruikshank 1998).

Because they were largely maritime peoples living in a diverse environment, Mi'kmaq had access to great varieties of food, allowing for increased opportunities for survival in the event of the demise of a particular species. Although there may have been periods of starvation, generally the Mi'kmaq flourished, early visitors commented on their health and attributed it to, "a good soup full of fat" (Denys 1908). Flexibility in resource extraction potential enabled the Mi'kmaq to successfully live and reproduce

their populations for millennia.²⁰ "Abundant and relatively stable food supplies permit greater population densities to survive, possibly resulting in the development of more complex cultures ... it has been estimated that as much as 90 per cent of their diet came from the sea" (Miller, V. 1995:349). Similar to the aboriginal maritime societies of the Northwest Coast of North America, the Mi'kmaq evolved into complex hunting and fishing societies.²¹ Although the Mi'kmaq were semi-nomadic, they exhibited a higher degree of sedentism than is usual among northern hunters and collectors (Miller, V. 1995).

The Mi'kmaq residence patterns and seasonal movements relied on the type of resources available in a given area. These resources varied significantly over the vast territory of Mi'kma'ki. In areas where there were greater concentrations of food, populations tended to be higher. Mi'kmaq bands congregated in semi-permanent village bases, established along waterways, where there was an abundance of fish and shellfish to be extracted during the spring and summer. During the fall and winter months, the bands separated in smaller familial groups to hunt. "Territoriality set in place a formal mechanism regulating economic relationships among families. By establishing where groups of related households would hunt during the winter, the Mi'kmaq privileged the customary rights of families living in each territory" (Wicken 2002:34). The winter hunting groups consisted of smaller familial groups, while in the summer, these family groups gathered into larger settlements, offering opportunities for new alliances through

²⁰ Virginia P. Miller estimates that the aboriginal Mi'kmaq population exceeded 35, 000 and that the circa 1600 population estimates greatly underrepresented the true number of pre-contact aboriginal population (Miller, V.P. 1976).

²¹ See for example Charles Menzies "First Nations of BC and Overview"(2000), Wayne Suttles' *Coast Salish Essays* (1987), or Robert Muckle's *The First Nations of British Columbia* (1998) and Dan Boxberger's *To Fish In Common* (1989).

trade and marriage. Meat and fish were dried and smoked. There was collective hunting of larger marine mammals and land animals such as caribou, muskox, bison and mastodon (Nash 1977:132). Other resource extraction was also cooperative. Weir fishing, for example, required that people work together to construct the weir and harvest the catch. According to one account of Mi'kmaq fishing technologies operating around 1610, the weir usually belonged to those who constructed it and they shared equally in the catch, "irrespective of who attended it" (Wallises[s] 1955:28).

The Mi'kmaq lived in conical wigwams covered with birch bark and mosses. They crafted canoes and other household items from birch bark, and made wooden kettles in tree stumps to boil their food (Martin 1975). Summer settlements were selected for close proximity to navigable water, abundant fish and shellfish resources, a well-drained and level site, and a good water supply (Hoffman 1995:130). Villages were fortified, and "within the enclosures were many lodges both large and small, one of which was as big as a market hall wherein dwelt numerous families" (Lescarbot 1911:356-357 in Hoffman 1995:132).²²

Selection and design of the home site was the responsibility of the male head of the family or of the band (Hoffman 1955:136). Women were responsible for setting up the wigwams and for transporting the poles between camps in the winter. The women and girls carry all belongings to the new site and each has a particular duty in preparing the home. Mi'kmaq women had vital roles in ensuring the smooth operations of daily life and daily encounters.

The wife of the head of the family or the wife who has born the first boy takes charge and has everything necessary brought to her ... It is also her duty to assign

²² It is possible these fortifications may have existed prior to contact as protection against other aboriginal enemies or they may have emerged as a response to increasing French settlements in Mi'kmaq territories.

his place to each one, according to the age and quality of the respective persons and the custom of the nation. The place of the head of the family is on the right. He yields it sometimes as an honour and courtesy to strangers. The women always occupy the first place near the door, in order to be all ready to obey and serve promptly when they are ordered (LeClercq, 1910:101-102 in Hoffman, 1955:138).

The Mi'kmaq creatively used the materials available to them to assist in their daily life. Before the arrival of Europeans, Mi'kmaq people had mastered techniques, which enabled them to make tools and equipment from, animal bone, ivory, teeth, claws, hair, feathers, fur, leather, quills, shells, clay, native copper, stone, wood, roots and bark (Nova Scotia Museum Series, 1978). The Mi'kmaq were also great weavers, using dyes and different weaves in making baskets and fish traps, as well as mats, and bags, from reeds, roots, grasses and barks. Birch bark was an important item used in making containers, decorative pieces, and a wide-bottomed canoe that was able to travel in both seas and shallow rivers. The canoes of the Mi'kmaq enabled them to travel both inland and on the oceans and were capable of remarkably long journeys between Cape Breton Island and Newfoundland and Labrador. The inland water routes connected tribal groups and were conduits of trade, warfare, and alliances. The Mi'kmaq had snowshoes and toboggans for winter transportation.²³ These technologies enabled the Mi'kmaq to be highly mobile over many types of terrain, which helped them to be efficient and effective traders, food procurers, and defenders of their lands against their enemies.

Sociopolitical Organization: Local Chiefs, Elders and Families

Due to the expansive territory, the abundance of diverse resources, and the ability to extract those resources to support a higher population density, the Mi'kmaq required

²³ The taba'gan of the Mi'kmaq is likely where the English toboggan name is derived (Wallises 1955:51).

social and political organization beyond the local territory.²⁴ Their geopolitical strategies included the division and defense of territories and resources based on family and tribal membership. However, the primary social unit of the Mi'kmaq was the family. The family is also the primary source for establishing and reinforcing community values that were the foundation of Mi'kmaq aboriginal justice and legal consciousness. Mi'kmaq lived in bilaterally extended family units. Residence patterns tended to be patrilocal, after a pre-marriage matrilocal residency in which the potential suitor demonstrated his worthiness to the woman's family in a form of bride service. Early visitors documented the rules and exchange in courtship and marriage. They involved elaborate gift exchange, permission seeking, and subsistence gathering rituals.

Other people who were not blood relatives may have been present in these bilateral kin groups if they chose to align themselves with the head of the family, the Saqmaw or Chief. Several family groups together formed a local band; each local band had its chief (Miller, V. 1983:42). The territories of the local chiefs were coextensive with the area occupied by the inhabitants of a single summer village. Within the village, the chief headed a council of elders, which consisted of the heads or representatives of the families in the settlements (Hoffman 1955:516). Membership in the local band was fluid:

The outstanding characteristic of the local band was the fluidity of its membership. Flexibility in residence was fostered by bilateral kinship reckoning, bilocal postmarital residence, the absence of exogamous unilineal kin groups, and considerable personal choice in marriage partners. This flexibility of Micmac social organization increased its ability to redistribute people to different locations as economic and personal situations warranted. Groups could alter their size with

²⁴ Contrary to the conclusion of Speck (in Chute 1999) the early French historical sources indicate that Cape Breton possessed a heavy Indian population even before the middle of the 18th century. This population resulted from the natural advantages of the island - namely its magnificent fishery (Hoffman 1955:540).

relative ease. This characteristic of cognatic and composite tribes creates residential groups which have adaptive advantages in environments where outstanding concentrated resources existed, but where year to year and season to season variability in location and abundance also occurred (Nietfeld 1981:457).

Mi'kmaq society was stratified, and positions of valued status were limited so that not all those of sufficient talent to occupy them, could achieve them (see Fried 1967:109).

The social order included slaves, commoners and chiefs. Chieftainship was predominantly hereditary. Primogeniture was common practice; the eldest son in a chiefly family began training at an early age in order to meet the expected requirements. If the eldest son did not demonstrate the exceptional qualities for leadership, and there were no other male children directly descended from the chief, his sister's eldest son was a possible choice. If this reckoning process failed to produce a chief, the search expanded within the extended family network (Hoffman 1955, Prins 1996, Thwaites 1898, Wallises 1955). When a chief believed he was going to die, he would designate a successor (Wallises 1955:171). Chiefs commonly held their positions for life, unless they committed a crime, for which they could be deposed. There is no direct evidence that females held chiefly positions at contact.

Chiefs were at the apex of local authority. They were spiritually powerful, or closely associated with a pouin or shaman, whose spiritually imbued abilities garnered them significant power, status, and prestige. Respected elders ranked a close second to Chiefs and pouin. As a man ages, and accumulates prestige from successful hunting and warfare, he becomes more active in the public life of his tribe. "It was the old men who spoke first at the public feasts and who constituted the council of elders. These were accorded respect as befitted their age and deeds; the youths were silent before them"

(Hoffman 1955:310). An elder may also be pouin. As women aged, they, too, gained status:

Old age was probably a time of relaxation of restraints. It was no longer necessary for them to undergo menstrual seclusion; they were cared for by their children or relatives, and were given respect and consideration by the younger people; and their advice was sought in matters concerning illness and the use of herbs. Furthermore this was probably the time when a few of them could gain genuine prestige by becoming shamans (LeClercq 1910: 229-233 in Hoffman 312).

Respect for elders was reinforced through daily activities in the home and through public deference in ceremonies or in any social gathering. With respect to food taboos, of which the Mi'kmaq had many, elders were given the favoured pieces, and always ate first. Generally elders were perceived as embodying wisdom due to their long experience, ability to persevere, their tales of survival, and understandings of the world around them. The respected elders formed a Council of Elders, and together, with the Chiefs and the pouins, likely made decisions that would affect the communities or families within the communities, particularly those related to dispute management, settlement relocation, division of territories and resources, war and peace. This council was called on to address problems that could not be resolved within nuclear and extended families, where it is likely the majority of problems were addressed. The words and opinions of the respected elders carried weight, and the women, children, and undistinguished young men, were required to adhere and abide by the instructions of the elders and chiefs.

Biard suggests decisions of the council depended upon a unanimous vote on the part of the members and the only such decisions were regarded as giving the chiefs authority to act upon a certain matter. Mi'kmaq political organization was characterized as being dependent upon the voluntary association of the adult male members of the community - women, children, and young men who had not yet killed their first moose having no part in the system. The latter were apparently required to obey without question the decisions of the councils and the chiefs. (Hoffman 1955:516)

These decisions usually revolved around affairs between tribal groups, such as declarations of war, seeking revenge for a wrong doings, and the division of resource territories.

Kinship was a critical foundation of Mi'kmaq political organization. Chieftainship was the product of kinship affiliations, as well as superior personal ability, and was customarily passed down through families having a tradition of chiefs, and members capable of assuming the roles. Basic to the power of any chief was a large, cohesive, and stable kinship group of which he was the recognized leader. The larger the unit, the more powerful the chief, because of the greater number of alliances and affiliations traced between it, and other groups (Hoffman 1955). In addition to belonging to a large and powerful family, leadership ability, superior intelligence, generosity, courage, and aggressiveness in war, and superior hunting ability, were the desired qualities for a chief (Miller, V. 1983:47). Chiefly authority was secured by means of example, customs, kinship and family alliance rather than coerced obedience (Nietfeld 1981:466). Biard described the relationship of the chief and his family as follows:

There is the Sagamore, who is the eldest son of some powerful family, and consequently also its chief and leader. All the young people of the family are at his table and in his retinue; it is also his duty to provide dogs for the chase, canoes and provisions for bad weather and expeditions. The young people flatter him, hunt and serve their apprenticeship under him, not being allowed to have anything before they are married, for then only can they have a dog and a bag; this is, have something of their own, and do for themselves. Nevertheless they continue to live under the authority of the Sagamore, and very often in his company; as also do others who have no relations, or those who of their own free will place themselves under his protection and guidance, being themselves weak and without following. Now all that the young men capture belongs to the Sagamore; but the married ones give him only a part, and if these leave him, as they often do for the sake of the chase and supplies, returning afterwards, they pay their dues and homage in skins and like gifts (Biard in Thwaites JR III:89).

Oratory was an important skill because chiefs needed to convince followers to participate fully in their directives, such as warring, or forming alliances with other families and bands, and complying with territorial divisions for hunting and fishing. Chiefs were required to recite their family ties in order to remind people of their kin ties and obligations. These activities were significant to identity formation and the building of a Mi'kmaq legal consciousness, lineage mattered. Chiefs and elders would recite their genealogies in speeches at marriages and funerals in order to preserve the histories of the families, communities, and their ties to one another, the land, and the spirit world. The speeches included descriptions of important events, acts of courage and generosity, exceptional hunting and fishing adventures, and perhaps most importantly, instructions on what constitutes desired qualities for living right in the Mi'kmaq way:

In order to keep alive the memory, and preserve by tradition from father to son, their history of their ancestors, and the example of their fine actions and of their greatest qualities, something of which would otherwise be lost on them, and would deprive them of a knowledge of their relationships, which they preserve by this means; and it serves to transmit their family alliances to posterity. On these matters they are very inquisitive, especially those descended from the ancient chiefs. This they sometimes claim for more than twenty generation, something which makes them more honoured by all the others (Denys 1908:410).²⁵

The Mi'kmaq practiced polygyny, allowing chiefs to expand their networks of followers and alliances with other family groups. The greater the family size, the greater the contributions to the chief, which in turn improved the chief's ability to redistribute goods to a larger number of people. Fulfilling such economic roles enabled the chief to gain the respect needed to keep followers in times of war, or during other high risk situations (Thwaites JR II:101).

²⁵ Nicolas Denys was writing about observations he made in 1670s in Mi'kmaq country.

Chiefs provided subsistence for all connected to them and did not accumulate individual wealth. The poorer a chief appeared, the greater his status, because his poverty was attributed to his tremendous generosity and kindheartedness toward others, values highly regarded among the Mi'kmaq. Generosity in ranked societies holds an important redistributive function, and may translate into how Mi'kmaq legitimated claims to a particular position in the social hierarchy. Successful chiefs accomplished political objectives while maintaining culturally appropriate moral images.²⁶

The occupation of this chief was to assign the places for hunting, and to take the furs of the Indians, giving them in return whatever they needed. This man made it a point of honour to be always the worst dressed of his people, and to take care that they all were better clothed than he. He held it as a maxim, as he told me one day, that a rule and a great heart like his, ought to take more care for others than for himself because good hunter as he was he always obtained easily everything which he needed for his own use, and that as for the rest, if he did not himself live well, he should find his desire in the affection and hearts of his subject. It was as if he wished to say that is treasures and riches were in the hearts and in the affections of his people. (Biard in Hoffman 1955:512)

Exceptions to chiefly generosity were rare. One chief gained notoriety by the fact that he was selfish, cruel, conceited, and vicious. People, "receive him, more through fear than through friendship ... [T]hey all wished for his death; he is not liked by a single one. If they are delinquent in their duty, he beats them, but not when they are together, for in this case he could not do it with impunity" (Denys 1908:195). When chiefs were not generous, followers could withdraw their support and ally themselves with other families; however, it may have been difficult for immediate family members to leave, as kinship was the ultimate social glue. There are instances when one who desires to become a

²⁶ See Sergi Kan's (1989) work on the Tlingit Potlatches for an examination of the dialectical relations of contradictory principles of hierarchy and equality, competition and cooperation and how they are reconciled in ritual domains of the Tlingit mortuary complex.

chief, competes with a seated chief for the position. Biard indicates that troubles arose when one member did not want to pay tributes to a chief:

Now all the young men captures belongs to the Sagamore [chief]; but the married ones give him only a part, and if these leave him, as they often do for the sake of the chase and supplies, returning afterwards, they pay their dues and homage in skins and like gifts. From this cause there are some quarrels and jealousies among them as among us, but not so serious. When, for example, some one begins to assert himself and to act the Sagamore, when he does not render the tribute, when his people leave him or when others get them away from him; then as among us, also among them, there are reproaches and accusations, as that such a one is only half a Sagamore, is newly hatched like a three-days chicken, that his crest is only beginning to appear; that he is only a Sagamochin, that is, a baby Sagamore, a little dwarf. And thus you may know that ambition reigns beneath the thatched roofs, as well as under the gilded, and our ears need not be pulled much to learn these lessons. (Thwaites JR III:87-95).

From the above description it seems informal practices were acceptable in challenging chiefs who did not meet public expectations. Insulting an individual and suggesting that they are not mature or capable of their position was likely an effective social control mechanism. Chiefs protected their positions by behaving according to culturally prescribed norms that allowed them to ‘save face’, and to not bring any shame on themselves by being just, fair, and generous. In addition to their kinship connections, generosity, and oratory skills, chiefs needed to inspire confidence, demonstrate superior intelligence, and leadership, all within the much valued concept of the ‘great heart’. They were required to ‘act like a Chief’, or behave with a dignified demeanor in all of their public actions. Those whom held supernatural or spiritually sanctioned powers, had a distinct advantage, particularly those with outstanding success in hunting, fishing, warfare, and dispute management.

Following these influential people was a class of commoners, who also held power in that they could choose to ally themselves with whoever treated them best.

Among commoners, age status afforded advancement in the social hierarchy. "With the accumulation of prestige and attainment of old age, a commoner could also look forward to certain honours and privileges, and to having his voice heard and his words weighed in the councils of the nation (Hoffman 1955:577). Chiefs were responsible for the care of orphans and found homes for them with the best hunters, where they were raised as if they were natural children of the head of the family (LeClercq 1910:238). The lowest class was composed of slaves, usually taken captive during wars and raiding parties. Male commoners who were not associated with a large extended family could not hope to attain the necessary prerequisites for chieftainship; however, they could aspire to prestige and reputation through their activities in war or in hunting. Those that could not inherit a position competed for rank and prestige among the other young men.

For a young man to rise in the esteem of his people, it apparently was necessary for him to be superior in hunting, to be among the bravest in warfare, to be generous and hospitable to all the people in his camp and to visitors, stripping himself of all his wealth and seeking only the affections of the people. It was also absolutely necessary for him to remain unpretentious and humble; otherwise it would be said that he was a 'half Sagamore' [chief], a baby ... (Hoffman, 1955: 274).

Women were spiritually powerful and followed certain restrictions during their menstruation. As with some other aboriginal societies, menstruation was very powerful time in a woman's life cycle and she had to be careful that she did not inadvertently cast this power to some negative result. In order to protect both menstruating women and the community, the females were secluded in special huts during their menses and assisted by elder women (Hoffman 1955:277). They were not permitted to come into contact with hunting and fishing tools, or any utensils that were used daily. They were not permitted to

eat certain foods, especially the foods meant for others to eat because it was feared that their power would alter the success of the food procurement.

Early Micmac believed the spirit of an important food animal must be protected from the contamination resulting from contact of its flesh with women. Menstruation, parturition, and death carried contagion and insult, particularly to moose and beaver. Only a bad girl or woman would eat beaver while menstruating; for the smart beaver, discovering this, would not allow itself to be captured by a man who had permitted it to be eaten by his unclean daughter or wife. For two months following childbirth women might not eat moose or beaver. Neither they nor menstruants might eat meat or drink soup from a bark kettle or a container in which beaver or moose had been cooked. Only if this taboo was observed could good hunting continue (Wallises 1955:108).

Thus it was important for the community that women follow these taboos or else risk jeopardizing the group. I have not come across evidence of what happened if these taboos were broken but likely if hunting or war efforts were going wrong these taboo systems provided a place to lay blame and find explanations. These forms of control are an example of how day to day interactions, governed by belief systems and economic pursuits, make up part of the law ways of the Mi'kmaq.

Mi'kmaq society was a stratified society with a complex networking of relations and competition over desired positions. Family was the core unit of social organization. Elders within families clearly held influence and their wisdom was sought in decision making and dispute management. Beyond the local level was a national tribal organization that joined Mi'kmaq across seven districts under one government, language and according to the Mi'kmaq, one mind.

Mi'kmaq Grand Council: A National Political Organization

The traditional view held that the Mi'kmaq world consisted of seven directions, a number significant to the Mi'kmaq as it denotes the number of geopolitical regions within the Mi'kmaq cultural universe. Oral history tells us that the Mi'kmaq nation comprised

seven districts divided according to the geographical landscape and natural boundaries, such as rivers (Hoffman 1955).²⁷ Mi'kmaq polity had three levels: local, district, and national. Cape Breton Island, for example, formed the district Unama'ki, which translates into 'foggy place'. This area was well populated due to an abundance of resources, particularly large game and fish. Unama'ki was, at times, considered the traditional head of Mi'kmaq territory, with mainland Nova Scotia as the torso, and the other districts as limbs (Hoffman 1955:540). This district became a principal gathering place of the entire nation, particularly after the arrival of British, whose intrusion forced the Mi'kmaq up into the more isolated regions away from European settlement. Each district chief participated in a larger national political organization called Mi'kmawey Mawio'mi, or the Mi'kmaq Grand Council.²⁸

The Grand Council was the apex of Mi'kmaq political, economic, and spiritual organization. A Grand Chief and a governing council, consisting of a Grand Keptin, a Putus, and a War Chief, headed the leadership structure of the Grand Council. Beneath the Grand Council executive were the captains or district chiefs. Each of the seven districts of the Mi'kmaq Nation had a chief, chosen from among local chiefs. Local chiefs were chosen from the headman of the most powerful local family. As with other levels of chieftainship, membership in the Grand Council was usually hereditary, provided the

²⁷ According to Janet Chute, anthropologist Frank Speck argued that the Mi'kmaq Grand Council wholly owed its origins to the Wabanaki Confederacy.²⁷ Chute, however, notes that "...the consensus of opinion today holds that more likely it emerged out of traditional seasonal assemblages that the Mi'kmaq held for religious, trade, and military purposes" (Chute 1999:495), rather than from Mi'kmaq participation in the intertribal organization. Historian William Wicken, an expert witness for the Mi'kmaq defense in an aboriginal treaty rights case, argued that there was no direct historical evidence that the Grand Council existed in the 1700s, but stresses that the lack of evidence did not mean that it did not exist. "It only means that there was no historical documentation to make a definitive statement" (Wicken 2002:20).

²⁸ See Janet Chute's work on Mi'kmaq Leadership (Ethnohistory 46:3,1999), Steven Augustine's work on the Grand Council and my Master's Thesis: *Mi'kmawey Mawio'mi: Changing Roles of the Mi'kmaq Grand*

individual had the necessary apprenticeship and skills. These leaders were charged with directing and supporting the people along the 'good path' in their domestic relations. Oral traditions do not suggest that there were any female chiefs in the Grand Council, but do suggest that women were significant supporters and held some influence over the actions in the councils. They could request deliberations on particular events or concerns.

As an oral culture, the Mi'kmaq used oratory and storytelling to pass along their historical 'evidence' prior to the arrival of Europeans and the stories of the Grand Council were no doubt part of that cycle. Although there is debate over the origins of the Grand Council, Mi'kmaq oral tradition indicates that it developed in response to a need for organized interaction with other aboriginal nations in matters of war and trade.²⁹ It filled the need to organize the nation internally to deal with social, ecological, economic, and ceremonial matters, all of which influence community justice issues (McMillan 1996:33).

The Grand Council met regularly to plan and manage the affairs of the nation. A most important management task was the assignment of resource territories. Proper assignment reflected community health, military strength, and cosmological balance of the Mi'kmaq peoples.³⁰ It was the Grand Council, along with their advisors, including respected elders and pouin, or those with special healing and other worldly powers that reinforced the resource laws of the land.³¹ Chiefs and councils allocated access to

Council From the Early Seventeenth Century to the Present (1996, Dalhousie University) for further information on this important Mi'kmaq political body.

²⁹ The designation of 'Captain' likely originated from the influence of the French and is used here for simplicity rather than the Mi'kmaq word which has been obscured.

³⁰ Hoffman suggests the assemblies were formal ceremonies in that they reassigned to extant bands and families those territories which they had traditionally used and were still using; their most important function undoubtedly was the reapportionment of territory of defunct or extinct bands, and the granting of territory to new families or bands (Hoffman 1955:186).

³¹ Speck argued Mi'kmaq territorial boundaries are respected by others in a group, compensation is given for resources taken by outsiders, and tracts may be reoccupied after prolonged absences. The Mi'kmaq access system falls under the purview of aboriginal title (Chute 1999: 492-3).

resources and demanded tribute from outsiders for such privileges. "On occasion it was a political integration much larger than the head of the family hunting unit that emerged as the most significant actor in any forum dealing with Mi'kmaq land and resource issues" (Chute 1999:493).

It is the right of the head of the nation, according to the customs of the country, which serve as laws and regulations to the Gaspesians [Mi'kmaq], to distribute the places of hunting to each individual. It is not permitted to any Indian to overstep the bounds and limits of the region which shall have been assigned him in the assemblies of the elders. They are held in autumn and spring expressly to make this assignment ... In summer they pay visits and hold their State Councils ... several Sagamores come together and consult among themselves about peace and war, treaties of friendship and treaties for the common good. It is only these Sagamores who have a voice in the discussion and who make the speeches, unless there be some old and renowned Autmoins [shamans], who are like their priests, for they respect very much and give them a hearing the same as to the Sagamore. It happens that sometimes that the same person is both Autmoin and Sagamore and then he is greatly dreaded. Such as the renowned Membertou. (LeClercq 1910:237).

The Mi'kmaq had concrete ideas and rules of ownership and trespass, including enforceable sanctions if breached. When someone hunted on another's territory without permission, the wrongdoer had to hand over his or her catch, or a portion thereof. If they sought permission they may pay a tribute, or make use freely, providing they followed correct spiritual protocols, offering thanks, and appeasing the spirits. Juridical ideology shapes spiritual values and principles within every facet of Mi'kmaq socioeconomic and political activity, and, were both shared and contested, by individuals and communities, as they interacted with one another. As Wicken notes:

Since family groups managed the land's animal population, any unwarranted intrusion undermined a group's ability to maintain a material and spiritual balance between its own needs and those of the animal population. When travellers did not inform the proprietor group of their presence, the latter could confiscate their goods in compensation for violating its rights. In sum, the territorial division of lands for the winter hunt created boundaries within Mi'kmaq society as well as

customary laws governing the land and each family's relationship to it. What is critical is that this relationship identified individual groups of families as inhabiting defined areas, where they enjoyed specific rights and obligations (2002:35).

The family heads of each district were responsible for planning the seasonal movements of the people, for confirming, and reassigning hunting territories, for delegating work to his immediate relatives, wives, children, slaves, and escorts, and for providing these with hunting dogs, canoes, and provisions and reserves for bad weather and expeditions. He also provided the young men of the band, the apprentice hunters, with food and provisions, taking their furs and game in exchange (Hoffman 1955:187).

The Grand Chief or Kji Sakamaw was a particularly outstanding individual, imbued with all of the chiefly characteristics admired by the Mi'kmaq, he usually had the 'greatest heart'. The following notation tells us about Grand Chief Membertou, a well regarded Grand Chief made even more famous by the fact that he was the first Mi'kmaq to be baptized by French missionaries in 1610 (Hoffman 1955: 527-528). This Grand Chief was a great kinap (a brave warrior), and pouin (a shaman), and thus a very powerful leader.³² Membertou was known to be a, "very great and cruel warrior in his youth and during his life" [he lived an extraordinarily long life of more than a century] and therefore he had many enemies (Lescarbot 1911:354-355). Clearly Membertou was responsible for dispute management within the communities he lived, and it is likely that he may have been called upon to settle problems in other areas of the nation, particularly when local and district chiefs could not bring about an adequate resolution.

³² Pouin has a variety of spellings, namely: Booin, Buoin (Wallises 1955), Bouhinne (LeClercq 1910:217). Lescarbot (1914:159) and Biard (JR II:75) called shamans Aoutmoins. The Jesuits also called the shamans Jugglers. Erickson said there was no distinction between shamans and witches and called them buoins following the Wallises' pattern.

At Port Royal he has under him a number of families whom he rules, not with so much authority as does our King over his subjects, but with sufficient power to harangue, advise, and lead them to war, to render justice to one who has a grievance and like matters. He does not impose taxes upon the people, but if there are any profits from the chase he has a share of them, without being obliged to take part in it. It is true they sometimes make him presents of Beaver skins and other things, when he is occupied in curing the sick, or in questioning his demon (whom he calls Aoutem) to have some news of some future event or of the absent: for, as each village, or company of Savages has an Aoutmoin, or Prophet, who performs this office, Membertou is the one who, from time immemorial, has practiced this art among his followers. He has done it so well that his reputation is far above that of all the other Sagamores of the country, he has been since his youth a great Captain, and also having exercised the offices of Soothsayer and Medicine-man, which are the three things most efficacious to the well being of man and necessary to this human life (ibid).

Chiefly status was significant in Mi'kmaq juridical practices. The political system reinforced the socioeconomic and spiritual values and ideologies of the culture, and provided the foundations for Mi'kmaq legal consciousness. The Mi'kmaq had flexible, formal and informal ways of dealing with problems as they came up. Informally respected leaders of the community were responsible for attending to wrongdoings and coming up with amicable solutions if possible. Other juridical practices were more formal, involving meetings, official declarations, orations, and attempts at consensus decision-making strategies, enabling the Mi'kmaq to carry out collective dispute management. For example warfare was a formally sanctioned juridical activity, directed as a response to socially constructed notions of wrongdoing and vengeance.

Warfare and Revenge

The Mi'kmaq carried out war exploits against other aboriginal nations prior to contact and during colonial settlement. Situations of war brought together the local, district and national chiefs. Great warriors were well regarded among the society. Biard tells us that Mi'kmaq warring was international in scope and did not occur between the

seven districts, "Their wars are nearly always between language and language, or country and country, and always by deceit and treachery" (Hoffman 1955). While wars were likely a result of a disruption in the balance between local tribal communities and their natural resources, a major cause of war was revenge (Prins 1996:107).

They never attack their enemies with the intention of seizing their country or of subjugating them to the laws and the customs of Gaspesia [Mi'kmaq]. They are entirely content provided they are in a position to say "we have conquered and are avenged upon our enemies"... They never ask the aid of their allies except in the last extremity, finding in their own ambition courage enough to fight and overcome their enemies, if these be not invincible. They ask, nevertheless, for auxiliary troops from their allies if they cannot themselves settle their quarrels; and they send ambassadors, with collars of wampum,³³ to invite these to take up the hatchet against the enemies of the nation (LeClercq in Hoffman 1955:611).

The Mi'kmaq wage war as a tribe on account of wrongs done to a private individual. "The whole race is very revengeful and insolent in victory, carrying about the heads of their captives as trophies and spoils of victory" (Thwaites JR II: 73). Wars served as a mechanism for obtaining honour, and to exact revenge, which provided opportunities to maintain, or enhance, status. The early missionaries noted that the Mi'kmaq never forgot their injuries. It was considered weakness not to avenge a wrong. An individual may be ostracized for not completing an act of revenge because establishing balance, and demonstrating bravery were critical to Mi'kmaq legal consciousness. For example, even in war, cases of revenge acted on a "principle of equivalent retaliation", which may have applied not only to killing equal members in other tribal groups, but also to compensation in goods and wealth. As Redfield suggests,

³³ William Wicken describes Mi'kmaq wampum use as a communication device to send a specific message among aboriginal peoples separated by geography and language. "Wampum made diplomatic exchanges possible between peoples who spoke similar through distinct dialects. For facilitating communication over long distances, wampum served the same purpose as an alphabetic script. For recording information, it could not... It made use of symbols...and depended on a human intermediary who could interpret the belt's message (2002:91-92).

"custom restrains the injured party from unlimited revenge. Retaliative force is stylized by custom into a sort of ritualistic revenge, and something like a legal process results" (Redfield in Bohannan 1967:12). If there were no limits to revenge, then a constant state of warfare may have emerged, and other tasks necessary for survival neglected, this was not the case. The principle of equivalent retaliation fits well with the idea of balance and fixing relations, the underlying principles of Mi'kmaq justice.

Women had important roles in warring and the settlement of disputes through revenge. One account held that the women of the community performed a dance urging men to take revenge. If the men could not carry out the revenge, the women would take it upon themselves, and thus shame the men by inferring their cowardice (Maillard 1758:19-30). If one offended or abused the honour of Mi'kmaq women, the community took revenge. Archival documents tell us that during warfare, the Mi'kmaq intentionally protected enemy women and children from injury and death. According to LeClercq, Mi'kmaq sometimes tortured male prisoners but, "they are not so cruel with regard to the women and the children; but quite on the contrary, they support them and bring them up among those of their own nation" (LeClercq in Hoffman 1955:577). Women did have the opportunity, and perhaps the responsibility, to torture male captives. War prisoners became slaves of the victors and made to do menial tasks as punishment (Hoffman 1955:579). If an enemy committed a great offense, such as insulting a Grand Chief by stealing from him, or helping captives to escape, there was no mercy, as the following episode indicates:

One day there was an Armouchiquois woman, a prisoner, who had aided a fellow-prisoner from her country to escape, and to aid him on his way had stolen from Membertou's cabin a tinder-box (for without that they do nothing) and a hatchet. When this came to the knowledge of the savages, they would not proceed to

execute justice on her near us, but went off to encamp some four or five leagues from Port Royal, where she was killed. And because she was a woman the wives and daughters of our savages executed her (Lescarbot in Hoffman 1955:578).

Because war required great cooperation, and put strains on resources, the decision to go to war was not taken lightly. There were recognized forms and limits of retaliation among the Mi'kmaq. War is never declared except by the advice of the old men in the Council of Elders and under the direction of the Grand Council, and with the support of extended family alliances. Discussions were held and the reasoning behind going to war had to be laid out in order to justify taking such a risk. The forums gave individuals the opportunity to question the approach. The following quote indicates a desire for consensus before submitting everyone to the risk of warfare. According to this passage the opportunity to challenge a call to war is a formal process.

... [w]hen they wish to make war, the Sagmos most in credit among them sends the news of the cause and the rendezvous, and the time of the matter. On their arrival he makes them long orations on the subject which had come up and to encourage them. At each proposal he asks their advice, and if they consent they all make an exclamation saying Hau, in a long drawn out voice, if not, some Sagmos will begin to speak and give his opinion and both are heard with attention (Lescarbot 1914: 264 in Hoffman 1955:610).

Sometimes the call for war came about from dreams in which ancestors came to the living. The Mi'kmaq believed that unless a wrongdoing against a deceased ancestor was avenged, their relatives could not rest in peace and continued to walk among them until the matter was resolved. Getting one's allies to put stock in such a dream may have been difficult, especially for those of lesser social rank. One story tells of a Mi'kmaq warrior who dreamt of impending danger from the enemy Kwedech, who kept the news of his dream to himself, and having “been snubbed by his comrade for supposing that he possessed superior prophetic powers” (Hoffman 1955:656). Thus, it appears that there

were mechanisms, such as snubbing, to control people from claiming they possessed supernatural powers. In this case the warrior was able to stay awake, keeping watch for the enemy and thus keeping his 'medicine' strong enough to protect him. His comrade slept, and thus his medicine weakened, and he consequently died in the battle that came about as prophesized.

Successes in war increased individual status and sometimes rank. While strength and courage were important factors, many Mi'kmaq legends indicate supernatural power was a significant component. For example, warriors rubbed themselves with medicine to protect them from injury. They also played games of waltes, a dice and bone throwing game, to acquire spirit or magical power before going to war (Wallises 1955:213). The Mi'kmaq kinap is a specialized term for one who possesses supernatural abilities related to war. A kinap is defined by Albert DeBlois (1996) as a person of legendary strength and in translations of *Pacifique* by Bernard Francis (1990) as a giant, hero, or warrior.³⁴ A person could become kinap in order to 'cure their heart', particularly after enduring some horrific experience. Wallises gives the example of how a Mi'kmaq woman from Cape Breton, "whose children had been spitted and roasted in the Mohawk fashion by English soldiers", became a kinap and killed many enemies in retaliation (Wallises 1955:246). Hoffman notes that Mi'kmaq battles were won and lost on the relative power of the rival kinap, and warriors were just there to "mop up" (Hoffman 1955:650). Kinap were warriors, but also teachers, and thus responsible for instructing younger people in strategies of combat, as well as day to day living. They were considered protectors.

A number of stories provide examples of Mi'kmaq dispute management between nations. Within the tales are a number of elements that describe feud development and

conflict resolution usually centered on conflicts over resources. These conflicts sometimes lead to a death. The theme of avenging the death of a community member is clear throughout. The goal beyond revenge seems to be restoring balance. Most of the elements of Mi'kmaq law ways are present in tales. The perceiving of the injury, the naming, blaming, claiming of the trouble, and the outcome or dispositions are all socially constructed and negotiated.³⁵ The interconnectedness between spirituality and economy, ritual and revenge, and the balancing of loss within culturally acceptable limits, shape the telling. Story themes demonstrate that not all disputes are immediately resolved but may fester over time producing blood feuds, a pattern that remains evident in present Mi'kmaq society.

Koqqwaja'ltimk: Early Legal Consciousness

The Mi'kmaq were well equipped and well adapted to their environment. In addition to their material culture and resource strategies, they had corresponding, culturally imbued ways of living with each other within their environments. They had social laws reflecting the ideas and practices to ensure survival shaping their legal or juridical consciousness.³⁶ The Mi'kmaq had ideas about what had to be done to keep the world in balance, and how to treat each other justly, notions manifested as the term koqqwaja'ltimk. There were social norms in Mi'kmaq culture that existed without the sustaining force of courts, police, or other such expressions of authority.³⁷ There were particular practices to appease and please the spirit world, to correct mistakes, to explain

³⁴ A common spelling is ginap, an anglocized version of kinap.

³⁵ See Conley and O'Barr's model of a natural history of disputing (1998:96).

³⁶ The term law is used here to describe linkages between cultural meaning and legal concepts which include standards of behaviour and belief and action and are embedded in consciousness and are part of the transformative system of culture. Laws describe conduct and application of juridical ideology.

the unexplainable, and to bring harm to others when balance was disrupted. For example, the Mi'kmaq attributed great supernatural power to specific places and objects. If homage was not given to certain sacred spaces it was thought that illness would result (Hoffman 1955:427). These ideas and practices constituted the legal consciousness of the people and helped form strategies enabling them to live, work, and survive together each day. Community cohesiveness and value sharing formed the basis for the translation of cultural teachings, through Mi'kmaq oral traditions, shared within and between families.

Teachings, Oratory and Oral Traditions

How to live right was first transmitted within Mi'kmaq families. Adults taught the children rules and etiquette in the home, which grandparents, and other members of the extended family, further reinforced. The central values also glossed today as the "sacred teachings" reflect concepts of love, honesty, humility, respect, truth, patience and wisdom.³⁸ Teachings included protocols for showing children respect for their elders. Elders often taught by doing, and children learned by trying. Sometimes ideas of noninterference get convoluted here. Mi'kmaq let their children learn experientially. Parents refrain from interfering in that process unless great harm was to come to them. Sometimes this education practice is misinterpreted and characterized Mi'kmaq justice as non-interfering. There is no evidence to suggest that in terms of disputes, or living the right way, that people simply did not interfere, or were extremely permissive. On the contrary, Mi'kmaq confronted problems and wrong doers.

³⁷ See Hoebel's *Law Ways of the Comanche* in which he defines a "social norm is legal if its neglect or infraction is met by the application, in threat or in fact, of the absolute coercive force by a social unit possessing the socially recognized privilege of so acting" (in Bohannon 1967:187).

³⁸ See Murdena Marshall's *Mi'kmaq Sacred Teachings* describing the seven stages of life with the seven gifts (a poster in the appendix).

Within the oral traditions of the Mi'kmaq, their legends, historical accounts, and anecdotes, undoubtedly served to help socialize the young, to acquaint them with the mores of the society, and to educate them as to the behaviour expected of them under special circumstances. Children were told of the ancient law ways. The stories shared over generations taught listeners how to avoid shame and reproach, and how to carry out exploits considered honourable, such as exacting avenge in the socially sanctioned manner, and sharing. Sharing was a critical virtue valued by the Mi'kmaq and remains part of the social milieu of community life and interaction today.

The Mi'kmaq word for sharing is utkunajik. The sun shares its warmth; the trees share their wind; and the Mi'kmaq share in the same spirit, be it in their material goods or in their life experiences. Most words in the Mi'kmaq language describe a relationship between the people and nature. Respect for nature is an extension of tribal awareness, for the Mi'kmaq knows that nature is an integral part of his existence ... The term Mi'kmaq also describes and create a coherent social description of how to act in this society. It describes a society where the well-being of others is placed above the individual wants and desires in the material world. This is the essence of the alliance, a customary code of behaviour and values which emphasizes Mi'kmaq dignity in spite of flux (Johnson 1991:27).

According to several accounts, the Mi'kmaq would gather in large numbers after the harvest season, as winter settled in. During these gatherings they would recite to one another the names of all those born and died since they last gathered. They would also discuss any significant happenings such as usual weather, exceptional fishing and hunting expeditions, conflicts, and disputes, and tell stories. Included in the gatherings were competitions and games. These occasions brought about opportunities for seeking out potential marriage partners, and building political and familial alliances. Chiefs and elders petitioned newlyweds by advising them on how to get along without quarreling. They would deliver lessons regarding marriage at wedding ceremonies (Wallises

1955:239). Pouin also are involved in marriage instructions and give warnings about the consequences of infidelity or acting as a spy for another tribe.³⁹

The Mi'kmaq held ceremonies for the dead, where sacred beliefs brought the tribal members together for a, "collective and emotionally charged ritual" (Hoffman 1955:502). These were important socializing events because they provided the opportunity to reinforce how to live right, and they brought elders and children together so that the young ones could benefit from their knowledge and instruction. Legal consciousness becomes embedded in the individual through participation in the community. Participation in ceremony forges identities, particularly those marking rites of passage and shifting phases of liminality, during public conferrals of status changes.

Mi'kmaq Cosmology and Cosmogony - How to Live Right

Mi'kmaq belief systems included ideas about life after death, and ideas about reward and punishment, which Hoffman concluded were aboriginal concepts rather than Christian (Hoffman 1955:361). People successful in acquiring food, were assumed to be good people because they were able to communicate with the spirits in ways that allowed for human consumption. There was a belief that objects that people used in life were necessary in the afterlife, and imbued with a particular spirit, which travels with them after death, and thus necessitates the practice of grave goods. In terms of an afterlife, or as ways to explain death, the Mi'kmaq believed that:

³⁹ Pouin - refers to supernatural, mystical, impersonal power and to the subjects which possess it. The word may be applied to the mystical force though to be causing an intangible or mysterious experience, or to the spirit being possessing such power, or it may be applied to a human possessing power. It may be possessed in small or large quantities resulting in a ranking of supernatural beings according to the 'strength' of their power. Since one's position in this system of rank can only be determined by individual tests of strength - i.e. by shamanistic combat - the Micmac legends relating Bouin [pouin] read like a rell of gladiatorial combats (Hoffman 1955: 379).

[T]he dead and their ghosts have the same needs for drinking, eating, clothing, for hunting and fishing as when it was in the body, whence it seems that in their revels and feasts they always serve a portion to these souls which are walking, say they, in the vicinity of the wigwams of their relatives and of their friends; that they went hunting the souls of beavers and of moose with the souls of their snowshoes, bows, arrows (Hoffman 1955:358).

Fears of the afterlife, or punishment, in the form of inability to secure the necessities for life in other worlds, may have acted as a deterrent to wrong doings. Due to the importance of food in this hunting and collecting society, there were many taboos on food preparation and distribution. Wasting food was an offence to the spirit contained within. Stories and songs taught younger people how to behave with food. They emphasized saving everything, even eel skins, and what could not be saved should be buried, including hair (Parsons in Hoffman 1955:374).

By continued remembrance of those who have died, the Mi'kmaq forged their identities by connecting themselves to their ancestors in rituals and by reciting their lineages in their practices of oratory whenever the occasion arose. People who could not detail their heritage had lower status than those who could connect themselves to large and powerful families. Closely associated with cosmology is the transmission of beliefs to members of the society. It is through teachings that translation of community values, the core of justice practices, occurs.

Expressions of ideas and processes of justice arise in spiritual values and principles, around which the Mi'kmaq organized, and conducted, their daily political, economic, and social matters. By examining some of the origin stories and supernatural belief systems, the connections between Mi'kmaq spirituality, and the organization of daily lived juridical practices, which form the underlying creative forces of Mi'kmaq

legal consciousness, are delineated. Beliefs were closely celebrated in elaborate rituals surrounding food, death, marriage, feasting, and other social and individual activities.

The Mi'kmaq practiced animism and anthropomorphism. Mi'kmaq spiritual beliefs held the sun as the central force responsible for creating life. There was a commonly shared belief that a Great Spirit or Creator, as manifested in the form of the sun, controlled the destinies of all persons and things. The sun figured strongly in their early spiritual beliefs, daily rituals, and sun worship was common.⁴⁰ Sunrise ceremonies, for example, were performed to seek protection, and to ask for power to overcome enemies, success in hunting and fishing and for prosperity in future generations (Hoffman 1955:384). Mi'kmaq peoples held various standards of good and evil, and right and wrong, maintained in elaborate rituals and protocols surrounding food, death, marriage, feasting, and other individual and communal activities. Failure to adhere to protocols in these rituals increased the potential for individual and communal risk. The sun rise ceremony is described by as follows:

They performed no other ceremony than that of turning the face towards the sun. They commenced straightway their worship by the ordinary greeting of the Gaspeians [a name for the Mi'kmaq used by early missionaries], which consisted in saying three times, Ho, ho, ho after which, while making profound obeisances with sundry movements of the hands above the head, they asked that it would grant their needs: that it would guard their wives and children; that it would give them the power to vanquish and overcome their enemies; that it would grant them a hunt rich in moose, beavers, martens, and otters, with a great catch of fishes; finally they asked the preservation of their lives for a great number of years and a long line of posterity (Hoffman 1955:384).

Mi'kmaq cosmology held that there were divine beings other than the Great Creator, which were human in form, but immortal, and in possession of supernatural

⁴⁰ Maillard witnessed Mi'kmaq had great veneration for the moon, which they invoked whenever they traveled at night by land or sea or to tend their snares (Accounts of the Customs and Manners of the Micmakis). Mi'kmaq are also known as People of the Dawn.

power, a power humans could access. Supernatural beings were integral to Mi'kmaq life ways, acting as intermediaries between the Mi'kmaq and the Great Spirit or Creator. It was thought that these beings had the power to cause misfortune. Some humans, places, and animals, had supernatural capabilities that derived from the powers of the cultural hero-transformer, Kluskap. Kluskap is one of the most important cultural hero / trickster figures in early Mi'kmaq folk law.⁴¹ Kluskap is a spiritual teacher, a warrior, adventurer, transformer and pouin [shaman]. He created the landscape of the Mi'kmaq, making sure they had the skills for survival, and then, after many adventures, he retreated to some far off land. Legend has it that Kluskap will come again, particularly if the Mi'kmaq encounter serious trouble, the details of which are left to the imagination. The stories of Kluskap relate tales of good and evil, and "embody the laws, morals, and wisdom" of the nation, providing explanations for natural wonders, such as thunder, rain, and death (Runningwolf 2000:x). Some stories have Kluskap as a good twin in combat with his evil brother. Mi'kmaq cosmogony tells us that Kisukwl, the Creator, taught Kluskap how to live right, and he in turn, instructed the Mi'kmaq on how to live right.⁴² He is a benevolent figure that showed Mi'kmaq how to speak the language, make tools, hunt and fish, and get along, and is the embodiment Mi'kmaq wisdom.

A number of transformation stories describe the manner in which Mi'kma'ki (Mi'kmaq territory) and the L'nuk (the name the Mi'kmaq people call themselves) came

⁴¹ Kluskap is spelled a number of ways [Glooscap, Klu'skap, Gluskap etc.] I have chosen to use the spelling used by Marie Battiste in Henderson (1997).

⁴² The religion of the northern woodland Indians may be characterized as having a basic substratum of widely held beliefs, while the ceremonies and ritual observances associated with these beliefs - and sanctified by them - demonstrated considerable regional diversity and temporal plasticity. This substratum included beliefs in a Great Spirit, a Great Creator or a Great Mystery, thought to have created the universe and supernatural and living things. The Great Spirit was thought of as being invisible, immaterial, and nonanthropomorphic, but was also capable of manifesting himself in such aspects as the sun, the moon, or

to be. Kluskap's Grandmother, Nukumi transformed from a stone to an elder in order to teach him how to communicate with the animal and spirit worlds. Animals were sent to the spirit world to get instruction on how to survive, and came back with knowledge of songs and rituals that Kluskap performed to show honour and respect; values central to Mi'kmaq legal consciousness. Kluskap's relatives were transformed from the natural world into human forms.

One origin story goes as follows:

On the other side of the Path of the Spirits, in ancient times, Kisukwl, the Life Giver, originated the firstborn, Niskam (the Sun), who was brought across sk-tikmujuawti (the spirit path or Milky Way) to light the earth. Kisukwl also sent across the sky a bolt of lightning that created wsitqamuk (the dry earth) and united the life forces out of wsitqamuk to form the keeper of life known to the Mi'kmaq as Kluskap. Legends recount that this guardian spirit lay naked on wsitqamuk, his limbs pointing in the four directions. In time, Kluskap became a kinap [warrior] and a pouin [shaman], a powerful teacher whose gifts and allies were great. In another bolt of lightning came the light of fire, and with fire came the animals, birds and plants. The other life forms gradually gave Kluskap a human form. Kluskap rose from the earth and gave thanks to Kisukwl by honouring the six directions: up (the sun), down (the earth), and east, south, west and north. Kluskap then honoured a seventh direction: inward, signifying the abilities that lie within the human form (Battiste in Henderson 1997:13).

The story delineates individual characteristics valued within Mi'kmaq culture. Kluskap stories helped explain how order came from chaos through the creation of the nation. Embedded in the language were the lessons for life. From these lessons the Mi'kmaq learn how to live right and together. Ritualized tellings of the stories passed these lessons across generations.⁴³ As with any oral tradition, the purpose of storytelling and myth making are complex; it was a method to produce and reproduce local

the heavens. The Great Spirit was also thought of as controlling the destinies of all things, material or immaterial, and of being omnipotent and omniscient (Hoffman 1955:489).

⁴³ See Julie Cruikshank (1998) for an examination of how storytelling mediates between social action and local knowledge and the potential for translating distinctive cultural meanings to diverse audiences.

knowledge. The Mi'kmaq use myth to explain how the world operates, provide information, and explore social problems and their resolutions. According to Stephen Hood (in Prins 1996:21), [Kluskap] "was always sober, grave, and good; all that the Indians knew of what was wise and good he taught them".

Kluskap stories relate tales of good and evil in the actions of supernatural beings and humans, and of their good hearts and bad hearts. He held in contempt those who acted underhandedly, and mistreated decent people, and showed his scorn by denying them the opportunity to fight the honorable or 'real' warriors contest against him (Runningwolf 2000:41). Kluskap stories told of ways to appease other than human beings with offerings and proper behaviour, and made clear the consequences of wrongdoings, most of which revolved around issues of respect. Some stories tell of how abused or social misfits were able to gain spirit powers or possession of objects with important powers, thus encouraging fair treatment of all peoples, and proper handling of objects such as tools, and sacred medicine pouches. Other stories were warnings for children to honour and obey their parents, and to stay close to home, for if they were to run away, evil spirits could capture them, shrink them, and keep them in a birch bark box. Stories about serpents living in the lakes and woods deterred children from going near dangerous places. Thus the oral traditions are juridical in their preventative capacity.

Supernatural beings were integral to Mi'kmaq life ways, acting as intermediaries between the human world and the Great Spirit. It was thought that these beings had the power to cause misfortune. Some humans, animals, plants, and places, also held supernatural capabilities that produced explanations for successes and failures, conflicts

and their resolutions, weather patterns, and other important features of daily life. Social control mechanisms evolved from these beliefs. For example, ways of appeasing the spirits, if not properly carried out, resulted in illness. Fear of any social ill was particularly powerful in communally based societies, where the wrongdoings of one had the potential to affect many, if not the whole community. The Mi'kmaq followed certain gestures to keep minds at ease, but also to help define roles and delineate rules of social interaction. Failure to carry out proper gestures created the potential for disrupting the relationships between the offenders and the spirit world, and consequently impact community social balance. The stories also cautioned toward self-control, for many tales indicate that problems worsened as a result of people letting their anger and rage take over. When an offense was committed, it was primarily an offence against relationships, and secondarily a violation of rules.

Kluskap stories encapsulate the use of sacred objects. For example, one story explains the significance of the sacred pipe. Tobacco was a valued plant used in offerings and a pipe culture ensued. The bowl of the pipe was red stone, pigmented from the blood of ancestors. The stems were white ash and the tobacco was an offering, the smoke of which carries invocations to the spirit world. According to one interpretation the pipe and its smoke contained power that could do well or bring harm:

When you use this pipe [Kluskap instructed] to make your prayers, do it in a sacred manner and your prayers will be answered. If you use it wrongly, harm will come back on you and your families. Use this pipe wisely. Be careful what you pray for, because you will get exactly what you ask for (Runningwolf 2000:72).

Smoking the pipe had significance in establishing peaceful relations. Enemies did not share a pipe; if one refuses to take the tobacco pipe when presented with it, it was a

sign that he is not adesquides, or a friend (Lescarbot 1914:253). Mi'kmaq smoked prior to making important decisions, and before undertaking risky tasks. The smoke was thought to help build concentration, and lead to the best or right way of dealing with things (Runningwolf 2000:113).

Within the Kluskap tales, good and proper behaviours were contrasted with undesired traits and actions. As mention above, one of the central concepts in the Mi'kmaq value system, which informed aspirations and behaviour, was the concept of 'great heart'. Chiefs, respected elders, kinap, and pouin who were especially revered, were usually considered to have 'great hearts', meaning that they put everyone else above themselves, were generous, wise, brave, demonstrated terrific leadership qualities, and extraordinary spirituality. Kluskap had the greatest heart and his stories were told to inspire people to behave according to the values he personified and embodied.

Feasting Protocols and Rituals - Instilling Mi'kmaq Values and Tplutaqan

The Mi'kmaq had many feasting protocols, reinforcing ideas and values of expected proper behaviour, and interconnected with the sociopolitical and economic welfare of the people. Deference for rank and age were the most obvious protocols. The eldest and most notable people make the first speeches and conduct any rituals, such as pipe ceremonies, spiritual cleansing practices, and of course, orations of genealogy, marking lineage and kinship to enhance ties of belonging and place. Sharing and generosity also go hand in hand with reputation building. "They are in no ways ungrateful to each other, and share everything. No one would dare to refuse the request of another, nor to eat without giving him a part of what he has" (LeClercq 1910: 290). Sometimes a host will not eat with his guests because he wants to give all that he has to them. Feasts

are made to honour individuals and recognize their achievements. Hoffman suggested it was, "the greatest honor possible for a Mi'kmaq man and the goal of all his achievements, for him to receive honor and recognition in the solemn feasts of his nation"(Hoffman 1955:686). The Mi'kmaq feasted to mark most transition points in the cycle of life:

With the child's first tooth a celebration is held, and the teeth of the elders officiate at the feast and there is a vast amount of chewing, and they rejoice thus that the little one will soon be able to make use of his own. When he walks alone, they celebrate again, and at this festival there is much dancing. The first game a child kills in hunting affords another occasion for a great celebration the family assemble and all the Indians of the vicinity are invited to this feast, if they are away on an expedition, it will be deferred until their return, and in the meantime, to preserve the game better, it will be smoked. At these Feasts, a somewhat special formality is observed, neither the family of the young hunter nor himself taste the game which he has killed and no matter how small it might be, it is a point of honour to divide it among all the Guests. Care is taken to put it in the cauldron last. They eat to their hearts content and only pause from time to time in order to honour the hunter with cries and joyful songs. All game killed by him in his earliest youth is given to others, to show his skill and courage, but he is not so liberal with his prizes when he has attained the marriageable age (Hoffman 1955: 270).

This is evidence of teaching a sharing ethic, and a way to demonstrate skills desirable in a marriage partner.

Some feasts mark a change in status, or are concerned with the future status of a hunter. Feasting also provides the opportunity to seek help from community members and to remind them of their duties. For example, during the feasting for the first moose kill of the season, the women use the opportunity to call upon the men to seek redress for a wrong, or a death still unavenged (Hoffman 1955:685). Animal ceremonialism was significant in teaching Mi'kmaq values with regard to keeping balance between the animal world, the spirit world, and the human world. Rituals were associated with the killing of game, a system of taboos surrounding proper disposal of body parts, and distribution of food to community members, to ensure future availability of resources.

The first time a young male kills a moose marks an important transition from youth to adulthood, and is celebrated in an elaborate feasting complex. A key feature of food ceremonialism is sharing:

Those who kill the first moose as the beginning of January or February a time at which those people suffer greatly, since they have consumed all their provisions, make it a pleasure to carry some of it themselves very promptly to those who have none, even if these are distant fifteen to twenty leagues. And, not content with this liberality, they invite these latter also, with all possible tenderness, to join their company and to remove closer to their wigwams, in order that they may be able to aid these people more conveniently in their necessity and in their most pressing need, giving a thousand promises to share with them half of their hunting (LeClercq 1910:117).

Rituals create shared meanings for those involved. They are important mechanisms for defining membership, and delineating status and their attending responsibilities. Songs and dances are symbolic manifestations that integrate individuals into the group and build identity consciousness. Evidence suggests that the aboriginal dances of the Mi'kmaq were held for entertainment purposes, to celebrate war victories, and honour brave, courageous, and successful folk. In victory dances, Mi'kmaq sported war trophies. Songs tested magic powers, particularly in war parties, where each canoe would challenge the other to a song duel to see who could last the longest (Wallises 1955:214).

Generally the dances were performed in a circle, and steps were accompanied by the beating of a drum made from a sheet of birch bark. In victory or war dances, the men made movements as if they were at war, "representing fighting, winning victory and removing the scalps of their enemies" (Wallises 1955:192). Women had a different style of dance from the men. Songs were sung for different occasions, ranging from welcome songs, to war chants, to mourning descants. Some songs recounted stories, offered fables

with a moral lesson, or warnings of the consequences of wrongdoings. Special songs, dances, and feasts, honoured those who successfully avenged themselves (Wallises 1955:219). Mi'kmaq women sang captive songs as part of their torture complex. The women danced about the prisoners, singing and slashing them with knives until they died (Wallises 1955:219).

In addition to the above ceremonial practices, the Mi'kmaq practiced a sweat lodge tradition. "During sweats ... they chanted songs and told stories to make themselves laugh ... being refreshed they put their robes upon them and then went into their wigwams as composed as ever" (Denys 1908:416-417). Lescarbot suggests there was shamanic participation and the Mi'kmaq likely used sweat lodges as a religious ceremony.

... [I]t is a rite of purification and healing, undertaken both to restore and to maintain bodily health, but undertaken even more generally as a preliminary for participation in religious exercise ... In the Indian's eyes the sweatbath was far more than a simple physical efficacy. It brought him intimately and directly into contact with the Powers which uphold his world, giving universal health and sanity of nature. All the elements, fire, stony earth, water and vaporous air, entered into the ritual healing, which was preceded by chants and prayer and was felt to bring a new birth into the life of that greater community of being in which man's existence is only a participation (Hoffman 1955:309)

Connected to Mi'kmaq law ways is the use of the sweat lodge as a purification ritual conducted prior to making major decisions. Sweats acted as a conduit to the spirit world, which helped in guiding those decisions. As a purification ceremony, spiritually sick wrongdoers could seek solace and healing in the sweat lodge with the help of a shaman. Regardless of its many uses, the sweat lodge offered an opportunity for counsel for those that entered.

Respect and Reciprocity

Respect for all things, human and other than human, was the central theme in many Mi'kmaq teachings and oral traditions. Respect for one another, the wisdom of elders, the bounty of the earth as embedded in netukulimk, were all vital to demonstrating the good and expected behaviour, which fostered aspects of Mi'kmaq legal consciousness that informed the people of how to 'live right'.

Since all things have a common origin in the sparks of life, every life-form and every object has to be respected. Just as a person has a life-force, so does a plant, rock or animal. Therefore, the Mi'kmaq are taught that everything one sees, touches or is aware of must be given respect. This respect requires people to develop a special consciousness that discourages careless treatment of things. Thus, a person gathering roots, leaves or bark for medicinal purposes pleases the life-force of each plant by placing a small offering of tobacco at its base, believing that without the cooperation of the manitu the mere form of the plant cannot work is cures (Battiste in Henderson 1997:15).

Children were taught to be respectful of elders, to listen, watch attentively, and to treat everything with special care for its spirit. Apparently precocity was undesirable, because if one is too clever when young, it was believed that he or she will have no sense when they grow up, and this leads to trouble. They also encouraged respect for animals in the proper treatment of dogs; vital to hunting, and part of the Mi'kmaq prestige package. The following tale suggests why it is important to treat all with kindness and respect:

A certain man was always kind to his dog, and another was never kind to his dog. The former man heard the following conversation between these two dogs: Why don't you go hunting for your master? He is never kind to me; he gives me only hard bones and no meat. You are treated well, and you hunt for your master. When it is cold, he drives me out of the wigwam and I almost freeze. That is why I do not hunt for my master. The man told this to his friend. "I don't know whether you have had bad luck", he said and related the dogs' conversation. The friend took the dog into his wigwam and treated him well. Soon it captured moose, and later much other game. The man, because he had shown no kindness to his dog, had nearly starved" (Wallises 1955:115).

Mi'kmaq were great travelers and visiting among relatives and friends was frequent. When traveling in other families' territories certain courtesies were practiced as a way of showing hospitality and respect. Evidence indicates that the host has a duty to welcome and feast guests as long as possible, and the guests gave presents to their host. Cultural expectations indicate a strong emphasis on reciprocating such hospitality; failure to do so resulted in strained relations. Sharing among friends and family, as in chiefly generosity, were paramount practices in Mi'kmaq communities, fostering cohesiveness and improving chances for survival.

The early missionaries commented on Mi'kmaq hospitality toward kin and strangers. As part of the great-hearted complex, the Mi'kmaq strived to care for all of their relatives, friends, widows, orphans, the elderly and strangers. Failure to do so brought the risk of being called stingy and without heart, "the injury most felt among them ... it is a crime among our Indians not to be hospitable" (LeClercq in Hoffman 1955:603). Malinowski may have called this an economic system of exchange. Clearly reciprocity has law-like properties to organize behaviour. Here the principle of obligation, a main attribute of law, can be found in these binding obligations as the rights of one party, and acknowledged as the duty by the other, which were, "kept in force by the specific mechanisms of reciprocity and publicity inherent in the structure of society" (Malinowski 1966:58).

As we learned from the Kluskap legends and mythological complex, the Mi'kmaq had ways of belonging and behaving that were favoured, and those that were not. Emotions are socially negotiated responses that derive their meaning from a culturally

constructed moral rhetoric of the self. In turn, the rhetoric of the self derives its significance, and is reinforced, within historically informed social contexts (O'Neill 1996).

Conflict in Early Mi'kmaq Culture

Mi'kmaq culture during early contact was not edenic. While it may be attractive to think of the past as harmonious and peaceful, this was not the case. As outlined above, the Mi'kmaq participated in cultural prescribed warring and avenging practices directed at managing relations between culture groups. However, there were other sources of conflict that produced tensions within Mi'kmaq communities. For example, as mentioned above, trespassing caused tensions or damaged relations. If a person went into other families' hunting grounds without asking permission, taking game, food, or other materials, a fight may ensue, or compensation paid to the owner may be required. These actions were breaches of the concept of netukulimk, and thus challenges to the geopolitical, and resource strategies of the nation.

Theft of personal property may have occurred, particularly in instances of someone wishing to access supernatural powers, or to bring harm to an enemy by stealing their medicine bundles, pouches, or other such articles imbued with special strength. Due to a general ethos of sharing and borrowing, theft was not likely a common problem until the colonial period, when competition over access to European goods, and a rapid decline in resources increased tensions and reduced opportunities for survival. An example of a property infraction concerns the treatment of another person's dog. Dogs were highly valued in Mi'kmaq society as they were indispensable in hunting activities, and protected their masters from bad medicine. If one intentionally injured another's dog it was grounds for fighting.

Other sources of conflict are events producing shame and embarrassment, and require compensation to bring resolution. For example, a servant who was sweeping hit a man with a broom. This incident caused the man great shame and lowered his status in the community. Insults produced conflict as well.

The [Mi'kmaq], however, are so sensitive to affronts which are offered them that they sometimes abandon themselves to despair, and even make attempts upon their lives, in the belief that the insult which has been done to them tarnishes the honour and the reputation which they have acquired, whether in war or hunting (Hoffman 1955: 425).

Sometimes spirits caused wrongdoings. A skadegamutc is a ghost that manifests as the mind or spirit of a dead person. Some stories suggest that prior to death there is a desire to remedy a dispute in order for the dying person to pass onto the next world peacefully. In order to achieve resolution, the ghost of the dying person seeks those involved in the conflict and fights them. Shortly after the fight is over, the dying person usually succumbs to death, but leaves some physical evidence that a confrontation has taken place.

If you say that you will fight a certain person before you die, then, when you are sick, your skadegamutc will appear to that person and will fight him. Two women were once seen fighting in a wigwam and pulling each other's hair in the usual way, while nearby in another wigwam a woman lay dying. That night she was found dead with one hand full of hair. Her skadegamutc had been called to help in the fight (Wallises 1955:151).

Other grounds for dispute include taboo breaking. The belief system held that if the hunt was unsuccessful, if the weather was bad, if things were lost, it was because someone ignored proper adherence to religious and ceremonial protocol. With the sun playing a central role in the daily cosmology of the Mi'kmaq, any disruption in its regularity was cause for concern, and was linked to bad behaviour. If a misdeed was discovered, so significant was the crime of upsetting the sun, that death was the result.

Unfortunately there is no data to describe who was responsible for determining who was wrongdoer and what was the infraction. From the statement below it seems in extreme cases, any community member could seek out the perpetrator.

When the sun [Naguset] is angry, he hides himself and there is an eclipse. In the old days people said to one another, "Perhaps Se'sas is angry with us." They would go to each wigwam, asking "Have you done anything amiss? Se'sas is angry with us." If a misdeed was discovered, the wrongdoer was killed. At an eclipse of either sun or moon, women went out of the wigwam, nursed their infants, and prayed to the celestial body (Wallises 1955:96).

Daily stresses, induced by the pressure to succeed in providing food and protection may have resulted in heightened moments of conflict, particularly when food was scarce, or the weather was bad. Competition to gain status in the community through generosity, bravery, spiritual prowess, or by accessing the rights to favoured resource territories, was probably high among young adult males. The strain of living up to these standards, and of participating in the ceaseless prestige contest, took its toll on young men (Hoffman 1955: 274). These tensions erupted in fights.

The Gaspesians [Mi'kmaq] have at present no fundamental laws which serve them as regulations. They make up and end all their quarrels and their differences through friends and through arbiters. If it is, however, a question of punishing a criminal who has killed or assassinated some Indians, he is condemned to death without other form of law. "Take care my friend if thou killest, thou shalt be killed." This is often carried out by command of the elders, who assemble in council upon the subject, and often by the private authority of individuals, without any trial of the case being made, provided that it is evident the criminal has deserved death ... (Hoffman 1955:513).

Disputes were generally not so disruptive to daily activities. In small scale societies petty quarrels and insults could not disrupt the daily pressure to acquire food, clothing, shelter, and produce tools; however, fights did occur. Dispute management occurred through the mediation of kinfolk within closely related communities, and by negotiations, under threat of revenge if necessary, between more distantly related

communities (Barsh 1991:11). Friends and companions were able to referee fights between community members and to negotiate settlements quickly. More serious offenses, such as murder, were treated formally, in some cases, by taking the matter before a council of elders, or informally, by the individual acting on his or her own volition and seeking revenge for example.

Seeking Revenge - Fights, Feuds and Peace Declarations

As in warfare, revenge is a key factor in Mi'kmaq legal consciousness. It is both a cause of trouble and a remedy. Once a call to avenge a wrongdoing has been made public, there is no turning back. Failure to carry out a claim brought greater shame to an individual and their family. Revenge is a significant aspect of finding and achieving a sense of balance in Mi'kmaq society. There is no strong evidence that the Mi'kmaq in general did not get along with each other, yet, clearly they did not live a utopian existence, free from trouble. When problems did arise, there were various acceptable mechanisms available for their management. For example, fighting was perhaps the most common way to act on trouble.

If the offenses are not between tribes but between compatriots and fellow-citizens, then they fight among themselves for slight offenses, and their way of fighting is like that of women here, they fly for the hairs, holding on to this they struggles and jerk in a terrible fashion, and if they are equally matched, they keep it up one whole day, or even two, without stopping until some one separates them; and certainly in strength of body and arms they are equal to us, comparing like to like; but if they are more skillful in wrestling and nimble running, they do not understand boxing at all ... (Thwaites JR III 91-97).

Fighting was either informal or semi-formal. I consider any outside involvement in a duel to be semi-formal because it requires one to act a role, to interfere if necessary, to make sure the fight is fair. It seems that fairness constituted an equal matching of foes

without the use of weapons. These fights were easily modified by friends, or by the authority figures in the community, chiefs or elders and on some occasions, pouin [shaman].

The little offenses and quarrels are easily adjusted by the Sagamores and common friends ... The great offenses, as when some one has killed another, or stolen away his wife, etc. are to be avenged by the offended person with his own hand; or if he is dead, it is the duty of the nearest relative when this happens, no one shows any excitement over it, but all dwell contentedly upon this word habenquedouic "he did not begin it, he has paid him back: quits and good friends." But if the guilty one, repenting of his fault, wishes to make peace, he is usually received with satisfaction, offering presents and other suitable atonement (Hoffman, 1955: 509).

LeClercq tells us that:

When they are convinced at length of their fault, one may threaten to break their bones with blows of clubs, to pierce their bodies with swords, or to break their heads with guns [clearly post contact], and they present themselves to submit to these punishments. "Strike me," say they, "and kill me if thou wilt; thou are right to be angry, and as for me I am wrong to have offended thee." (In Hoffman 1955:599).

While it may be true that fighting was an immediate and satisfying response to more simple affronts, perhaps a harsh or hurtful word, excessive teasing, tripping, or shaming, for example, were not easily wiped clean. Evidence suggests some situations did lead to longer periods of contention and occasionally developed into feuds.

There is little early evidence on feuding within Mi'kmaq communities but evidence of feuding between tribal communities exists. If problems arose between families sharing resource territory or winter and summer campsites, bringing tension to the community, it is likely that the parties would avoid each other, and if necessary, move away from each other. In aboriginal times, there are stories of social fragmentation and groups splitting up as a way of ending or avoiding ongoing confrontations. In order for a person or family to leave a resource community, tensions and personal risk must be quite

high because the community offers levels of security and comfort not easily acquired by strangers moving to a new group, or individuals struggling on their own. If resource stresses require that groups split, that is a socioeconomic matter decided by political processes. However, in some cases, if resource decline is a result of bad behaviour, improper adherence to protocols, bad medicine, or some other breach, a marginal group in the community may get the blame. When people with less status, less supernatural power, and less subsistence skills face accusations of performing witchcraft, or are held responsible for negative cosmological interventions, they are ostracized by the community and forced to retreat to other parts. This may be a survival tactic of the community.

Feuding between families may have resulted over competition in resource areas, or due to bad relations resulting from a marriage refusal, or a break down in alliances. Accusations of sorcery, bad medicine, the casting ill will or bad fortune on another, caused suspicions to increase and trouble, not easily fixed by fistfights, resulted. Indeed fist fights themselves may alleviate problems only temporarily, particularly if the one who loses does not accept defeat, and seeks to avenge his or her honour. This may lead to feuding between individuals. Individual feuds easily escalate into family feuds due to the high levels of interaction in tight knit communal situations, as people take sides, and ally themselves with friends and family.

Dispute management also had ritual aspects. Evidence suggests that at the conclusion of some conflicts, the custom was to bury a hatchet in the deepest hole possible. Some conclusions were marked with the sharing of a pipe. After the parties made a formal declaration of peace, and the presents dispersed, dances and feasts

commemorated the event. Treaties of peace between Mi'kmaq and other aboriginal groups occurred prior to European contact and were celebrated with such rituals.

Compensation was a further aspect of Mi'kmaq dispute management. Spiritual and material offerings, presents and atonement were important processes in the return to socio-spiritual balance. In order for restitution to occur, the parties or party that perpetrated the wrong must take responsibility. According to LeClercq:

Also they endure with patience the severest punishments when they are convinced that they have deserved them. They even make considerable presents to those who punish them severely for their misbehaviour, in order, say they, to remove from the hearts of the former all the bitterness caused by the crime of which they are guilty (Hoffman 1955:599)

LeClercq goes further and suggests:

It is forbidden them by the laws and customs of the country to pardon or to forgive any one of their enemies, unless great presents are given on behalf of these to the whole nation, or to those who have been injured (LeClercq 238-246 in Hoffman 1955:603).

Thus the Mi'kmaq had a full range of culturally constructed disputing processes and management strategies. From ritualized peace settlement, to fist fights, and compensatory practices, the Mi'kmaq established standards and procedures for interpreting and controlling what went on around them. They possessed symbolic and practical resources for adjusting behaviour and the promotion of compliance, which occurred within acceptable parameters of comportment and the moral values that supported them. Their rules and processes generate from the same systemic source a type of coherence within their entire cultural system; here law is culture.⁴⁴

Spiritual Practitioners - The Early Justice Entrepreneurs

One final aspect of early Mi'kmaq legal culture needs examination. Mi'kmaq religion and spiritual beliefs permeated all aspects of Mi'kmaq daily life, and spiritual leaders called pouin, were important figures called upon to mediate between the spirit and human worlds. Successful spiritual leaders significantly influenced the socioeconomic and political organization of the early Mi'kmaq.⁴⁵ Pouin possessed supernatural power obtained through gift or inheritance, and were associated with particular supernatural animals. Some pouin had the ability to shape shift into their guardian animal. Pouin apprentices embarked on spirit quests that involved isolation, fasting, and visioning. Once they acquired their spirit power they could employ their power to do good or evil. Pouin were also healers and were called on to treat the sick.

Whether the guardian animal is responsible for unethical conduct is not wholly clear, but it would appear that the shaman himself has to bear the brunt of the blame for unfortunate or disastrous happenings in the community (Frederick Johnson 1943:70-72 in Hoffman 437). A clever pouin could shift blame onto the community by suggesting that the spirits were upset with their behaviour, instead of his or her own shortcomings.

Spiritual practitioners could be either male or female. Females considered to be spiritually powerful were usually elderly. According to Vincent Erickson, early female religious practitioners played a special role in sun worship (1978:7). As healers, women could easily acquire the knowledge to locate medicinal plants, having spent a great deal of time in the woods collecting the game their male counterparts procured for them. Unfortunately there is little documentation specifically about women's roles during the

⁴⁴ See Lawrence Rosen (1989) who explains cultural concepts that describe human nature, social attachments, social relations and their consequences for legal consciousness in Islamic society.

early contact period that could be used to estimate their pre-contact practices as pouin; however, they played significant socioeconomic and political roles as discussed below.

In addition to being spiritual leaders, the pouin practiced curing which required extensive knowledge of local plants and their medicinal applications. Illness was thought to be brought about by failing to pay proper homage to Mi'kmaq deities, being in possession of evil spirits, bad medicine, or through acts of revenge for some past wrongdoing. The tools of the pouin were special property, and were collected and kept in a medicine bag. Much of their shamanistic activities were associated with their abilities to heal with herbal medicines and dream divination. They also had special bowls, pipes, hair wands, and flutes, items that were well guarded and considered dangerous if they fell into the possession of others. Part of the cleansing and curing habits of the Mi'kmaq included sweating. The Mi'kmaq used sweating as a rite of purification and healing, and pouin were often called upon to lead the ritual through song and clapping. Sweating was also considered to be a conduit to the spirit world. The spirits were sought to provide clarity in decision making, a factor important in responding to conflict management.

In terms of juridical activity, Mi'kmaq citizens called upon pouin to conduct sweats, help find lost articles, to locate the time and place of successful resource extraction, to make predictions about enemy activity, commend or rebuke war designs, and find out if a missing person was dead or alive. Pouin were known to use reflections in containers of water to elicit confessions about their wrongdoings from onlookers (Erickson 1978:7). According to one account from a non-Mi'kmaq observer in the mid 1700s, pouin juridical activity was carried out as follows:

⁴⁵ According to Hoffman (1955: 305) Mi'kmaq ceremonial and religious practices were similar to those of the Central Algonquian tribes.

The shaman may say that everyone present has to tell him everything in order to clear the way for the spirits to come and give him direction ... The Great Spirit which has all knowledge of future events, would not declare himself till every one of the assistants should have told him in the ear what were his actual thoughts or greatest secret. To this purpose he gets up, laments, and bitterly inveighs against the bad dispositions of those of the assistants, whose fault it was that the effects of his art were obstructed. Thus going round the company, he obliges them to whisper in the ear whatever hold the first place in their minds, and the simplicity of the greater number is such, as the make them reveal to him what it would be more prudent to conceal. By these means it is, that these artful Jugglers render themselves formidable to the common people, and by getting into the secrets of most of the families of the nation, acquire a hank over them ... [O]ut of fear of their established influence over the bulk of the nation, they dare not oppose its swallowing their impostures, or its regarding all their miserable answers as so may oracles.

Once he has all the information he needs he says he cannot give an entire solution until those is a particular state, and they know who they are, that in order for him to serve the interests of the whole nation ... I appoint that person without my knowing as yet, who that person is, to meet me' at such a time and place ... the Manitoo or Great Spirit orders me to spare his reputation and not expose him for if there is any harm in it to him, there is also harm to me" (Maillard 1758: 36-42 in Hoffman 455-456)

Thus the pouin are powerful people whose influence is critical to the wider legal consciousness of the community and the nation. The shaman therefore, was of necessity, a superior person in intelligence, perception, intuition, and judgment, and well respected by the community. If, as sometimes happened, the office of shaman was combined with that of chief, the religious, judicial, and executive aspects of authority and government were embodied in a single individual, and his powers and responsibilities were correspondingly broad. The responsibilities of these spiritual and juridical practitioners are many:

His divinations chiefly turn on the expedience of peace with one nation, or of war with another; upon matches between families, upon the long life of some, or the short life of others; how such and such persons came by their deaths, violently or naturally; whether the wife of some great Sagamo [chief] has been true to his bed or not, who it could be that killed any particular persons found dead of their wounds in the woods, or on the coast. But what the Jugglers [pouin] are chiefly consulted upon, and what gives them the greatest credit, is to know whether the

chase of such a particular species of beast should be undertaken ... how best may be discovered the designs of any nation with which they are at war; or at what time such or such persons shall return from their journey (Maillard 1758:36-42 in Hoffman 1955: 456-7).

With such responsibilities, the pouin were considered to be the guardians of public welfare, morals, and conduct in general. According to LeClercq, “it was felt that the infraction of the traditional laws of the nation brought misfortune upon the entire nation”(LeClercq 1910:261 in Hoffman 1955:461). It was then up to the pouin to correct or bring about balance by locating the guilty party through divination, and then meting out the proper punishment Successful predictions and healings bolstered reputations and improved chances of being aligned with powerful and chiefly families. Citizens would pay the pouin for their services with food, access to hunting grounds, household objects, tools, or other such materials. “Conjuring was frequently competitive, acquisitive, or used to acquire honour. All is prompted by the economic need for food, hunting grounds, and such” (Hoffman 1955:436). Thus, the pouin are the earliest Mi’kmaq justice entrepreneurs for their central roles in Mi’kmaq juridical practice. They were well compensated for their efforts to restore balance, seek out and punish wrongdoers, and they encouraged individual conduct that would facilitate the prosperity of the community, in which they lived and worked.

Conclusion

Orally transmitted, Mi’kmaq justice practices and their concrete abstractions (see Smith, G. 1999) are found in the language, and visually expressed through teachings, sacred and secular rituals, ceremonies and oratory. Other practices such as resource extraction, and relations of production, also shape individual and collective forms of legal consciousness and tplutaqan, as Mi’kmaq peoples participated in daily economic,

political, social, and spiritual activities.⁴⁶ There were dynamic processes available to resolve problems, and new normative patterns developed as changes in social organization and environment occurred. There were multitudes of flexible approaches for regulating behaviour that may be described as competing cultural models of socially sanctionable practices that shifted in relation to daily experiences. Community leaders, during this time period, had modest coercive authority.

Ideas and practices of justice occur in spiritual values and principles, and within the political, economic and social interaction of the individuals and communities within the cosmos of Mi'kmaq culture, they were spiritual and practical. The Mi'kmaq territory was divided into seven sociopolitical regions that covered what is now Nova Scotia, Prince Edward Island, parts of New Brunswick and Newfoundland and into New England. The regions were joined through political alliances, common language, kinship and economic relations. Embedded in the language are concepts of injury, loss, security, empowerment, harmony, revenge, shame, forgiveness, banishment, integration and balance. The oral traditions and Kluskap stories offer some insight into how the early Mi'kmaq handled problems between groups. Dispute stories tell that some resolutions force the offending party to move away in order to avoid ongoing confrontation. Another important aspect is that of managing disputes not through seeking immediate resolution, but through intermittent feuding and revenge. There may have been a reliance on spiritual guidance and the need to acquire spirit help in seeking to avenge problems.

When an offence was committed, it was primarily an offence against relationships and secondarily a violation of rules. When problems arose, family members intervened to

⁴⁶ See Bruce Miller's work on tribal codes that outlines the complex relationships between the legal standing of individuals, members of extended families and tribal interests and their conflicting claims

produce solutions because the family was the primary site of cultural justice production. Generally, responsibility for managing wrongdoings remained with the parties involved. If wrongdoings developed into feuds, or were interfering with the daily operations of the community, spiritual practitioners were called in to assist, to remove sicknesses thought to have caused the troubles, or to find other causes and propose potential solutions. Other times, persons with authority, such as community leaders, or respected elders, talked with the wrongdoers, teaching them how to fix the situation, and to find balance in a concept called apisik tugwan, a mutual forgiveness. It was important for social cohesion, group unity, and ultimately survival, that members be reintegrated into the group.

Dynamic, flexible processes by which attempts to resolve problems, were made available through informal and formal practices ranging from talking, teaching, and ritual performance, to ridicule, shaming, gossip, and ostracization. Some problems were quickly resolved through immediate confrontation, such as fighting it out, or by employing hapenkuituik, the law of vengeance that states that great offences are to be avenged by the family wronged.⁴⁷ To make even is called asidolisk. The nation's leadership adjudicated other disputes by recognizing alliances, banishing wrongdoers who did not alter their bad behaviour, redistributing hunting and fishing territories, giving instructions on war and peace, and reminding people of their teachings - the expected standards of how to live right. A significant part of this practice was the recitation of genealogies which served to remind people of their connectedness, their identity and place, within the Mi'kmaq world. It remains important today, where are you from and who is you dad or mom, endure as the first questions marking a new encounter. Many of

(1997).

⁴⁷ Marie Battiste, in Henderson (1997) discusses the concept of hapenkuituik as a law of revenge.

these elements of dispute management continue to be evident today and will be dealt with in later chapters.

Contrary to early interpretations of Mi'kmaq culture as simplistic, and without law, Mi'kmaq society incorporated complex practices designed to direct relations between members of their society. Socially constructed expectations and standards, around which these practices were enforced, challenged, and changed, were based on underlying principles of Mi'kmaq justice found within family, community, and nation. These practices were founded in daily interactions reflecting the interconnectedness of Mi'kmaq physical, social, and spiritual realms. Mi'kmaq justice was, and remains, about relations. Kinship patterns, marriage practices, political processes, notions of authority, status, inheritance, class, relationships to the land, each other, the spirit world, and outsiders, were all guided by ideas about how to live right. The goals of Mi'kmaq justice were to reinstate wrongdoers into the community, to find balance, to maintain, and when needed, restore relationships with people, the land, and the spirit world. Of course not all disputes were resolved as evidenced in ongoing blood feuds and community fragmentation. Life was not purely harmonious, nor edenistic, and the Mi'kmaq had sophisticated, flexible mechanisms for justice, legitimated because they were made meaningful by those that participated in and witnessed them. These concepts involved confrontation and intervention in periods of disharmony, and are flexible because they conform to the specialized circumstances of each event.

From the above evidence, the Mi'kmaq had complex and dynamic traditional justice processes that were formal and informal. I described Mi'kmaq life ways during the pre and early contact period in order to prepare for an analysis of the impact of

colonization on their juridical practices and legal consciousness, and to set the framework for understanding Mi'kmaq justice ideology and practices as they exist today. By foregrounding Mi'kmaq law ways against a background of culture and process, Mi'kmaq culture can be further illuminated.⁴⁸

⁴⁸ Comaroff and Roberts (1981) argued for situating law in its total social context.

Chapter Four: Confronting Mi'kmaq Legal Consciousness

In the previous chapter I demonstrated that Mi'kmaq legal culture involved the necessities of subsistence, survival, and getting along, and that the law ways of the Mi'kmaq were not a self-contained system of handling right and wrong; rather, traditional law was a system of values embedded in social relationships.⁴⁹ The social life of law was active in relationships that were fluid and dynamic, bending and stretching, as they were adjusted within transformative processes accommodating local needs. Mi'kmaq legal consciousness reflected the interconnectedness of their political, economic, and spiritual life ways.

In this chapter, I address the consequences of the clashes of legal consciousness as the Mi'kmaq entered the contact zone, and experienced terrific socioeconomic and spiritual transformations resulting from their encounters with missionaries, traders, military forces, and eventually settlers, in their traditional territories. British tools and processes of colonization, namely treaty making, centralization, and residential schools, characterized the criminalization of Mi'kmaq life ways. British assimilationist projects worked to colonize Mi'kmaq law ways through the development of a centralist justice system that rejected Mi'kmaq autonomy. Over time, the Mi'kmaq nation, once independent and powerful, was subsumed in unequal relations of power that alienated the Mi'kmaq from carrying out fully, their traditional law ways, and from equal participation in the Euro-Canadian justice system.

⁴⁹ See Jo-Anne Fiske (2000), Bruce Miller (2001) and Wayne Warry (1998) for examples of analyses arguing indigenous law is relationship centered and rule supported rather than rule centered.

The Mi'kmaq experienced different forms of legal consciousness as they entered into trade, alliances, and war, with their indigenous neighbours, and as they encountered European newcomers. When Europeans began settling in Mi'kma'ki, new kinds of relationships emerged, both within Mi'kmaq societies, and between societies. Contact with Europeans brought the Mi'kmaq in collision with foreign systems of law. This collision resulted in alterations of socioeconomic and political rules due to the impact of the fur and fish trade, increasing competition over resources, war, rapid population decline, and colonization (Denys 1908, Larsen 1983, Lescarbot 1911).

Labels and definitions of identity, imposed on the Mi'kmaq through colonial processes, generated binary oppositions, that placed Mi'kmaq and non-Mi'kmaq in adversarial, us/them relations, binding the Mi'kmaq into positions of sociocultural subjugation. The hegemonic force of British law however, resulted in colonial processes that actually increased Mi'kmaq cultural production. As the Mi'kmaq resisted subjugation, fought that alienation, and struggled to maintain their identity, continued use of old law ways and the production of new law ways, to accommodate changing environments and relations, heightened legal consciousness. Mi'kmaq resistance to colonization is writ large in contemporary Mi'kmaq legal consciousness. The colonization of Mi'kmaq legal consciousness characterizes their juridical discourses and practices, and has since become hegemonic in its own right within Mi'kmaq society. This chapter examines the historical context of colonization so we can better understand present day Mi'kmaq legal consciousness as articulated in discourses of justice as entitlement, and justice as healing, as sites of resistance to domination by the larger society.

Theorizing Colonial Processes

Scholars have demysticized colonization by breaking down powerfully hegemonic myths that have corrupted and distorted indigenous historical realities. For example, some academics are challenging the stories that inaccurately portray a heroic discovery, the quick and passive demise of the few inhabitants, who succumbed to the dominant culture naturally, by exposing the complexities of colonial power relations (Culhane 1998, Hill 1992, Stocking 1991, Wolf 1982). Colonial myths have long held that North America was a vast, uninhabited, yet bountiful wilderness, ripe for European conquest, and readily available for civilization through superior technological and social mores of the more 'evolved' cultures of the 'old world'.⁵⁰ In Canada, portrayals of colonial encounters often celebrated the benevolent actions of settlers, missionaries, and colonial officials as they generously assisted in assimilating indigenous peoples into a society they deemed superior (Furniss 1999).

On one hand, images that gloss the internal conflicts and cultural complexities by portraying an edenistic, and primitive indigenous world, contributed to their domination and marginalization because they tend to justify colonial projects, absolving their perpetrators from any wrongdoing. On the other hand, indigenous communities appropriate these images to counter the repugnant results of colonization by claiming to have lived in a more harmonious state prior to European contact. Harmony ideology models are counter-hegemonic strategies used by colonized groups to protect themselves from encroaching power holders, and at the same time are hegemonic strategies used by colonizers to defend themselves against organized subordinates (Nader 1990:1). The

⁵⁰ For counter arguments that demonstrate indigenous cultural complexities and significant innovations see Cornell (1988), Culhane (1998), Dickason (1992), Furniss (1999), Josephy (1993).

harmony ideology complex, as demonstrated below, was present in the colonization of Mi'kmaq legal consciousness and in Mi'kmaq counter-hegemonic resistance.

By fully realizing indigenous communities' proficiencies we can better understand the full effects of colonization and the resulting paternalistic relationships. Aboriginal peoples were not childlike societies without the capacity to endure, had not Europeans attended their civilizing missions of salvation, industrial domination, and forced assimilation. Furthermore, by appreciating the depths of the complexity of indigenous cultural practices and histories, aboriginal agency within colonial processes is more recognizable. Contrary to homogenizing hegemonic myths, contact and colonial processes involved at least three connected dimensions, “intersecting histories characterized by differentiation, heterogeneous cultural relations and values, and relations of power that encompass contradictions and tensions” (Roseberry 1994:88). These dimensions show the story of the colonization of the Mi'kmaq to be much more than straightforward contact, conquest, assimilation, and disappearance. Mi'kmaq colonial experiences on the surface fit the stereotypical associations of the Comaroffs' model, which states that colonization occurs as follows:

(i) With spatial distance and racial difference, re-presented typically in the argot of center-and-periphery, civilization and barbarism; (ii) with the extension of over rule by a well-developed imperial state, usually through the offices of a local colonial administration; (iii) with active presence of expatriate colonists, among them settlers, missionaries, plantation and mine managers, the staff of chartered companies, and government personnel; (iv) with the imperatives of political economy (Comaroffs 1997:16).

Unevenly experienced, Mi'kmaq colonization resulted in economic and political cultural productions. The social reproduction of institutions and practices, as meanings and identities negotiated and altered, occurred in processes particularly heightened during

moments of conflict and resistance (see Sider 1993, Smith 1999). These productions generate, based on culturally available narratives and practices, shifting discourses and interpretations that are vital to the formation of consciousness of colonial experience. These are processes that challenge the penetration of cultural domination which emerge as contradictions from the “complex array of social ties to which culture is connected” and produce a variety of outcomes (Sider 1993a:155). These outcomes are read here as clashes of legal consciousness between and within the Mi’kmaq nation and the larger society.

Contact and Colonization of Mi’kmaq Law Ways

As Richard White (1991) suggests, contact zone encounters were complex, and less linear than the many simple stories of conquest, assimilation, and cultural persistence in Indian-white relations, as told by dominant society, and regurgitated in their whitewashed history.⁵¹ White uses the concept of the ‘middle ground’ to analyze processes of cultural change that occurred when indigenous peoples met Europeans. During first encounters, the parties treated each other as aliens. Then they learned ways to accommodate each other, forging a middle ground in which they could mutually comprehend and interact. The middle ground was a place of power struggles, negotiations and accommodations; a complex web of changing relations that marked changing modes of production during the early encounters in Mi’kmaq territory.⁵²

During the 1500s, newcomers to Mi’kma’ki arrived from Europe, namely French Breton, Normans, and Basques, English, Spanish and Portuguese, who made seasonal

⁵¹ See Stephen Cornell (1988), Elizabeth Furniss (1999) and Daniel Paul (1993), for further arguments that discuss Eurocentric notions of colonialism.

voyages to fish for cod using first a wet fishery, and then a dry fishery. Entering into trade with the fishers, the Mi'kmaq procured beavers, and other furs, in exchange for tools, food, and liquor (Prins 1996:44-45). During this market period, the Mi'kmaq voluntarily participated in the fur trade, and while some encounters called for armed resistance, the general practice was diplomacy, marked by substantial aboriginal autonomy.⁵³ J. R. Miller argues that the early contact period during the 1600s was one of cooperation, where mutual benefits in trade and alliances, marked relations.

To preserve fish, to gather fur, to probe and map the land, and to spread the Christian message, cooperation by the Indians was essential. For their part the Indians found it acceptable, and occasionally desirable to humour the newcomers. To a minor degree the explanation could be found in Indian traditions of sharing and avoiding coercion of other. A more important reason for their toleration of and cooperation with the French was that the newcomers' activities were compatible with the continuation of Indian ways (Miller, J 1989:40).

The Mi'kmaq encountered the first French Jesuit settlers, who arrived in Nova Scotia in the early 1600s, with the principle aim of settlement being conversion to Christianity (Henderson 1997:79). Mi'kmaq interaction with the French missionaries brought about changes in their spiritual and political order, which manifested as changes within their legal orders as well. Although their contact was generally sporadic, the French and Mi'kmaq fostered relations described more as camaraderie than as adversarial. That the Mi'kmaq were willing to participate in French Catholic ceremony and religious services was not an indication of submissiveness, but rather a shared

⁵² See Eric Wolf's *Europe and the People Without History* (1982) and Bruce Trigger's *Natives and Newcomers* (1985) for detailed examples of indigenous encounters with foreigners during contact and colonization.

⁵³ Stephen Cornell defines patterns of incorporation and response in his history of Indian-White relations. He delineates a number of periods, such as the market period, conflict period, reservation period, as so on, and frames them according to the type of economic and political incorporation experienced by indigenous groups (Cornell 1998:14).

enjoyment of pageantry, an ability to find common ground within acts of worship, and a way to solidify trade relations.

The Mi'kmaq, following their traditional law ways, demanded presents and presentations as people entered their territories, encouraging reciprocal relations, fostering economic development rather than avarice. In order to facilitate trade and alliances, the French and Mi'kmaq eventually intermarried, learning each other's languages and ritual complexes. Orally proclaimed, Christian inspired regulations may have fit well with Mi'kmaq oratory traditions.⁵⁴ One source suggests the Mi'kmaq developed a special spiritual alliance with the French missionaries to prevent sickness and in fulfillment of Kluskap's prophecies (Henderson 1997:82). Without the Mi'kmaq, French survival was tenuous, given the harsh conditions of the environment and the Jesuits' lack of experience.

After several difficult winters, the French settled at Port Royal. Treated to Mi'kmaq hospitality under the leadership of Membertou, a great pouin, hunter, warrior, and aged Grand Chief of the Mi'kmaq nation, the mission was increasingly successful. Lescarbot, a French lawyer associated with the mission described Membertou in the following passage:

He has under him a number of families whom he rules, not with so much authority as does our King over his subjects, but with sufficient power to harangue, advise, and lead them to war, to render justice to one who has a grievance, and like matters. He does not impose taxes upon the people, but if there are any profits from the chase he has a share of them, without being obliged to take part in it (Lescarbot in Thwaites JR 1:57).

⁵⁴ To wit, the humanist impulses of the missionaries, if not necessarily their doctrinal teachings, struck a chord with indigenous ideas of action in the world, of healing and the making of history, of moral infraction and entitlement, of community and civility (Comaroffs 1997:8).

Lescarbot had been teaching the Mi'kmaq about the Christian faith, since one of the responsibilities stipulated by King Henry IV for people traveling to New France was religious conversion of the indigenous peoples therein. It was in part through this lawyer's efforts that missionary Abbe Fleche was able to celebrate the sacrament of baptism among the Mi'kmaq. During an illness, Membertou, unable to treat himself, summoned his pouins (shaman) who were also unable to cure him, so he sent for the French for help. According to Lescarbot, Membertou asked Sieur de Poutrincourt, a prominent French Jesuit settler, to come see him (Thwaites JR2:153). Poutrincourt was able to provide the necessary care that was attributed to preventing Membertou's death. Membertou may have interpreted the Jesuit's healing abilities as being derived from supernatural powers similar to his own. Not long after this incident, Poutrincourt opportunistically revisited his Christian teachings with Membertou in the hopes of converting him and his very large family, knowing full well that he was one of the most powerful and influential persons in Mi'kma'ki.

On June 24, 1610, Father Jesse Fleche from the diocese of Langres, whose commission provided him the political jurisdiction and religious authority to give absolution, to baptize the Mi'kmaq, and to establish alliances with the Holy See, baptized Grand Chief Membertou in the Catholic faith. This alliance was in fulfillment of Messamouet's vision and Kluskap's prophecy. Messamouet was also a high-ranking chief of the Mawio'mi and a relative of Membertou's. A ceremony was held combining Mi'kmaq and Christian rituals in which Membertou, along with twenty-one family members were baptized (Henderson 1997:85). Wampum belts, made to record the

concordant, were presented to the church, and to the other district chiefs to let them know of the alliance.

Conversion was not a straightforward process. It is difficult to determine how effective the missionaries and Jesuits were in transferring their religious concepts to the Mi'kmaq, particularly as their presence was sporadic due to financial hardships brought about by European wars. The repercussions of the European conflicts were felt throughout Mi'kmaq territory.

Anthropologist Laura Nader argues that law as cultural control is inseparable from political and religious colonization, and that the understanding of hegemonic ideational control must be connected to our knowledge of social or institutional control (Nader 1990:xxiii). Nader discovered the concept of harmony ideology as a tool of pacification used by missionaries in colonization processes to control indigenous populations.

The basic components of harmony as ideology are the same wherever it appears as culture control: the emphasis on avoidance and conciliation, the belief that conflict resolution is inherently good and that its opposite, continued conflict or controversy, is bad or dysfunctional, the belief that peaceful, orderly behaviour is more civilized than confrontative behaviour, the belief that consensus is of greater survival value than controversy (Nader 2002:32).

Harmony ideologies, also known as coercive harmony, were employed by missionaries in Mi'kmaq country to justify their discrediting of Mi'kmaq religious and spiritual beliefs systems. Practices of confrontation embedded in Mi'kmaq sociolegal practices of fighting, pouin intervention, and seeking vengeance, as well as any facets of Mi'kmaq economic life that did not fit with European commercial endeavors, were discouraged with the threats of spiritual, and commercial sanctions. These coercive tactics appealed to Mi'kmaq notions of spiritual sanctions and reciprocity obligation networks, around which they constructed their legal consciousness.

The Jesuits described Mi'kmaq culture as without law, and failing to recognize them as such, they disapproved of Mi'kmaq dispute management techniques, particularly revenge, direct confrontation, and fighting. Failure to comprehend Mi'kmaq law ways contributed to notions that Christian doctrines were needed to bring order to the Mi'kmaq world and precipitated ideologies of European superiority. A hierarchy of values is hidden in legal notions of idealizations, particularly in ones that value harmony over conflict, or confrontation, or adversarial activities, and these become hegemonic as colonial powers pushed for agreements and conciliation to minimize disruption to goals of pacification (Nader 2002:125-126). Coercive harmony silences disputing practices of indigenous peoples, and prohibited the violence that they had formerly relied on to manage their disagreements and problems. The carefully regulated processes of Mi'kmaq dispute management that were guided by the canons of reciprocity, and sanctioned by the threat of retaliation and revenge, were significantly altered as, "Christianity moved the fundamental direction of moral reciprocity from the horizontal plane between people to the vertical between man and God mediated by the pastor and church" (Nader 2002:128). Eventually Mi'kmaq exposure to Christian doctrines also led to Christianization of Mi'kmaq power relations because the social powers of pouin, and kinaps, as well as Chiefs, and the Mawio'mi, to heal, fight, provide subsistence, to carry out day to day activities, were repeatedly discredited by the priests. Within this pacification process, the incorporation of concepts such as sin, punishment, and absolution, required changes in behaviour and belief systems, and thus altered traditional forms of Mi'kmaq legal consciousness.

The missionaries used Catholic dogma to transform spiritual and social relations as they attempted to convert beliefs and condition cultural practices of the Mi'kmaq to those acceptable within the Church. For example, by undermining death and mourning rituals, shamanic consultations, mobile seasonal rounds, and polygyny, as profane, and promoting Christian doctrines as sacred, the Jesuit missionaries, at first subtly distorted, and then, directly condemned, traditional practices. Pouin or shamans held significant local power that they used to do good or evil. As their, "conjuring was frequently competitive, acquisitive, or used to acquire honour ... prompted by the economic need for food", the priests saw them as obstacles to their economic and spiritual enterprises (Hoffman 1955:436). Pouin were the guardians of public welfare, morals, and general conduct, and were central to correcting infractions of the traditional laws. Without them, misfortune could be brought upon the entire nation, intentionally or inadvertently. For the missionaries, denouncing the pouin was paramount. Pouin, when denoted as jugglers, were said to communicate with the devil and thus considered evil. One missionary set about discrediting the pouin by violating his sacred medicine bundle using the items inside for his own profane use:

There was in addition a little bow a foot in length, together with a cord, two fathoms long, interlaced with porcupine quills. It is this fatal bow which they use to cause the death of little children in the wombs of their mothers. I utilized this cord to make a line for fishing trout, and with it I took more than two hundred, in three hours' time, in a place where they were very abundant. That surprised our Indians a little - to see that I made as little account of a thing which the jugglers esteem so much (LeClercq in Hoffman 1955:446-467).

Perhaps LeClercq did not see the irony in his story. He pushed pouin to throw their medicine bundles into the fire, claiming them to be the property of the devil, regardless of their magical ability to provide food. Other tactics used the priests included attempts to

prove oracles false by showing their prophecies to be inaccurate, and by revealing their practices as folly. The priests had difficulties swaying the skeptics, as Abbe Maillard reported in the mid 1700s:

By these means it is, that these artful Jugglers render themselves formidable to the common people, by getting into the secretes [sic] of most of the families of the nation, acquire a hank over them, some, indeed, of the most sensible see through this pitiful artifice, and look on the Jugglers in their proper light of cheats, quacks, and tyrants; but out of fear of their established influence over the bulk of the nation, they dare not oppose its swallowing their impostures, or its regarding all their miserable answers as so many oracles (Maillard 1758:36-42 in Hoffman 1955:457).

Missionaries wanted the Mi'kmaq to settle and become farmers because their nomadic ways made conversion difficult. Missionaries encouraged Mi'kmaq to dispense with their notions of spiritual sanctions by replacing them with Christian concepts of penance and punishment, concepts that shift moral values and deterrence principles. What happens morally when the only fear against doing something wrong is the fear of punishment? (Nader 2002). Gender relations and roles of women, were significantly altered by Christian proselytizing, and European paternalistic policies, that mutated marriage concepts, child rearing, women's work, and the geopolitical strategies of the seasonal round. Political procedures were interfered with as Mi'kmaq institutes of authority were usurped within colonial processes that ultimately contributed to the demise of this formerly self-sufficient, thriving, and once populous nation. These transformations were not all one side imposing itself on the other; on the contrary, the Mi'kmaq tried to assimilate the French into their indigenous legal system through intermarriage and conferring of chiefly status on non-Mi'kmaq deemed worthy of such recognition.

Between the 1600s and 1800s, missionary contact with the Mi'kmaq was generally sporadic, yet precipitated significant cultural changes that had lasting effects on Mi'kmaq cultural practices and identity. By the 1800s, the majority of Mi'kmaq living in Nova Scotia belonged to the Roman Catholic faith (Hoffman 1955, Miller, V. 1976, 1982). Ideas of harmony may have been attractive to the Mi'kmaq's other worldly imaginings, but they also presented confusing and contradictory messages, particularly as the French incited the Mi'kmaq to commit hostile acts against the English as the wars in Europe were transferred to Mi'kma'ki and at the same time promoted harmony internally.

Meanwhile the Mi'kmaq continued to honour their alliances with the French as they entered into conflicts with the English. Mi'kmaq leaders saw themselves as equals with the king of France and offered gifts and military assistance to the French. In return, the Mi'kmaq expected the French to honor their alliances by periodic ceremonial distribution of presents. With time this connection spawned a complex middle ground of cultural accommodations in which Metis offspring of Mi'kmaq women and members of the French merchant families played prominent roles as intermediaries (Chute 1999:496).

Well before any long term settlements were established, the Mi'kmaq of Nova Scotia experienced rapid and significant population decline due to diseases contracted from Europeans, "as well as lowered resistance to endemic diseases resulting from dietary change and the introduction of alcohol" (Miller, V. 1982:107). As LeClercq noted, the effects of drinking alcohol acquired in trade with fishers and fur hunters were taking their toll and causing new forms of disputing:

... injuries, quarrels, homicides, murders, parricides, to this day the sad consequences of the trade in brandy; and one sees with grief Indians dying in their drunkenness; strangling themselves, the brother cutting the throat of the sister, the husband breaking the head of his wife, a mother throwing her child into the fire or the river, and fathers cruelly choking little innocent children whom they cherish and love as much as and more than themselves when they are not deprived of their reason. They consider it sport to break and shatter everything in the wigwams and to bawl for hours together, repeating always the same word. They beat themselves and tear themselves to pieces, something which, happens never or

at least very rarely, when they are sober. Sometimes they rob, ravage and burn the French houses and stores (LeClercq 1910: 255-256 in Hoffman 604).

Another passage notes:

They always allege, as their usual excuse, that they had no sense when they had committed such and such actions. When they are convinced at length of their fault, one may threaten to break their bones with blows of clubs, to pierce their bodies with swords, or to break their heads with guns, and they present themselves to submit to these punishments. "Strike me and kill me if thou wilt; thou are right to be angry, and as for me I am wrong to have offended thee". It is not the same however when they are ill-treated without cause, for then everything is to be feared from them. As they are very vindictive against strangers, they preserve resentment for the ill-treatment in their hearts until they are entirely avenged for the injury or for the affront which will have been wrongly done them. They will even make themselves drunk on purpose, or they will pretend to be full with brandy, in order to carry out their wicked plan, imaging that they will always be amply justified in the crime which they have committed if they but say to the elders and heads of the nation, that they were tipsy, and that they had no reason or judgment during their drunkenness. They do not know what it is, as a rule, to give up an enterprise which they once have formed, especially if it is public and known to their fellow countrymen; for they fear to incur the reproach that would be made to them that they did not have heart enough to carry out the design (Hoffman 1955:599- 600).

It is likely that the French used these crises as moments to appeal for harmony and instilling harmony ideology as a way of bringing the Mi'kmaq under submission, playing on the concept of guilt, but also the idea of immediate absolution through confession, made possible through conversion to Catholicism. The power to offer penance as a way to manage disputes, quickly freed them from the responsibilities of their actions that formerly would have required excessive gift giving, and amending practices, that were part of the wider reciprocity and exchange systems the French sought to undermine.

It is neither gaming nor debauchery that disables them from the payment of their debts, but their vanity which is excessive in the presents of peltry they make to other savages, who come either in quality of envoys from one country to another, or as friends or relations upon visit to one another. A village is sure to exhaust itself in presents, it being a standing rule with them on the arrival of such persons to bring out everything that they have acquired during the winter and spring

season, in order to give the best and most advantageous idea of themselves (Hoffman 1955).

If the French could interrupt these patterns, they would gain some economic advantage. As European conquest of Mi'kmaq lands proceeded, the French made land grants to their French subjects in Acadia. Article seventeen of the Charter for *La Compagnie des Cent Associes* (1627), provided protection only for Christianized Mi'kmaq as French subjects and they were included in proprietary and inheritance rights. The blatant denial of aboriginal rights and titles emerge as critical factors in the pacification efforts embedded in coercive harmony, and reveal the ultimate goals of conversion to be the dispossession of Mi'kmaq lands, control of their economies through the dissolution of their life ways, and law ways.

Despite experiencing a great deal of cultural change, the Mi'kmaq remained able, for a time, to keep the French on the middle ground. However, once the British arrived and began making claims on their territories and resources, without due regard to Mi'kmaq protocols, and without recognizing the sovereign authority of Mi'kmaq political, spiritual, and sociolegal organization, the middle ground shifted considerably. The process of accommodation and alliances that occurred on the middle ground with the French and the early traders, foregrounds the genocidal invasion and occupation that marked the onslaught of colonization of the Mi'kmaq. "The real crisis and the final dissolution of this world came when Indians ceased to have the power to force whites onto the middle ground. The middle ground eroded as whites dictated the terms of accommodation" (White 1991:x).

Eventually European occupation of Mi'kmaq territory contributed to a decline in chiefly authority and disrupted social organization. The cultural processes for handling

changes, such as succession and apprenticeship, eroded due to rapid population decline and interference. Resource extraction processes and technologies shifted with the introduction of guns and European tools. Over time, the necessities of subsistence became scarce due to increasing incursions by British, an expanded fur trade, which significantly pressured resources, and a change in seasonal rounds, as more time was spent procuring furs instead of bringing in supplies for winter.

The expansion of the settler population challenged subsistence endurance. A group of middlemen emerged as go betweens for the traders, military forces, missionaries and the community, enabling people who had previously not demonstrated the required, and desired, chiefly characteristics, to assume new forms of power, status, and privilege. Economic shifts show a marked change during the 1500s and 1600s. Previously, family trading focused on consumption rather than accumulation, which meant that there was a practical limit on the number of furs traded with indigenous neighbours (Wicken 2002:32). With the arrival of European fishermen and traders,

... new systems of exchange were created as the Mi'kmaq consciously chose both to trade the bulk of their furs to Europeans, and to trade a far greater number of them. This decision, made individually by communities scattered throughout the eastern seaboard, precipitated a new economic conjuncture in Mi'kmaq history. From that time on, families would have less influence over the prices attached to individual furs and goods than had been the case in their trade with aboriginal communities (Wicken 2002:33).

During this period, the assignment of hunting territories and decisions concerning the seasonal movements of groups, formerly in the hands of the council of elders and the Grand Council, and central to Mi'kmaq legal consciousness, underwent changes. Early observers suggest that the authority of this extralocal body seems to have declined much

more rapidly during the contact period than that of the local chiefs, who would be involved with the individual alliances of their communities (Hoffman 1955: 187).

One cannot give a more convincing reason for the decadence of the Gaspesian nation, formerly one of the most numerous and flourishing of Canada, than their disregard for the fundamental laws which the elders had established, but which our Indians have not observed, and still do not observe at present, except in so far as it pleases them; for it is truth to say that they have neither faith, nor kings, nor laws. One sees no more among these people those large assemblies in the forms of councils, more that supreme authority of the heads of families, elders and chiefs, who regulated civil and criminal affairs, and in the last resort decided upon war and upon peace, giving such orders as they thought absolutely essential, and enforcing the observance thereof with much submissions and fidelity. There are now only two or three Indians who, in their own districts still preserve, though feebly, a sort of power and authority ... The most prominent chief is followed by several young warriors and by several hunters, who act always as his escort, and who fall in under arms when this ruler wishes particular distinction upon some special occasion. But in fact, all his power and authority are based only on the good will of those of his nation, who execute his orders just in so far as it pleases them. We had among us, at the River of Saint Joseph [Restigouche], one of these old chiefs whom our Gaspesians considered as their head and their rule, much more because of his family, which was very numerous, than because of his sovereign power, of which they have shaken off the yoke, and which they are not willing any longer to recognize (Hoffman 1955: 603).

Having lost the middle ground, the harsh realities of colonization were to be felt more deeply and cruelly. As the British gained dominance over the French in Mi'kma'ki, they did not develop the same kinds of relations of reciprocity and accommodation with the Mi'kmaq that the French enjoyed. Rather, the British ignored Mi'kmaq customs and activities, except when they interfered with their settlement plans and commercial activities. In 1713, the Treaty of Utrecht between France and Great Britain, ended a decade of wars, and 'Acadia' became part of the British Empire. The colonial office renamed 'Acadia', Nova Scotia, as a symbolic gesture of this conquest. British attempts to erase Mi'kma'ki, and the Mi'kmaq, began in earnest.

British/Mi'kmaq Relations: Treaty Making and Shifting Legal Consciousness

Despite the treaty, the French still remained a potent military force at Unama'ki, or Ilse Royal, as the French called it (Cape Breton Island), which remained isolated from British rule until about 1800. The French also maintained their alliances with the Mi'kmaq. During this period, due to depletions brought about by an extended war, Great Britain did not have the financial power to establish a forceful presence in 'Nova Scotia' (Wicken 2002:99). Here patterns of incorporation and response in aboriginal-white relations resembled Cornell's (1988) conflict period, in which the forced expropriation of indigenous lands, and exclusion from the larger economy, marked a decrease in demands for indigenous labour, as settlers moved in and appropriated Mi'kmaq resources, land, and place, in local commercial enterprises. The four criteria outlined by the Comaroffs (see above) were most obvious in their relations with the British, but Mi'kmaq resistance continually ruptured and compromised the boundaries the British sought to establish (1997:24). The Mi'kmaq responded to the British intrusion with periods of intensive armed resistance and then in negotiations under duress. As British aggressions against the French and Mi'kmaq escalated, the British instilled a campaign of genocide that significantly diminished their numbers (Miller, V. 1982, Paul 1993).

The Mi'kmaq do not appear to have acted in any national capacity, hostile or otherwise, in relation to the British in the early eighteenth century. Any resistance against British encroachment on their lands arose from small groups, acting under local leaders. Heads of these units demanded payment for land and resources that they declared Britain had taken without permission. British recalcitrance in responding to these requests doubtless underlaid the many sporadic and sudden attacks by Mi'kmaq parties on British fishing or merchant vessels, often heedless of whether France and England were at war or peace (Chute 1999:496).

Mi'kmaq alliances with the French put them in bad favour with the British, and whenever they sought support for their interests, as self-determining people, the British

used these alliances against them. After the Treaty of Utrecht, which granted Nova Scotia to the British, but did not end hostilities with the French, the French sought to secure Unama'ki (Cape Breton), a disputed area under the treaty, and built a fort at Louisbourg, expanded their settlement efforts. The Treaty of Utrecht did not stem from the conquest of the Mi'kmaq, nor the purchase of their land, but from the defeat of France. The missionaries encouraged the Mi'kmaq to remain separate from the settlers and traders, who they thought were encouraging disreputable behaviour, interfering with trade and conversion, but generally interaction between communities was unavoidable. The French relied on the Mi'kmaq to help attack the British, and gave presents in the hopes of sabotaging potential Mi'kmaq-British alliances.

British efforts to promote settlement among English speaking Protestants were largely unsuccessful until the creation of Halifax in the mid 1700s. In establishing its new colony, the British created the Nova Scotia Council in 1720, as the king's chief administrative body. The governor appointed the council members, who possessed wide-ranging powers, including the right to overrule the governor's authority, and to act as a court of law in which the French could be brought into submission (Wicken 2002:89). The British could not simply ignore the Mi'kmaq, as their retaliatory efforts interfered with British commercial designs in the fish and fur trade. The British solution was to enter into treaty with the Mi'kmaq.⁵⁵ Here British law ways became the, "cutting edge of colonialism, an instrument of power of the alien state and part of the process of coercion"

⁵⁵ The treaty making period of the Mi'kmaq is very complex and requires great attention to detail to do it justice, pardon the pun, and thus falls outside of the scope of this paper. William Wicken has written an excellent account of the treaty process entitled *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Jr.* (2002).

that undermined Mi'kmaq cultural production, particularly their law ways, and redefined relations with the newcomers in their territories (Chanock 1985).

The treaty making process did not occur in a vacuum. Local and global events affected the contexts and relationships in which negotiations took place. Personalities, religious wars, spread of disease, capitalist expansion, changing modes of production, world trade networks, and enlightenment ideals; the restructuring of political and social organization, bureaucratic expansion and colonial policies, played varying roles in shaping the changes taking place as culture groups collided, confronted, accommodated, dissolved and resisted within colonial processes. As groups negotiate their identities, within and between, their cultures are continually reconstituted, and law ways stand out as less easily changed, and take on increasing importance under conditions of confrontation and change (Merry 2000:51). Such was the condition in Mi'kma'ki, as British military power moved in to protect New England fishers and traders in the settlement of their new colony.

The Mi'kmaq had entered other treaties with indigenous groups and held informal agreements with the French. Agreements were recorded with wampum and repeated in oral recitations, which became embedded in the memories of the audiences, and passed on through generations. The Mi'kmaq had experience in transmitting the information contained in covenants across time and space, according to cultural norms, using memory, oral traditions, and the wampum as mnemonic devices. Mi'kmaq social organization employed collective decision-making processes (recall the assemblies, elder oratory, and gatherings of councils), which enhanced social cohesion, minimized ill will,

and limited political disagreements that might undermine village stability (Wicken 2002:44).

Since the Mi'kmaq participated in treaty negotiations, they must have had an explicit political order and a common political will or they could not have exerted any influence on the treaty-making process. Without such a political order the treaties would have been redundant, as the British could have simply forced themselves on the Mi'kmaq through military means. That the British did not, and recognized that they could not, and were worried even as late as 1808 about the dangers the Mi'kmaq posed to British Nova Scotia's security, indicates that such an order did exist. There is no more telling proof of this than the British signed not just one treaty with the Mi'kmaq but five separate agreements over fifty-three years between 1726 and 1779 (Wicken 2002:40).

In 1726, the Mi'kmaq of Nova Scotia entered into their first treaty with the British. When the Mi'kmaq signed the treaty of 1726⁵⁶ they entered into a new type of relationship, which required different conceptualizations of agreements, and contributed to the construction of a new consciousness, as new sets of understandings of persons, and relationships, emerged (Merry 1991:892). The 1726 agreement was a peace and friendship treaty designed to end years of conflict between the British and Mi'kmaq, and end the Indian wars taking place in the northeast. British planned to use the treaty to incorporate the Mi'kmaq into the network of British colonies to assist in their battle against the French. The treaty consists of two parts. The first part comprises the articles of peace and agreement signed by the Mi'kmaq, Maliseet, Passamaquoddy, and Penobscot delegates to guide their future relations with British colonies. The second part of the treaty comprises the reciprocal promises made to the aboriginal communities by Nova Scotia officials.

The legal system of the British interacted with the existing system of the Mi'kmaq. New forms of law emerged, and a short lived middle ground persisted. There

were significant conceptual differences that formed important distinctions in the interpretations and understandings of the treaties. For example, the British emphasis on the written word and Mi'kmaq emphasis oral traditions, were vastly dissimilar. The Mi'kmaq held long discussions about the meaning of the treaty. Their decision processes were directed by these discussions, in which their terms were determined jointly among their leadership and their constituents. However, Mi'kmaq terms and understandings were not articulated within the narrow confines of written articles, but would have been understood and preserved, as part of the life of the treaty in Mi'kmaq conceptions of it. Memories of the consultative decision making process, in which many people participated and articulated their opinions, are what gave the treaty meaning, and life, in Mi'kmaq world views. These opinions would have been based on long term historical memories, teachings, and records of the relationships the families and groups had with the land, resources, and spirit worlds. Furthermore, protocols that governed the transmission of information and the reception of messages, influenced communication processes. For example:

When a messenger arrived, the chief and council of the village gathered to greet him. Then a pipe filled with tobacco was passed to each person present; this symbolic re-enactment of the peace that existed among the Wabanaki acted as a pledge of the sincerity of those who were present. Only after the tobacco had been smoked did the messenger rise and deliver his message (Wicken 2002:93).

The historical record reports the smoking of a peace pipe and burying hatchets between Mi'kmaq and British to mark the end of hostilities.

Importantly the language of the spoken and written words differed. The Mi'kmaq had French translators, but how fluent the Mi'kmaq were in French is questionable,

⁵⁶ The treaty ratified by the Mi'kmaq at Annapolis Royal was an exact copy of the agreement signed at Boston in December 1725.

particularly in matters concerning the translation of British intent in treaty making. Prior to 1726, missionary activity was greatly diminished in Mi'kma'ki. The tumultuous historical relations between the French and British also likely skewed missionary interpretations of the political objectives of the British. While total incomprehension, with or without French intervention, was unlikely, translations had serious implications for the Mi'kmaq. As Wicken explains, while treaty making embodied both cultures, the embodiment was unequal, as the writing of the treaty was in English, not Mi'kmaq:

For good example, consider these English concepts: 'lawful', 'submission', and 'subject'. These words were specific to the history of Great Britain. Mi'kmaq history had not evolved in the same manner, so the words used would have been different than those used by the British. How the Mi'kmaq understood 'lawful', 'submission', and 'subject' would have been conditioned by their own history and by the history of their interactions with European people (2002:97).

The British had the power to control the interpretation of the treaties, power derived through the hegemony of British law. They were able to impose their cultural order onto the Mi'kmaq, providing the British colonial officials with the means to simultaneously deny Mi'kmaq their autonomy, while breaching the laws that they had made recognizing their sovereignty. British law in the colonies focused on forming alliances with aboriginal peoples, in which the aboriginal communities acknowledged British sovereignty, and agreed to submit to British law peacefully. After a ceremony to mark the occasion, British expected Mi'kmaq incorporation into a "proper understanding of the law, and so learn to behave like members of a civil society" (Wicken 2002:113). The treaties were to facilitate this colonizing process by regulating Mi'kmaq interactions with British subjects. This process was to set up a hierarchical relationship with an

omnipotent king and his obedient subjects to benefit the British and subdue the Mi'kmaq, rather than enter into reciprocal relations.⁵⁷

The nine clauses of the articles of the 1726 treaty outlined the framework for the regulations in which to impose the laws of the colony on the Mi'kmaq. Problems abounded as clear understandings of how the lands were to be dispersed, utilized, and settled, remained ambiguous. In each clause, British law superseded alternative legal conceptions embraced by the Mi'kmaq. For example, the treaty states that new settlements were to be lawfully made; however, what was meant by 'lawfully', according to the British, and how the Mi'kmaq were to interpret it, were not outlined. As Wicken notes, this situation created ongoing political and legal questions regarding British settlement of Mi'kmaq lands, and Mi'kmaq rights of occupation, ownership and title (2002).

The Mi'kmaq were resistant to English encroachment on their lands. They emphasized they were the first inhabitants, the rightful owners of the territories, and rejected the notion of anyone else holding jurisdiction over them, or their resources. The Mi'kmaq asserted their sovereignty; any right to settle their lands derived from their authority, not some invisible king in a foreign land. In the reciprocal promises of the treaty, it was guaranteed that the "Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor any other their Lawfull Occasions". The clause thus assured the Mi'kmaq could continue to exercise their customary rights on their lands, but did not define which lands, yet implied the British should settle elsewhere, so as not to interfere with Mi'kmaq survival practices on those lands. As was customary among the

⁵⁷ A relationship that differed significantly from French-Mi'kmaq alliances in which the French king was seen as benevolent and protecting in a dynamic relationship that required constant nurturing by the king

Mi'kmaq, permission to access and compensation were required before lands could be used, and if trespassers were found, they had to pay for the violation to make things right according to Mi'kmaq law ways. The Mi'kmaq firmly believed it was necessary to protect their present and future endeavours by committing to rebalance their symbiotic relationships with all things human, and other than human. These Mi'kmaq patterns of settlement, management, and work, clashed with those of the British and French. Wicken concludes:

Thus, when the Mi'kmaq were told that the British would not molest them 'in their persons, Hunting, Fishing and Planting Grounds nor in any other their Lawfully Occasion,' they understood this to mean that in these areas they would exercise some form of control that would enable them to protect their hunting and fishing lands from outside interference. This control would include the right to regulate outsider's travels through their lands - a right that included regulating the movement of New England traders (2002:132).

A further clause of the 1726 Treaty altered long standing Mi'kmaq dispute management. The clause states, "That in case of any misunderstanding, Quarrel or Injury between the English and the Indians, no private Revenge shall be taken, but Application shall be made for redress according to his Majesty's Laws." As noted in the previous chapter, the Mi'kmaq law of habenquedouic demanded revenge in the case of murder, either through compensation in goods, or life for life. A story recalled by Wicken⁵⁸ tells that when a killing occurs between people from different nations, revenge was the community's responsibility, and reparations were the responsibility of the offender's community or nation, rather than confined to a settlement within the families.

Some New England fishermen encountered a small group of Mi'kmaq off the coast of Cape Sable and offered to pay them if they went to 'hunt birds'. Two Mi'kmaq took up the Englishmen's offer and were later found dead, 'their bodies

who was available to hear complaints and try to meet their needs (Wicken 2002:115).

⁵⁸ The story is in the Archives Nationales, Paris, France - Archives de colonies - Correspondence general, Canada 35:12v-13r, MM. Ramezay eet Begon au ministre, 13 septembre 1715.

floating in the water.' Believing that the fishermen were responsible for the two deaths, local Mi'kmaq villagers seized nine or ten fishing vessels. The captains were kept prisoner, and the crew members released 'all disfigured after cutting their cheeks from the mouth to the ear. Though none of the fishermen were killed, the fact that the captains were kept hostage suggests that the Mi'kmaq intended to ransom them in compensation for the lives of the two men who had been killed. In this instance, a Mi'kmaq village was exacting revenge on the nation it held responsible for the killings...New England officials interpreted the hostage taking as an act of war; the Mi'kmaq believed that their actions had defused a dangerous situation. By avenging the deaths, they had righted a wrong, and prevented further bloodshed (Wicken 2002:135).

The British, outraged at the act, held their methods to be superior without understanding the customs by which Mi'kmaq law ways were mobilized. The treaty was to create a new process to resolve disputes, but left the details up to the imagination. Removing the power to adjudicate their injuries according to their customary practice altered sociolegal power held by chiefs, elders, and community leaders, and forced the Mi'kmaq to seek redress in a foreign legal system that had little meaning for them.

Initially the Mi'kmaq did not use the system and later, the British legal system was generally unresponsive to Mi'kmaq applications. By signing the treaty, the Mi'kmaq agreed that they would not remedy perceived wrongs committed against them, by the strangers in their territories, by their own hands, but would submit to a judicial process, based on the British rule of law and punishment. To access this process they could complain to the governor, who was the conduit to the king, the one responsible for mediating disputes with the Mi'kmaq in Nova Scotia. Clearly the British had faith in the rule of law, and individual rights, and wanted to control conflict in the region because it interfered with ability to pursue their colonial economic interests, and their competition against the French. Contrary to British beliefs, the Mi'kmaq did not agree to become subjects of the Crown. The treaty process itself was a negotiation between independent

nations, and yet formed on concepts that presented contradictions in their meanings and interpretations cross-culturally. Through his thorough analysis of treaty making, Wicken concludes that based on the social and economic interests of Nova Scotia officials, "they interpreted the treaty in a manner that explicitly recognized that the Mi'kmaq were independent of British law" (Wicken 2002:140).

By mid 1700s, British presence in Nova Scotia had expanded significantly with settlements at Halifax and Lunenburg, as well as several forts and new military forces. These settlements were built without Mi'kmaq consultation, or approval, on territories they regularly occupied. Hostilities between French, British, and Mi'kmaq escalated as Mi'kma'ki was undergoing vigorous transformation as British colonists began to claim more and more of the landscape, changing names, clearing lands, and building walls. Renewal of the 1726 treaty occurred on several occasions, once in 1749, and again in 1752, with the addition of seven new articles. The flexibility with which the treaty was originally interpreted was increasingly undermined as the colonial officials were able to strictly enforce, due to a larger military and bureaucratic presence, a narrower interpretation that served their land acquisition and economic needs as paramount over any concerns of the Mi'kmaq.

Governor Cornwallis arrived in 1749, determined to exact his authority over the Mi'kmaq. Known for his brutality, he offered rewards for killing or taking the scalps of any Mi'kmaq, because they demanded negotiating new settlements rather than just submitting to the British (Paul 1993:108). Cornwallis empowered himself in a patriarchal role to unilaterally impose British law on the Mi'kmaq without consultation. He ignored Mi'kmaq interpretations of the treaty because he thought the Mi'kmaq were a "savage

and barbaric race that needed to be told what the law was, not to participate in its creation" (Wicken 2002:175). On July 14, 1749, Cornwallis opened his commission and swore in six initial councilors. Four days later, four justices of the peace were appointed and sworn in. Two were military men, but two were civilians, a civil engineer and an attorney at law. On 19 July, the settlers were assembled in separate companies with their respective overseers to choose a constable for each company. Cornwallis' commission gave him power to establish the accepted institutions of British civil government: a council, a legislative assembly, courts, and a judiciary. It accorded him the power of the civil executive to defend the colony, exercise the king's prerogative of mercy, administer public funds, make grants and assurances of lands, and establish fairs and markets.

Most significantly, Cornwallis' commission gave authority to the governor 'with the advice and consent of our said Council and Assembly or the Major part of them respectively ...' in Nova Scotia: to make, constitute and ordain Laws, Statutes and Ordinances for the Public peace, welfare and good government of our said province and of the people and inhabitants thereof and such others as shall resort thereto and for the benefit of us our heirs and Successors, which near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britain (Barnes 1984:4).

Through conquest, the king could impose what law he wished, but once having imposed English law, was obligated by the constitutional restraints of English law. Between 1608 and 1774, those constitutional restraints increased while the king's prerogative decreased, but had not yet disappeared. There was much confusion as to what English laws were, and were not in force, in the colonies (Barnes 1984:11).

Furthermore, under Cornwallis:

Beginning in 1749 Britain began a deliberate policy to overwhelm the Mi'kmaq population by importing German Protestants, Planters, and retinues from disbanded regiments who could be settled in mass on lands frequented by the Mi'kmaq during the summer months. This policy frightened and enraged the

Native population, who feared for the security of their access to shore and sea, from where they derived much of their sustenance (Chute 1999:497).

In the 1752 treaty, the government agreed to provide the Mi'kmaq with financial incentives to keep peace, finding this to be a less expensive avenue than continuing hostilities. The treaty promised annual presents. A final article of the treaty promised:

That all disputes whatsoever that may happen to arise between the Indians now at Peace and others His Majesty's Subjects in this Province shall be tried in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Advantages and Privileges as any others of His Majesty's Subjects.

Now the dispute mediation process between the culture groups had clarification, as a formal court system was in place in Nova Scotia. However, "the British were unable to impose their law on the Mi'kmaq, or to make them live as if they were the king's subjects," because fighting continued as the Mi'kmaq resisted British domination (Wicken 2002:190). The image of the lawless frontier no doubt became firmly entrenched in British colonialist minds.⁵⁹

By 1758, the French lost their stronghold as Louisbourg fell to the British, but the Mi'kmaq continued to fight without their allies, forcing the British to pursue further treaty making with them. The final treaties with the Mi'kmaq were the treaties of 1760-1761, which were based on the treaty of 1726 (Wicken 2002).⁶⁰ In 1761, Lieutenant-Governor Belcher held an assembly to ratify a treaty of peace and friendship and a ceremony to bury the hatchet. Belcher promised that:

... the king (George III) would protect their religion and would not interfere with the Catholic missionaries living among them: 'The law will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you,

⁵⁹ See Jo-Anne Fiske's article in *BC Studies* (115/116:1997/98) in which she addressed how traditional law was displaced and delegatized in discourse and practices as she examines the colonizers who emerged as lawmakers and law enforcers.

⁶⁰ Another treaty was signed in 1779 but it did not substantially modify the earlier treaties (Wicken 2002:191).

the great weight of the Laws will fall upon them and punish their Disobedience.' However, the Mi'kmaq, said Belcher, must also learn to respect the rights of His Majesty's other subjects: 'I must demand, that you Build a Wall to secure our Rights from being trodden by the Feet of your people' (Wicken 2002:216).

"For two years the government issued presents in accordance with the terms of treaties of peace and friendship that had been signed in 1760 and 1761, and then it abruptly discontinued the practice" (Chute 1999:500). By this time, the gulf between the communities of the Mi'kmaq and the British were firmly entrenched. The British had successfully marginalized the Mi'kmaq through the treaty process as British law gained centrality in its interpretation. However, the Mi'kmaq persisted in resisting the imposition of the British sovereign's will, fully recognizing the British intentions, and their disregard for their rights. The Mi'kmaq continued, against all odds, to exercise their culturally derived authority over their lands and resources. Written legal code did not confine Mi'kmaq law ways; however, their legal consciousness shifted through these experiences. The British failed to honour their promises to the Mi'kmaq and continued their colonization of Mi'kmaq legal consciousness in other ways.

Chapter Five: Colonizing Mi'kmaq Legal Consciousness Legislated Alienation, Centralization and Residential Schools

In this chapter I examine the post-treaty making period in Mi'kma'ki to explicate the colonization processes that inform Mi'kmaq legal consciousness today. Important historical events embedded in the memories and histories of the nation occurred between 1800 and the present. Colonial policies wrought undue hardship on Mi'kmaq persons and the negative affects of forced assimilation, coerced settlement, and racism, produced the foundations of legal ideology and consciousness, characterized by resistance to these processes. This chapter takes a look at the brutal assimilation events of residential school and centralization in Mi'kma'ki, and provides an analysis of their import to Mi'kmaq legal consciousness.

Following the treaty period, little attention was paid to the Mi'kmaq until about 1800, when the British expanded their colonial rule over Mi'kma'ki, and began efforts to acculturate and assimilate the Mi'kmaq into sedentary farmers on 'lands set aside for them'.⁶¹ The colonists were not satisfied merely with political and economic control, but sought to deny the Mi'kmaq their sense of history, and to worked to disfigure their culture.⁶² In addition to non-recognition of their treaty rights, the Mi'kmaq became alienated from the colonial criminal justice system.

A special committee of the Legislative Council ruled that the hunting way of life constituted an obstruction to 'civilization'. Benefits and assistance to the Mi'kmaq henceforth would be directed wholly toward compelling bands to take up farming: any group that failed to conform to official mandates would be 'abandoned to their Fate'. To this end the Mi'kmaq were being offered no protections, legal or otherwise, against settler encroachment on the enclaves arranged for them by

⁶¹ The agent named Monk apparently withheld relief to particular families if they showed independence (Upton 1979:84).

⁶² See Frantz Fanon for an analysis of racialization as a necessary product of colonization (1967).

license. Loyalist influxes after the Revolutionary War brought hunters into the interior for moose hides, killing thousands of animals in a single season for their profitable skins and leaving the carcasses to rot (Chute 1999:503).

Despite having well-developed legal institutions with fully functioning courts in Nova Scotia since the early 1700s, the Mi'kmaq did not generally litigate (Harring 1998:178). Two cases that did go before the bench in the 1800s brought about a ban on the sale of liquor, and protected the Mi'kmaq right to hunt porpoise⁶³ (Upton 1979). After decades of colonial indifference to British breaches of treaties, and rejection of the legal rights of the Mi'kmaq, in the 1830's, the lands and conditions of the Mi'kmaq in Cape Breton were surveyed.⁶⁴ Finding the conditions to be subhuman, a law was made in 1842 to appoint an Indian commissioner to supervise reserves, act against squatters, and admit Mi'kmaq to local schools. This law was to, "afford protection to this helpless race, and elevate them in the scale of humanity" (Upton 1979:90).

The Colonial Office had legal functions, but was difficult to administer from overseas, and more difficult to prevent corruption in its administration, such as in operation of truckhouses, which were to regulate trade. Bureaucratic crookedness facilitated the theft of Mi'kmaq lands and resources, and diminished any opportunities for the Mi'kmaq to challenge them legally, according to British law. The Gradual

⁶³ This was "An Act to prevent the Sale of Spirituous Liquors to Indians, and to provide for their Instruction" (Statutes of Nova Scotia 1827-1835 [Halifax, 1836] p.53). Upton notes that successive drafts of the bill show that the title changed from restrain, to regulate, to prevent the sale of liquor while the provisions remained the same; clause IV, concerning instruction, was penciled in (RG5, series B, vol.10 PANS). (Upton 1979:207 n.44).

⁶⁴ Mi'kmaq never ceded land under the terms of the Royal Proclamation of 1763, which militated against unregulated cessions of aboriginal lands. Nor had they received any compensation for loss of any resource rights. The standard British response to any question concerning Mi'kmaq prerogatives to land and resources had been that all indigenous rights had allegedly been assumed by France and then transferred to the British Crown upon the fall of the French regime which restricted the Mi'kmaq access to their traditional hunting and fishing grounds, except in specially designated locales established by government fiat and then only on a sharing basis with neighbouring non-Native settlers for more than 200 years (Chute 1998: 496).

Civilization Act of 1857 was enacted to prevent such corruption and emerged from an act in 1839 to protect Indian lands from squatters. These acts formed the basis of the legal dualism that is characteristic of Indian policy manifested in the Indian Act of 1876 (Harring 1998). That legal dualism existed within the treaties is another dimension, but one not recognized during colonial expansion and domination in Nova Scotia. The historical record shows that there was little or no enforcement of laws protecting Mi'kmaq lands, and that all of the reserves on Cape Breton, except two, had been violated by squatters. H. W. Crawley, an Indian commissioner in Cape Breton in 1849 reported that:

Under present circumstances no adequate protection can be obtained for the Indian property. It would be in vain to seek a verdict from any jury in this Island against the trespassers on the reserves; nor perhaps would a member of the Bar be found willingly and effectually to advocate the cause of the Indians, inasmuch as he would thereby injure his own prospects, by damaging his popularity (in Harring 1998:181).

Such was the legal environment the Mi'kmaq endured. Furthermore, British subjects thought Mi'kmaq and other First Nations persons across the country were incapable of giving evidence and swearing oaths to tell the truth in courts of law. Any evidence they gave in a court it was to be used:

... [I]n the discretion of such court, judge, coroner, gold or other commissioner, or justice of the peace, to receive the evidence of any aboriginal native, or native of mixed blood, of the continent of North America, or the islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God, and of any fixed and clear belief in religion, or in a future state of rewards and punishments, without administering the usual form of oath to any such aboriginal native, or native of mixed blood as aforesaid, upon his solemn affirmation or declaration to tell the truth (B.17 Laws of British Columbia No. 74 (1867) (Smith, D. 1975:58).

Here the blending of church and law are very apparent and inextricably fused in the procedural administration of settlers' notions of justice. Additional disregard for Mi'kmaq

rights or treatment as equals occurred in the use of written text as evidence. In making statements for court procedure, Mi'kmaq words, if translated at all, were reduced into a statement which most could not read to verify, and to which they had to put their mark regardless of its validity. The inadequacy of these court procedures, which are alienating to oral societies with differing conceptions of: right and wrong, guilt and intent, and explication of evidence, are yet to be fully addressed today.

The Mi'kmaq were not passive receptors simply accepting the inadequacies of the imposed legal system, on the contrary, they resisted in a variety of ways, ranging from non-participation in legal cases to petitions. For centuries the Mi'kmaq made petitions to Crown officials in England against British violation of the treaties, which the Mi'kmaq articulated as violations of relationships.⁶⁵ Petitions made in 1814,⁶⁶ 1841, 1854, 1860 and even in 1982, cited numerous infractions of human rights, racial discrimination, theft of property, confiscation of land, and violations of persons. They also noted the extreme poverty and poor health in which the Mi'kmaq lived as consequences of British colonization of Mi'kma'ki. The petitions went largely unanswered, but the Mi'kmaq continued to resist occupation of their lands, and held their annual gatherings despite protests from settlers.⁶⁷ Yet, when hunting group heads complained to the special

⁶⁵ For example, petitions have been made to the United Nation Commission on Human Rights on behalf of the Mawiomi arguing racial discrimination and arguing for self-determination (Grand Council) (1983).

⁶⁶ For example the one sent by Daniel Tony, who in 1814 requested that he and seventeen families be allowed land for agriculture because moose and many other animal species had been 'destroyed by the English settlements of late years'. Tony and his group requested land near Gut of Annapolis, where they could hunt porpoise and fish ("Petition of Daniel Tony" 1814, PANS, RG 1, vol.430, 148 1/2). (Chute 1999:534 n138).

⁶⁷ The following excerpt is an example of the strategies employed by both sides: A great alarm was raised here in 1779 by a large gathering of Indians from Miramichi to Cape Breton, probably a grand council of the whole Micmac tribe. In that year some Indians of the former place having plundered the inhabitants, in the American interest, a British man-of-war seized sixteen of them, of whom twelve were carried to Quebec as hostages and afterwards brought to Halifax. This is what led to this grand gathering. For several days they were assembled to the number of several hundreds, and the design of the meeting was believed to be to consult on the question of joining in war against the English ... These gatherings continued yearly,

committees created to protect their rights about settlers burning the forests, or overexploiting game, officials simply retorted that recognition of special Native rights would obstruct settlement (Chute 1999:503).

By the 1800s, Mi'kmaq populations had declined to their lowest, and there was a general sense among the settlers that the Mi'kmaq would disappear. The majority of productive lands once held by the Mi'kmaq had been taken over by settlers without due compensation. Resources were depleted, the fur trade having reached its zenith. The Mi'kmaq increasingly became dependent on the colonial government for support. They entered an era that corresponds to Stephen Cornell's concept of the reservation period, a time of continued land loss, declining demand for Indian resources, and the emergence of welfare dependency (1988:14).

British thought Loyalist movements into the interior would force the Mi'kmaq into agriculture. George Henry Monk, superintendent of Indian affairs for Nova Scotia stressed in 1808 that as his province lacked any back country to which the Mi'kmaq could retreat from their inevitable fate, his superintendency had complete control over them. To wean the Mi'kmaq from their dependent state, those demonstrating signs of settlement and industry would be rewarded with clothing of cheap materials, provision, and perhaps a few farming implements, but afterward they would be left in a situation to provide for themselves (Chute 1999:504).

Through the Indian Act and Confederation, the Mi'kmaq came increasingly under the administrative control of the dominant society as the Canadian government implemented sporadic, but violent programs of assimilation, acculturation, and elimination. Their populations were radically reduced through epidemics, war and starvation. The Mi'kmaq were alienated and marginalized at all levels of interaction with the dominant society. Notwithstanding the series of treaties that were to protect Mi'kmaq

till a vessel with small pox was sent to quarantine at the mouth of the Middle River, about the year 1838. They now have similar gatherings annually in the month of July on Indian Island Merigomish (Chute

rights, their cultural practices and justices systems were eroded by the laws and values of the western system. In general, the settlers either did not comprehend or abhorred Mi'kmaq cultural systems and values. Avenues to justice were repeatedly closed off to the Mi'kmaq. The government did not consult the Mi'kmaq about changes to settlement patterns, nor were they reimbursed for their land and resources as settler populations continued to expand in their territories.

The British North American Act of 1867 entrusted Canada with the federal responsibility for aboriginal peoples and the lands reserved for them. However, provinces were given authority over the lands and resources within their boundaries. The division of powers caused numerous jurisdictional problems that some Mi'kmaq interpreted as, "an excuse for non-fulfillment of the Crown's treaty commitments, and as a pretext for preventing serious discussion of the land question" (Marshall and Denny 1989:88). Canadian Indian policy evolved from a misconceived moral premise embedded in pre-confederation legislation that generally justified the discriminatory legislation found throughout the Indian Act and assimilation policies. According to Derek Smith in his analysis of the history of Canadian law and aboriginal peoples:

This moral premise takes a variety of forms, but in general terms it states that Indians who choose to live an Indian style of life are to be considered "uncivilized" (cf. B.15, B.17).⁶⁸ They are therefore culturally and morally different from other British subjects, and therefore require special legislation, among other things, for (a) their protection from (particularly unscrupulous) others, (b) for the restraint of moral vices, and (c) to regulate their passage from an "uncivilized" to a "civilized" state. The premise clearly underlies the long-established proscription of the use of alcohol by Indians. It underlies the recurrent questioning of the acceptability of testimony given under oath by Indians (e.g. B.17) (Smith, D. 1975:xvii).

1999:550).

⁶⁸ B. 15 20 Victoria (1857) Cap. 26 (Province of Canada). An Act to Encourage the Gradual Civilization of the Indian tribes in this Province, and to Amend the Laws Respecting Indians. Articles referred to inheritance patterns, requirements of enfranchisement and land allotments.

Accumulating federal and provincial powers resulted in an increasingly complex bureaucratization and the further erosion of Mi'kmaq control. Policies to assimilate aboriginal peoples served to destabilize the authority of the Mawio'mi (Grand Council). Colonial settlement plans altered normal survival patterns to such an extent that they were no longer able to restore them. Poverty and hunger expanded among the Mi'kmaq due to reduced participation in the Nova Scotia settler economies, the resulting settler encroachments, and because successful migration and resource extraction became impossible.

Paternalistic policies of containment, surveillance and the criminalization of indigenous activities pronounced the colonial notion of the dominant society's burden to civilize and protect the Mi'kmaq. In order to increase control over the Mi'kmaq and to speed up their assimilation, the government enforced policies of centralization in education and communities, hoping to integrate the Mi'kmaq into the capitalist economic order (see Fiske 2000). Rules and regulations according to British conceptions of individualism, Protestant work ethic, and religious discipline, became the order of the day rather than the values, principles and positions constitutive of Mi'kmaq laws ways.

Residential Schools

One of the most notorious and direct forms of racism and discrimination was the establishment of Indian residential schools.⁶⁹ In addition to legislation, the colonizers considered education to be the vehicle by which the Mi'kmaq could achieve 'civilization'. As an additional burden of colonialism, the memory of the schools and injustices

⁶⁹ See Isabelle Knockwood's *Out of the Depths: The Experiences of Mi'kmaw Children at the Indian Residential School at Shubenacadie, Nova Scotia* (1992). She addresses the painful stories arguing that her people have been silenced far too long and must tell their stories to begin their healing journeys.

perpetrated in those institutions permeate Mi'kmaq legal consciousness today. While the scope of this paper prevents me from fully treating the effects of the Shubenacadie residential school, which opened in 1929, the contextualization of Mi'kmaq colonial experiences is incomplete without giving it some attention. Shubenacadie School opened under Deputy Minister of Indian Affairs, Duncan Campbell Scott. Scott held the position that there was an "Indian problem", and the only way to eradicate that problem was through aggressive assimilation. The highly controversial schools are now well known to be institutes of abuse, torture, violence, and slavery, for some, and places of learning and camaraderie for others. Some anthropologists claim that residential schools planted the seeds of supratribalism and pan-Indian resistance. Cornell (1988) for example, suggests the schools created opportunities for lasting friendships and facilitated intertribal bonds and communication as people shared a common experience of being Indian in the white world (1988:114-115).⁷⁰

It is only within the past five years or so that people in Mi'kmaq country have talked openly, and more freely, about their residential school experiences, so extensive were the silencing mechanisms brought about by the horrors experienced there. The stories are generally devastating to listen to and even harder to imagine in their tales of inhumanity. The purposes of the schools were made very clear to the students imprisoned there. Being Mi'kmaq was bad, and everything that had anything to do with that identity needed to be eradicated at all costs. The school was located at Shubenacadie, on the mainland about forty kilometers northeast of Halifax. Shubie School, as it is known, was

⁷⁰ I agree with this analysis. Today the survivors of residential school have launched a class action suit and have started a series of healing programs with funds from the Healing Foundation, a government program sponsoring recovery type programs to help people collectively heal from the negative effects of residential

managed by the nuns and priests of the Catholic Church, and funded through the federal government and church donations. Children were rounded up from communities across Mi'kma'ki, put into panel trucks, loaded on buses and trains, ripped from their families, communities, culture, and all that was familiar to them. What criterions qualify a student as eligible for the school remains ambiguous because not all Mi'kmaq children attended.

When children arrived at the school they were strictly separated according to gender. A separation that prevented brothers and sisters from communicating and supporting each other, disrupting long held familial connections. The school was a farm / industrial school, and the daily routine included prayers, chores, a brief study period, more chores and prayer. Some students benefited from the instruction, however the tactics and finesse with which it was exacted leaves much to be desired judging from the accounts of beatings, public humiliation, and general merciless treatment. The general conditions of the school were harsh as acquiring adequate funding was a constant problem and the children, the first to suffer, were undernourished. The following interview excerpts are included to illustrate what life was like for these Mi'kmaq students from Cape Breton. Perhaps captive is the more appropriate word, because the school was in effect a jail, responsible for changing behaviour through incarceration and punishment. That this behaviour modification program emanated from a program of colonization and domination is abundantly clear.

We started walking from the train station to Shubie. It was a big, big building man. The first ones I met was two nuns and Father [name omission]. That was the wicked guy. That guy clobbered you like nothing.

Not long after arriving, this person escaped from the school but was captured by a local non-aboriginal resident who received a bounty for reporting him.

Anyway I got back and we did not get a beating right away. They let us eat something and sent us up to bed. Then all of a sudden there was Sister so and so. I don't know. Four nuns anyway, and they hold me down and start beating me with a strap. As far as I know it was fifty lashes but they just kept going until you pass out you know. Jesus Christ. I never forgot that. And after that I always got beaten and I did not give a shit anymore. Sometimes I used to make like I cry and rub my knuckles into my eyes like. They used to beat our knuckles with serving spoons like. That is why my knuckles are all beat up like. Every time I talked Mi'kmaq they made me eat raw soap, the ones they scrubbed the floor with. Jesus Christ that stuff was strong, it burned like Lysol. Every time I blinked I had to go to the bathroom. You get used to it after. You get immune to it. And fighting, we fought everyday as you grow up. You know like somebody would come up to me and say you are a Membertou guy and smack.

Sometimes when you talk Indian they put a weight in you mouth and they make you say the alphabet and you sound like retarded man. Honest to god you sound like deaf and dumb most of the time.

JM: Was that the biggest rule there, that you cannot speak Mi'kmaq?

Yeah if you spoke that you are cursing [cursed] all ready if you spoke ilnu wesu gedul? [meaning 'do you speak Mi'kmaq]. And he if he doesn't understand he will go to the eneip or nun and tell them you are cursing or swearing. Finally I just gave up ilnuwesu [speaking Mi'kmaq]. You even forget it.

JM: Did you?

Oh yeah when I came out I could not speak Indian then.

He speaks fluent Mi'kmaq now. In addition to the beatings, the food was substandard. I have heard several people comment that the priests and nuns received higher quality meals while the children were fed food that was sometimes rotten, poorly prepared, and inedible. His story continues:

And when the other kids went home for the summer I used to stay back and work in the garden and take care of the pigs and cows. I used to even eat cow food, that grain. That is rough stuff boy. You don't pass that easy, dry [laughs].

JM: You must have been hungry

Hungry I guess. It was like slave labour working in the field. We ate turnips raw and carrots. We worked all day. After I finished all those years in Shubie and I came out I tried to go school here, but I lasted a week.

In another interview, a man who had started on what he called his healing journey, a journey that took thirty years for him to begin, shared the following account. It tells a story of sexual abuse. The offenses committed against these blameless children by the people assigned to protect them are staggering.

JM: Did they use a lot of intimidation?

Oh yes. I remember one. Jane, I worked in the garbage and sometimes it was a privilege to work in the garbage because the hunger there, you were hungry too. I got into the butter, whatever was left on the butter dish there, I started salvaging that. I guess I picked up a stomach cramp during that night in the bed and I soiled myself. When the nun saw this, it was two o'clock in the morning, and nun came along and told me to come down and take a bath. It was two in the morning and I had to go all the way down the stairs with her, and I was sick and crying. She filled that tub with hot water, it was hot. She threw me in there, it was hot. She soaped me with sunlight soap, it was a new bar and I could feel it burning. I could feel the soap hit my leg, burning. She has a brand new bristle brush she started scrubbing me down. I can talk about this because I come to terms with it. She started reaching down to my privates, she didn't ejaculate me, but she rubbed down there. I am defenseless. So on top of all that, the next morning I had to parade down in front of all the kids, you got your laundry. There were girls dinning in this section and boys dinning in that and you gotta go through that. You had to walk, that is your humiliation I guess. You have to walk with your laundry and they are laughing. That is an indication not to soil yourself.

Holding the perpetrators of these crimes accountable has been a terrific challenge and Mi'kmaq resistance is far from over. Some of the challenges occur internally as the following excerpt of another survivor relates.

That Shubie thing there, there was times I wanted to squeal. I even told people remember when I squealed on the guy. I went to the Bishop. [name omission] and [name omission] took me there and I had a recording to everything that went on there in English, and in Mi'kmaq. Your father [to another person sitting in the interview] even heard it. He asked me a couple of times to think it over before I take it up there. But finally Father [name omission] heard it, and a couple of people I thought might back me up heard it, and I ended up in the nut house.

JM: After you tried to tell people what happened to you in residential school?

After I was telling on the priest.

JM: They put you in the mental hospital?

They tried to tell me to forget about it, that it was not worth squealing on them. Finally they let it go. Even when I got out [of the hospital] they were tearing my house apart. They gave my land away behind the gas bar without my consent or anything. After that I tore that house down and took it to Malagawatch, [a Mi'kmaq community in Cape Breton] went on a drunk and then there was no lumber left, someone in Malagawatch took thinking it does not matter it is just [name omission], that kind of an attitude.

JM: So what is life like for you now?

There is no life there you just exist down there. You cannot reach out to anybody, even if you try to help yourself they just kick you down. You are labeled. Once you are labeled you are labeled for life. It does not matter where you came from or what you did. They see you, but they don't see themselves, what they did, what they have done before. They will push you down, once you are labeled, especially if you are from Shubie, or Dorchester [a penitentiary]. Me, I am just stubborn. Sometimes I say things because if I don't, I am going to clobber them, or take it out on myself.

I was hateful when I came out of Shubie. Just bump me and I would chase these white guys with a machete. I got one guy by the neck.

According to this gentleman, people from Shubie School are labeled, and their chances for improving their lives are diminished by that label. He attributes the majority of his problems to his residential school experiences, employing the fact that he was not taken seriously when he tried to seek retribution as evidence of his weakened status. The unequal power relations are evident as he was essentially made powerless to help himself. Isolated from his community, labeled as a troublemaker, and ostracized because he challenged the Catholic Church, an institution embraced and fully integrated into Mi'kmaq communities, he became further marginalized. As one man against the Catholic Church, particularly during the 1980s when residential school atrocities were silenced, challenging the hegemony of a segment of Mi'kmaq culture that upholds Christianity as one of its significant identity markers, he had limited options. These labels compound the impact of what is sometimes called residential school syndrome, and is evident in the desperation that he describes the following commonly shared among Mi'kmaq survivors:

There is something like a generation gap there. They [kids] live in a fast world now. Now they think we are too lenient on the kids, but I do not agree with that. I am not a family dude, but if I had a boy I do not want to get him on the wrong track. I do not want him smoking. No one disciplines me. A lot of Shubie guys, someone asked me one time you find Shubie guys or guys from the residential school system suicidal? I said, 'We are all suicidal.' We like our booze and we are trying to get our freedom back that was taken away. You can't do that, you can't go back.

As this participant noted, many people who attended residential school ended up in prison, significant evidence that residential school negatively impacts life long after it was over. He describes his life in prison.

You are just a number you are not even a person any more. The first couple of months I took it hard, waiting. I did not know how long I was going to be there. Then a riot breaks out. I went through two riots in Dorchester. And it is worsen than, I never been in a war, but in there you have no place to hide, no place to go. And you got to be with them too, cause if you ain't they will beat the shit out of you too. There were lots of us Shubie guys in there.

These interview citations are from a few persons who chose to discuss their school experiences during our conversations. I admire their strength in sharing with me and feel honored that they entrusted me to tell parts of their stories. Over nine hundred Mi'kmaq attended residential school. There are approximately six hundred direct survivors still alive. Many of the survivors are participants in a class action suit against the Canadian government and the Catholic Church, seeking reparation for the damages incited by the school personnel. When I asked one woman to describe herself, she said first and foremost that she was a residential school survivor. She and many others are concerned about the length of time it is taking to get their cases heard, let alone settled, in the Canadian justice system, a situation that requires further research. Residential school experiences have negatively affected all subsequent generations of attendees' families.

Those who controlled the school dominated through fear, intimidation, and extreme abuse.

Mi'kmaq demonstrated their opposition to this brutal form of assimilation through everyday resistance. Some parents hid their children every time strangers came on to the reserves in order to keep them out of the school. One family avoided going to residential school by hiding under a bed:

Indian agents used to come around and I remember them. There would always be two together, a man and a woman, and they would walk up the driveway to our place and our parents would tell us to hide. We would hide under the beds or wherever until they went away.

JM: That is how you avoided going?

Probably, it was the fear in my parents, they were very fearful of us being taken away and we were very afraid of these people coming over. We did not know who they were. As young as we were, we knew, at that time. I could not define awful if I tried, it was just the norm. It was an automatic reaction, we saw someone coming and we would bolt.

To this day it was a big learning experience that has to be passed down to our children today because they don't really know what happened what went on. I cannot explain residential school victims for you because I never experienced it. It is something like this we pass down. It is unfortunate today that very few people discuss certain elements of their lives.

JM: More people are beginning to feel safe talking about it

Yeah because that stigma is going away gradually of the native was at fault.

The state has employed a strategy of blaming the victim in order to absolve themselves of complicity in the numerous crimes committed against the Mi'kmaq. As the abuses at residential school were revealed, victims began to emerge as survivors, empowered by their shared experiences as they strive to maintain or regain their individual integrity. The government had to change its strategy in order to counter the increasingly powerful human rights discourses Mi'kmaq appropriated. As such, much of the discourse around residential schools has turned to healing and harmony. The state, perhaps to avoid fully litigating and compensating each claim against them, established a

\$350 million healing foundation to address the damage caused by residential schools across the country. Accessing the funding and sustaining the programs is another matter. The Healing Fund must commit all its funds by the end of 2003. The federal government's track record of supporting sustainable programs in First Nations is marginal at best. It seems unlikely that a short term program can resolve the consequences of decades of abuses.

Regardless, as a tool of colonization, the residential schools are seen as yet another of the dominant society's efforts to destroy Mi'kmaq peoples and their culture. Their existence has created intense feelings of anger, mistrust, and hatred of non-Mi'kmaq by many Mi'kmaq, whether or not they attended the schools themselves. The schools have also spawned a great deal of spiritual and cultural confusion because they were rife with contradictions. A woman from Membertou recalls how her mother's experiences at residential school impacted her life:

My mother was a survivor and she went through hell there. She was one of the youngest kids at Shubie School. She spent the younger part of her life being confused. The confusion was when she went home in summer she had to learn her language over again. When she went back to school she had to learn English again. When you do not have a strong foundation of one language it is very difficult. The treatment she got there was very cold and she was very cold. She was not a touchy-feely person. She did not show emotions. She was violent. She would not think twice about smacking me in the face, and she yelled a lot. It is only stuff she learned, that is what she was taught. My mother did not speak Mi'kmaq. I knew I was half-Indian and I was very proud of that growing up, but she could not teach my culture. When she moved away she had a difficult time when she moved to Maine. She had a dark complexion and dark hair, and people stared. She stayed at home for along time, she shut right down.

Residential schools interrupted Mi'kmaq socialization practices and disrupted social cohesion in part taking away integral pieces of the extended family. Breakdown of extended families interrupted traditional juridical teachings and practices, and convoluted

sources of authority. Corporeal punishment and scripture replaced traditional Mi'kmaq dispute management techniques, transforming the legal consciousness of the Mi'kmaq who experienced these events.

Ultimately, the dominant society failed to reach its goal of total assimilation and the school closed in 1967. The telling of these stories demonstrates the complexity of the context within which Mi'kmaq legal consciousness is made and unmade. Residential school discourses are representative of both colonial and counter-colonial processes. No longer silenced, some residential school survivors increasingly express the need to commemorate their experiences, a process that will entrench the event in the local community consciousness. Residential schools discourses play large in resistance strategies informing Mi'kmaq legal consciousness explicated in subsequent chapters. Not long after the school opened, however, the Canadian government put another policy of forced assimilation into practice, again with far reaching and destructive consequences for the Mi'kmaq.

Centralization

One of the most violent projects of Canadian assimilation was the centralization policy. During the early 1940's an aggressive campaign to control Mi'kmaq life ways was embodied in a centralization program. The program forced and coerced Mi'kmaq from across the province of Nova Scotia onto two recognized reserves, one at Eskasoni, Cape Breton, and the other at Shubenacadie, on the mainland. The objective of the centralization program was to improve administrative efficiency. In effect, it reduced Mi'kmaq land bases and restricted their daily hunting, fishing and social activities even further. By herding Mi'kmaq into one area, increasing surveillance, and direct control

over their daily activities, the government demonstrated their highly invasive colonial tactics. Traditional economic and subsistence migration patterns were disrupted. Traditional leadership structures were further eroded by the unilateral imposition of the policies of containment. Centralization was the "first social experiment of its kind in Canada ... the Department of Indian Affairs implemented the policy to terminate Mi'kmaq special rights and political status, both with the objective of another kind of involuntary assimilation" (Henderson 1992:46).

Tactics used to persuade people to move from their home communities were underhanded. In Waycobah, Indian Affairs agents burned down the school, farmhouses, and barns, and threatened to burn down the church, thus forcing families to leave for Eskasoni. Incentives were used to coax people to move. Agents promised plenty of jobs, food, and new homes for everyone. It was a time of extreme desperation for many Mi'kmaq peoples. Jobs were scarce. The Depression had hit the rural communities hard, and the underprivileged were the last to recover. World War II was underway and many Mi'kmaq men volunteered their services.

To enforce centralization policy, in a Treasury Board Minute, the Department of Indian Affairs introduced the Criminal Code to the Mi'kmaq. The Criminal law forced Mi'kmaq onto the two reserves. In April 1947, Eskasoni's entire male workforce went on strike: for a wage of fifty cents per hour for ordinary labour, the removal of white labourers from the Reserve and increased financial support from the federal government. The instigator of the strike was convicted of "intimidation" under the Criminal Code. The RCMP forced the Mi'kmaq to go back to work at the previous forty cents an hour, the 1942 rate. The coercive enforcements of the federal criminal law were used to implement the assimilation policy (Henderson 1989:46).

The conditions at Eskasoni during centralization were difficult. In the following interview excerpt, a Mi'kmaq elder from Membertou, who was born and raised in Waycobah, tells of her recollections of centralization:

But after that when Eskasoni centralization opened that is where they got everybody there, Indian agents whatever.

JM: Did you have to move to Eskasoni during centralization?

Yeah, we move 1948. We did not get used to it. We only stayed there five years. But the ones that are living in Eskasoni, they are used to it. Some of the people move from Barra Head, well they move because everybody moved. From down the shore at Barra Head, but only few from Barra Head moved. Whycocomagh quite a few of them moved off the reserve.

JM: Did they make you?

Yeah they forced us. Indian Agent Killam told my father you have to take the children away [I was out of school], my sister and brothers, there were a few of them, he said if you don't take those children and move to Eskasoni we will take the kids away. So my mother got scared. I told my father let's go. I was working in the village for a long time for wealthy people housekeeping. There was an undertaker there and he was magistrate. So I worked there for quite a while. I left my job because I had to go with my parents. That was the year before I got married. I met my husband in Barra Head, Chapel Island. We went to Eskasoni in 1948, in August, no October. We did not stay too long. We got new beds and everything was good, everything was nice, living room had a ceiling. My father made a house when they threatened to take the kids away. The fellow said he would give us jobs in the bakery, and Dad would get lumber and make his own house.

Half of the house was not finished, not even the bottom. My dad said he could not move yet because the house is not finished, I don't have enough lumber. MacKinnon told him to go to Malagawatch and tear the boards off the school. They did not give us gyp rock or anything like that. The house is just a shell. Dad took us to Malagawatch, and we cleaning the boards and took it to Eskasoni and helped Dad put the house up, the floor and everything. There was no water, only outside toilets. We got the water in this swamp area so it was smelly and that. My father said to get it from the brook. We went back and my sister was sick with the measles. We went back to Whycocomagh [Waycobah] in the middle of winter. My sister was sick. She was working in the store in Eskasoni before she got the measles. But her employer did not give her job back after she got sick. So we went back when little sister was about six or four. Two men took us back, and a couple of cows, and whatever was left. The mattresses were all gone and wet and everything. When we got to Whycocomagh my mom made us straw mattresses and my Dad had sold the house but he got it back. If it was not for the Doctor we not be able to move back, he gave daddy \$150. He was from Cleveland he was doctor for Whycocomagh. The house was so cold and we were miserable. But once we got to Whycocomagh we felt safe.

JM: You did not feel safe in Eskasoni?

No really nobody touch us in Eskasoni, or hurt us, it is just the food and we don't use to the place. We don't have enough and it is cold.

This family was coerced into moving by the Indian agent threatening to remove the children. This tactic is particularly heinous as the children in the family were well cared for, and as noted, gainfully employed in the village. Promises made by the agents were not fulfilled. There were not enough homes for all of the families, or enough jobs, food was scarce, and the water was bad. Many families had to live in army surplus tents and struggled to keep warm and dry. Other research participants repeated her story of the homes being like shells, many lacked ceilings, walls and furnishings were extremely sparse. Lack of facilities and resources contributed to an increase in illness and communicable diseases. The sociopolitical structures of the Grand Council and large extended family networks were also altered. Putting strangers together under situations of duress no doubt caused tension and conflicts.

Mi'kmaq social pastimes were criminalized during centralization. For example, the Indian agents stationed at Eskasoni outlawed waltes, a favourite gambling game of the Mi'kmaq, particularly among some of the elders. In an interview with another Mi'kmaq elder from Waycobah, I was told about Indian agents and the law, in a story about a fine her mother received for playing the game:

JM: What were the Indian agents like?

They were like the bosses on the reserve. On Tuesday night it was the custom to gather in some places and play waltes. And they play a game they call seventy-five, and they are having fun. This old lady was living in Eskasoni in Castle Bay, at New York corner, and they were playing this waltes. The mounties went there and raid that place and took everything, waltes, even the blanket and that was the old lady's last blanket.

JM: Why?

Because they were gambling but they were only fooling. They were not playing for any money. This other place at Denny's, even my mother got caught there they were playing seventy-five at two cents a game, and another one's sitting on the floor playing waltes. My father is comical and likes to tease and says your mother got caught. She stayed in jail [joke]. They fined

them twelve dollars each and that was a lot. And I often wonder where that twelve dollars go.

That is why I say the law was strong, very, very, strong. If you were playing here, maybe six or eight, just for entertainment or social evening, and the Indian people like the social evening on Shrove Tuesday night, and then they put it away until after Easter. I don't like to think about it, or talk about it, because sometimes I get so bitter, thinking about what happened to mostly the old people, like my mother she was not young. They did not arrest her but they took everyone's names and then they have a trial over at the Indian Agent office.

JM: Were the Indian Agents in the community all the time?

Yes in Eskasoni, there was only one office in Cape Breton and it was in Eskasoni. The Agent and the superintendent was there too, and he was also a magistrate or something, so they could have a trial.

The Indian Agents were working to alter the social behaviour and activities of the Mi'kmaq. That the agents targeted elders may have outraged the community, but also likely generated fear that community members, no matter how benign their activities, could be prosecuted. This elder alludes to a sense of corruption in her wondering who benefited from fines paid by the accused. Clearly the agents were perceived to have considerable, if corrupt, power. She then told me another story that demonstrates the extent to which Mi'kmaq lives were regulated under regimes so unreasonable and dysfunctional.

I am thinking about another one, it is funny and it is cruel. My husband used to work in Eskasoni for the Indian Agent. They [the Indian Agents] got these chickens, oh Donald would have a good laugh. They keep care of them, and they have these little houses where they hatch them. They are for the people on the reserve. You get so many of them, and certain families get so many of them, and every so many days they give them away to who wants them. This neighbour of ours got two or three dozen because they have so many children, lots of kids, little wee ones. My gosh, in the fall this Indian Agent heard that he sold all his chickens, and he got a warrant, and got the moutie, and he had to go to trial.

JM: Because he was not allowed to sell his own chickens?

That's right. So my husband spoke to them at the trial and he [was the one who] gave him the chickens. He had to say he got so many chickens. This guy comes in all dressed with even a tie on and shiny shoes, he was just well dressed. The trial started and they said to this guy, 'you know this guy and

this guy?’ ‘Yes’. ‘Did you get some chickens?’ ‘Yes’. Mr. This guy, ‘did you know you were getting these chickens for your children?’ ‘Yes.’ ‘Did you know you are not supposed to sell them because the eggs are for the children?’ This Guy stood up and said, ‘sir those were all boys, no eggs!’ That is why he sold them because you could tell if it was a little rooster when they were tiny. It was funny. He respected that trial so much, he was all dressed up and everything, but they could not do anything and he just It was something for two or three dozen chickens, a big trial. If it was chickens that laid eggs he would be in jail for two or three months. Today I could not understand it. In those days they would put anybody in jail for little things like that. Those are just a few stories.

JM: What if people could not pay fines?

They had to serve time.

Under the centralization program the reserve served as a type of assimilationist camp. Daily activities came under rigid scrutiny, their every move policed. People were encouraged to speak English as well. Instead of improving life, conditions for the Mi’kmaq apprehended there, became worse. Increasingly Mi’kmaq persons were sent to jail for non-payment of fines. The lack of compassion of the Indian Agents is evident in this final story of centralization at Eskasoni:

I will tell you another story. When we first moved to Eskasoni, that is why I said the laws were stricter or harder. This guy, his family had a baby and they were living in a tar paper shack, a shanty. It was winter time, near spring. At that time there were no doctors or hospitals you just had babies in the homes with midwives. Anyway, they had this little baby boy and it was raining. It was raining so hard the shack was starting to leak and there was this, people used to live in tents when they first move to Eskasoni, when the family move they live in tents first. They had this tent. It was the Indian agent's tent. The old midwives cut the tent and put it inside the shack over where the woman and the baby because it was leaking. They put that on top. After awhile, a few days, the Indian agents heard what happened, and by gosh, they sent the moutie about this tent. ‘You ripped this tent,’ and took him to jail! Next day he had a trial and he got thirty days for destroying government property. And it was just an old army tent. I supposed they were given to the Indian people. When I think about it today it [tents] was for the Indian people through the government. And he was in there for thirty days.

Clear in this woman’s testimony is the incredulous regard Mi’kmaq people had for the Indian agents, the police, and their policies. The Indian Agents appear adept at

ripping apart normal communitarianism in favour of militant regulation. Trials, fines and jails, were replacing traditional dispute management mechanisms. Legal universality, or generalities in laws that infringed on their basic rights, and conflicted with their value systems, moral and otherwise, replaced indigenous traditions of particularism in dispute management.

When war veterans returned home they expressed their anger over the treatment of their people while they were off defending Canada. A group of veterans wrote a brief to the Department of Indian Affairs castigating the government for not upholding the human rights of the Mi'kmaq, another resistance strategy. Ultimately the project was deemed unsuccessful, centralization terminated in 1949, and many families returned to their home communities, or moved elsewhere.

Instead of centralization, the Department of Indian Affairs moved to policies of wholesale assimilation. In order to facilitate this process they created twelve bands across Nova Scotia in 1958, run by Chiefs and Councils as determined under the *Indian Act*, which led to conflict and factions between this and the traditional leadership of the Grand Council. The external governments have long preyed upon such internal divisiveness.⁷¹ Law and order was instituted on the reserves through the RCMP and the Criminal Code. Indian Agents acted as judges. In 1969, the federal government tabled the *White Paper*, a policy that terminated any special legal and political status of aboriginal peoples in order to assimilate them completely into mainstream society. The distinct rights of Aboriginal peoples were seen as an impediment to their economic success and were thought to contribute to their social problems, which were identified as high rates of alcoholism, promiscuity, child neglect and constant fighting, by the Department of Indian Affairs

(DIAND 1969). To facilitate assimilation into the mainstream legal system the government employed people from the communities to help.

Policing Mi'kmaq Communities

To facilitate surveillance and social control the government hired special aboriginal constables. These positions caused many contradictions for those having to arrest their friends and family members.

The benefits to the colonial criminal justice system gained from recruiting indigenous people to enforce its rules must be weighed against the burdens which this may entail for indigenous people such as the threat to identity and the necessity of managing conflicting loyalties, and the political costs of participating in a hybridized system which may retard increased autonomy... Indigenization is a bureaucratic reform measure and part of the process of underdevelopment – forces them into limbo between hinterland and metropole Indigenization seems more an end in itself rather than a transitional stage toward pluralistic legal system – it serves as a cheap substitute for some measure of autonomy, self-government, sovereignty - it assimilates indigenous people into the imposed social control apparatus rather than autonomizing the social control apparatus for the benefit if indigenous people (Havemann 1988:72-74).

A journal of one such special constable, stationed in Waycobah and Eskasoni, records his activities. In general his duties included breaking up fights, attending to the sick, collecting fines, finding lost persons, and rounding up truant children. Sometimes he was required to pick up children to take them to the Indian residential school in Shubenacadie. The journal indicates that most of the infractions occurring on the reserves were alcohol related, and many of them precipitated by whites selling liquor. The constable's job was a difficult one, and required him to do many tasks not normally considered police duty. The following is a letter he wrote asking for a better salary. Included in the letter, written around October 1965, are telling signs of the problems in the community, and the numerous bureaucratic channels he had to go through to seek help.

⁷¹ See Bruce Miller 2001 and Tord Larsen 1983.

**To Hon. Allan J. MacEachren Minister of Indian Affairs
Honourable Dear Sir -**

I have a very serious problem in regards to my livelihood. I have being [sic] working with Indian Affairs Branch as a Special Indian Constable policing Whycomagh [Waycobah] Indian reserve, cooperating with RCMP in the area. I have been acting mostly as Interpreter for the Indians when they go to court or on all investigations. My salary is \$2400.00 per year. I have worked with children aid society, also on many occasions, with probation officers. On many occasions also I have to interview the Superintendent of Indian Affairs regarding Indian Act. I have discussed my situation with WM McLean local M.L.A. Other times I have had series of writing with Education dept of Indian Affairs trying to better lives of Indians in reservation. I have been a member of Indian Advisory Council also. I took active part in many organizations dealing with the Indians Social Welfare. Also when they are sick or in trouble of any kind. I cannot talk too well with the Chief [my omission] lately the Chief is now for past eight months being investigated for misappropriation \$4006.00 of funds federal grants. I believe in a very short time the charges will be laid against him and his council. I do not expect any recommendation from him because of the above mentioned incident. I have also discussed my salary with Supt. Hugh S. MacNeil of Indian Affairs Branch he could not help me either because the rules and regulations that he has to follow he also would recommend that I get fair salary.

This job started as a part time salary but I feel most strongly that this job cannot be a part time salary. I am on call twenty-four hours a day. I have never reused a call from any man or woman or child requesting police protection also my daily patrols on reservation.

I am asking you to take part in my situation and to at least a minimum wage retroactive from May 1963 as a full time police.

Cpl. R Bently of Port Hood detachment of RCMP knows of this letter he also interviewed for me with a solid recommendation before this Indian Affairs Branch. I don't want to make application for relief from Indian affairs. I have little pride left me to show my children example right now. I am frustrated and don't know what to do. I am in danger of losing my furniture of the debts occurred. I have eight in the family of dependents mostly attending school. I hope that you will be able help me on this matter. Many thanks

Yours most sincerely,

[my omission]

Indian Constable

Whycomagh

In an interview with the Constable's son, his father now deceased, I was told that his father eventually quit his job, and that he particularly did not like taking children to

the Shubenacadie residential school. The Constable, known for being fair, was well respected and well liked in the community. He was an active church member and a singer of Mi'kmaq hymns. He and his wife encouraged their children to go to school and to learn English. While they learned English, his children all maintained their Mi'kmaq language, and today, several family members are very active in promoting Mi'kmaq rights, and make challenges to the mainstream justice system, resisting wholeheartedly incorporation into mainstream society.

Conclusion

Once pushed off the middle ground,⁷² the Mi'kmaq experienced a downward spiral of dependency and subjugation. It was not just top-down domination; the Mi'kmaq resisted with a variety of strategies. Their law ways, invisible to the dominant society, continued to operate in modified forms, such as elder instruction, visiting, and trespass reciprocity. Some disappeared altogether, such as bride service, and new ones emerged, such as those blending Christian with Mi'kmaq traditions, as they underwent profound economic and political changes. Increasingly violent confrontations, and sporadic, but usually unsuccessful litigation became characteristic of Mi'kmaq life ways during these dark days. Contrary to colonialist beliefs, the Mi'kmaq had formal and informal law ways that guided their family, resource, and spiritual relations. The impact of colonization continues to affect relationships between the Mi'kmaq communities, the Province of Nova Scotia, and the federal government.

Harmony ideology has been an important part of social transformation, through law, under Western political and religious colonization, and a key to counter-hegemonic

⁷² Referring to Richard White's (1991) concept as discussed in Chapter Four.

movements as well. The hegemonic forces that seek pacification and re-socialization become the forces of resistance and accommodation (Nader 2002). The representation of Indian justice as informal and consensual, rather than adjudicative, was a representation promoted by white judiciary and natives (Nader 2002). Here the challenge of defining the internal culture against the external culture, and the transforming historical relations in which they are embedded, emerge as ongoing challenges of resistance, cultural productivity, and survivance.

The fluidity of their situation, the constantly changing pressures on them, the difficulty of developing a strategy for coping even in part with these pressures, and especially the importance of maintaining at least some significant aspects of their own ways, their own social relations, their own values, in the midst of this turmoil - all this often confronts Native American peoples with *an unavoidable and irresolvable antagonism between their past and their present*. This antagonism is usually forced on Native Americans by their vulnerability in a larger society that simultaneously insists both on the 'otherness' of dominated people and on their compliance with a larger set of constantly changing standards, laws, and practices (Sider 1993:9).

The very distinction between internal and external is put into question as cultural concepts, as well as economic and political models, are borrowed, shared, and appropriated across a spectrum of power in Indian country (Nader 2002:125). Despite the questions that may emerge, dichotomous conceptualizations of 'us versus them' became another hegemonic product of colonization processes in Nova Scotia, establishing firmly legal boundaries that became entrenched in Mi'kmaq legal consciousness, and mirroring the adversarial system in which the Mi'kmaq became mired. During the colonial processes, Mi'kmaq were defined around a perceived failure to adhere to Euro-Canadian values, ideals, morals and patterns of socioeconomic practice, and these definitions exist

in government policy and historical consciousness (Dyck 1986).⁷³ These categories are embedded in every day forms of racism and are part of the pronounced Indian/White divisions that exist in Nova Scotia. As Nader sates:

The story is a long history of continuity, in which colonial dichotomies used to control the 'uncivilized' are transferred to contemporary legal arena along with the same ideologies of control. It appears to be exactly by means of binary thinking, as in the move from the adversarial law model to the harmony model, that legal remedies are controlled at the local and international levels (Nader 2002:120).

As indigenous peoples face the consequences of inaccurate cultural representation, the pronouncement of these colonial dichotomies are heightened, as cultural productions increase in opposition to those imposed upon them.

Under an express delegation of the Queen of Imperial Parliament in 1867, the federal government has the authority to state in general terms what sort of human conduct is prohibited in Canada. Canada enacts prescriptive rules in the Criminal Code. The generality of the rules governing human conduct is important; it is associated with the political idea of formal equality before the law (Henderson 1992:35).

The general criminal laws enacted by the federal parliament are viewed as somehow above the antagonism of private interests. The rules are imperatives of the state. They are commands of an artificial political order over individuals, who have no inherent social or cultural order. By act of a national institution the contending private interests are reconciled; rather than embody any factional interest in Canadian society, an impersonal criminal justice system is established. Coercive enforcement takes the place of a natural community or culture. The criminal laws of Canada require uniformity of application to all individuals in Canada. The Queen delegated the administration of justice to various local authorities not the national government (Henderson 1992:35).

The argument for equality before the law creates contradictions because how can one system reconcile the differences embedded in binary and dichotomous categories? The

⁷³ See Noel Dyck for a discussion of a cultural doctrine of how whites become universally versed in beliefs that identify indigenous peoples as problems.

effects of these laws have been to remove justice from the communities to a remote and powerful entity. The legal imaginings of the colonial powers created a system of hierarchical categories that defined imposed identities that served their political and economic strategies, and are maintained in legal discourses of similarity and difference that perpetuate relations of dominance and subjugation (see Menzies 1994). That the Mi'kmaq have not enjoyed equality before the law, illustrates the ongoing consequences of colonization, and the entrenchment of systemic racism in the Canadian justice system, a system that fails to live up to its hegemonic ideals of impartial, equal, and objective adjudication. Western law has contributed to significant cultural transformation and distortion, and has reformed political, economic, and spiritual relations of the Mi'kmaq. Despite the disruption of their traditional law ways, the colonial encounters endured by the Mi'kmaq have heightened Mi'kmaq cultural production, and for the culture group, a new era in juridical revitalization emerged as they faced additional crises of confrontation and resistance.

Colonization strategies and policies, particularly the failure to recognize treaties, residential school and centralization, have all contributed, in varying degrees, to current economic, political and social problems such as family breakdown, disrupted gender and generational roles, severe class stratification, poverty, poor health, and community erosion, prevalent in First Nation communities (see Asch 1997, LaRocque 1997, Monture 1992, 2000). The Mi'kmaq collective and communitarian economic bases were usurped as they were required to become submissive, individualistic economic agents, contrary to their law ways. While many adapted to new market conditions, as competition increased with increasing settler populations, the Mi'kmaq were relocated or denied access by

discriminatory people creating discriminatory laws to protect their own interests. Interests of the dominant society were protected through the creation of labels and stereotypes as categories of convenience to better justify their brutality. Underdevelopment and dependence brought about by colonialism has contributed to over representation of First Nations within the mainstream justice system, a situation made worse by systemic racism, both overt and covert, in Canadian society (Jackson 1992, LaPrairie 1993).

The irony of the colonization processes and the hegemonic forces with which newcomers to Mi'kma'ki tried to assimilate the Mi'kmaq, is that these experiences, rather than destroy Mi'kmaq culture, have stimulated innovative expressions of Mi'kmaq identity against those identities imposed upon them. As discourses about residential schools become more open, and hence more contested, the experiences and sufferings of the students are better understood within communities. The openness provides a base for communication and gaining knowledge, enabling community cultural production, as well as empowering movements of individuals and communities seeking to avenge the many wrongs. The outrages at such indignities perpetrated among their family members, by the church and by the government, have fuelled both resistance and healing discourses, which are articulated within changing legal consciousness across generations. The same applies to centralization discourses, the blatant upheaval of families, the threats, the level of inhumane treatment, are recycled as powerful reminders of a painful past for which the Mi'kmaq are determined to seek compensation. Awareness of the consequences of the trickery and underhandedness of the government, and its representatives, are shared across aboriginal reality, and make it very difficult for the Mi'kmaq to enter into agreements with non-aboriginal governments because their track record is filled with

deceit, corruption, and abuse of power. The failure of the government to recognize treaties has long been part of the legal consciousness of the Mi'kmaq, passed along generation after generation, fuelling new strategies of resistance.

It is forbidden them by the laws and customs of the country to pardon or to forgive any one of their enemies, unless great presents are given on behalf of these to the whole nation, or to those who have been injured (Hoffman 1955: 603).

Although the discourses vary over time, the common thread is that the Euro-Canadian governments and their policies, abused the Mi'kmaq time and again. Despite so many losses, the Mi'kmaq continue fighting. As the Mi'kmaq increasingly engage in their histories, histories long denied them through colonial domination, new symbols provide opportunities for new interpretations that help shape current identities, and discourses about traditional practices are modified for use today. Justice practices remain orally transmitted, embedded in the family and language, and are evident in the spiritual values and principles within the political, economic, and social interaction of the individuals and communities within the cosmos of Mi'kmaq culture. Justice remains conceptualized as koqqwaja'ltimk, to be treated justly, which by necessity, include issues of survival, power, and identity. Mi'kmaq law ways are still concerned with conflict, wrongdoing, dispute, as well as the prevention, and balancing or management of these problems when they occur. The various ways conflicts are evaluated and handled, depend on the context in which they occur, and remain culturally constituted. How to live right may change as Mi'kmaq culture changes, but the idea of living right, remains.

The consequences of colonization have not ended. Colonial mentality exists among many who see themselves as superior and argue against acknowledging cultural differences that support increasing opportunities for improving Mi'kmaq life ways. Some

people are still arguing for complete assimilation, denying history and rights by suggesting that the treaties, residential schools, and centralization, happened a long time ago, and are irrelevant today. It has taken tremendous tenacity to fight these strong opponents. Concepts such as one justice system for all, and equality before the law, are powerful, widely accepted, and indeed, celebrated myths of the colonial era that are hard to break. Analysis of the production of Mi'kmaq legal consciousness must include the above discussion of colonization because these historical events are very much a part of Mi'kmaq identity and lived experiences. They frame how Mi'kmaq people negotiate, enact, and legitimate, individual and collective understandings of themselves and others. These historical relations, reflect and frame the distinctive processual creation of Mi'kmaq legal consciousness, and their attending juridical beliefs and practices; a process of cultural revitalization, facilitated by emerging discourses that capture the past, and yet are crafted to face today's challenges and needs. Much of the healing discourses in Mi'kmaq communities have emerged in response to the extensive damage, pain, and suffering, experienced throughout generations of colonization. The influences of colonial processes on Mi'kmaq legal consciousness are profound and are apparent in resistance, rights, and healing dialogues, the central juridical discourses articulated by Mi'kmaq today.

Chapter Six: Donald Marshall and Contemporary Legal Consciousness

Introduction

In addition to the key events of colonization outlined in the previous chapter, the wrongful conviction of Donald Marshall Jr. stands out as one of the critical events in contemporary Mi'kmaq history that shapes Mi'kmaq legal consciousness, particularly the consciousness that forms as opposition to mainstream society. The significance of this case cannot be underestimated because it forms a negotiating space between past injustices and future success, and has framed a powerful rights discourse in Mi'kmaq society. Marshall's wrongful conviction informs the following perceptions of justice for Mi'kmaq peoples: one, that the mainstream justice system fails Mi'kmaq people; two, that Mi'kmaq people are better suited to control their own justice system; three, that traditional justice practices need to be modified to have meaning today; and four; that it is the right of the Mi'kmaq to control their own justice system and to govern themselves. In this chapter I recount the events of Marshall's wrongful conviction and contextualize its place as a central element in Mi'kmaq legal consciousness.

Donald Marshall Jr. was born in Cape Breton Island. Raised in Membertou, a small First Nation community within the city limits of Sydney, Nova Scotia, the heart of east coast steel production. He is the eldest son in a family of thirteen children.⁷⁴ He is from a prominent, well-respected family, popular within Membertou, and the Mi'kmaq nation. Donald's father is the Late Grand Chief Donald Marshall Sr., leader of the

⁷⁴ Donald Marshall Junior is known to many of his friends as Junior. He is named after his father and hence the denotation of the diminutive. In Mi'kmaq culture it is customary to drop the diminutive once the namesake has died. Now that Donald Marshall Junior's father has passed away, his name formally is Donald Marshall and the diminutive is removed.

Mi'kmaq Mawio'mi or Grand Council, from 1964 until his death in 1991. His mother Caroline, originally from Waycobah, currently resides in Membertou.⁷⁵ Due to the nature of his position, and the quality of his leadership, the Grand Chief traveled frequently within the seven traditional districts of the nation, keeping in touch with his people, and carrying out his traditional roles of cultural, spiritual and political leadership. The Grand Chief traveled extensively into other tribal territories. Recognized as a dignitary by Canadian society, Grand Chief Marshall met both Pope John Paul II, and Queen Elizabeth II, when they visited Canada in the 1980s. Well regarded in the non-Native community, Grand Chief Marshall operated a dry-wall business, and had ties to the Knights of Columbus, bowling leagues, and churchgoers, in the town of Sydney.

In 1971 the Grand Chief's namesake, Donald Marshall Jr., was charged and convicted of murder, in the second degree, for the stabbing death of Mr. Sandy Seale, a black youth who lived across town in Sydney. Marshall was sentenced to life in prison. He was innocent. He served eleven years in jail before he could prove his innocence. The impact of the Grand Chief's son's wrongful imprisonment reverberated across a diverse range of communities within the Mi'kmaq Nation, the town of Sydney, and across the country.

The wrongful conviction for murder is the first of two important cases involving Donald Marshall Jr. that have significantly transformed relations between Mi'kmaq and non-Mi'kmaq in the Atlantic Provinces, and in particular in Nova Scotia. The second case, a Supreme Court of Canada decision in 1999, known as the Marshall Decision, is a treaty test case guaranteeing Mi'kmaq rights to fish commercially. How the Marshall

⁷⁵ Within the Marshall family, it is claimed that Mrs. Marshall's prayers most aided in Donald's release from prison. She also had a visitation foreshadowing her son's release. This is a great story that makes my

Decision on fishing rights has influenced Mi'kmaq legal consciousness, juridical discourses, and practices, is a topic for full explication in future research, and is addressed, only briefly, below. The tremendous impact of the fishing decision cannot be analyzed without due consideration of the influence of Marshall's wrongful conviction for murder as a significant event for the Mi'kmaq nation, and the Canadian judicial system.

Marshall's wrongful conviction for murder has permeated the legal consciousness of a large majority of Mi'kmaq persons, particularly those familiar with his story, directly or indirectly.⁷⁶ The man has become a well-known symbol of injustice for aboriginal peoples across the country and around the world.⁷⁷ The events of his wrongful conviction, life imprisonment, eventual release, and resultant Royal Commission, are concretized for public consumption in various forms, ranging from pieces in textbooks, to movies, to documentaries, journal articles, and literally hundreds of newspaper articles and television mentions.⁷⁸ The consequences of the incident, and the subsequent media exposure, cannot be underestimated in terms of their impact on Mi'kmaq relations with the government in Nova Scotia, and with the larger society in general.⁷⁹

In this section, I briefly outline the facts of the case and describe the Royal Commission, in order to present the context in which the Mi'kmaq were encountering the

hairs stand on end whenever it is told.

⁷⁶ In almost every one of the 85 interviews conducted for this research people mentioned either the Marshall Inquiry, the Recommendations of the Marshall Inquiry, or "what happened to Junior" in our conversations.

⁷⁷ Marshall has traveled across Canada and to locations as far as Fiji to discuss his experiences and to speak out against racism. In the spring of 2000 Donald Marshall received The Wolf Project Award - an international grassroots initiative that honors people who have worked toward promoting respect and understanding between people of diverse racial and cultural backgrounds. Previous award winners include Nelson Mandela and Elder William Commanda.

⁷⁸ In August 2001 Maclean's Magazine, Canada's National news magazine called Marshall "A First Nations Icon" and a 2002 CBC production of *Life and Times* called Marshall "A Reluctant Hero".

Canadian justice system during the last quarter of the twentieth century. The case illuminates the tensions between Mi'kmaq living in Membertou and the town of Sydney, particularly the relationship between Sydney town police, Mi'kmaq youth, and the Canadian Criminal Justice System. I do not describe the full details of the police investigation, the court case, nor Marshall's prison experiences; they are documented in the *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, and elsewhere.

Here I demonstrate how Marshall's wrongful conviction and the Royal Commission become symbolic in processes of transformation and reinterpretation of Mi'kmaq justice, identity, resistance and survivance. Within the Mi'kmaq Nation, the bearing of Marshall's wrongful conviction, the abomination of his lengthy incarceration, and the continued prejudice he experienced post-release, are profound. Represented in shifting of cultural narratives of law and legality are the far reaching outcomes of this event. Such narratives include an ongoing informal evaluation by the Mi'kmaq, of the Province of Nova Scotia's ability to make right, to make amends to the Mi'kmaq nation, and to ensure no Mi'kmaq person encounters discrimination within its justice system. These evaluations are often weighed against whether or not the eighty-two recommendations, put forth by the Royal Commission, have been adequately implemented. The recommendations of the Marshall Inquiry are the focus of a discussion in which I describe and analyze developments in Mi'kmaq justice programs and practices, since the report was released in early 1990. The question remains, has the Province, and its justice system, fulfilled their obligations to repair the relations damaged

⁷⁹ See Teun A. van Dijk's *Elite Discourse and Racism* which looks at how racist discourse produces racist class structures and how they impact social organization and stratification (1993).

by centuries of discriminatory colonial policies, which are epitomized in Marshall's wrongful prosecution? Finally, I analyze the significance of this case in terms of its impact on current internal and external relations regarding Mi'kmaq identity and rights, and Mi'kmaq capacity to control justice programs and practices, in other words, within the relations defining Mi'kmaq legal consciousness.

The Context: Aboriginal and Non-Aboriginal Relations in Cape Breton

General community attitudes and practices influence justice values and processes. Interviews conducted with Membertou residents revealed that relations between members of the town of Sydney, and the community of Membertou, were not close during the 1970s. Mi'kmaq did not experience equal representation in the town's economy, polity, or education systems. Instead, relations were marked by long term marginalization and alienation, characterized by prejudice and discrimination, symptoms of colonial mindsets in Nova Scotian society contributing to perceptions of the Mi'kmaq as an underclass. Historically, a significant degree of physical, cultural, and social separation between the two communities, further isolated the Mi'kmaq.⁸⁰ The Sydney police members perpetuated this separation in their law enforcement tactics and behaviour toward Mi'kmaq people. The Mi'kmaq experienced over surveillance, coercive force, racial profiling and physical abuse at the hands to the town police.

A bilingual [Mi'kmaq / English], self-employed, male resident of Membertou First Nation, in his mid-40's, remembered his encounters with Sydney police during the 1970s:

Yeah [there were tensions] and police in Sydney always told us to get back to your reservation. Go back to your reserve. When we were going to dances in

⁸⁰ A study undertaken as part of the Marshall Inquiry found that Blacks are effectively excluded from participation in the mainstream Nova Scotia society as well as Mi'kmaq (Clairmont, 1989 Volume 4).

town. They did not say it politely either. They would say get back to your goddamn reserves you Indians.

The police also conducted what the locals called 'round-ups' on the reserve. They picked up adults with unpaid fines, most frequently resulting from charges of public intoxication, and took them to the county jail. Mi'kmaq youth and police tormented each other, often resulting in chases, and when caught, the occasional rough up. One interview participant [bilingual, mid 40s, university graduate] called the police actions toward Mi'kmaq in town, "blatant racial profiling". He told of the police constantly harassing Membertou residents, and when ever there was any trouble between, "Whites and Mi'kmaq it was always the Mi'kmaq person who got the blame". He also suggested this practice was widespread, having experienced similar behaviour in Halifax many times in the past.

During the 1970s, non-Natives did not visit Membertou regularly or openly. When Mi'kmaq people went into town it was usually only to shop, after which they would return home. On occasion, once the laws prohibiting aboriginal peoples from purchasing liquor were repealed, Membertou residents began frequenting the local bars. While some people socialized back and forth across the perceived cultural and physical boundaries, such interaction was not widespread. A bilingual female elder from Membertou, made the following comments about her experiences, describing relations between Sydney town and First Nation residents as separate and peaceful, but when the two mixed, the potential for troubles increased because there were laws limiting Mi'kmaq freedom and behaviour.

At one time ago people never really seemed to get in trouble. Why would they get in trouble? They stayed on the reserve. But when we were growing up the only time I went into town was on the weekend, maybe Saturday night. That is the only time you had money to go. You went to a movie and came home and that was it. You stayed on the reserve. There was no going into town.

You had no business going into town. As I grew older it was still the same. You just went to town for the necessities you needed, you came back home and you stayed on the reserve. We weren't, I don't remember too much, I always got along with everybody. But a lot of people didn't. But then when things started was when some of the avenues were opened to us in the town, especially for the people that drank anyway. Because at that time they were not allowed in liquor stores, they could not even go into liquor stores one time ago. When the opportunity came, and they could go in, that is when you started seeing more of our people in town, but even before that, they would go into town, and they would find someone to go to the liquor store for them. Then they would have you pay that gentleman [to buy the liquor] and then you could not bring it back on the reserve, so you had to find a place to drink it right there. And I think that is why most our men became alcoholics. They couldn't, because where it was passed to you, that is where you drank it, whether behind the forum, behind anywhere. You had to finish your bottle because if you were caught, and you were bringing it home, you were arrested because you were not allowed to have it. So when the bottle was given to you, you drank it all, so you became a drunk and you got arrested and that is probably where we get our name 'nothing but drunks'. But that was a long time ago.

Another mid 40s, male, Membertou resident, bilingual and self-employed, described growing up in Membertou. He talked about interactions with non-aboriginal persons as being conflicted. He had made friends from town while attending school off-reserve, but felt he could not freely, nor openly, bring them to visit. Sometimes hostilities erupted when suspicious non-aboriginal males visited the community.

JM: Town people did not come on to the community very often?

They weren't allowed. There was a curfew after 6:00 p.m. the first time, and then 9:00 p.m. that the non-natives were not allowed on the reserve.

JM: Who enforced that?

Indian Act I think.

JM: In the community who enforced that?

The community people.

JM: If you were walking down the street with your non-native friend?

It was little different when I was growing up, we would bring our friends up there but we would go to a place where nobody could see us.

JM: This curfew was earlier?

It was always there. They used to call them 'squaw hunters'. Guys used to come up there looking for women. We used to beat up their cars, and throw rocks at them, and everything just to get them off the reserve because that is

what we were told to do by the chiefs, and who ever was responsible. That was part of our learning process about keeping white people off the reserve.

JM: Did it happen in the other communities too?

I don't think it happened too often in the other communities they were so far out in the woods. You would probably get killed out there.

Thus being from Membertou was clearly marked as different from being from town.

Taken for granted daily activities such as shopping, going to a movie, or buying a bottle of wine, took on different meanings for those from the First Nation community.

Membertou, during the 1970s, did not have many amenities, there were small tuck shops selling tobacco and candy, but little else. Employment opportunities were very limited for Mi'kmaq both in Membertou, and in Sydney. Employment in town often consisted of janitorial and maid service positions in hospitals or private homes, and others were involved in construction as labourers. In the late 1960s, the community school closed, forcing children from Membertou to be educated in town. Interactions between the communities were generally uneasy. Racial slurs and stereotypes pervaded social interactions between the relatively economically homogenous, and conservative working class townsfolk, and the Mi'kmaq. Fighting was common among youth gangs, and between aboriginal and non-aboriginal, in some of the rougher bars. Many stories told of how it was always the "Mi'kmaq who got the blame" when these altercations were broken up by police or bouncers. These public perceptions, prejudicial against Mi'kmaq, also permeated the legal consciousness of Sydney's law enforcement agencies, and courts, and thus precipitated the discriminatory treatment experienced by Mi'kmaq before the law.

Donald Marshall's Case

Donald Marshall's encounters with the Canadian justice system were not impartial, objective, or equitable. Mi'kmaq in Sydney, often seen as troublemakers, criminals, and as having less status than non-aboriginal peoples, had uneasy relations with the law and its enforcers. Marshall had a few minor brushes with the law prior to 1971. In one episode, only fifteen years old, he served five months in jail for supplying liquor to minors, even though he was a minor too, he was convicted without due process, or legal representation, an indication that the court system was very adversarial.

On May 28, 1971, Donald Marshall Jr. and an acquaintance met in Wentworth Park, Sydney, Nova Scotia. They had been at a dance and were cutting through the park on their way to their respective homes before midnight. The two youth encountered two men, one 59 and the other 25, and had words.⁸¹ The older of the two men attacked the boys, fatally wounding Marshall's companion by stabbing him in the abdomen and saying, "This is for you, Black man", and then lashed out at Marshall, cutting his arm (Evans 1990:9). After police investigations and court proceedings, rife with prejudice and misconduct, found him guilty of the murder, Donald Marshall, Jr. received a life sentence in a maximum-security federal penitentiary. He was only seventeen. The detective handling the investigation was Marshall's nemesis, John MacIntyre, a former beat cop well known for his conflicts with Mi'kmaq youth. The police investigation into Mr. Seale's death was critically unprofessional according to a report by the Honourable Gregory T. Evans, Q.C.⁸²

⁸¹ The two men were Roy Ebsary, 59 a former ships cook, "who had a reputation for violence and unpredictable behaviour, and had previously been convicted on a weapons charge involving a knife" and James MacNeil, 25, unemployed labourer (Evans 1990:9).

⁸² Judge Evans was one the Commissioners of the Marshall Inquiry.

The four Sydney police officers who initially responded to the report of the stabbing - did not do a professional job. They did not cordon off the crime scene, search the area or question witnesses. In fact, none of the four officers dispatched to the scene remained there to protect the area after Seale had been taken to the hospital. Their conduct was entirely inadequate, incompetent and unprofessional (Evans 1990:9).

The same can be said to the subsequent police investigation directed by then Sergeant [later to become Chief] of Detectives John MacIntyre. MacIntyre very quickly decided that Marshall had stabbed Seale in the course of an argument, even though there was no evidence to support such a conclusion. MacIntyre discounted Marshall's version of the events partly because he considered Marshall a troublemaker and partly because he shared what was a general sense in Sydney's White community at the time that Indians were not "worth" as much as Whites. Regardless of the reasons for his conclusions, MacIntyre's investigation seemed designed to seek out only evidence to support his theory about the killing and to discount all evidence that challenged it (Evans 1990:9-10).

MacIntyre's investigation also included coercing false statements from two unreliable witnesses. MacIntyre used the power of his position to pressure a youth on probation to incriminate Marshall, his tactics "went far beyond the bounds of acceptable police behaviour" (Evans 1990:10). Because of the perjured evidence, Marshall was charged on June 4, 1971 with Mr. Seale's murder.

The Trial

In reviewing this case it is difficult to find anyone legally attached to the case that did not make mistakes, serious mistakes, given that an individual's life was imperiled, and another individual's life was lost. Marshall was at great disadvantage from the beginning. Marshall's first language is Mi'kmaq; the trial was conducted in English. The dominant society has general, culturally shared expectations of how one behaves while in court. Being from a cultural background different than those who created such expectations, Marshall did not have access to the rules of behaviour, or the codes of conduct. The court did not provide, nor hear, any explanation of culturally specific

behaviour in formal settings that may have influenced how the jury interpreted Marshall's behaviour in court.⁸³ Witnessing Marshall's behaviour as contrary to the general courtroom expectations, led people to assumptions, imbued with personal interpretations of appearance and actions, which, subsequently and consequently, reflected in decision making processes. He was tried by an all-white jury rather than a jury of his peers. No murder weapon or motive linked Marshall to the crime, only contradictory and false statements by witnesses coerced by police.⁸⁴

Even though Marshall's father was Grand Chief, his important honorary position is without remuneration. Similar to the majority of Membertou residents at the time, Donald Jr. grew up poor. Unable to afford a highly skilled criminal lawyer, he had inadequate legal representation.⁸⁵ Even though his legal aid defense lawyers had access to "whatever financial resources they required, [they] conducted no independent investigation, interviewed no Crown witnesses and failed to ask for disclosure of the Crown's case against their client" (Evans 1990:11). The Crown prosecutor also failed to interview the witnesses who gave contradictory statements, nor did he disclose the contents of the inconsistent statements to the defense, thus he did not meet his professional obligations. Even the judge made several errors in law, "The most serious of those was his misinterpretation of the *Canada Evidence Act*, which prevents a thorough

⁸³ For example deference mannerisms vary between cultures. In some communities direct eye contact is a form of respect, in others, direct contact may be interpreted as a challenge and thus lacking respect. Marshall is a fairly shy and soft spoken individual, at 17 years of age, terrified and angry, speaking a language other than his mother tongue, he spoke with his head down and in a muffled voice. His inability to behave in a way that was expected of him was due to the fact that he had not been socialized within the same sets of social constructs as those who expected, and hence demanded, such behaviour from him.

⁸⁴ Witnesses at the first trial admitted during the Marshall Inquiry to giving perjured testimony due to pressure from Detective John MacIntyre.

⁸⁵ The Royal Commission found that the defense counsel failed to argue certain issues at the appeal which represented a serious breach of the standard of professional conduct expected and required of defense

examination of Pratico's [a police witness] dramatic recanting of his statement against Marshall outside the courtroom"(Evans 1990:11). Taken together, these factors contributed to the wrongful conviction and subsequent life sentence.

An eyewitness to the murder, the second man present at Seale's murder, came forward to police days after Marshall's conviction, and pointed to the real murderer, Roy Ebsary. Sydney City Police Department, and the Department of the Attorney General asked the RCMP to examine the allegations, but the RCMP failed to investigate the declaration thoroughly, and discounted the claim. In reviewing the witness' story, the RCMP Inspector⁸⁶ did not interview any additional persons, relying instead exclusively on polygraph tests, and on what MacIntyre had told him about the case. The RCMP investigator did not speak with Marshall, or with the witnesses from the trial, or anyone from the Mi'kmaq community where Marshall lived. He did not even talk with Roy Ebsary, the man the witness stated killed Seale. Instead, he relied only on sources as directed to by MacIntyre, whom had a vested interest in controlling the case (Mannette 1992). And the travesty continues:

The fact that MacNeil had come forward with this new and potentially important information was not disclosed to Marshall's defense counsel nor to the Halifax Crown counsel assigned to handle Marshall's Appeal of his conviction. As a result, this information was never presented to the Court of Appeal. If it had been, it is all but inevitable that a new Trial would have been ordered (Evans 1990:11).

Marshall's appeals also failed due to errors made by Crown Counsel and Defense Counsel. Neither lawyer raised the issue of the Trial Judge's incorrect rulings. Furthermore, the Court of Appeal has a duty to review the entire trial record. If they had fulfilled their legal obligations they would have caught the fundamental errors and would

counsel (1989 Vol.1:83). At trial defense counsel failed to put forth a complete and vigilant defense (Turpel 1992:88).

be compelled to order a new trial. That they did not is testimony to their incompetence and their lack of effort suggests they too presumed Marshall was guilty.

Donald Marshall maintained his innocence throughout his incarceration, which testifies to Marshall's courage, and sense of right. However, maintaining his guiltlessness cost him parole eligibility because he could not demonstrate remorse, and thus he served a life sentence for a crime he did not commit. After ten years in penitentiaries, far from his home community, Marshall's tenacious efforts to prove himself innocent finally paid off. Roy Ebsary, once again, was identified as Seale's murderer, and more 'credible' witnesses could provide the needed evidence. Based on the 'new' evidence, Marshall's case was reinvestigated and he was released on parole in 1982. Ebsary admitted to the stabbing, was convicted of manslaughter after three trials, and was eventually sentenced to one year in the Cape Breton County Correctional Centre. He was white.

The Release: More Apparent than Real

After Marshall was released on parole, steps were taken toward his acquittal. The Federal Justice Minister of the day, Jean Chretien, influenced by the views of Chief Justice for Nova Scotia, Ian MacKeigan, referred the Marshall case to a special Reference at the Court of Appeal, which prevented a wide-ranging examination of the case.⁸⁷

"Marshall was not only put in the position where he was required to prove his own innocence, but the issue placed before the Court was narrowed to the simple question of whether he was guilty or innocent of the charges against him" (Evans 1990:13). Evidence that the Deputy Attorney General and the Crown Prosecutor acted inappropriately during the Reference process added to Marshall's trauma. There was also a conflict of interest

⁸⁶ Coincidentally the RCMP Inspector's name was Marshall, no relation.

during the Reference trial when, the Attorney General of Nova Scotia at the first trial, sat as a panel member hearing the Reference, further complicating matters.

The special Reference to the Nova Scotia Court of Appeal, hearing Donald Marshall's acquittal, blamed Marshall for his wrongful conviction. They justified their condemnation by specifying he intentionally perjured himself, and it was his fault for instigating a robbery,⁸⁸ and thus any injustice to Marshall was, "more apparent than real"(Appeal Division Nova Scotia Supreme Court Judgement, 10 May 1983).

While the Court did quash Marshall's conviction and enter a verdict of acquittal, it also inexplicably chose to blame Marshall for his wrongful conviction. The Court's conclusion in this regard represented a serious and fundamental error. The Court used the evidence before it - as well as information that was never admitted to evidence - to "convict" Marshall of a robbery with which he was never charged, and concluded erroneously that Marshall had "admittedly" committed perjury. The Court's further suggestion that Marshall's "untruthfulness ... contributed in large measure to his conviction" was not sustained by the evidence before the court (Evans 1990:13).

The Reference Decision prejudiced Marshall's ability to seek compensation for the wrongs perpetrated against him. Unlike Judge Evans's analysis that the court behaved inexplicably, other analyses found the Court to be protecting their own interests, and the interests of the province, by uncritically accepting their discriminatory practices as just, in spite of overwhelming evidence to the contrary. Their decision, "fit comfortably with the popular racist stereotypes of *Indians* as liars, thieves and drunks" (Turpel 1992:90). The police officers and members of the legal profession that were largely responsible for Marshall's wrongful conviction, were never charged, nor held to account for their

⁸⁷ The Reference was held under what was then Section 617(b) [now Section 690(b)] of the *Criminal Code* instead of Section 617(c) [now Section 690(c)] (Evans 1990:13).

⁸⁸ Roy Ebsary's version of the events indicated that the trouble started because Marshall and Seale attempted to rob him. This was not the case. Marshall went along with Ebsary's version of the events because of the way the RCMP officers conducted their interviews with him in Dorchester prison in 1982. The police insisted "there was something else going on in the park other than just a casual walk through the park to catch a bus" (Evans 1990:12).

misconduct. Many people were outraged and confused over the Reference Court's statements. Through the ordeal, Marshall was revictimized rather than vindicated.

Marshall sought compensation for his wrongful conviction. In addition to the prejudice induced by the Reference Court decision, federal and provincial jurisdictional conflicts over First Nations persons negatively impacted the compensation decision process. The province contended that compensation should be a federal responsibility because Marshall, as a Mi'kmaq person, was not the responsibility of the province under the *Indian Act*. The province argued further that because his conviction was an offence against the Criminal Code of Canada, in a court with a federally appointed judge, and he had been incarcerated in a federal institution, they should not have to pay for the errors. The federal government rejected the province's position, citing the administration of justice is a provincial responsibility (Wall 1992:19).

In 1984, the province appointed a one-person commission, the Campbell Commission, to examine the issue of compensation. The media speculated that the province was more concerned with the issue of compensation than with the fact that its justice system was unable to protect the innocent from wrongful prosecution (Wall 1992:19). These facts are clear indications of the brutality and of the failure of the Canadian legal system for aboriginal peoples, and the lack of willingness on the part of the province of Nova Scotia, to recognize any fiduciary or social responsibility for the First Nations residing therein. These struggles over jurisdiction continue to impede many Mi'kmaq - Provincial - Federal arrangements and agreements, particularly those dealing with Mi'kmaq empowerment and self-governance, and hence justice.

Despite the province's desire to wash their hands of the case, significant pressure emerged from the public to hold an inquiry. Clearly the injustices done to Donald Marshall, and subsequently the Mi'kmaq nation, were increasingly evident to those who learned of the situation. That the sacrosanct justice system was shattering was unsettling to many. That the province was unwilling to address this problem directly, and openly, heightened suspicions that politicians were in collusion with the failings of its judiciary. The media followed the case closely since it reopened in 1982. Marshall's new lawyers pushed for public hearings, as did opposition politicians, who used the issue to politically embarrass their rivals. Mi'kmaq political organizations, namely the Union of Nova Scotia Indians, demanded the province take action to investigate these horrific wrongs committed against one of their own. According to Bob Wall, "there is no evidence of a call for a public inquiry on the part of the legal community," other than Marshall's lawyers, an indication that the legal practitioners were not interested in an internal review.⁸⁹

It is safe to conclude that the impetus for a public review of the Marshall Case resulted primarily from pressure exerted by the media, Mi'kmaq and Black organizations, private citizens, and opposition politicians both federal and provincial. However, by the time the government reluctantly agreed to allow a public airing of the case, the concerns being expressed went far beyond the details of one investigation that seemed to have gone wrong. The provincial government and the Attorney General's office were being accused of meddling in the affairs of the criminal justice system to cover up political wrongdoing. The justice system was being portrayed as overtly racist and was plagued by a growing list of alleged scandals involving ministers of the government. The announcement of a royal commission, then, can be seen as an attempt at damage control by the government. What was needed was a public relations gesture that would appear to deal with the problem (Wall 1992:21).

⁸⁹ Bob Wall was hired by the Commission to prepare daily summaries of the testimonies for the benefit of the Commissioners and the Commission Council which "required attendance and substantial note taking

The Royal Commission on the Donald Marshall, Jr. Prosecution

The Province of Nova Scotia resisted holding public hearings into Marshall's case for more than four years until they finally acknowledged calls for a public inquiry.

Convened through a provincial order-in-council, the *Royal Commission on the Donald Marshall, Jr., Prosecution* opened in October 1986.⁹⁰ The mandate of the Marshall Commission was limited. The instructions: to find out what happened specifically in the investigation of the victim's death; the charging and prosecution of Marshall with that death; the subsequent conviction and sentencing of Marshall for non-capital murder for which he was later found not-guilty. Matters the Commissioners considered relevant to these instructions were also permissible within reason.⁹¹ The Commission was also ordered to make recommendations within the parameters of the above mandate. The limits of the mandate prevented interested parties, particularly the Mi'kmaq nation, from challenging the juridical status quo. The Commission was not asked to examine the Canadian legal system's hegemony, or to challenge the possibilities that the doctrines of Canadian justice, as an impartial, objective, value-free, and independent judiciary, were not equally available to all that come before it. Nor was it asked to address the broader aspects of the social, economic, and political structures surrounding the issues, for example, the ongoing colonial relations between the dominant provincial and federal governments, and the impoverished Mi'kmaq; conditions that contributed to Marshall's wrongful conviction. It was not asked to address the criminal justice system's failure to

during the hearings each day" (Wall 1988:29 n.4).

⁹⁰ The terms Inquiry and Commission are used interchangeably in this document to describe the *Royal Commission on the Donald Marshall, Jr. Prosecution*. Other Royal Commissions such as RCAP[Royal Commission of Aboriginal People] will be addressed by their full names or acronyms in order to differentiate them from the Marshall Inquiry / Commission.

⁹¹ These are the Terms of Reference of the Order in Council appointing the Royal Commission given by the Honourable Alan Abraham, C.D., Lieutenant Governor of Nova Scotia, October 28, 1986.

respect cultural differences, or the overt and systemic biases against aboriginal peoples. It was not to address how, and why, some people are regarded differently in a system that purports to be righteous and just based on claims that everyone that comes before it is treated equally.

Hearings began on September 9, 1987 and ended November 3, 1988. Three Superior Court Judges: Alexander T. Hickman, Chief Justice of the Newfoundland Supreme Court, Lawrence Poitras, Associate Chief Justice of the Quebec Superior Court and the Honorable Gregory Evans, (retired) Ontario High Court, presided over the inquiry. The three justices were assisted by twenty lawyers representing everyone who had an interest in the case, from Marshall's personal defense, to the attorney general of Nova Scotia, to the family of the victim (Kavanagh 1988). They heard from one hundred and thirteen witnesses, and examined one hundred and seventy-six evidence exhibits, over a total of ninety-three days. Estimates of the cost of the Marshall Inquiry are more than seven million dollars.⁹²

Dealt with extensively in the Inquiry were the RCMP investigation of Mr. Seale's murder, and the role of the Attorney General's office in the prosecution, particularly their failure to disclose vital evidence. But issues such as jury selection, personal and structural biases of legal processes and professionals, cultural differences, and socioeconomic factors, were not addressed. The power inequalities evident in this case were not challenged within the Commission. Marshall's treatment while in prison and the parole process were deemed federal jurisdiction and, "lawyers for Correctional Service of Canada raised objections, citing an unpublished agreement between them and

Commission Counsel to restrict inquiry into areas of federal jurisdiction" (Wall 1992:30 n.20.). The ongoing playing off against federal and provincial jurisdictions remained an impediment to accountability, responsibility, transparency, and justice, throughout Marshall's juridical experiences.

Observers and participants expressed frustration with the inability of the Inquiry to address the systemic problems of inequality between Mi'kmaq and non-Mi'kmaq. Marshall's supporters saw the Inquiry as an opportunity to get at the roots of the issues at stake, to seek retribution for the discriminatory treatment of aboriginal peoples within the Canadian justice system, and to uncover the racism in wider social interactions that mask that discrimination, aspects central in Mi'kmaq legal consciousness. Retribution was also sought for the wrongs committed against the individual, but the process ultimately submerged those responsible for Marshall's wrongful conviction (Mannette et al 1992). High profile, Ontario lawyer, Clayton Ruby was lead counsel for Marshall, with his partner Marlys Edwards and Halifax lawyer, Anne Derrick, as co-counsels. At first the province proved unwilling to pay Marshall's full legal fees during the Inquiry, suggesting they would only pay for his personal counsel during his actual testimony and that the, "counsel employed by the Commission would adequately represent Marshall's interests at other times"(Wall 1992:23).

During the examinations the police maintained they were doing their job, "in sworn testimony and actions saw it as their job to maintain racial separation, not to promote integration ... that their job was to rid the town of *Indian* trouble"(Henderson 1992:48). The police are the most visible arm of justice, uniformed, authoritarian, and

⁹² An article in *Canadian Lawyer* September 1988 suggested that each hour the commissioners sat cost over \$1000 (Kavanagh 1988:18). Joy Mannette gives of figure of \$8 million for the cost of the inquiry

armed with both physical and socially constructed power to control behaviour. Sydney town police and Mi'kmaq peoples of Membertou had very strained relations. It was widely believed that the arresting officer had a personal dislike for Marshall and wanted to get him off the streets. It was hoped by many, if not by all of Marshall's supporters, that someone would be held directly censurable for this deliberate corruption and perversion of justice, of which he was the intended victim. The Commission made no recommendations for laying criminal charges against those that suppressed evidence or obstructed justice. Proving that a personal vendetta, by a person characterized as racist, contributed significantly to Marshall's wrongful conviction was difficult within the parameters of the justice system, particularly because the police were members of that justice system. If members of the police force had been found culpable, of which it seems no doubt some of them were, perhaps the structure itself would not have been able to withstand the revelation. Police, as members of a wider society, demonstrated attitudes that reflected shared embracing of colonial folklore such as, "whites were *better* than Indians and that Indians are generally criminal," making the case unfortunate, but inevitable, in light of those attitudes. Such insidious justifications are perplexing, but very apparent upon examination of this case. By linking the pervasiveness of the colonial mindset, its attendant racial stereotypes and profiling, with the taken-for-granted place of law in the dominant society, we can see how unequal relations are reproduced, and how difficult it is for the powerless to challenge and shift those productions that operate against them. Marshall's wrongful conviction epitomizes the hegemony of the Canadian criminal justice system, legal process, and its discriminatory nature against First Nations peoples.

The process of the Inquiry itself was criticized because, "it's engaged in a detailed examination of the justice system using the very same instruments and techniques it is examining - truly an exercise in navel gazing" (Kavanagh 1988:20). The methodology for determining the effect of racism in the criminal justice system was never clarified.⁹³ During the first week of sworn testimony, the Commission ruled that direct cross-examination of the key witnesses about their attitudes about Indians was improper (Henderson 1992:38). They did not engage in any dialogue about racism as either a social construct, or a juridical construct, but rather treated it as a biological fact. This ruling prevented any full examination into the hierarchies and ideals associated with racial perception in both the social and judicial consciousness (Henderson 1992:39).

Race is the primary status characteristic in the legal consciousness of Canada. Racism is a social construct - a category of perception. Race at the trial was discussed as a matter of physical characteristics by everyone except Mi'kmaq who discussed culture and linguistics as primary status characteristics of identity. Inquiry validated the immigrant's view of the Indians. Junior was always considered just an Indian no mention of his nationality or ethnicity - only his race. The continual use of Indian by the Inquiry illustrated the legal profession's assumption of colonial thought. It perverted the perception of formal equality before the law in the legal consciousness (Henderson 1992:38-39).

The legal consciousness of dominant society is most comfortable with logical analysis and causal explanation but, in confronting racism and treaty rights, it had to confront the notion of unconscious structures in the human mind and artificial social orders imposed on aboriginal people (Henderson 1992:37). The Commissioners did not permit questions, "probing whether there is a pattern of 'behaviour without intent' in the justice system that results in discrimination by colour and race" (Kavanagh 1988:20).

⁹³ In efforts to determine whether and in what ways there might be racial discrimination in the New Jersey Courts, The New Jersey Supreme Court Task Force on Minority Concerns suggested that one of the most important and detrimental forms of racial variation might be differential voluntary use of law and courts by minority populations (Ewick and Silbey 1998).

Instead, the Commission used political power and class as a way to determine differential treatment in the justice system. Here the Commission went beyond the narrow mandate of the specifics of Marshall's wrongful prosecution to examine if unequal treatment in the justice system was widespread. The Commission compared RCMP investigations of two Nova Scotian MLAs [Members of Legislative Assembly] with Marshall's investigation. They wanted to know if politicians and ordinary citizens received equal treatment in the system. The fact that Mi'kmaq persons are not ordinary citizens, that they are citizens with constitutionally recognized special rights, was not addressed and any discussions of treaty issues were silenced. The fact that this comparison was limited to RCMP investigations is telling. This tactic may have served to quiet the accusations of political corruption that were devastating to the province.

The province persisted in its resistance to any attempts to access files they felt went beyond the more specific mandate of the Commission. They went to court to prevent the Inquiry from asking questions about Cabinet discussions concerning the Marshall Case. The province lost. The Commission sought testimony from the judges of the Court of Appeals, to which Nova Scotia Justice ruled that judges had absolute immunity. The Commission appealed and went to the Supreme Court of Canada, where the appeal was overturned. Thus, while the political operations of the province came, momentarily, under scrutiny, the operations of the judiciary were protected, thus diverting attention onto the province and the police.

In essence, the Commissioners had taken the very limited mandate and, in the face of the obvious displeasure of provincial officials, proceeded to expand it to include a wide range of political and social issues never intended for scrutiny by the province. It was widely felt within the provincial bureaucracy and by political players that the Marshall Commission had become a 'loose cannon' (Wall 1992:25).

The province made every effort to control the Inquiry and protect its interests by restricting the Commission to the failings of the police investigation, but the Commissioners had to protect their legitimacy as well:

... through its own actions and consistent with due process, the Marshall Inquiry was able to demonstrate, publicly, through its instruction and educative functions, that the desired juridical epistemology and bureaucratic practices, which had been called into question, can ensure that justice is done ... in this sense, the combination of targeting human fallibility and instructing by example resulted in the Marshall Inquiry's ability to allay public doubt about judicial process, state legal coherence, and administrative rationality (Mannette 1992:65).

Nova Scotians were exposed to glimpses of Mi'kmaq culture through media accounts of the trial, the Royal Commission hearings, and the political fallout. During the much publicized Royal Commission they learned of the discrimination present in their communities and justice system. They were also exposed to the general socioeconomic disadvantages of being Mi'kmaq in Nova Scotia. Nova Scotians also became aware of the resiliency of Mi'kmaq tribal culture, and witnessed heightened cultural production of Mi'kmaq resistance to domination through Marshall's experiences. In all, the Marshall Inquiry generated levels of empathy for the plight of Donald Marshall, his family, and his culture that were not present prior to his exoneration. Marshall's name became synonymous with injustice. General public perceptions seemed to favour the politicians and the police as the wrongdoers. Perhaps they did not share any feelings of responsibility for discrimination against aboriginal people in the province because those biases and prejudices were redirected through other social actors. Or perhaps people were seeing the results of discrimination and decided to take a moral stand against prejudice. Bridges between communities that were formerly isolated were beginning to form. Some of the racial barriers, on both sides, started to come down, forging new relationships and

new opportunities for understanding and cultural exchange. Regardless of intent, boundaries were blurring and factions were communicating.

A critical outcome of the Inquiry was that it challenged the sanctity of the justice system, and the power of the police, by showing them to be products of the society from which they emerge, rather than as reified, insulated organizations, operating under false pretenses of impartiality for the presumed benefit of total society. However, "the integrity of the justice system was not impugned, it was human fallibility, in the guise of individual incompetence, which caused the apparent systemic breakdown" (Mannette 1992:65). Furthermore, the Commission revealed the extensive racism perpetuated by high-ranking officials within the political and judicial structure of Nova Scotia.

... no one in the justice system was willing to put their "balls in a vice over an Indian," a member of a powerless, isolate race.⁹⁴ It was not politically or socially wise for an attorney's career for him or her to challenge local or provincial authorities to protect this inferior human (Henderson 1992:42).

Such revelations are significant. The justice system, through this Commission, chose not to censure individuals, a tactic that is equally revealing in its illumination of the limits of the system, calling into questions definitions and meanings of justice cross culturally, and across class.

A critical failure of the Marshall Inquiry was that it did not address the legal rights of Mi'kmaq persons. It did not consider treaty rights and obligations but rather focused on skin colour as the basis of individual identification (Henderson 1992). The legal rights of the Mi'kmaq nation were never addressed. This denial, contained within an assimilationist philosophy promoted by the province, that argues the Mi'kmaq have a

⁹⁴ Robert Anderson, Director-Criminal in the Nova Scotia Attorney-General's Department advised Felix Cacchione, Donald Marshall's attorney during his request for compensation, "Felix, don't put your balls in a vice over an Indian" and later admitted at the Inquiry "it sounds like something I might say."

formal equality with all citizens in the administration of justice, erodes Mi'kmaq institutions and erodes collective rights. The Mi'kmaq Grand Council, in its submissions to the inquiry, argued that, "to achieve equality before and under the law and the right to the equal protection and equal benefit of the law, the Mi'kmaq require substantive equality rather than formal equality" (Henderson 1992:59).

The Mi'kmaq had a limited voice in the inquiry, affording only a few of their recommendations to be incorporated into the findings. Some interpreted this process as Mi'kmaq collusion with the inquiry process, producing an image of consent, but in reality, the Mi'kmaq rarely consulted, were marginal to the creation of the recommendations.⁹⁵ During the inquiry, the Mi'kmaq seized the opportunity to demonstrate that there exist different and unique interpretations of juridical frameworks. Culturally differentiated modes of speech, and concepts such as guilt and intent, deference behaviour, language connotations and intonations, need recognition and accommodation in order for Mi'kmaq to experience justice within the dominant society's justice system. The Mi'kmaq called for a tribal justice system, which the province of Nova Scotia misunderstood as a simple matter of indigenization of juridical actors in their system (Mannette 1992). Furthermore, while recognizing, on the surface at least, that the Mi'kmaq have culturally imbued ways of handling and responding to problems, the Commission and the justice system in general, tends to treat aboriginal persons as all the same. Aboriginal diversity is subsumed by the hegemony of the justice system, Marshall was not seen as a Mi'kmaq person, he was seen as *an Indian*, and all *Indians* were perceived as being the same. "Mi'kmaq worldview emerges in the Marshall Inquiry,

⁹⁵ See Turpel and Manette (1992).

then, as an excluded, not preferred, interpretive framework within a dominant ethnic hegemonic order" (Mannette 1992:72).

The Recommendations: Mi'kmaq Legal Consciousness Gains a New Discourse

In 1989 the Royal Commission on the Donald Marshall Jr. Prosecution published a seven-volume report. With the release of the Report, the Province of Nova Scotia made a public apology to Donald Marshall, Jr. He was fully exonerated and no longer held responsible for his wrongful conviction. The opening statement of the *Digest of Findings and Recommendations* reads:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could - and should - have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and or competent manner. *That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native* [emphasis mine] (Royal Commission - Digest 1989:1).

The Marshall Inquiry Commissioners reported, "In our view, Native Canadians have the right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with, and sensitive to their history, culture and language" (Digest of Findings and Recommendations 1989:11). As part of their duty, the Commission was compelled to make recommendations to "help prevent such tragedies from happening the future" (Digest of Findings 1989:1). Marshall and his supporters hoped that the Royal Commission would make specific recommendations about the laying of criminal charges against those directly responsible for his wrongful conviction. Marshall in particular, wanted action taken against the Sydney police, especially since he earlier dropped a civil suit in order to facilitate the Commission itself.

However, it was not to be, the Report stated, “it is our view that the function of a public inquiry is not to determine criminal responsibility, but to inform people about the facts of the matter under consideration” (Digest of Findings 1989:1). This was a significant disappointment, once again Marshall felt his hands tied and justice remained elusive.⁹⁶

As part of the reporting process, the Commissioners hired researchers to conduct various studies to add to their hearing findings.⁹⁷ They found that Mi’kmaq and Blacks experienced unequal treatment, and additional evidence of discrimination and prejudice in the Nova Scotia criminal justice system. Scott Clark conducted a field-based analysis to identify the adverse effects for aboriginal peoples in the system, and to explain the underlying causes of those problems by examining history, social structure, and economies, as a way to explain contemporary conditions and behaviours (Clark 1989:xiii). Clark’s general findings confirmed the need for community based justice programs due to the adverse affects of Mi’kmaq participation in an ineffective, culturally insensitive and discriminatory justice system. He argued that the underlying causes for Mi’kmaq involvement in the criminal justice system stem from socioeconomic marginalization, and the historical consequences of colonization. Additionally, Clark argued that before meaningful innovations can be implemented, the province of Nova Scotia must recognize Mi’kmaq rights to land and resources according to their treaties with the Mi’kmaq, as well as their constitutionally protected rights. Importantly, Clark recognized the need for the province to accept and help facilitate Mi’kmaq self-

⁹⁶ Personal communication.

⁹⁷ Research studies were conducted on the following topics: Public Policing in Nova Scotia (volume 2); Mi’kmaq and Criminal Justice in Nova Scotia (volume 3); Discrimination Against Blacks in Nova Scotia: The Criminal Justice System (volume 4); a series of Opinion Papers: Walking the Tightrope of Justice: an examination of the Office of the Attorney General (volume 5); Prosecuting Officers and the Administration of Justice in Nova Scotia (volume 6); and transcripts of Consultative Conference on Discrimination Against Natives and Blacks in the Criminal Justice System and the Role of the Attorney General (volume 7).

governance (Clark 1989:69-70). These recommendations revitalized inherent rights discourses in Mi'kmaq communities. Clark then went on to make twenty general recommendations including calls for reviews of the criminal justice system, policing, and sentencing, and the establishment of an Aboriginal Justice Institute, provincial courts on reserves, and tribal justice systems, to name a few.

In reading over the submissions it requested, the *Royal Commission on the Donald Marshall, Jr. Prosecution* made a total of eighty-two recommendations based on their analyses of the research reports and hearings. Their recommendations were grouped under various headings: Righting the Wrong: Dealing with the Wrongfully Convicted; Visible Minorities and the Criminal Justice System; Nova Scotia Micmac and the Criminal Justice System; Blacks and the Criminal Justice system; Administration of Criminal Justice; and Police and Policing. Eleven of the eight-two recommendations dealt directly with the Mi'kmaq.⁹⁸ The Mi'kmaq took up these recommendations using them to build the foundation for articulating their dissatisfaction with the provincial and federal governments, individually and collectively.

Since 1989, the Marshall Inquiry has been a strategic platform for politics of embarrassment, as well as a powerful negotiating tool, utilized by members of Mi'kmaq political, cultural, spiritual, and economic organizations to bring about social changes in their communities. Marshall's story, told again and again, in various communities, is included in both Mi'kmaq and Nova Scotia education curriculums, and thus embedded in the consciousness of multiple generations. Donald Marshall is often asked to give public lectures on his experiences, and during the past ten years he has given over one hundred

talks at schools, justice programs, governmental and aboriginal organizations. As Merry notes (1992), daily talk by ordinary people contributes to defining what law is, and how it is understood to affect lives. Learning and framing the expectations of law and senses of legal entitlement in and through these discourses, Marshall's wrongful conviction permeates Mi'kmaq legal consciousness through daily tellings. Enacted as fuel for Mi'kmaq resistance to judicial domination by the mainstream society, his story and the recommendations of the Royal Commission provide the impetus for a separate Mi'kmaq justice system, reinforcing rights and entitlements arguments as Mi'kmaq encounter and challenge mainstream governments.

The appalling situation of Marshall's wrongful conviction epitomizes the adverse effects and the inappropriateness of Nova Scotia's justice system for Mi'kmaq, and represents problems experienced by other aboriginal peoples as they encounter mainstream justice across Canada. Marshall's experiences, both in prison and in the inquiry, confirmed over and over that the mainstream justice system in Canada was not safe for Mi'kmaq. This confirmation gave the Mi'kmaq something tangible by which to frame their discourse of resistance. They were better able to justify their legal entitlements and refined their arguments in language taken directly from the legal systems lexicon. Cultural productions increased in the Mi'kmaq nation during the post Marshall Inquiry era, as their valued cultural components, ideas of legal entitlement and sense of rights, were threatened from outside. New articulations gave the Marshall recommendations a life of their own, beyond the wrongful conviction, as Mi'kmaq interactions with the legal system constituted new social relations. Much of the Marshall

⁹⁸ The breakdown of the 82 recommendations is as follows: 8 for wrongful conviction and compensation; 11 visible minorities and the criminal justice system; 4 for Blacks in the criminal justice system; 11 for the

Inquiry and recommendations became empowering for the Mi'kmaq, at least at the outset, as they entered into new relationships with the Canadian society, and its legal system. Explored in the next chapter, are these ideas, which address the interaction between the Mi'kmaq nation and the mainstream justice system post Marshall, and their outcomes in terms of Mi'kmaq juridical practices, and their shifting legal consciousness.

Chapter Seven: Aboriginal Justice – The National Context

Before entering a discussion of what happened in Mi'kma'ki after the *Royal Commission on the Donald Marshall, Jr. Prosecution*, I briefly detail the national context of aboriginal justice in Canada during the last quarter of the twentieth century. This chapter addresses the changing justice policies of the federal government, and the rise of contemporary Mi'kmaq political organizations, in order to fully explicate the conditions of negotiation and contest, in which Mi'kmaq interpretations of the Marshall Inquiry recommendations were articulated.

The discrimination experienced by Donald Marshall was not an isolated event. Evidence of injustices against aboriginal peoples have accumulated over the centuries and continue in the present. For example, charges of police brutality, particularly in Saskatchewan, and mismanagement of criminal cases in Manitoba and Alberta, reflect that many problems remain unresolved. It can be assumed that for those incidents that are reported, there are many more that go unreported. The general overrepresentation of aboriginal peoples in the Canadian justice system is pandemic, indicating serious infrastructural and societal problems, and is suggestive of widespread sociolegal inequality. Statistically, aboriginal peoples are more likely to be arrested, denied bail, spend more time in pretrial detention, less time with lawyers, and are more likely to get jail time, when convicted.⁹⁹ One of the most pervasive legal ideologies of mainstream justice understands crime to be an individual responsibility, a consequence of individual

⁹⁹ See the *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1: The Justice System and Aboriginal People. Winnipeg 1991.

failure.¹⁰⁰ From this perspective, aboriginal peoples' problems with the law are rooted in the individual, rather than in larger systemic marginalization, which discriminates against aboriginal peoples as a group, and contributes to ongoing denial of their sovereign and human rights, both individually and collectively. These interpretations perpetuate colonial processes by failing to address the systemic problems contributing to crime, and the failure of the justice system to enact koqqwaja'ltimk, to treat aboriginal peoples justly.

Historically, as a product of colonial domination, First Nation peoples have been denied the right to be self-governing and self-determining, and thus are forced to participate in a justice system that is largely culturally irrelevant, as individuals, and as members of culture or tribal groups. Aboriginal relations with the larger society are characteristically unequal. First Nations individuals and communities regularly experience economic, cultural, and spiritual ostracization, overt and covert racism, resulting in perpetuation of generalized, stereotypical images that misconstrue First Nations persons as potentially, and normally, more oriented to criminal behaviour, and thus in need of greater surveillance.¹⁰¹ On one hand, increased surveillance, high levels of poverty, distorted public perceptions entrenched in colonial mythology, in addition to clashes of cultural consciousness; contribute to the crises of overrepresentation in the mainstream justice system for aboriginal peoples. On the other hand, continued aboriginal alienation from justice processes, deemed legitimate for everyone else, further compounds the crises.

¹⁰⁰ See Susanne Karstedt and Kai-D Bussmann (eds). *Social Dynamics of Crime and Control: New Theories for a World in Transition*. Oxford: Hart (2000).

¹⁰¹ See LaPrairie (1991), Wotherspoon and Satzewich (1993), Frideres (1998).

In the past quarter century, some communities experienced over-surveillance, while other communities could not access any protection, and their justice needs remained denied or ignored. Aboriginal peoples do not stand a fair chance if they chose to use the system to advance their personal and collective claims. Financially, the process was inaccessible, most Aboriginal peoples could not afford lawyers, nor could they access the education systems that reproduced mainstream legal consciousness, and specific legal knowledge, necessary for successful litigation. The colonization of aboriginal peoples by the legal system, unevenly felt, reflects emerging class differentiation, as well as differences embedded in cultural beliefs and practices.¹⁰²

Within the past forty years, it became clear to various aboriginal leaderships that the dilemmas were wider than the justice system. There was, and remains, an identity crisis within Canada. Assimilation programs, and power struggles, furthered by contradictory policies at the federal level on a purported "Indian Problem", fueled the crises. In 1966-1967, the Hawthorn Report supported the position that full recognition of aboriginal peoples as having a special status as "citizens plus", be granted in order to ensure their separate identity is maintained to improve their social health. However, the 1969 White paper, in which the Liberal government proposed complete assimilation and wholesale denial of aboriginal rights, caused social conflicts and outrage in aboriginal communities across the country. The White paper, in contradiction to Hawthorn, argued for full integration of aboriginal peoples into 'white society', and the end to the any special legal status protected within the *Indian Act*. Canada was mirroring the termination policy of the United States that eliminated reserves, promoted urban migration,

¹⁰² James Waldram discusses these issues in *The Way of the Pipe* (1997) as he explores incarceration practices.

challenged tribal sovereignty, and imposed assimilation between the late 1940s and early 1960s (see Cornell 1988). Reaction to this program of cultural genocide generated the development of organized political action within First Nations across North America. Fueled by the civil rights movement, the American Indian Movement, Red Power and Hawthorn Report's recommendation that aboriginal peoples be granted a special status of 'citizen plus' to maintain their separate identity, the late 1960s and early 1970s saw a proliferation of tribal political organizations, opposition politics, and resistance to assimilation.

The Rise of Contemporary Political Organizations in Mi'kma'ki

In Mi'kma'ki ethnogenesis and cultural productivity increased, resulting in the emergence of tribal political organizations, as well as the revitalization of the traditional tribal council, the Mawio'mi. Ethnogenesis is a dynamic process, rooted in historical consciousness. Mi'kmaq ethnogenesis has not been linear, nor has it simply been an oppositional model of interethnic relations between the state on one side and Mi'kmaq on the other. Rather, as Jonathon Hill (1996) suggests, ethnogenesis and ethnocide are not indications of demographic extinction or genesis, but forms of sociopolitical organization and their attendant cultural categories identifying those groups. Internal, localized divisions and rivalries, powerful personalities, and bases of power, play key roles in the manufacturing of ethnic consciousness and mobilization, as do the larger geopolitical and economic conditions, also affecting such productions.

The history of the politicization of Mi'kmaq organizations in the post White paper era illuminates the complexity and diversity of the nation. These organizations, their leaders and contests, their membership, and their internal and external relations, are

critical to Mi'kmaq justice processes and attending legal consciousness. The first association formed was the Union of Nova Scotia Indians, which held its first meeting July 12, 1969 and held its first annual general assembly September 13, 1969.

The organization came into existence to provide a unified political voice for the Mi'kmaq people of the province in the face of proposed federal government policy to assimilate Canada's First Nations people into mainstream society. The 1969 White Paper is widely viewed by the First Nations' leadership as the government's deliberate attempt to introduce a policy of cultural and political genocide. Faced with the prospect of extinction, a group of Mi'kmaq leaders formed the Union of Nova Scotia Indians to provide political leadership for the Mi'kmaq Nation (UNSI 2000).

When the Union first started, all thirteen reserves participated in some form. Band chiefs represented the interests of their various communities, some with stronger personalities, others less inclined to activism. The political capital of each community differed in part with its leadership, its population, and its access to resources.

The Union developed into an umbrella organization that coordinates programs and manages financial support for a diverse number of portfolios, ranging from housing, welfare, community health and wellness, to economic, cultural and legal programs. The objectives of the Union include protecting the welfare and wellbeing of its membership by improving economic and social conditions, and by ensuring collective and individual rights are not abused. The Union also acts as a facilitating organization to promote Mi'kmaq culture. It is the Union's job is to keep aboriginal issues on the political tables and to negotiate programs for the advancement of Mi'kmaq interests in cooperation with business and government.

An individual becomes a member of the Union if they are a registered Indian pursuant to the provisions of the *Indian Act*, and if their name appears on a Band list (a list containing the names of all members of that Band, whether residing on or off reserve

and whether eligible or not to vote for Chief of that band), and who is ordinarily resident in Nova Scotia, whether or not they live on a reserve (UNSI 1994). The Union is, like other Mi'kmaq organizations, a strong advocate for Mi'kmaq treaty rights and land claims. They have a research arm to conduct investigations to support their petitions. The Union's legal department has supported court actions in which its members have been charged with resource violations, particularly fishing and logging, using treaty rights to counter those charges. For example, when Donald Marshall was charged with selling eels illegally, the Union on Nova Scotia Indians funded the legal battle, which resulted in a successful Supreme Court Decision of treaty recognition, affirming Mi'kmaq rights to fish commercially. They have also launched a significant land claim case in Nova Scotia, and have participated in a number of human rights and environmental issues cases. The Union is a forerunner in promoting a Mi'kmaq justice system.

The Native Council of Nova Scotia [NCNS], founded in 1975, represents the second largest interest group, supporting the interests of off reserve, and non-status, or unregistered Mi'kmaq. It was formed under the initiative of non-status women. Women who had lost their status due to the *Indian Act* section 12 1B, which prevented aboriginal women from maintaining their status as aboriginal persons if they married non-aboriginal men. The Union initially supported the efforts of the women to push the government to honour their fiduciary obligations; however, they did not have enough resources for their own communities, let alone resources to support off-reserve Mi'kmaq. Federal program funding was made available to organize core programs, such as the Union and Native Council. The Nova Scotia Native Council is associated with the Congress of Aboriginal

people, formerly the Native Council of Canada, where Nova Scotia is included in the regional grouping of the Maritimes.

In an interview with a former Chief and President of the Native Council of Nova Scotia, he holds the *Indian Act* responsible for the political divisions of the nation, particularly between status and non-status, and for the decline of the Mi'kmaq Grand Council as the governing body of the Mi'kmaq.

... This problem with the Indian Act system, you look at each band calling itself a First Nation. You see a sign that says Millbrook First Nation, it is heart wrenching for me because that's not a fact. There is a misconception that is being implied to our own people and to the public that a community of a few hundred people is a nation, it is not, it is only one aspect of a bigger nation. If a political organization only represents the people within those bands, within those geographic boundaries, and if you proceed along those lines and don't take the full responsibility of representing all the people in all the traditional territories, then you are giving up on the traditional territory. Then you are conceding to the fact that the government has taken certain lands away from you arbitrarily and that you have no more say over those lands. I think that is not healthy and it is one of the things that Native Council has been trying to promote within Grand Council and the Chiefs as well. Since we had the *Simon* case in 1985, we were at least working together on certain issues. It is really larger off-reserve lands that are traditionally Mi'kmaq territory, not the bands the Indian Act created.

Despite the political splits and contests over equality of services and equal rights, common links between on and off reserve persons, are continually made through cultural events such as Treaty Day and St. Ann's Mission, powwows and sports competitions, family ties to reservations, language and other factors, which help people identify themselves and each other, as Mi'kmaq. When a treaty rights case comes to light members in all communities have a vested interest in its outcome, and thus interaction with the legal system is potentially a unifying force for the various Mi'kmaq groups as they come together to battle for communal rights, which transcend particularized political, residential, and status boundaries.

In 1984, political disagreements between mainland and Cape Breton bands resulted in the formulation of a third organization. A splinter group called the Confederacy of Mainland Mi'kmaq was created to represent the interests of the status Mi'kmaq residing on mainland bands, namely Millbrook, Afton, Pictou Landing, Bear River, Horton, and Annapolis Valley (Wicken 2002). The Union continued to represent the Cape Breton bands of Wagmatcook, Waycobah, Eskasoni, Chapel Island, and Membertou, where the head office is located, as well as two mainland bands: Indian Brook [Shubenacadie] and Acadia. All thirteen chiefs of the Mi'kmaq bands of Nova Scotia continue to come together to discuss policies and strategies to improve Mi'kmaq sociocultural conditions, and to build their economies. As with any political organizations, there are tensions over philosophical and ideological differences, and competition over limited funding.

Other tensions revolve around cultural and identity issues, for example Cape Breton bands tend to have higher rates of language retention than the mainland bands. Some argue that Cape Breton Mi'kmaq are more 'traditional' or more 'authentic', which leads some to say that they are also more backward, whereas the mainland Mi'kmaq are seen as more progressive or perceived as less Mi'kmaq. The leadership of the traditional government of the Mi'kmaq Mawio'mi [Grand Council] generally reside in Cape Breton, adding to the argument that they are more traditionally oriented communities. Together, the three political organizations, and the more spiritually directed Grand Council, manage to represent the interests of all who live in Nova Scotia, status and non-status, and who choose to identify themselves as Mi'kmaq, whether or not they belong to a band.¹⁰³

¹⁰³ Status Mi'kmaq are those people of aboriginal descent who are recognized as 'Indian' under the definitions set out in the Indian Act. According to the act, individuals can lose their status in a number of

Other interest groups, such as the Native Women of Nova Scotia, formed in 1972, representing specific groups within the Mi'kmaq nation, have limited voices in Mi'kmaq politics. All three of the major political organizations emerged during the post civil rights movement, and have strong activist qualities; additionally they have been stakeholders in various Mi'kmaq justice programs, and all were profoundly affected by the recommendations of the Marshall Inquiry in their dealings with non-Native agencies and governments.

Aboriginal Justice at the National Level

Since 1975, Justice Canada and the Solicitor General sponsored conferences, commissions, and reports on aboriginal relations with mainstream justice. Over and over policies were set to improve the justice system and make it more equitable.

An agenda was set forth calling for the provision of better access to all facets of the justice system, more equitable treatment, greater Aboriginal control over service delivery, recruitment of Aboriginal personnel, cross-cultural sensitivity training for non-natives, and more emphasis on alternatives to incarceration, and crime prevention. Between 1975 and 1990 more than twenty government reports reiterated these types of recommendations [including the Marshall Report] (Clairmont and Linden 1998:4-5).

It was clear there were dilemmas and the government set about finding ways to address them. It appears that the problems were thought to be located in the conjuncture between the criminal act and the punishment, because initially, the solutions designed were focused not on changing the system, but rather on helping people become adept at being processed through the system.

Attempted solutions included the development of liaison type programs to help aboriginal peoples when they encounter the justice system. In the 1970s the Native

ways; as a result, many people of aboriginal descent are no longer considered to be Mi'kmaq by the Canadian government. All of the status Mi'kmaq in Nova Scotia are associated with one or another of the

Courtworker Program was established and by 1977, it became an ongoing federal and provincial/territorial cost-shared 50/50 program. The program assists aboriginal accused with understanding their legal rights, options, and responsibilities when appearing before criminal courts. It does not provide assistance to those appearing before family and civil courts, even though similar communication problems and cultural sensitivity issues are also at stake. The criterion of the cost sharing agreement is the limiting factor. It is a national justice service program available for all aboriginal peoples regardless of where they live or their status [Inuit, Metis, status, non-status, on / off reserve].¹⁰⁴ Some programs operate proactively with workers attending courts, seeking out people who need help, while others are accessible to clients through a local office by appointment or drop-in. Generally, the workers explain court procedures, charges, and the consequences of the charges to their clients and their support networks.

Ideally court workers help clients acquire legal representation, and act as a referral service for translation, and other social programs such as NADACA [substance abuse counseling], employment counselors, and social workers. Excluded from the cost sharing agreements are any rehabilitative functions, or work normally done by probation or corrections personnel. Healing processes, within a juridical framework, are not fundable under this central program and thus rarely accessed at this level of juridical process. A great deal of the infrastructure and networking required in holistic approaches are without consistent core funding, and workers are compelled to reduce their field and client time in order to pursue funds elsewhere. Workers may speak in court on behalf of their clients, acting as a liaison between the officials and the accused, helping to reduce

province's thirteen reserves (Wicken 2002:4).

¹⁰⁴ New Brunswick and Prince Edward Island do not provide Aboriginal court work services.

communication and cultural barriers, and enabling justice personnel to provide a culturally sensitive juridical experience for aboriginal offenders and victims.

During the first twenty five years of the court worker program, service delivery focused on one, or a combination, of three primary models: information and referral, rehabilitative, and paralegal services. Currently the program is shifting to include restorative justice approaches however funding criteria to meet these changes are slow to adjust. Historically the program has been offender rather than victim focused. With the adjustment to restorative paradigms, victims' services are emerging as core programs in some locations. In Nova Scotia, the court worker program was largely unsuccessful, operating sporadically and with few exceptions never for more than two years at a time since the 1970s. Problematically, the court worker program is the key fundable program in the cost-share archetype of federal and provincial agreements, around which other Mi'kmaq justice programs, were developed or embedded, and will be discussed more thoroughly the case study below.

Changes in the federal Department of Justice were occurring nationally. In 1991, the year after the release of the Marshall Inquiry reports, the federal government reorganized its administration and delivery of aboriginal justice. Research found that policing on reserves was perceived to be inadequate and that relations were often strained, reducing the amount of reporting (Clairmont 1999). Policing practices needed significant modifications as new mandates were created to close the gap between the quality of service and perception of policing that existed between aboriginal and non-aboriginal experiences. As we learned from Marshall's experience, aboriginal encounters with police often reflected wider problems of social inequality and discrimination.

Clairmont, in his study immediately post Marshall, found that Mi'kmaq community members, on and off reserve, had an overall negative view of police and were critical of the inadequacy of services they received. Conflicts between non-aboriginal police and aboriginal peoples were widespread and needed to be addressed. The government made the following broad organizational changes:

Responsibilities for First Nations policing were transferred from Indian Affairs to Solicitor General Canada. In the Solicitor General Canada the Aboriginal Corrections Policy Unit was formed, and in Justice Canada, the Aboriginal Justice Directorate came into being. Both were launched as part of the Aboriginal Justice Initiative. The mandates of these groups were to advance Aboriginal justice interests, improve the response of the conventional justice system and facilitate greater Aboriginal direction of, and innovation in, justice in aboriginal communities (Clairmont and Linden 1998:5).

The Aboriginal Justice Directorate [AJD] funded pilot projects that fostered the development of community-based justice programs. The AJD was a limited term program commissioned for five years. Between 1991 and 1996, the ADJ supported over six hundred projects researching alternative justice programs. Predetermined to end in 1996, pressure from aboriginal and other interest groups sought its extension, and in 1996 AJD was renewed for five more years as the Aboriginal Justice Strategy [AJS], with a yearly operating budget of more than seven million dollars.

Additionally, the Royal Commission on Aboriginal Peoples emphasized the need to develop further the new agenda of autonomy and legal pluralism, and was also a factor in securing the extension of the federal program. The federal Liberal government implemented its Red Book commitment to prioritize aboriginal justice reform, and through the AJS, moved toward the creation of cost-shared, long term, viable justice programs and institutions. "Particular emphasis is placed on those communities that are

engaged in negotiating or are working toward sectoral agreements for justice under the inherent right of self-government" (Clairmont and Linden 1998:6).

Changes were also made in correction services across the country. In 1992, the Department of the Solicitor General created the Aboriginal Corrections Policy Unit. The unit's mandate evolved to, "explore offender treatment in selected Aboriginal communities returning to a restorative, healing approach in dealing with criminal activity" (Clairmont and Linden 1998:5). This mandate emerged in response to prisoners' demands to be able to practice their spirituality while incarcerated. In 1982, the Indian Brotherhood at Kent Prison, British Columbia, launched a human rights complaint, triggering a nationwide movement, to protect their rights to freedom of religion and recognition of aboriginal spirituality as a religion. Eventually spiritual ceremonies were sanctioned in some but not all prisons and penal facilities across the country. Those institutions that chose to participate in aboriginal program development permitted sweat lodge, sweet grass, elder counseling, and craft production for aboriginal inmates.

Anthropologist James Waldram describes aboriginal spirituality as a form of symbolic healing that has become central to the revitalization of aboriginal cultural identity within inmate populations. It is the trauma, fracturing and or loss of identity resulting from processes of colonialism and racism that has contributed to high rates of incarceration and recidivism amongst aboriginal persons (Waldram 1997). Symbolic healing provides the tools to create identities that can counter these negative effects and restore individuals to a more holistic state of health (1997). Additionally, correction services started using aboriginal-specific programs for substance abuse and aboriginal liaison worker programs.

From the aboriginal side of the legal arena, the Indigenous Bar Association was incorporated in 1989. The original signatories include well-known legal advocates for aboriginal justice such as Graydon Nicolas, who is now a judge in New Brunswick, and Don Worme, who has built a successful law firm in Saskatchewan. The objects of the corporation in 1989 were:

1. To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions;
2. To promote the advancement of legal and social justice for Indigenous peoples in Canada;
3. To promote the reform of policies and laws affecting Indigenous peoples in Canada;
4. To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada;
5. In pursuance of foregoing objects, to provide a forum and network amongst Indigenous lawyers:
 - To provide for their continuing education in respect of developments in Indigenous law;
 - To exchange information and experiences with respect to the application of Indigenous law; and
 - To discuss Indigenous legal issues.
6. To do all such other things as are incidental or conducive to the attainment of the above objects.

Thus, the Indigenous Bar Association envisioned a legality that better reflected their central cultural tenets of spirituality and tradition as they address social concerns. A mandate of the Indigenous Bar emphasized educating aboriginal peoples about the Canadian legal system. One of the greatest obstacles to achieving positive experiences in the legal system is understanding the rules and processes (see Merry 1990, Conley and O'Barr, 1998, 1990).

The commencement of the Indigenous Bar Association did not include Mi'kmaq representatives from Nova Scotia because there were no Mi'kmaq lawyers at the time. Discussions to remedy this situation were underway in the province at Dalhousie

University's Law School in Halifax. The University had implemented an affirmative action program across the campus. By 1989, the Law School had only graduated one aboriginal person in its history, and decided it was necessary to implement an affirmative action program. Funding received from the Nova Scotia Law Foundation helped establish the Indigenous Black and Mi'kmaq Law Program.¹⁰⁵

A significant impetus for getting the program up and running was the Inquiry into the wrongful conviction of Donald Marshall. The Marshall Inquiry clearly showed a lack of support for minorities within the legal system, and recommended that institutions establish affirmative action programs for blacks and natives.¹⁰⁶ According to Dean Christie of the Law School, "the new program is one of the first positive effects of the Marshall Inquiry" (Madill 1989). As with many affirmative action programs questions were raised about standards of evaluation and achievement. The University responded by indicating that the success of the program was based on a support network of tutorials, mentoring, and counseling, designed to assist students in completing the degree at standards equal to any other law degree.

In 1994, further controversies erupted as Mi'kmaq graduates found it difficult to secure articling positions. One student found that law firms did not think her knowledge of aboriginal law would be an asset. Another student indicated that interviews with firm employers, "gave her the impression they wouldn't hire her because they don't think native lawyers can bring in enough business for their firms" (Micmac-Maliseet Nations News 1995:9). By 1996, less than half of the graduates from the IB and M program were

¹⁰⁵ Originally called the IBM program it is now officially called the IB & M program due to copyright issues with IBM the information technology company.

¹⁰⁶ To mark its ten anniversary, the IBM Program at Dalhousie Law School honoured Donald Marshall at a reception and awards evening.

called to the bar, and none were hired back to their articling firms. In order to overcome systemic discrimination for aboriginal lawyers, people became hopeful that a Mi'kmaq Justice Institute, one of the Marshall recommendations, would provide them with employment and a culturally sensitive work environment.

On the national front, in addition to the Law Reform Commission of Canada and the Department of Justice advocating diversion and restorative justice in the 1970s and 1980s, there were many changes occurring with respect to aboriginal peoples and mainstream justice, as well as political changes within First Nations. In keeping with the widespread view that the criminal justice system has not worked well for aboriginal peoples, there has been a proliferation of justice initiatives, based on alternative dispute resolution and restorative justice philosophies, to address problems of over representation and alienation. These programs have had mixed results. Aboriginal communities seemed well suited to launch restorative style programs, given their difficult relations with mainstream justice, and due to the fact that the types of crimes were generally those most effectively and efficiently solved, using local remedies. Certainly the notion of restorative practices as being inherently aboriginal appealed to those persons interested in revitalizing and reinventing traditions, which facilitated the distinctiveness of their communities against condemning presumptions of assimilation.

However, in Nova Scotia there was little progress in any of the above directions until after the Marshall Inquiry. The recognition of widespread failure of the mainstream system to provide judicious services for aboriginal peoples, a general acceptance by the federal government of aboriginal self-governance and determination, facilitated the move toward community based justice. An overall shift in justice ideology, from penal to

community based healing, and restorative practice, helped pave the way for implementing the recommendations emerging from the Marshall Inquiry (see Clairmont 1999, Miller, B 2001, Warry 1998).

On a global scale, ethnicity as a political tool was gaining momentum (Morin and d'Anglure 1997). Cumulative efforts by indigenous political organizations and non-governmental organizations brought about international recognition of their cultural differences, and world wide attention to the socioeconomic changes the dominant society has imposed on them, though the United Nation's General Assembly Proclamation that 1993 be the International Year for Indigenous Populations. The Mi'kmaq participated in this ethnic consciousness building process, sending representatives to Geneva to learn from the working groups how to mobilize their national and international identity within a human rights discourse. The story of Donald Marshall, along with a discourse of 'broken treaties, broken promises', symbolized the unacceptable conditions of social injustice the Mi'kmaq endured in Canada. It is within these contexts that the Mi'kmaq mobilized the Marshall recommendations. Through this mobilization various articulations of Mi'kmaq legal consciousness emerged, at times unifying the nation, and at times causing antagonism within, between, and against societies. These are addressed in the following chapter.

Chapter Eight: After the Marshall Inquiry

A New Era in Mi'kmaq Justice

In this chapter I examine Mi'kmaq responses to the Marshall Inquiry by comparing competing discourses framing the articulations of Mi'kmaq legal consciousness. I describe the contentious relations within and between Mi'kmaq communities and the province, and demonstrate that the province did not relinquish much to shift the balance of power, maintaining their position of dominance after Marshall's wrongful conviction was over turned. Reflected in Mi'kmaq negotiations with the province as they worked to interpret and implement the recommendations of the Royal commission, are the sets of symbols Marshall invoked. These symbols were subject to various interpretations of events and relationships around which the Mi'kmaq enacted their legal consciousness in opposition to those imposed upon them by the larger society. These interpretations became sites of internal contest and are described as I detail the various justice programs that emerged post Marshall Inquiry.

The Union of Nova Scotia Indians took the lead in reacting to the Marshall Inquiry, and formulated a response on behalf of the nation. They were working in a loose partnership with the Grand Council, under Grand Chief Marshall's leadership, and other political groups, namely the Confederacy of Mainland Mi'kmaq, and the Native Council of Nova Scotia.¹⁰⁷ The Mi'kmaq responded to the Commission's report, and its eighty-two recommendations, with a statement of principles acknowledging that the inquiry, "has opened new doors; it has created new opportunities and it has fostered new hopes of our people's aspirations for self-reliance and self-determination" (UNSI 1990:1). The

Union of Nova Scotia Indians' [UNSI or Union] reading of the report delineated the recommendations into two groups, those that deal with improvements to the justice system outside of Mi'kmaq communities, and those that pertain to the development of a justice system within the Mi'kmaq community.

Two main threads emerged in the Mi'kmaq discourses; one was a rights discourse that entailed treaty, constitutional, and human rights arguments for self-determination and thus the right to control their own justice system. The other thread entailed the cultural necessity to control a separate justice system that could meaningfully manage disputes in Mi'kmaq communities. However, both of these discourses quickly became submerged under the red tape of bureaucracy, and shifted to discourses challenging the failure of governments to appropriately finance the needed changes and relinquish control over justice processes. Having played the legal bureaucracy game throughout the Marshall Inquiry, the increasingly politically savvy Mi'kmaq mounted a tremendous campaign for asserting their rights to administer justice on their own. Committees were convened, research proposals were vetted, and platforms for negotiations between nations were chartered.

The release of the inquiry reports was an empowering turning point for the Mi'kmaq. The reports came to symbolize the opportunity to regain authority over all aspects of their lives, to counter colonization, and to govern themselves - there was an abundance of evidence justifying the transfer of juridical control back into Mi'kmaq hands. The Marshall reports concretized the racism and discrimination many Mi'kmaq experienced, and validated and valorized their actions in resisting such behaviours. The

¹⁰⁷ Native Council of Nova Scotia was founded in 1975 to represent off-reserve non-status and Metis, it is an advocacy group assisting those Mi'kmaq and Aboriginal peoples who live outside the *Indian Act* (1993).

Marshall Inquiry, along with other inquiries across the country, upheld the fact that the Mi'kmaq, and other aboriginal communities, exist as communities outside of the mainstream, and that they have distinct cultural understandings and ways of being that require alternative sets of institutions to accommodate those differences. The Mi'kmaq suffered the consequences of colonization but they were not assimilated, could not be assimilated, and now, should not be assimilated. Mi'kmaq survival was in part embodied in and represented by Marshall's survival. The momentum for nation building, and for their release from the shackles of mainstream colonial attitudes, had solid foundations in the public consciousness, legal and otherwise, as a result of the Marshall Inquiry. Armed with the findings of the inquiry, and using the recommendations to define their direction, the Mi'kmaq launched into a period of heightened cultural production as they strived to build their own justice system.

Eleven of the eight-two Marshall recommendations dealt directly with the Mi'kmaq. The follow excerpt lists and details the recommendations pertaining directly to the Mi'kmaq:

20. Native Criminal Court: a community controlled Native Criminal Court established initially as a 5 year pilot project incorporating the following: a] a Native Justice of the Peace appointed under Section 107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offenses committed on a reserve b] diversion and mediation services to encourage resolution of disputes without resort to the criminal courts c] community work projects on the reserve to provide alternatives to fines and imprisonment d] aftercare services on reserve e] community input in sentencing, where appropriate and f] court worker services

21. Native Justice Institute: A Native Justice Institute be established with Provincial and Federal funding to do, among other things, the following: a] channel and coordinate community needs and concerns into the Native Criminal Court b] undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people c] train court workers and other personnel employed by the Native Criminal Court and the regular courts d] consult with Government on Native justice issues e] work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information

needs of Native people f] monitor the existence of discriminatory treatment against Native people in the criminal justice system.

22. Tripartite forum on Native Issues: Mi'kmaq / Provincial / Federal forum similar to Ontario Indian Commission be established to mediate and resolve outstanding issues between Mi'kmaq and government, including native justice issues.

23. Mi'kmaq Interpreters: all courts in Nova Scotia have the services of an on-call Mi'kmaq interpreter for use at the request of Mi'kmaq witnesses or accused.

24. Native Court Workers: Provincial and Federal governments, in consultation with Native communities, work together to establish a Native Court Worker program as an immediate first step in making criminal justice system more accessible to Native people.

25. Sittings of Provincial Courts on Reserves: We recommend that the Chief Judge of the Provincial Court take steps to establish regular sittings of the Provincial courts on Nova Scotia reserves.

26. Legal Aid funding: that Nova Scotia Legal Aid be funded to permit them to: a] specifically assign lawyers to work with Native clients to develop a specialization with respect to the concerns of Native people b] hire a Native social worker/counselor to, among other things, act as a liaison between Native people and the Legal Aid service.

27. Liaison with bar: that a program of ongoing liaison between the bar prosecutors, private defense and legal aid - and Native people, both on and off reserve, be established through the Nova Scotia Barristers Society. The Society must also educate its members concerning the special needs of Native clients.

28. Native Constables: RCMP and municipal police forces, where applicable, take immediate steps to recruit and hire Native constables.

29. Native Justice Committees: that the advice of leaders chosen by the Native community and sitting as a Native Justice Committee be sought by judges in sentencing Natives, where possible.

30. Probation and aftercare: We recommend that the Provincial and Federal Governments facilitate and finance mechanisms by which Native people can have more control over the treatment of Natives convicted of an offence, such as establishing a probation office capability and community based aftercare services on reserve.

Taking these as the foundation of their institution building, the Mi'kmaq political organizations struggled to create programs that would stratify their nation's needs. The Mi'kmaq made efforts to present a united front to the opposition politicians within the dominant society in order to increase their purchase power. Relationships between the organizations were always tense because they had to compete for scarce and limited funding, usually from the same source. Fractious conflicts over representation, membership numbers, and membership criteria, reflected the consequences of the many contradictions emerging from labels imposed by the *Indian Act*, and the Department of

Indian Affairs, which unilaterally controlled the legal definitions of who is and who is not Mi'kmaq. Membership numbers directly correlated to amounts of funding made available, the more members the better the chance to justify more funding.

Mi'kmaq political organizations, under the leadership of the Union, along with Confederacy of Mainland Mi'kmaq (CMM), and Native Council of Nova Scotia (NCNS), and interest groups such as Native Women of Nova Scotia (NWNS) and Mi'kmaq Friendship Centre (MFC), took the position that, while some of the eighty-two recommendations facilitated a starting point, the desired end point was the implementation of a community-based, Mi'kmaq owned and operated justice system (UNSI 1990:5). They posited that everyone wanted significant changes to the handling of juridical practices, and the majority wanted community based programs that better reflect their unique culture and socioeconomic circumstances. Most importantly, all Mi'kmaq parties wanted to be directly involved in the consultations surrounding program development. They were making a united stand against the unilateral imposition of programs by the provincial and federal agencies. They wanted to shift the dynamics of domination once and for all. Over time, however, the tensions between these organizations became evident as they were forced to compete for program control and dollars.

In responding to the Marshall Inquiry, the Union of Nova Scotia Indians submitted that, "It is all but inevitable that Mi'kmaq will continue to interact with the "outside" system," and they are committed to working with both the federal and provincial governments to address the needed changes to the justice system (UNSI 1990:2). They also welcomed any efforts to indigenize the system but cautioned, "An

indigenization of the present system will only serve to improve the administration of a non-Mi'kmaq form of justice, law enforcement and incarceration upon the Mi'kmaq" (UNSI 1990:2-3). This approach was not a solution for the Mi'kmaq political leadership, they wanted to define, and operationalize, Mi'kmaq justice on their own terms.

To this day, the Mi'kmaq continue to abide by a system of social control that is unique in their communities. It operates upon different principles of fairness and justice. The key question is not whether it exists but rather how do we harness these Mi'kmaq concepts of justice to design and to develop an acceptable and an effective justice system on Mi'kmaq communities? (UNSI 1990:3).

In order to bring about positive changes in justice, the Union recognized that socioeconomic conditions needed vast improvements, and that without direct community involvement, and broad-based community acceptance, no program would be supported, or successful. In order to gain that acceptance, the Union proposed that time to consult with community members and financial resources to, "engage the necessary expertise to design what is acceptable to the community," be made available to them. While the Union agreed that the Mi'kmaq formally accept the intent of the recommendations, they also recognized some of their limits.

To begin implementing the Marshall Recommendations and establish a Mi'kmaq justice system, a Tripartite Forum on Aboriginal Issues [recommendation #22] formed in March 1991, and a sub-committee for justice started in May of that year. The forum, modeled on the Ontario Indian Commission, was to use mediation to resolve unsettled issues relating to justice between three parties: the Mi'kmaq, Nova Scotia, and federal governments. One of the first orders of business of the justice sub-committee generated a community needs assessment of the court worker program, and a study on aboriginal

community justice, conducted by Dalhousie University social scientist, Professor Don Clairmont.¹⁰⁸

The mandate of the project assessed two key areas: policing and the court worker program. The objectives were to determine the policing requirements for on and off reserve Mi'kmaq, and a needs assessment for a court worker program, and its attendant roles and functions. Clairmont's analysis of the policing survey results found:

[A] need for profound change especially in policing style, cultural sensitivity, indigenization and direction of the policing effort ... despite the Marshall Inquiry's recommendations, no major effort appears to have been directed at systematic community problem-solving with native people, cultural sensitivity training, recruitment of native people or understanding special native rights. Among the RCMP while much more has been acknowledged at an official level and an agenda has been established for implementation, there is still a major problem of effecting the proposed changes at the operational level. Finally it was noted that native self-government issues have added a new dimension to the agenda for policing which goes beyond the adequacy of the service provided (Clairmont 1992:12).

Clairmont's study indicated a need to address policing. He made fourteen police oriented recommendations with a strong emphasis on the development of a community-based policing arrangement among those forces serving native communities. In addition to cultural sensitivity training, improved police professionalism, and recruitment of aboriginal officers, especially female officers, Clairmont urged the thirty-seven recommendations directed at policing in the Marshall Inquiry be implemented as soon as possible. It was also suggested that satellite RCMP offices on reserves be established to help facilitate community-based initiatives.

¹⁰⁸ Clairmont's study employed nine researchers who interviewed six hundred and twenty two Mi'kmaq households, on and off reserve, using a survey instrument, discussion groups, in-depth interviews and other approaches, to gather first person views and experiences with court and policing systems. The results of the study produced a three-volume report entitled "Native Justice in Nova Scotia" (1992) used to guide policy formation and program implementation.

With respect to the second dimension of the study, Clairmont made five recommendations toward the establishment of a justice worker / justice advocacy program to provide public legal education, court worker activities, police, corrections, and other justice liaison roles, and to promote community justice infrastructure development. The next step was a new organization, Mi'kmaq Legal Services, envisioned as an independent and apolitical body, to oversee the justice worker program. This independent and apolitical body was modeled on the national court worker organization. The study also recommended enhanced interpretation services, and the immediate hiring of at least one Mi'kmaq legal aid lawyer. To date there has never been a Mi'kmaq legal aid lawyer for the Cape Breton region.

The Union, using Clairmont's findings, launched into negotiations with the tripartite forum using the argument that the Canadian justice system was a manipulative tool used to suppress First Nations for centuries. They suggested that the Criminal Code of Canada, like the *Indian Act*, was an instrument of abuse and a fundamental violation of the terms of the 1752 treaty, which they argued, "clearly laid out the framework for a 'two-legged' system" (of justice) (UNSI 1992a:12). While the Marshall Inquiry exposed corruption and racism, it also helped get the Union, "back on the road to proper implementation of Article eight of the Treaty" (UNSI 1992a:12). The tripartite forum negotiations were not always smooth. Conflicts emerged over differences in positions between parties over program implementation, making negotiations difficult.

The Union started with two proposals:

One initiative relates to the establishment of a Mi'kmaq regional police force which would operate throughout Cape Breton Island, where five of our communities are located. Our ultimate goal is that this force would be empowered by Mi'kmaq authority, and have jurisdiction off reserve and in urban areas where

Mi'kmaq citizens are involved. Another has to do with a diversion program at Shubenacadie for Mi'kmaq citizens charged with certain offenses; instead of their cases proceeding in the criminal courts, they will have an opportunity to go before a tribunal on reserve, made up of community members and elders. Instead of 'punishment', the focus will be on reconciliation and restitution. As these projects become established, we intend to move forward on related issues as a means of obtaining full implementation of the 1752 Treaty terms (UNSI 1992a:12).

Thus, the justice discourse the Union articulated on behalf of the Mi'kmaq nation, to the tripartite forum, was treaty rhetoric, which reflected their desire for recognition as a sovereign nation. Contained within this rhetoric was a widespread desire for the Mi'kmaq to solely control justice processes, a control deemed necessary for true sovereignty to exist. A long held point of contention was the denial of Mi'kmaq sovereignty by the province. Marshall's wrongful conviction helped fortify the argument for recognition of the Mi'kmaq as self-determining people. While the Mi'kmaq strengthened their call for self-governance, the province remained reticent in handing over any unconditional juridical powers to the Chiefs or other potential justice carriers.

Alternative Justice Programs in Mi'kma'ki

In the meantime, between the release of the Marshall report, Clairmont's community needs assessment, and the establishment of a Mi'kmaq Legal Services, also glossed as the Mi'kmaq Justice Institute, three justice projects were developed and implemented by the Mi'kmaq, in conjunction with the Department of Justice, within the mandate of the tripartite forum. The Friendship Centre Justice Worker Program was approved for one and a half years in 1991. The Shubenacadie Band Diversion Program began a three year run starting March 1992, and in September 1992 the Community Legal Issues Facilitator Demonstration Project was given funding for three years. The three programs were provided limited term funding enabling them to focus primarily on

providing public legal education, and improving relationships with Mi'kmaq in mainstream justice processes. Ultimately they did not institute anything greater than the most conservative changes to local justice.

Shubenacadie Band Adult Diversion

The Shubenacadie Band Diversion program was based at Indian Brook First Nation, located approximately eighty kilometres north of Halifax.¹⁰⁹ The Shubenacadie Band was established in 1820. In 1998 the total band membership was 1909, with 1108 members residing on the reserve lands, making it the largest Mi'kmaq community on the mainland and second largest in the province after Eskasoni, Cape Breton, which has a population over 4000 (Sack 2002). Indian Brook is a rapidly growing community. Between 1991 and 1996 it experienced a positive population change of 22.4%. The population change for all of Nova Scotia, during the same period, was positive one percent according to the Statistics Canada 1996 census. In 1996, 40% of the male labour force and 23.3% of the female were unemployed. The average total income of persons reporting income in 1996 was \$10,680 for Indian Brook residents, while Nova Scotians average reported income was \$21,552. Figures for previous years were even lower. Indian Brook was perceived to be an area of high 'social disorder' crime, according to justice officials who worked in the area. Assaults, public drunkenness and other liquor violations, vandalism, and break, enter and theft, were the most common charges.

The diversion program derived from a combination of recommendation # 20 calling for Native Criminal Courts and the general recommendation #18, of the Marshall Report, which stated:

We recommend that the Province, in close cooperation with the Native and Black communities, formulate proposals for the establishment of appropriate diversion programs for Native and Blacks, and that the Province actively recommend such programs to the Federal Government with proposals for any necessary amendments to the *Criminal Code* (Digest of Findings 1989:27).

After a great deal of negotiating, the Federal and Provincial Departments of Justice and in-kind support from the Shubenacadie Band brought funding to the three-year project.

The program was set up at Indian Brook as a test case and it was expected that other Mi'kmaq and Black communities would replicate the model.¹¹⁰ Persons are diverted from the criminal justice process at the prosecutor's level. The staff included a full time director, a diversion officer and a secretary. The program staff were supported by a twelve member Justice / Advisory panel, with two alternates, and a youth advisor, each holding two year appointments. Panel members were selected from the community in a process following eligibility criterion, and conflict of interest guidelines, set out in collaboration with the tripartite forum. Efforts were made to select panel members from all groupings in the community in order to avoid factionalism (Clairmont 1996:45).

A training program was designed by Diversion staff in conjunction with other justice agencies, and government programs, and was adopted by the Tripartite Sub-committee on Justice as a template for future use by the proposed Mi'kmaq Legal Services organization based on Marshall Recommendation # 21. The training was comprised of eight modules. The first four modules dealt with orientations of Provincial and Federal legal agencies, institutions, and their administrative functions. Court procedures, policing practices and the roles of various players in corrections and national parole board were included.

¹⁰⁹ Indian Brook or L'nu Si'puk is the Mi'kmaq name for the community. A priest named Boudreau named Indian Brook Shubenacadie, and the band retains the Shubenacadie Band Council as its legal name. People from Indian Brook are often referred to as being from 'Shubie'.

Modules that focused on how to deal with accused, victims, and witnesses, as well as learning legal terminology, followed the structural segments. Further orientation of federal and provincial statutes, acts, legislation, and political and non-political institutional structures, were provided. Modules five through to seven dealt more specifically with diversion and community based alternatives, and trained the panel in cross-cultural sensitization, mediation, arbitration, facilitation skill development, as well as restorative *versus* punitive models of justice. Included in the training program was an evaluation component that enabled the staff to conduct ongoing needs assessments to improve program efficiency and effectiveness. Evaluations were required to legitimate the program both externally to the government funders, and internally to the increasingly bureaucratic First Nations governments operating under the semi-visible hand of the Department of Indian Affairs. Externally, the evaluative focus was on the fiscal bottom line of whether the number of cases warranted the costs of the program.

The extensive training was largely outward looking, focusing on how to manage Mi'kmaq encounters with mainstream justice according to the needs of Nova Scotia Justice, Corrections, and police services, rather than on meeting community needs. Importantly, the program provided a much-needed public legal education background for the panel members and staff. The accumulated legal knowledge was then diffused to the community through informal mechanisms among friends and family. No formal options for publicly educating the community, such as workshops and information sessions, took place in this particular program. Few members of the public attended the diversion hearings, a factor that later contributed to its downfall.

¹¹⁰ Due to the scope of this paper I will not be discussing juridical developments within Black communities of Nova Scotia, further research is required in this area.

As with most diversion programs, the decision to divert cases lies with the Crown, often in cooperation with the investigating police member.¹¹¹ In the case of Shubenacadie Diversion, the program was underused, due in part, to a lack of commitment by the justice system officials who controlled referrals. As a result, Diversion did not meet the anticipated caseload, and internal management problems forced a number of diverted cases to be returned to the courts for resolution. The program considered a total of eighty-one cases between November 1992 and March 1996, numbers far from the projected two hundred cases per year.

The first seventeen cases handled by diversion pertained to fraud charges against people illegally obtaining welfare or unemployment insurance. Allegedly defrauding the government is sometimes interpreted locally, not as a crime per se, but rather as getting what one deserves, because sentiments regarding the government tend toward, "they owe us" (for what they stole from us), and that ration (welfare payments) are a right, regardless of an individual's income. As a starting point, these cases were extremely contentious and likely caused more harm than good for the program's reputation. One wonders if the department of justice was using the Diversion program as a scapegoat, or as a way to divert media attention away from the beleaguered provincial justice system. If the case had gone to trial in the public court system it would have looked like another attack on the Mi'kmaq people. Within the community these cases caused tensions and divisiveness and perhaps some saw the program as siding with government or with justice, rather than the community, thus raising trust and validity issues.

¹¹¹ For example the Vancouver Aboriginal Transformative Justice Program, as well as programs in Thunder Bay, Toronto, Winnipeg and the now defunct South Vancouver Island Project use this approach.

In the post Marshall era, many Mi'kmaq persons justifiably lacked confidence in the justice system, and did not trust the government. Organizations that were perceived as colluding with the 'enemy' were suspicious. These suspicions, compounded by an ethos that kept confidential any of the activities, including successes of the program, and the Crown's failure to divert cases, isolated the program from the community. The program ran into trouble.

In general, people did not know much about Diversion and thus could not value it, or own it, as something good [or bad] for the Mi'kmaq. The few times that a court took place in the community, a Grand Council member, or an elder, opened the proceedings by reciting a Catholic prayer in English or Mi'kmaq, and burning sweet grass. A Grand Council flag was on the wall rather than a photo of the Queen. Other than these few symbolic differences, the process was not distinct from Shubenacadie Provincial Court.

In its final year, only twenty-four cases were referred. The main types of offences were 'social disorder' crimes such as mischief, public disturbance, minor assaults and threats, with the majority of these offences involving alcohol consumption. Thirty percent of the cases returned to court largely because the divertee failed to appear, did not sign off on their disposition, or failed to comply. The program's jurisdiction was limited so that cases involving domestic or violent assault also returned to court. Seventy percent of the divertees were male, and eighty to eight-five percent of the divertees were between the ages of nineteen and thirty. Ninety-five percent of the divertees were unemployed when their case was processed (Clairmont 1996:8). Due to a lack of advocacy and networking by program staff with justice system officials, and the community, the referral process suffered.

The program was plagued by high turn over of panel membership, which staff attributed to the lack of security due to uncertainty over the continuity of program funding. As a pilot project, termination potential often interfered with personnel commitment. Over all, panel membership declined because members who held positions in other community organizations, such as the Band Council, or Mi'kmaq Family and Children Services, felt there was a conflict of interest or at least the potential for it, or they were too busy with their other jobs. A further issue was the lack of work, because few cases were actually being diverted, it was difficult to see any tangible results, and thus hard to generate enthusiasm for the program.

The program organization shifted in the final year from providing opportunities for community-based services, toward serving administrative functions for provincial court dispositions, such as fine options, and community service hours. The panels were under utilized, and the program became more a "professional, bureaucratic style of diversion, akin to the style of the provincial program where diversion is routine if not virtually mandatory for certain minor crimes and where a probation officer acts as a one-person panel" (Clairmont 1996:13). Thus, occasions for community involvement, and opportunities for relationships between wrongdoers and victims to repaired, or at least acknowledged, were greatly diminished.

The Shubenacadie Diversion program was isolated from the community, not many people knew about it or how it worked, and therefore those who were eligible did not opt to participate in it. In Clairmont's final evaluation, he noted there were internal and external issues that needed resolution in order for the program to succeed, internally the community needed to be educated about their juridical options:

A variety of reasons accounted for this reluctance including a desire to keep the matter 'private' and 'outside the community', lack of reliable information about the program, reluctance to accept responsibility or admit guilt in the matter, unconcern about getting a criminal record, fear of harsher treatment by the diversion panel and, infrequently, dislike or lack of trust in Diversion staff and / or diversion panel members. Research indicated that those accused offenders who knew about the program were more likely to have gone through, or have wanted to go through, diversion. And those persons who did go through diversion were generally, though not uniformly, positive about the project (Clairmont 1996:16).

Externally, Clairmont found that the most obvious variable in determining the number of diversion cases was the justice system personnel's decisions. Justice system players wanted the diversion program to help with their workload because they considered Indian Brook, "a high crime area with much violence and family feuding which produced a large volume of work for the provincial court" (Clairmont 1996:18). It was hoped that the program could deal effectively with community problems and interpersonal conflicts, but justice department actions contradicted their stated desires because the police, Crown, and other legal players did not recommend all eligible accused for diversion. During the final year of the program over one hundred members were charged with offences that were divertable, but less than one quarter came to the program. Ironically, one prosecutor, upon leaving the position, was "disappointed that diversion did not deal at all with family violence and that it was of limited value in dealing with underlying, festering neighbour to neighbour disputes," when the prosecutors themselves were reluctant to refer such cases (Clairmont 1996:20).

Two problems contributing to the lack of referrals were one, the complexity of the protocol agreement, and the lack of flexibility in the prosecution office to interpret that protocol, and two, the fact that no diversion representative attended court to recruit potential clients. Protocol problems stemmed from the types of cases that were to be

diverted, provincial / federal jurisdiction issues, appeals, discretionary powers, plea bargaining, mandatory divertable charges, and so on. Staff turnover in the prosecutor's office also hindered program development as trust relations take time to get established, and not all justice staff, in part due to a lack of familiarity, did not readily embrace the restorative process. These realizations pointed to an immediate need for Mi'kmaq court workers to facilitate closing the gap between the courts and the community.

Referral processes are one of the most contentious issues in aboriginal justice programs. If channels are opened for community controlled referrals, infrastructure development has to be in place to handle them. Because communities are small, it is hoped that programs are accessible, but programs generally start out very small and lack infrastructure support. The programs need people to use them, but in small communities where word of mouth spreads very quickly, two sets of problems occur. One problem is a fear of making a mistake, which then tarnishes the program before it gets off the ground and thus erring on the side of caution. The second problem occurs when the program is a success, many people want to use it and it becomes overwhelmed and cannot handle the demand. The line between success and failure is so short in limited term projects that there is not enough time, or resources, to build community trust and commitment to the program while building the resources to support its functions. A sentiment often reported notes, "they [the funders] only give you enough to hang yourself, and sometimes not even that".¹¹²

Legal Aid was another area where networking proved problematic. A legal aid office was to be housed in the same location as the diversion project, which was housed in the community recreation centre, a logical strategy that failed to materialize due to lack of

resources and the inability to reach an agreement with Legal Aid. Even though the police had a detachment at the same site, Diversion contact with the force was limited. Thus the program was thoroughly isolated, and despite efforts to reduce the number of Mi'kmaq persons going to court, "there was significant over-representation of Shubenacadie band members as well as greater recidivism, more court appearances per incident and more charges per incident for natives than for non-natives," in the area (Clairmont 1996:22). Furthermore, the over-representation of Mi'kmaq women was significant and indicated that a community mechanism for dealing with interpersonal disputes between women was urgently needed. Clairmont found that private prosecutions, which do not directly involve the crown prosecutor, also miss the chance to be diverted. Private prosecutions could potentially be diverted if a mechanism was available to community members to self-refer.

Private prosecutions take up considerable court time and may run the gamut from 'desperate' to 'malicious' attempts to problem-solve by resort to 'outside authority'; usually there is much uncertainty and confusion on the part of both plaintiff and defendant and the cases simply peter out, possibly resulting in more serious problems later (Clairmont 1996:27).

Diversion assisted the Province and Corrections in helping individuals complete their community service hours as part of the fine options program - a program designed to keep offenders out of jail for non-payment of fines.¹¹³ The Diversion program only offered placement for fine options, not supervision, because they did not have the staffing capacity. The off loading of supervision by Corrections created financial and time burdens on an already skeletal staff. However, a community based mechanism for

¹¹² Personal communications.

¹¹³ Statistically a high number of Aboriginal offenders were incarcerated for non-payment of fines - fines they could not pay due to high levels of unemployment resulting from economic marginalization (see LaPrairie (1994) for statistical analysis).

monitoring compliance could have assisted in building community confidence in locally based justice activities. The program, by increasing its visibility and promoting its effectiveness with tangible results of the products of labour from community service hours, would have been empowering, if the funding is available.

Unfortunately, the substance of diversion did not develop in the Shubenacadie project, and discussion was limited to specific cases, rather than to projecting appropriate mandates and practices by which to fulfil them. Protocols between the band and the government, and the actual powers of the project, were not substantiated, and hence the program was reactionary. However, the prevailing view was that, "compared to provincial criminal court, it would relate more effectively to divertees and victims and reflect community values" (Clairmont 1996:42).

In terms of youth justice, Diversion, as mandated by the tripartite forum, was eager to take over from the province and the Boys and Girls Club of Truro that held the contract for alternative measures for youth aged 12 to 15. The justice panel was trained in alternative measures mediation and could easily facilitate the shift to holding hearings in an environment familiar to the youth, a factor that would reduce intimidation and lead to productive resolutions for youth and community alike. Tapping into the youth market may have been one avenue to improve program efficacy and efficiency. However, internal changes within Correction's organization and mandates needed to occur before Diversion could take on the youth program which did not fully materialize.

The complexity of the legal domain tends to operate against instituting changes. Diversion's mandate was expanding, but their capacity was shrinking. It became impossible to maintain a strong cohort of justice panels members because the work was

too sporadic. Exciting projects were discussed, but negotiations became half-hearted, never amounting to any full commitment between the federal, provincial, and carrier organizations, and the Mi'kmaq. Each program had a different carrier, different rules, different clients, and different laws attached to them. Struggles over coordinating the diversity of the programs, their various goals, and objective protocols, seriously impeded any concrete developments. Coordination of services were also hindered by the fact that promises made by the province, such as the appointments of Justices of the Peace [JP] to hear and decide cases in Mi'kmaq communities, had to go through so many bureaucratic channels, that by the time Diversion was dwindling down, no JP's had been appointed. The idea of creating an umbrella organization under the Diversion program seemed the most logical step, but the obstacles to merging the programs were insurmountable. Before Diversion could gain its core as a Diversion program, it was spread too thin by demands made on it by Indian Affairs, Corrections, and Departments of Justice to take on every other program. As Clairmont concluded in the end of program evaluation:

Diversion at Indian Brook largely evolved as a professional, aloof bureaucracy preoccupied with confidentiality, secrecy, and staff/panel training. This style did not generate any community enthusiasm nor counter effectively rumors and ignorance. It was too autonomous formally vis-à-vis the chief and council and informally vis-à-vis the community. The only alternative justice initiatives where significant progress could be seen were areas where external justice officials defined clear but modest roles for the Diversion organization, namely assisting themselves in parole and probation cases and looking after provincial court dispositions (Clairmont 1996 45-46).

With Shubenacadie Adult Diversion the Mi'kmaq did not have the opportunity to gain the experience required to develop and institute changes within their communities. Mainstream programs could not just be simply imported; culturally significant structural changes had to take place before these programs would be meaningful internally. The

Mi'kmaq wanted community control over decision making, and wanted to be able to push the boundaries to suit their needs, the training of the panel members however, readied them for the development of the Native Justice Institute.

The project [Native Justice Institute] utilizes the 14 member Justice Panel as a parallel entity called Justice Advisory which feeds directly into federal and provincial corrections and national parole board. One of the purposes of Advisory is to enable the offender and the community to appropriately handle their own people through decision making at the community level. Advisory makes decisions based on information supplied by the probation and parole officers and any other individual that makes their intent known (Christmas 1994).

But staff turnover in Corrections, Justice Canada, the prosecutor's office, and various policy changes, continually shifted the focus away from institution building within Mi'kmaq communities, and kept the focus on negotiating relations between the other two members of the tripartite forum. With the problems in Diversion, it was difficult to see how the program could extrapolate to all communities across the Mi'kmaq nation. The core of Mi'kmaq justice, as community justice, was getting lost in the detail and bureaucracy of the mainstream justice system, resulting in the loss of grassroots mobilization. The clear intent remained that the Mi'kmaq wanted their communities to control justice processes, but the government's mandate limited the cases to those deemed appropriate by the crown prosecutor, and thus significant community based cases such as family violence, were left unattended.

In a small community like Indian Brook where kinship ties are complex and dense, ruling out family violence cases cut deeply in the eligibility pool. It also served to undercut a major motivation for justice system officials in supporting the program since the latter identified family violence and feuds among families as the major community problems (Clairmont 1996:45).

Diversion failed to bring tangible results despite widespread community support of the program according to Clairmont's surveys (1996:45). Diversion became

stigmatized in the broader non-Native legal agencies, and some staff members experienced personal difficulties as they were blamed for the demise of the program when its funding was not renewed, having failed in its initial institution-building and generating community goodwill. The case of Shubenacadie Diversion must not be considered in isolation however, because other adult diversion projects in Canada and the United States during the 1970s and 1980s also suffered from "low caseloads and gradual attrition to the status of administrative appendage for the formal justice system" (Clairmont 1996:50).

Band By-laws

While Diversion was considered to be unsuccessful, it did open the door to a number of initiatives and provided valuable training. The program dabbled in youth justice alternative measures, family violence dispute resolution research, on-reserve court sittings, and band by-laws, an approach taken by the Department of Indian Affairs to regulate activities in communities, particularly dog and traffic control. Under the *Indian Act*, section 107 notes that justices of the peace may be appointed to hear by-law offences under the *Act*. Jurisdictional parameters had to be worked out here too, particularly in terms of who would cover the costs. The province was concerned that special sittings on reserves may require more of counsel's time and thus increases their costs. Again because the *Indian Act* is federal jurisdiction the province does not want to take any responsibility. The question then moved to enforcement and the possibility of tribal police services prosecuting band by-laws.

Indian Affairs [DIAND] indicated that it would cross appoint individuals as Justices of the Peace under the *Indian Act*. It was hoped that complementary band by-law

enforcement would be a mechanism for Diversion to become involved in dispute management. This was putting the cart before the horse, as band by-laws had not been fully established in any of the reserves, and tribal police services were only in very preliminary stages. Indeed Membertou First Nation, under pressure from DIAND, was involved in an intricate, time-consuming project to set up traffic by-laws.¹¹⁴ Bands needed to set up by-laws before Justices of the Peace could hear cases. However, Justices of the Peace could be used to hear other offences, but the jurisdictional mire of enforcement of the *Indian Act* impeded any efficient implementation. Following excerpt from an interview with a Membertou band executive indicates the challenges:

Band by-laws are not customary law they are strictly creations of the Indian Act. They are not totally irrelevant. We did traffic by-laws. What caused it was the first Clairmont report. He had uncovered incidents where police laid charges under the Indian Act but when the charge got to court no one wanted to prosecute the by law, so they were often thrown out. In Millbrook some serious crime resulted due to non-prosecution of the by-law. We looked into it and found 60 plus by-laws in Nova Scotia on the books but never one prosecution. Indian Affairs ironically were going around reserves putting on training courses, wanting communities to exercise by-laws. But we knew that these were Mickey Mouse by-laws, that police were not going to lay charge with, and there were no prosecutions.

A national director of by-laws was looking for a place to develop a by-law but the by-law would have the entire system develop behind it. A police agency to lay charges, a prosecution service, a justice system available and a penalty administered. [He] got seconded from Indian Affairs to the Union and put on training courses and focused on the 5 Cape Breton bands. This was as tribal police was being developed and they had the mandate to enforce band by-laws. It was a long process and we took one year to create a model by-law and develop the system behind it. Chief Terry volunteered. We looked at a dog and traffic by law. We sat with tribal police to see if they would enforce it. They wanted to go through provincial summary offense tickets [SOT], to reduce paperwork [federal offense paperwork long and involved and reserves are federal jurisdiction]. We had to convince the province to use their SOTS. That was a major hurdle. We had to find someone to prosecute,

¹¹⁴ The band wanted to be able to get the proceeds from traffic violations that occurred on reserve. There was significant red tape to go through with police over the issue and involved complicated forms and their reproduction. A further position argues that fines are not the most efficient way to deter vehicle violations for already financially troubled Mi'kmaq persons as compliance is not always swift, if it happens at all.

province said they were overworked. We went to feds they said no because they just do major crime and Indian Act bylaws are not major issues. So Ted Pax was regional director for Justice Canada said to appoint someone from the bar, contacted their Sydney agent and Fred did some magic and they appointed an agent for bylaws. We went back to the province and they met us half way saying they will do the first appear in court because they are all ready there and it is on the docket. If there is a trial then call in the agent. So we got the prosecution. Then we worried about the court. Stan Campbell was the judge fortunately and he was very supportive. He helped as said he would hear the cases. He was worried about the penalty aspect because the Indian Act has a maximum penalty of \$100. There is no fine option under Indian Act and no alternative sentencing, only a fine. How do we collect a fine? Dave Muese was the court administrator [he is now mayor] he said he would pick up the court fine, for any offense there is a court fee and he would have all the fines collected, take the cut and give the rest to the band. We had to look at fine options because we know people on the reserve don't have money. So we went to probation people to apply fine options to this project and they stretched the rules and said okay. It took 2 years altogether. We went to Terry and Bernd and they circulated it through the community and got some feedback and it was my first year on council and the council signed off on it. Indian Affairs even came to the council meeting to witness the signing and gave it to Brian Doherty who gave us the money to publish the booklet in a format that the police could put in their pocket. A few months later tribal police were writing tickets and the most people who were charged were taxi drivers, not natives. They were speeding through the reserve and we have convictions and the money started to come in. So the money came back. We tried, but did not get highways to assign point for convictions under this code and we wanted them to put convictions on the provincial system, so if there were outstanding fines they would get paid when people renewed their drivers license. It would have meant amending provincial law. We have had convictions under the dog bylaw. The unique thing about this is that although it is a band bylaw it is based on an outside system. There are no sentencing circles (February 2000).

This long quote demonstrates the complexity of working through what should be a relatively straightforward exercise, the management of community traffic and dogs. Mr. Dan Christmas, with long experience in Mi'kmaq justice, clearly delineates the critical problem that underlies all justice interactions up to this point; they focus on managing external relations and negotiating power outside of the community. The bottom line is once again fiscal and cultural. Mi'kmaq want to reap the benefits of law enforcement,

keeping the fine dollars within the community, however alternatives to fit the financial reality of the bands must be included for the by-laws to have any effect other than increased criminalization for non-compliance and non-payment of fines. The *Indian Act*, while seeming to provide inroads into community controlled justice, by allowing band by-laws to be enforced, limits internal culturally imbued organization to the superficial in this instance. The bureaucracy of juridical process is staggering, even for a rule such as tying up a dog.

In most Mi'kmaq communities there were informal mechanisms that dealt with unruly animals, but this process has since been professionalized, and now there are dog enforcement, or animal control officers, in the Cape Breton communities, who have authority to deal with dog violations only. This professionalization has provided a limited number of jobs. The implementation and enforcement of band by-laws was not the path to Mi'kmaq justice. Indeed the focus on Indian Affairs instigated projects divided and diverted Mi'kmaq attention away from their central goal, establishing the Mi'kmaq Justice Institute. Indian Affairs did not grant projects equally within each community, and thus competition between communities for limited project dollars interfered with the ability to focus, or sometimes to even agree, on the task at hand.

Tensions between Mi'kmaq organizations became heightened, and internal conflicts created another set of disputes that required resolution. While Diversion was struggling within Indian Brook, concerns were raised over the gaps between Mi'kmaq elsewhere in the province and in the criminal justice system in Nova Scotia. Meetings of the Tripartite Forum were infrequent, but other political organizations managed to submit

competing proposals, for example the Native Council of Nova Scotia, developed the CLIF Project to fill in some of the service gaps.

CLIF - The Community Legal Issues Facilitators Demonstration Project

As mentioned earlier, the Native Council of Nova Scotia [NCNS] was established in 1975 as the self-governing authority for Mi'kmaq and all other aboriginal peoples residing off-reserve in Nova Scotia, and throughout Mi'kmaq traditional territory. The organization emerged as part of the politicization efforts resisting assimilation, and promoting aboriginal rights after the 1969 White Paper. Native Council of Nova Scotia divided the province into twelve zones for administrative purposes. Each zone elects a member to the Board of Directors to represent their zone at quarterly meetings and send delegates to the annual general assembly, to discuss issues and create policy. The NCNS head office is located on Millbrook First Nation, the second largest Mi'kmaq community on the mainland, near Truro, Nova Scotia.¹¹⁵ A president is elected through universal suffrage of all eligible off-reserve Aboriginal residents [status or non-status, Metis]. The president, an executive, and a board of directors, manage the Native Council. NCNS is an affiliate of the national organization of the Native Council of Canada. Native Council of Nova Scotia provides advocacy in areas of housing, employment, aboriginal rights and land claims, sociocultural development, constitutional recognition, and aboriginal and treaty rights. NCNS is a strong proponent of treaty recognition, and argues that government recognition of the Mi'kmaq treaties, and their fiduciary responsibilities as laid out in those treaties, would remedy the many problems experienced by aboriginal peoples in Nova Scotia. Off-reserve aboriginal peoples do not receive or have access to

the compensatory benefits afforded to people living on reserve under the *Indian Act* administration. NCNS fights for equalization of benefits, and conducts land claim research where, "emphasis of the Council's research is put on compensation for aboriginal people not residing on reserve" (NCNS 1993:12). NCNS has an outreach program, an education fund, sponsors a Mi'kmaq language program, runs a rural housing program, and a counseling agency.

Ideologically, there are tensions between NCNS and on-reserve Mi'kmaq leaderships, particularly over issues of authenticity, as the two groups, indirectly and directly, compete for funds for their various constituents. One of the bigger debates between the organizations during the early nineties was over membership figures. Both organizations counted members that flowed back and forth between on and off reserve residences. Numbers are important because they help to legitimize demands made on the governments for financial support, program development, and continuity. Accurate figures regarding Mi'kmaq population are notoriously difficult to ascertain. Other debates stem from the idea that *Indian Act* Chiefs and Band Councils are not traditional, and do not uphold the cultural ethos and characteristics deemed important by Native Council members. There is a significant amount of cross over between the two groups, the boundaries are very blurry when it comes to delineating the central tenets of each, and at times the relations have been adversarial, other times more cooperative. Currently Native Council acts independently from the other Mi'kmaq political organizations.

After the release of the Marshall Report, Native Council wanted to participate in the changes to justice. Many of their membership had experienced problems during encounters with police and courts. In 1991, NCNS proposed the creation of the

¹¹⁵ Offices were once located in Halifax, however costs required a relocation.

Community Legal Issues Facilitator [CLIF] Demonstration Project to provide a service to bridge the gap between the Mi'kmaq/Aboriginal people and the criminal justice system of Nova Scotia, to the tripartite forum. NCNS used the argument that the program was required as indicated in the findings of Royal Commission on the Donald Marshall Jr. Prosecution, and historically as stated in the Treaty of 1752, which upheld:

That all Disputes whatsoever that may happen to arise between the Indians now at Peace and others his Majesty's Subjects in this Province shall be tryed in His Majesty's Court of Civil Judicature, where the Indians shall have the same benefits, Advantages and Privileges as any others of His Majesty's Subjects (1752 Treaty Article Eight).

That they used Marshall Recommendations as their platform provides further evidence that Marshall had permeated the legal consciousness of the entire Mi'kmaq nation. NCNS was significant in maintaining treaty right discourses within their interpretation of their inquiry recommendations.

The tripartite forum accepted the proposal and the project started in November 1992, under the administration of the Native Council of Nova Scotia. Similar to Diversion, the program was cost shared by federal Department of Justice and the province. The primary goal of CLIF was to facilitate the provision of fair and equitable criminal justice services to the aboriginal community by providing a mechanism for meaningful communication and exchange to take place. CLIF was largely a conduit for public legal education, and cross-cultural sensitivity training, especially with police, judges, and corrections staff. Initially the proposal suggested the program run in each of the twelve zones of Native Council, but this was seen as excessive. Instead, they divided province into three target areas: Bridgewater representing the south shore,

Halifax/Dartmouth representing urban and central Nova Scotia, and Sydney representing Cape Breton Island.

A director, support staff, two case workers, and a board of directors composed of high profile justice, government (Mi'kmaq and non-Mi'kmaq) officials, and police officers, and Donald Marshall as the only non-professional member, guided the program, monitored activities, and shaped policies.¹¹⁶ It was important to the director that Donald Marshall participated in the CLIF project as his presence added a sense of legitimacy to the program, attracted positive media attention, and he could contribute based on his intimate knowledge of the prison system. In all, forty-one persons served as board members at various times over the duration of three years. Board members met regularly and were responsible for promoting CLIF within their respective agencies.

CLIF's mandate focused on facilitating between the Mi'kmaq community and police, lawyers, courts, corrections and legal education services. Here the Mi'kmaq community included both on and off reserve persons, unlike the Diversion project, which focused on the reserve. Initially at least, the emphasis and access leaned toward off reserve individuals, as is expected under the administration of NCNS. The bridge was based on providing information, support, and education.

CLIF provided three main services. The most comprehensive service was responding to calls for help from aboriginal persons who needed assistance due to "confusion or discomfort" or problems in dealing with police, courts, or any other justice service. The staff or facilitators helped to clarify charges, procedures, and options, and

¹¹⁶ For example the Directors of Community Corrections, Aboriginal Affairs for Nova Scotia, Public Legal Education, NCNS, CMM, Policing Services, Advisory Council on the Status of Women for Nova Scotia, as well as representatives from the Aboriginal Justice Directorate, Mi'kmaq Grand Council members, Inspectors and Deputy Chiefs of police, were board members at one time or another.

provided courtroom support, legal advice or translator services and sought funding if the person requested such assistance. The facilitators often took on the role of para-counselors in helping their clients manage the trauma of criminal proceedings. A second service involved setting up educational programs to help justice personnel become acquainted with, and understand Mi'kmaq culture, and the factors that influenced the ways in which aboriginal persons may respond to justice services. Thirdly, CLIF participated in a number of inter-agency and community activities to promote the program, and to facilitate cross cultural awareness and public legal education (Carlson, 1996). All of these activities derived from Marshall Recommendations.

It took about a year for the program to get established. Using an advertising campaign with the logo of an eagle carrying the scales of justice in a dream catcher shaped circle, posters provided contact numbers for persons in conflict with the law, or requiring information on the justice system. Between 1992 and 1996, CLIF's primary activities involved providing liaison and problem solving for aboriginal peoples interacting with the justice system. Eight hundred forty one [841] cases were opened by the project with the majority of clients over the age of eighteen and sixty percent living on-reserve.¹¹⁷ During the first sixteen months of the program the majority of cases were from off-reserve clients. Case workloads increased slightly over each quarter as old cases were closed, new cases opened and other cases remained ongoing with a total maximum of fifty-five open cases per worker as the recommended capacity (Carlson 1996:4). More than three hundred people in mainstream justice positions participated in CLIF's cultural sensitivity workshops and seminars. Cultural programs were also held in schools

¹¹⁷ Of the 841 cases that were opened, 46 involved clients who had previously used CLIF for a separate concern, thus 795 persons utilized CLIF's services according to Carlson's final evaluation in 1996.

throughout the province. According to the final evaluation of the project, two thirds of the clients most important concerns related to seeking support. Most clients needed help with court, understanding court procedures, their charges, their options, how best to defend themselves, and in accessing legal aid. Only a few requests were made to provide alternative sentencing or services.¹¹⁸

Support included the facilitator accompanying the Aboriginal person to court or other meetings, making contacts on behalf of the person, and providing interpretation in Mi'kmaq. In most of the other cases, the request for information and in a small number the issue was an inadequate or inappropriate Justice System response. The primary need, though, was to reduce the confusion or anxiety the system evoked (Carlson 1996:2).

As with the Diversion project, legal aid also became a target of concern for CLIF. Limited legal aid resources created obstacles to Mi'kmaq requiring assistance. Legal Aid was a leading source of referrals to the CLIF program as Nova Scotia Legal Aid was overwhelmed providing service to as many as seven hundred eight-five aboriginal clients between April 1993 and December 1993 (Benton 1994).¹¹⁹ Legal Aid, lacking Mi'kmaq lawyers, Mi'kmaq clients felt it was part of the adversarial system and provided only marginal or inadequate legal services.¹²⁰ CLIF provided a conduit for Nova Scotia Legal Aid to Mi'kmaq social service agencies. While Legal Aid lawyers were urged to consult with the community to investigate the possibilities of alternative dispute management,

¹¹⁸ For example in the last quarter of 1996 three requests for alternative sentencing or services were made compared to 32 requests for information and 63 requests for support.

¹¹⁹ Legal Aid provided service to a total of 14,194 clients, including the 785 Aboriginal persons during this period (Benton 1994).

¹²⁰ The Union and the Department of Justice in 1994 to examine the effectiveness of Legal Aid services delivered to Aboriginal clients contracted a study. It was found that Legal Aid, as with all other arms of mainstream justice, lacked understanding or awareness of Mi'kmaq culture and community resources. Recommendations were made to increase the number of permanent Mi'kmaq staff, that lawyers go to the reserves for intake purposes, that lawyers receive cultural sensitivity training, that Aboriginal clients be offered the services of a translator and that alternative measures be sought when appropriate, among others (Benton 1994).

few did so. Accessing Legal Aid by on reserve residents was difficult without transportation as offices were always located away from the communities.

Many looked to CLIF for financial resources to access legal advice and representation, resources CLIF did not have. People who had concerns outside of the realm of criminal justice made inquiries about issues such as guardianship, matrimonial property and adoption (Sylliboy 1996). In terms of family law, Mi'kmaq legal culture and community dynamics were quite different from the larger society, particularly in terms of the extended family networks and their roles in dispute management, child care and inheritance. The larger society knew little about Mi'kmaq cultural dynamics and less about how these apply in juridical matters. Others contacted CLIF for treaty and other rights-based support. Mi'kmaq persons encountering the justice system were increasingly relying on treaty based rights to argue their cases. Treaty cases are very expensive to litigate as they require a great deal of research and usually take up a lot of court time to thoroughly present. That more cases were being litigated within the discourse may also be attributed to the findings in Marshall that supported such recognition by the province.

Thus CLIF was being asked to be all things to all people. One possible solution to meet the demands was for CLIF to provide justice workers to give non-legal advice; however, resources were unavailable and Mi'kmaq were going to court without support. A central concern of the program staff was determining how far they can and should go in providing assistance. Time spent supporting people in court took staff away from their office duties, which included inserting client information for a database that tracked organizational needs and generating detailed reports or staff activities.

CLIF also provided a complaints service, a type of human rights hotline. In response to complaints of inappropriate or inadequate responses by the justice system, it was found that most reproaches stemmed from a lack of understanding of Mi'kmaq cultural values and traditions. Carlson's analysis categorized the complaints into four level of severity: 1] hostile and contemptuous attitudes, usually by police; 2] stress related inappropriate behaviour by justice staff; 3] lack of interest in understanding Mi'kmaq culture and traditions; and 4] lack of recognition of important differences. Remedies to the complaints ranged from lodging formal complaints against the police in their complaint process, to stress management, and cultural sensitivity training.

In addition to providing an educative function, CLIF was to establish a justice process that is fairer, less discriminatory, and more sensitive to the community's needs. Requests for translator services in Cape Breton were increasing, but a mechanism to link the courts with Mi'kmaq translators was lacking. Marshall Recommendations mandated implementing a translator program immediately. Cape Breton communities, in particular, required this service.

The executive director of the program, a former special Aboriginal Police Constable with the RCMP who had served the Millbrook community for twelve years, wanted to target youth through special education programs. He was concerned that Mi'kmaq, especially youth, had lost their sense of identity and wanted to use a holistic approach to building self-esteem and self-respect. The director was in favour of reinvigorating a talking circle format, which he argued was similar to the currently popular practice of group therapy, "except we have been doing it for centuries" (Mosser 1993). CLIF started to move toward alternative dispute resolution practices, and wanted

to be the organization involved in sentencing, probation and parole plans of aboriginal persons in their catchment areas. CLIF began moving into areas that Shubeanacdie Diversion was covering.

Policy existed that permitted aboriginal peoples direct involvement in these processes, but setting up the infrastructure to carry out the practices were too difficult to coordinate with a small staff already operating to capacity. The several cases that CLIF did participate in providing sentencing alternatives were successful. CLIF made sentencing recommendations and coordinated the conditions. For example, conditions in the case of a guilty plea on a common assault were: one year probation, keep the peace and be of good behaviour, attend drug dependency, attend anger management with Mi'kmaq Family treatment centre, complete fine options service within the Mi'kmaq community and attend local probation. The fine-option program involved the offender in painting the house of an elder, who appointed the type of work, and reported being satisfied with the offender and their respectful attitude. CLIF conducted follow-up to monitor compliance. CLIF was also active in connecting resources persons for release programs from Corrections facilities.

The final evaluation report recommended that the alternative dispute resolution program "allow mediation by an independent arbitrator in disputes that do not involve serious criminal activity, and that such a program should take advantage of traditional values including a sense of interconnection of all community members" (Carlson 1996:8). It also recommended using traditional healing practices for appropriate offenders, but did not offer any guidelines for instituting, and assessing, how they fit with the regular features of court, probation, and parole systems that the mainstream system

continued to impose. Overall, CLIF's design was to work within, and as partner to, the mainstream system, rather than acting as a separate entity for aboriginal justice.

CLIF's approach embraced healing discourses and the use of traditional healing as entailing a culturally constructed respect for family and community. The director of the program, himself a practicing traditionalist, utilized sweat lodge ceremonies and teachings of the Sun Dance to guide him and to instruct others. CLIF acted as a resource to provide custody programs to aboriginal offenders in an aboriginal prisoner liaison service that used these symbolic healing and spiritual approaches. The potential for CLIF to institute reintegration programs was being explored. Proponents of crime prevention programs argued that developing respect for Mi'kmaq traditions and culture would discourage criminal activity. Increasing requests to assist youth in trouble with the law were directed to the two mainland offices. In Sydney a youth alternative measures program was operated by Island Alternative Measures, which processed all youth including Mi'kmaq from Cape Breton. The director became a strong advocate for crime prevention and aboriginal youth camps. The director worked toward establishing a Mi'kmaq youth camp, in conjunction with a vision held by Donald Marshall, that cultural survival camps for youth would go a long way toward crime prevention and cultural revitalization. The Grand Chief Donald Marshall Aboriginal Youth Camp emerged from Marshall's vision in 1994, and utilized CLIF's connections to corrections it garner support with mainstream officials.¹²¹

¹²¹ Marshall raised all the funds himself and borrowed youth corrections facilities on the South Shore to run the camp for two years before moving it to Cape Breton, where it ran for another three years and became the topic of a Department of Justice documentary, sponsored by the Aboriginal Justice Learning Network. When CLIF was not renewed, the Marshall Camp came under the umbrella organization of the Mi'kmaq Justice Institute.

Throughout its operation, CLIF's numbers remained seasonally consistent. By the third year plans evolved to offer court worker services to the off-reserve communities in the three target areas of Sydney, Bridgewater and Halifax. That Halifax remained a key target area was perplexing, as an increasing number of cases from the Truro area outpaced the demands for service from the city, and prompted the office to relocate to Truro. It is possible that advocacy for urban representation of aboriginal peoples, common elsewhere in the country, was drawn upon in the metro Halifax region, in order to facilitate Native Council's agenda, that CLIF to be seen as accessible to all aboriginal persons regardless of geographic location. Because it made claims to represent all aboriginal persons, NCNS held itself as the logical body for carrying Mi'kmaq Justice Programs.

Throughout the project, CLIF remained focused on its three target tasks of facilitating aboriginal members' legal issues, coordinating cross-cultural education programs and building bridges, a point often illustrated by its supporters when the program was contrasted with the Diversion project, which became unfocused due to external pressures to carry various programs before a core was firmly established. The off-loading tactics of mainstream justice came from many angles, and because those programs all connected with pockets of money, it is very difficult for fledgling organizations, with minimal financial resources, and a history of short term funding, to say no. The notion of 'take it where you can get it,' challenges mandates, and can easily alter the course of programs in their developmental stages. Usually the community derived mandates are the first to succumb to those favoured within the limiting criteria of funding protocols set out by governments.

In the final analysis, CLIF was a successful program, and expanding the mandate seemed plausible and necessary. CLIF received letters of support and recognition for its good work from Ron Irwin, Minister of Indian Affairs, and Allan Rock, Minister of Justice, the Solicitor General, as well as provincial government and judicial authorities. CLIF employees expected that the project to be renewed; that it was not was a disappointment to all and caused bitterness in the Native Council of Nova Scotia.

A negotiating committee consisting of peoples from Justice Canada, the province, Diversion, the Union of NS Indians, Confederacy of Mainland Mi'kmaq, and Native Council of Nova Scotia started to combine all Mi'kmaq justice projects. The Tripartite Forum had run into difficulties. Irregularly held meetings, and internal strife stemming from the pending cancellation of CLIF, interpreted by some as a lack of apparent goodwill on the part of the province, were beginning to impede developments. There were some political maneuvers to try and oust Native Council from the tripartite forum as issues of membership and representation became more contentious. Governments were calling for the major political organizations to clarify their memberships in order for them to justify financial transfers. Periodically, one group or another would withdraw from the tripartite forum in protest over particular issues. Without all parties at the table, decisions regarding funding were unachievable.

As with Diversion, CLIF found evidence that a serious knowledge gap existed when Mi'kmaq persons attended court, particularly around court procedures, translation, and rights of accused, a gap which could be filled by court workers with a background in legal and treaty rights. Victims' rights and concerns were rarely discussed during this era. A further fissure existed in the management of inter-community disputes and problem

solving using culturally meaningful processes. Growing concerns around Mi'kmaq youth and the justice system also needed addressing.

The Aboriginal Court Worker Program – Conservative Programming

The third interim program was a pilot project funded by the tripartite forum, which operated out of the Mi'kmaq Friendship Centre in Halifax. It was a short term, one and half year Mi'kmaq Justice Worker project. This project quickly collapsed into a proposal, carried by the Union of Nova Scotia Indians, and the Confederacy of Mainland Mi'kmaq, toward the establishment of the Mi'kmaq Justice Worker Program of Nova Scotia, a program recommended in the Clairmont report needs assessment.

During the mid 1990's, significant reforms were taking place in all areas of justice, particularly those dealing with aboriginal peoples. The court worker program also underwent major transformations, particularly in developments pertaining to the increasing popularity of restorative justice. The restorative approach was considered to embrace aboriginal conceptions of justice as healing. Indigenous concepts were purported to be the foundations of dispute resolution and mediation, alternative measures, family group conferencing, sentencing and healing circles, and crime prevention, through community healing could be achieved. With the emergence of the restorative approach, the national working committee organized a restructuring of the program to incorporate essential changes to the system and its philosophies. They renamed the Native Courtworker program to the more politically correct Aboriginal Courtwork Program in 1996.

The court worker program is important in Nova Scotia because it operated as the core program around which most other juridical developments occurred. It is also the

central model that is acceptable to provincial and federal governments as a fundable program. During the reformulation of the court work program, the committee found that the governments' mandates were too restrictive, and prevented program efficiency and effectiveness because they were inflexible, contradictory, and unable to expand to meet the changing needs of diverse communities, as well as the ongoing changes within the justice system.

As with many aboriginal social service programs, survival, rather than expansion, is the daily experience. Although it is one of the longest running aboriginal justice programs, the court worker program has been plagued over the years by program insecurity, politics, and severe fiscal restraint. Justice Canada matched provincial funding until the 1992-1993 fiscal year when federal reductions came into effect. Two new programs were started in Saskatchewan and Nova Scotia, which reduced the amount of money available for other jurisdictions, which was seen as problematic, and a consensus on a formula for redistributing funds was not reached among the national working group responsible for reforms (Justice Canada 1997:iv).

Federal funding for courtwork services is contingent on compliance with a number of conditions, some of which are no longer appropriate. For example, the stipulation that courtwork services must be provided by independent, apolitical Aboriginal service organizations is difficult to reconcile with recent federal and provincial pronouncements supportive of Aboriginal self-determination and self-government. Rather, provided that they are committed to Aboriginal inclusive service provision, and accountable both to community and funders, the Working Group takes the view that the pool of potential service providers should be broadened to include all Aboriginal-controlled organizations. However, they caution against extending the definition of an eligible client to other visible minority groups, as this could jeopardize the principle that courtwork services should be provided by Aboriginal groups familiar with Aboriginal cultures and perspectives (Justice Canada 1997:iv).

After a series of national meetings found that the role of the court worker goes well beyond courtroom liaison for aboriginal accused, they made an argument for a more holistic approach to justice, countering the fragmentary and adversarial approach characteristic of the mainstream system. In his review of the program, Jim Coflin (1995) argued that there is chronic distrust due to ongoing experiences of discrimination and racism that create barriers to fair and effective justice administration. These experiences are meshing into legal consciousness and frame aboriginal justice discourses. These views support the findings of inquiries on aboriginal peoples and the justice system, which champion extensive expansion of locally controlled, culturally based services. Such expansions are envisioned to include a national network of services ranging from crime prevention to victim assistance, from public legal education to community based juridical programs, such as diversion, justice circles and youth programs that focus on healing and therapeutic avenues to manage problems.

In order to collect data, the Aboriginal Courtwork Program set up a nationally standardized aggregate data form to capture information on clients and activities as part of its accountability format. These were federally sponsored programs, and thus, in tripartite arrangements, the federal representatives tended to be more forward thinking and willing to move on their local implementation. Provincial governments, including Nova Scotia, proved more hesitant and less willing to hand over funds and control.

The problems of establishing independent, apolitical aboriginal service organizations plagued the implementation of Mi'kmaq justice programs. These restrictions are indicative of the challenge of creating systems that meet external stipulations at the cost of internal cultural infrastructure and organizational realities.

Fighting for Implementation

Despite the Marshall Recommendations, Mi'kmaq people continued to go through the justice system without any support; and mechanisms and infrastructure to divert cases to the community, needed development. However, the province did not think it was feasible to provide additional funding for services it argued overlapped the jurisdictions and mandates of CLIF and Diversion. Diversion evaluations were not very favourable and its future was in doubt. There was some progress regarding community input on sentencing, mediation, and fine options, but it was limited, and the Native Criminal Court (Marshall Recommendation #20) did not evolve. Debates over the efficacy, efficiency and equitability of the two programs reflected political tensions within the communities, and between Mi'kmaq and mainstream governments. The province appeared as only superficially embracing Marshall Recommendations, rather than assertively facilitating the implementations. These relations were further complicated by a government stance not to interfere directly with what the Mi'kmaq communities were doing, and yet simultaneously failing to acknowledge Mi'kmaq authority, and empower them fiscally to carry on with the changes. These antagonisms did not help validate Marshall Recommendation developments. Instead of funding parallel and complimentary programs, they decided not to renew Diversion or CLIF, in order to facilitate the creation of an umbrella program, called the Mi'kmaq Justice Institute. Mi'kmaq legal culture and legal consciousness were undergoing periods of rapid change as the Mi'kmaq struggled to produce juridical practices that could take on the Marshall Recommendations, and meet the insoluble demands of the provincial players. These cultural productions came to a head in the creation of the Mi'kmaq Justice Institute.

Chapter Nine: The Mi'kmaq Justice Institute

In this chapter I address the rise and fall of the Mi'kmaq Justice Institute. The program, once heralded as being the true test of the Marshall Recommendations, and the home of Mi'kmaq community based justice, faced insurmountable challenges as it tried to meet all the justice needs of the nation. This brief history of the life and death of this program illustrate two theoretical threads; the heightened cultural productions that occur as valued cultural components are threatened from outside and thus must be articulated within, and the clashes of consciousness that result.

As with all other Mi'kmaq justice initiatives, the impetus for the Mi'kmaq Justice Institute derived from the Marshall Inquiry. Recommendation number twenty-one of the Marshall Inquiry read:

We recommend that a Native Justice Institute be established with Provincial and Federal Government funding to do, among other things, the following:

- A] channel and coordinate community needs and concerns into the Native Criminal Court [recommendation # 20 (the Diversion mandate)];
- B] undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people;
- C] train court workers and other personnel employed by the Native Criminal Courts and the regular courts;
- D] consult with Government on Native justice issues;
- E] work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information needs of Native people; and
- F] monitor the existence of discriminatory treatment against Native people in the criminal justice system.

A 'Breach' Birth

The concept of the Mi'kmawey Jajikintumkewey¹²² or Mi'kmaq Justice Institute [MJI] provided exciting opportunities to empower Mi'kmaq communities, to revitalize their juridical culture, and to embrace their diverse legal consciousness in a framework that would allow for the betterment of daily life. According to interview data, it was seen as potentially the most promising of the Mi'kmaq justice programs because it was envisioned as holistic and a truly Mi'kmaq alternative that enhanced Mi'kmaq spirituality, polity, economy and society. After centuries of struggle against assimilation and discrimination, at last here was the opportunity for significant and permanent changes in Mi'kmaq justice experiences, a moment of decolonization, a movement toward freedom from constant oppression and domination by mainstream justice that had suffocated Mi'kmaq culture since its imposition.

It was hoped that MJI would provide many desperately needed jobs for Mi'kmaq persons, as well as bring peace to communities by reducing crime, and by enhancing Mi'kmaq legal culture through aboriginal rights and titles. Based on the outcome of the Marshall Inquiry, expectations were very high among most Mi'kmaq involved in the process. There was a shared assumption that the fair and just approach was to do whatever it takes to build a Mi'kmaq justice system, in order to prevent anyone from enduring the racism and mistreatment experienced, not only by Marshall, but by all Mi'kmaq. According to the Mi'kmaq players, the best way to accommodate this necessary empowerment was the realization of Mi'kmaq control over justice through the Mi'kmaq Justice Institute. Its broad mandate included the research, design, and

¹²² In the search for culturally derived alternatives, an organizational name helped give the program Mi'kmaq ownership. The newly named Mi'kmawey Jajikintumkewey, meaning 'of Mi'kmaw Justice', framed the start of the three phase transition toward the building of a Mi'kmaq Justice Institute.

implementation of community based, culturally specific justice, a mandate that went beyond, but included the structural indigenization of the other recommendations of the Marshall Inquiry. However, negotiations were not smooth or straight forward. Internal relationships deteriorated as competition for program control was facilitated by provincial interference and federal complacency.

Negotiations were rife with competing ideas of how best to set up the program and over financing it. In 1994, then Justice Minister Allan Rock, and the Premier of Nova Scotia, John Savage, came to an agreement in principle about the Justice Institute to create a vehicle for aboriginal justice programming. Five hundred thousand dollars were committed to the project by the federal and provincial governments, an amount that did not meet the projected costs of the program, which were projected at more than six hundred thousand dollars annually. The province indicated it would contribute up to two hundred and fifty thousand dollars per annum to the cost of the Native Justice Worker Program, subject to budgetary approval by the provincial government, and subject to an equal federal contribution. However, the federal government would not commit to any long term or permanent core funding because the Aboriginal Justice Directorate's mandate, from which the funds were to be drawn, was set to expire in 1996. In response to this short sightedness, the Mi'kmaq governments argued if the will and demand is present, surely they could find other funding sources to secure the core administrative dollars, necessary to operationalize Mi'kmaq justice well beyond the limits of the court worker mandate. Without the security of long term funding, the Mi'kmaq argued, it would be very difficult to attract experienced and competent staff, a problem that plagues

many aboriginal organizations, and is reflected in the ongoing trend of high staff turnover throughout the history of Mi'kmaq justice programs.

In order to create the Mi'kmaq Justice Institute, the Mi'kmaq, federal and provincial tripartite forum decided to amalgamate CLIF, Diversion, and the court worker program through a 'seamless transition' process that would occur incrementally in three phases during the 1994-1995 fiscal year. On paper, amalgamating the components appeared straightforward; however, this was not the reality. On the ground, political factions and personality conflicts, coupled with ongoing mistrust of the government players, their restrictive programming and funding policies, made the 'seamless transition' difficult, if not impossible. The Native Council of Nova Scotia became alienated in the process, disappointed that their CLIF program was shutting down despite its apparent success. Native Council remained firm in their stance that that all Mi'kmaq needed representation in justice services, and off-reserve accessibility was best facilitated through their participation. The Union of Nova Scotia Indians and the Confederacy of Mainland Mi'kmaq felt that on-reserve residents would be better served by programs under their leadership.

Even though it appeared that all members of the tripartite forum were in agreement that the Mi'kmaq Justice Institute was the best path for implementing Mi'kmaq justice, there was no evidence of good will from the government to guarantee the funding for the Mi'kmaq proposal for the Justice Institute. Such uncertainty challenged morale, and inhibited the advancement of other justice initiatives. The bottom line for the government players, the province, and the department of justice in particular, was a focus on money, rather than justice for the Mi'kmaq nation, and even negotiations

had costs. As a result, Mi'kmaq legal culture, once proactively buoyed by the creative potential in the Marshall Recommendations, became increasingly adversarial, as disillusioned partnerships returned to familiar roles of subjugation under the power of governmental spending.

Pressure was on the Mi'kmaq stakeholders to continue their demands for control over justice. Internally, Mi'kmaq wanted tangible evidence that something was being done about the sorry state of justice for their people. The Canadian justice system had little credibility in Mi'kmaq communities, and few people chose it as a way to deal with their problems. There was little sense of koqqwaja'ltimk, to be treated justly, in Mi'kmaq encounters with mainstream justice, even after the Marshall Inquiry. Those that were forced into court for charges externally derived, experienced a largely incoherent and intimidating process, in which they were totally powerless, and at the mercy of the non-Mi'kmaq legal personnel and adjudicators. Despite these obstacles, a small group of people became the driving force behind the Mi'kmaq bid to move justice forward, regardless of the internal tensions over territoriality, membership, and political ideologies, and external contradictions regarding funding and national jurisdiction issues.

In phase one, an interim management board was selected from representatives from the Union, Native Council of Nova Scotia, the Confederacy of Mainland Mi'kmaq, and the Nova Scotia Native Woman's Association. They hired an executive director to run the Mi'kmawey Jajikimtumkewey. Together the board and the director had discussions with Diversion and CLIF to determine an integration plan. The next step involved the executive director assessing the training requirements of the staff, and

setting up an evaluation methodology. The board needed to select a head office location, a process that posed jurisdictional conflicts.

Phase two involved the recruitment and training of the justice workers and support staff, the development of a justice worker training program, the creation and training of regional justice committees, and the development of goals, objectives, and operational plans. Regional justice committees were to be set up in five zones, which divided the province and included those areas already established by CLIF and Diversion. Phase two included the mundane aspects of setting up offices and legal issues such as incorporating the program. The executive director would coordinate the justice worker training program with the Shubenacadie Diversion program, outlined in the previous chapter, and also prepare a continuous training program based upon the CLIF training module.

At the end of phase two the interim board would dissolve and a new board of directors was to be selected to govern the program, act as representatives or ambassadors of the program, and to bring forth the views and needs of their constituencies to the Institute. Based on research and needs assessments reports carried out post Marshall, and on the experience of the other justice programs, it was reasoned that Mi'kmawey Jajikimtumkewey needed five full time justice workers, ten assistant justice workers (contract or per diem), and an executive, including a director, assistant director and a general secretary responsible for data entry - to start. Native Council wanted employees of CLIF guaranteed positions within the structure to take advantage of their experience and skills as trained staff, however, these demands met with resistance from the other players who wanted their membership employed too.

Phase three foresaw a fully operational Mi'kmaq justice program with an established board of directors, with goals and objectives outlined in a clear operational plan that included ongoing recruitment and training of justice workers, and functional regional justice committees. The public legal education, and liaison services could be integrated into the justice service network once the core program was up and running. Overall the merging of the programs into the initial Mi'kmawey Jajikimtunkewey seemed like a great plan, but it never came to fruition. The 'seamless transition' of CLIF, Diversion and the court worker program, into the Mi'kmaq justice institute came to halt as communication between the three Mi'kmaq political organizations [UNSI, NCNS, CMM] ceased over conflicts of membership and control.

Native Council was reluctant to establish a start-up date for the program that they felt did not reflect their membership's needs. CLIF fearing correctly that any disruption of services would be harmful to the momentum it had built wanted to protect its investment. CLIF decided to propose its own Aboriginal Justice Program called "CLIF Justice Services Commission", which won immediate approval of the board of directors of Native Council of Nova Scotia. However the proposal, if it was formally tabled to the tripartite forum, or not, was not the chosen, as NCNS was the politically weakest of the three Mi'kmaq stakeholders. The tripartite forum had become an arena of conflict, rather than negotiation, and was no longer a productive arena for Marshall Recommendation implementation. Here Mi'kmaq legal consciousness clashed within and between communities. In order to get the tripartite forum back on track the Premier announced, at a Treaty Day celebration, that he would be the minister responsible for Indian Affairs, and that politician Joe Ghiz would act as an independent chair for the forum. This

announcement was made just two weeks prior to the critical 1994 tripartite meeting to decide on what shape Mi'kmawey Jajikimtumkewey would take.

Once negotiations resumed, the province argued that the organizational structure was too broad, and thought it appropriate to limit the number of positions the Mi'kmaq requested. It was not clear how the province anticipated the program would develop without adequate staff doing the research and building public relationships. The province also wanted the Institute to defray as many training costs by using federal and provincial programs, a strategy that makes good fiscal sense, but substantively is very problematic due to the fact that government training programs were for non-aboriginal justice programs. Non-aboriginal peoples, whose knowledge of the diversity of aboriginal beliefs, practices and everyday life conditions is minimal, staff these training programs, a factor which contributes to the systemic discrimination that resulted in the need for the Mi'kmaq justice institute in the first instance. Thus the province's strategy did not demonstrate any reflexive exploration of the potential for Mi'kmaq innovation; rather, they maintained the status quo by seeking out the fiscal bottom line as the only parameter of their commitment, or perhaps lack of commitment. The government shortsightedly relied on the usual statistical evaluative standards as indicators of success; a cost per case ratio that precluded any inclusion, or comprehension, of Mi'kmaq values in determining program success. Clearly the province was not inclined to acknowledge Mi'kmaq sovereign authority through juridical vehicles. A tension that continued to emerge was the failure of the government to reconcile its demand for Mi'kmaq distinctiveness, which they needed to justify alternative programs in their constituencies, with providing the

Mi'kmaq the means to achieve the programs to accommodate their distinctiveness and the diversity within that demanded difference.

Internal tensions continued to mount and the tripartite members could not reach an agreement over the make up of the interim board. The critical stumbling blocks became a dispute between Native Council and the Union over the membership of the board of directors, the structure of the institute, the home base location, and the future of CLIF. In 1993, the Chiefs of Nova Scotia approved a proposal for the Mi'kmaq Justice Worker Program, contracted by the Union and Confederacy. It had a board model consisting of Chiefs from each of the thirteen communities, similar to the composition of most other boards of successful Mi'kmaq service programs. Late in 1993, the tripartite forum accepted the proposal in principle, but recommended the inclusion of the pilot projects, discussed above, which required a different board model to accommodate Native Council representation. Native Council wanted an apolitical board, arguing that the band elected Chiefs would not adequately represent their non-status or off-reserve members. The interim board was seen, by the Union and other parties, as a stepping stone that required chiefly support in order to get justice topics on the political tables in each community. An interview participant suggested:

The first board of directors will consist of Chiefs [and presidents] and one aboriginal representative from the Native Women's Association of Nova Scotia. The first board of directors will call an annual meeting and appoint a new board. I do not believe that this precludes chiefs and presidents from serving on the interim management board. Further we believe that each organization has the right to choose the representatives for the interim management board as it sees fit. No organization has the right to determine another organization's representatives. The final composition of the board of directors must be determined by agreement of all organizations.

Reaching a consensus was impossible with so many competing power interests involved. Native Council threatened to withdraw from the Justice Institute process to which the other parties responded by suggesting that other groups representing off-reserve interests, such as the Mi'kmaq Native Friendship Centre, were possible alternative partners. A significant amount of time and energy was spent trying to develop a plan agreeable to the diverse parties involved. According to the Mi'kmaq chair of the tripartite sub-committee on justice:

Initially there was some substantial dollars identified, \$500,000 to \$600,000 which was a reasonable budget for a new organization starting out. From that point we started to have some internal political problems. People were complaining about representation. There was a dispute between Native Council and the Chiefs over the composition of the board of the justice institute, which lasted a couple of years, and that held up funding. Our initial concept of the board was the thirteen chiefs, and that was how we formed other boards and associations. Native Council had a good argument saying that justice should be independent from politics, it should be blind and in order to administer programs it should be independent from the chiefs. We worked on the concept of an independent board and it took us another year to finally come to an agreement. So around 1997 we finally got to consensus on a ten-member board, with two alternates. These were not chiefs, these were people that were nominated and selected because of their background in justice issues. When we turned back to the feds and province, half of the funding disappeared and we were down to less the \$250,000 for the entire program.

The separation of justice from the Mi'kmaq state was a false separation mirroring principles of western legal styles rather than those of the Mi'kmaq. Historically, the Mi'kmaq did not have such a division; in fact, adjudication and juridical processes were holistically interconnected under the Grand Council, local chiefs, elders and families, providing conduits for culturally and spiritually sanctioned dispute management. The provincial government, without being invited, decided to participate in the debate over chiefly representation on the board. This interference was perceived by Mi'kmaq parties

as inappropriate and as perpetuating the divisions between the organizations. An interview with a Mi'kmaq lawyer, who holds an executive position on the Union of Nova Scotia Indians, had this to say about the provincial political interference:

I think part of the problem of that is that in the beginning there were people who were really concerned that the politicians would get involved in this justice institute and try to run it. In the eyes of political Canada and the two governments, that was a noble and worthy concern, to keep politicians out of running the justice system or they will abuse it. But I know where it came from, and where it was being promoted from. I wouldn't think that Mi'kmaq communities had much to say about that, but I know that the government funders were agreeable. They did not want involvement of the Chiefs and band councils. But I don't think that is the key issue. I think the other problem we had was that we were too concerned with being fair and being, making everybody equal. So that we concentrated on trying to show everything was fair, that board members came from such and such an area. In the end I don't think that helps much.

The Mi'kmaq parties to the tripartite forum were growing concerned with the fact that the province and the federal government were not adequately addressing the needs of the Mi'kmaq Justice Institute that fell outside of the narrow program guideline of Native Courtworker Program. There were concerns that the Mi'kmaq Justice Institute would simply be a glorified court worker program, a realization that made all of the efforts of CLIF and Diversion appear futile. Angered by the alienation of CLIF within the tripartite forum and the emerging MJI, the executive director of Native Council wrote in a letter to the Deputy Minister for Intergovernmental Affairs in Nova Scotia and other tripartite members the following:

... I am more disappointed that at the end of the day all that we have is a commitment for an off-the-shelf Native Courtworker Program discounting all other efforts to date and special measures best suited for Nova Scotia. I understand that that is the best that Justice Canada is prepared to offer. I am of the opinion that this is not the best for the Mi'kmaq Aboriginal people of Nova Scotia and, in fact, "by duress", the parties in Nova Scotia to the Tripartite Forum have to take it or leave it. This is a sad example of the role of the Tripartite Forum

to discuss, investigate and negotiate measures that will assist in the resolution of issues of mutual concern (September 27, 1994, Christmas 1994).

Furthermore, in the time it took to resolve the conflicts over the board structure, the federal funding program had lapsed, further supporting the view that it was the province's intention to hold up the program so that their share of the funding arrangement would also decline. In an interview with the Mi'kmaq tripartite chair for justice, the situation was summed up as follows:

The program that was to contribute to that pot had expired. It was a federal program from the justice secretariat, that money had expired in the wait for us to develop that program. Half the funding base was lost from the beginning and I think that was probably the fatal mistake because we went through so much energy and struggle to get the initial funding base identified. Then we went through a lot of internal turmoil to get the board established than when we were finally ready and half the money had disappeared it was too late to turn back. So the board went ahead and tried to develop a program out the \$250,000 that was left.

Our vision for the \$500,000 was to establish a justice worker program, not a court worker program. We envisioned a team of justice workers across the province and broke up the province into five districts. We identified a full time justice worker in each and part time workers in each, and that was based on caseloads we thought were manageable units and we thought this was how the \$500,000 would be spent.

So when we were left with \$250,000 we had to drastically cut the original proposal. There were no dollars provided for administration, as this was a federal requirement that no administrative dollars be provided for the program. So out of that smaller pot we had to provide administration. So we hired five people, an executive director, an assistant three justice workers. The three justice workers were to carry the whole province.

In the beginning they were clearly over their heads. It was an impossible right from the beginning. I guess if you had to put the blame on anybody that you would have to put the blame on Justice Canada. Their program requirements are so strict and inflexible that you really could not develop a program with it and all the province did was basically match what the feds did. So the feds always had the highest benchmark and once their benchmark dropped, the province's benchmark dropped as well, and that was the fatal mistake in the process.

Now the Justice institute to its credit did try to do other programs and I really did not become involved too much at that point. I was not a member of the board. I do know that they took over the Mi'kmaq Young Offender Project [MYOP] that the Union did start and they continued on with that.

They also took over the translator program that the Union also had and they tried to run with that. They also tried to get funding from Indian Affairs for some training and some research. But Indian Affairs was all one-time funding. I think the ultimate killer was that it just didn't have the base to operate the program.

JM: And it was in contradiction to the ultimate vision of the people here?

Yes, it was amazing. You went from 1990 when you had this vision of the Mi'kmaq by the time you got to 1998, 1999 it was a totally different concept, it was totally foreign. What ended up being administered was the federal vision because the feds were basically the gatekeepers. From the beginning the feds really felt no responsibility, no commitment, no attachment to the Marshall Commission, they totally washed their hands of the commission and they basically felt it was a provincial problem. The province felt it could not afford to go it alone and they needed to cost share and the bench mark was the federal program.

The competing visions of Mi'kmaq justice demonstrate an ongoing colonial relationship in which the dominated continue to find strategies to fight against the obstacles set out by the dominant. The dominant society controls the framework, monitoring the internal cultural developments, and strategically removes supports when ever it determines the costs are too high, or the internal workings begin to compete with their infrastructure. By the time the Mi'kmaq Justice Institute came into being, the Marshall recommendations were no closer to implantation, and Mi'kmaq control over justice continued to be elusive. The lead players driving the Mi'kmaq justice movement lost faith and burned out at the lack of progress. In fact, the individual perhaps most qualified to lead the developments decided he no longer want to face the infighting and moved on to other important work. The Mi'kmaq grew tired of the repeated bankruptcy of the governments' promises, and their misleading politicking. Even the recommendations to indigenize mainstream justice were only marginally realized. But determination and perseverance central to Mi'kmaq survivance sustained a new core of

people committed to realizing the Marshall recommendations and Mi'kmaq sovereignty over justice. Eventually, the Mi'kmawey Jajikimtumkewey [Mi'kmaq Justice Institute] came into being, backwards, short staffed, and short of funds, but Mi'kmaq nonetheless, at least at the outset.

A Brief History of the Mi'kmaq Justice Institute

After several years of contentious meetings and negotiations between Mi'kmaq political interests, the Province of Nova Scotia, and the federal government, in a tripartite process, the design for the Mi'kmaq Justice Institute [MJI] developed most fully between 1994 and 1995. A great deal of early effort went to the design of the Memorandum of Association, and the by-laws, which stated definitions of rules and procedures, membership, powers of the board, fiscal years, and audits, for the institute. These were aspects representing mainstream legal consciousness rather than Mi'kmaq values and ideologies. It took an additional year to establish a Board of Commissioners that was acceptable to all Mi'kmaq parties involved, the old conflicts of chiefly and partisan representation still lingered.¹²³

Once formed, the ten-member Board of Commissioners met regularly and, initially, with great enthusiasm, began working toward implementing the goals of Mi'kmaq justice as agreed upon by the Union, Native Council, Confederacy of Mainland Mi'kmaq, Friendship Centre and Nova Scotia Native Women's Association. Board membership included several lawyers, a high-ranking member of the Mi'kmaq Grand Council, Donald Marshall, and people with administrative and political experience who held portfolios in the major Mi'kmaq service agencies. Board participation was

voluntary, and members served two-year terms. In order for a board member to be replaced, the major founding organizations had to be in agreement over the selection of the new candidate. Replacements had to come from the particular zone that a member represented. In the history of the MJI, no board member was replaced although a few members resigned. Existing factions between the founding organizations prevented the occurrence of meetings to discuss potential successors, and thus the succession process was flawed. Other tensions reflected in the selection process included concerns about whether candidates should be on or off reserve residents, if they spoke Mi'kmaq, if they practiced Catholicism or Mi'kmaq spirituality, and if they could relate to problems of criminals and community. In the selection of the directorship these tensions became even more pronounced.

In November 1996, MJI was incorporated under the Societies Act of the Province of Nova Scotia. In January 1997, the Board of Commissioners selected an Executive Director from several candidates. The selection process was contentious. Concerns issued over whether or not the successful candidate lived in a Mi'kmaq community. Arguments reflected that the director ought to be from a reserve because the position required intimate awareness of the uniqueness of reservation life, its challenges and hardships. A director needs to understand the special dynamics that govern intercommunity relationships directly impacting formal and informal justice discourses, practices, and legal consciousness. A related issue was that of culture capital. The candidate needed to be Mi'kmaq, not only in name, but also in beliefs and practices, a supporter of Mi'kmaq

¹²³ The change in title from directors to commissioners occurred during the set up of the Justice Institute and may reflect a desired continuity with the Marshall Inquiry which was governed by commissioners.

sovereignty was preferable to someone compliant with maintaining the status quo. Other concerns emanated over whether the director be legally trained or not.

Conflicts between on and off reserve Mi'kmaq permeated the development of Mi'kmaq justice. The hiring of key staff to run the administration of umbrella programs, designed to represent all Mi'kmaq, often turned on whether someone was from a reserve and thus could relate to the conditions, dynamics and complexities of reserve life, or not. Off-reserve people often face the problem of having their 'authenticity' questioned. Indeed many people, who leave the reserve for work or education opportunities, are often greeted with suspicion upon their return. After many debates, a legally trained, reserve residing, Mi'kmaq woman was finally hired and the head office was set up in Membertou, Cape Breton. By the time the director was hired, the CLIF and Diversion programs were no longer in existence in any form.

MJI began to act as an administrative umbrella for all programs associated with Mi'kmaq justice. However, they had no administrative dollars because the governments would only fund programs and not the much needed core institution operating costs. Salaries and operating costs had to come from the limited budgets of narrowly defined, government approved programs, and thus reduced the dollars available for administering those programs.

In February 1997, the front page headline of the Micmac Maliseet Nations News, a monthly news magazine read: "Justice: Mi'kmaq Style". The first paragraph described the development as evolving from the Marshall Inquiry and the lengthy, conflict ridden negotiations. The later paragraphs read:

In spite of government bureaucracy, the Mi'kmaq have established the Mi'kmaq Justice Institute and had mandated it to not only administer justice as it relates to

Mi'kmaq people but to further promote new justice arrangements which are culturally relevant. The institute is interested in building partnerships between the criminal justice system and the Mi'kmaq/Aboriginal people.¹²⁴ The justice system needs to be accountable to the Mi'kmaq/Aboriginal people. It is time for the Mi'kmaq/Aboriginal community to shape justice policy and deliver a justice initiative from a Mi'kmaq customary law perspective The Mi'kmaq justice institute will administer and develop justice initiatives for the Mi'kmaq/Aboriginal community from an aboriginal perspective. The institute will be a service delivery institute which will be community based and keeping with the values and traditions of Mi'kmaq/aboriginal concepts of justice. The institute will promote Mi'kmaq concepts of justice to the legal community; introducing to members of the adversarial system Mi'kmaq (MMN February 1997:1).

The Marshall Inquiry continued as a strategic platform for the politics of embarrassment as the Mi'kmaq made challenges to the dominant society to open the way for Mi'kmaq communities toward self-governance and sovereignty. These strategies played out in the making of the Mi'kmaq Justice Institute. There are numerous juridical discourses shaping Mi'kmaq legal consciousness. Multiple forms of legal consciousness, emerging from historical sociocultural processes and asymmetrical power relations, are shaped and contested in public and private forums as the Mi'kmaq worked to establish juridical processes that meaningfully accommodate the diversity in their communities. As the shackles of colonization are worn down by Mi'kmaq resistance, the seemingly homogenizing effects of long term subjugation are also eroded. In particular, the impact of colonization, the experiences of residential schools, centralization, economic marginalization, systemic racism, increasing class stratification, changing gender and generational roles are all unevenly experienced and expressed within Mi'kmaq communities, and influence how people talk about and experience justice (see Conley and O'Barr 1998, Lazarus-Black 1994). Emerging in this creative process are competing discourses reflecting questions of legitimacy, authenticity, and efficacy of practices

¹²⁴ This denotation of Mi'kmaq/aboriginal was used to show that Mi'kmaq justice would be available for all

identified as Mi'kmaq, both within Mi'kmaq communities, and between Aboriginal communities and mainstream society. Within the Mi'kmaq Justice Institute two central goals persisted, one was to ensure better treatment of their people as they encounter mainstream justice, and the other was to create their own system of justice in order to deal meaningfully with problems in their territories. In order to achieve these goals, the Mi'kmaq Justice Institute became the carrier agency for all Mi'kmaq Justice initiatives except for policing. The following sections briefly address the programs and problems of the Mi'kmaq Justice Institute.¹²⁵

Translators and Court Workers

The first to come into the fold were the Native Court Worker program and the Mi'kmaq Translation Service. The Etui-Nsitmek Translation Services began as a separate program in 1995 as a result of Marshall Inquiry recommendation number twenty-three. The recommendation held that all courts in Nova Scotia have the services of an on-call Mi'kmaq interpreter for use at the request of Mi'kmaq witnesses or accused because:

The natural intimidation with the process and the confrontational and adversarial nature of the questioning, combined with these identifiable conceptual and language differences, result in Native witnesses and accused appearing ill at ease and unwilling to volunteer information to judges, juries, and lawyers (Royal Commission Report 1989).

The nature of law's power, and the inequality of its application, lie in its use of the language with which it controls the definitions of legal problems, the disputing process and the outcomes. Conley and O'Barr, suggest that by focusing simultaneously on law, language, and power, we can gain insight into how a legal system that aspires to equality can produce such a pervasive sense of unfair treatment. They found that, "If the law is

Mi'kmaq and aboriginal peoples in Nova Scotia.

failing to live up to its ideals, the failure must lie in the details of everyday legal practice - details that consist almost entirely of language" (1998:3). For the Mi'kmaq, language plays a critical role in resisting the legal system's inequality. By instituting translators in the process, they are seeking to reform the existing power arrangements.

Interpreters required training and an intense twelve week certificate program was set up in Eskasoni, Cape Breton, at the Unama'ki Training and Education Centre. Mi'kmaq persons provided instruction in the following topics: law terms, court protocol, ethics, sentencing, and legal specialist issues such as trial formats. Special attention was given to conceptual culture differences including the notion of time, language distinctions, such as the use of prepositions and sequences of phrases, and social issues reflected in client behaviour. University students were targeted for the course and were exposed to legal proceedings through practice sessions and meetings with legal personnel. An interview with one of the trainers described the translation training process as follows:

We had twelve students we lost a couple and six wrote the final exam and five passed. So we got five out of that process. These guys were trained. Bernie [a Mi'kmaw linguist] trained them in the language. Heidi [a Mi'kmaw lawyer] and I [a Mi'kmaq lawyer] trained them in family and criminal law. The way that we did the criminal law was that when they got a client and they gave the information about the charges, most of the time people are throwing around numbers and sections of the criminal code, and if you are not a lawyer or police person you do not know what the charges are. So we tried to familiarize the translators with the sections of the criminal code most commonly breached. So they would have an idea of what was being talked about. Bernie tried to relate the language to the kinds of questions being asked, how lawyers ask questions, so they would feel comfortable translating those into our language. We also did court structure and procedure so they would not feel lost. They would know when they were in provincial court or appeal court. It was more like an orientation program. We mapped out courtrooms.

¹²⁵ A thorough evaluation of Mi'kmaq Justice Institute co-authored by myself and Don Clairmont is available on the Department of Justice website.

There was on the job training where they went to the courtroom, they talked with IAMS [a youth alternative measures program], probation officers, and we shuffled them through different offices for a few weeks.

JM: You were satisfied with the training process?

Yes it was pretty good and the justice department of the province accepted it and the attorney general signed their certificates. We even had trial simulation. We coached them, we had a real judge come and he was satisfied.

The Union administered the original training program and acted as the contact service for the courts. They eagerly handed over the program to MJI. Under the administration of MJI, the translators were paid directly on a fee per service basis with MJI taking a ten percent administration fee. The institute then billed the courts and received reimbursements months later. Under the Union administration, translators billed the courts directly and had to wait months for payments, which was problematic for people who had no regular income, and preferred to see the fruits of their labours more readily. Translator services proved to be popular in Cape Breton, particularly when the court worker program increased the visibility of the service. The following interview excerpt illustrates the importance of the translator program:

The ones who did not call for a translator were having a tremendous amount of difficulty with the courts, and therefore they would answer to questions they did not understand, and ultimately, they would get themselves into trouble. A simple preposition, for instance, is a great example. I attended a murder trial as a translator where the prepositions, in and on, were very, very crucial. I managed to pick it up before it got by the judge and the jury, that this woman was saying that she shot her husband when he they fell on the bed instead of when he was in the bed, a big, big difference. The Crown contented that he was in the bed when she shot him, when she was trying to say that he was on the bed after they had wrestled. So those are the problems that we are up against. Even if a Mi'kmaq person speaks English, still they don't appreciate the impact of those things, like those prepositions. They get themselves in big, big trouble because they would have answered yes he was in the bed, thinking that they were speaking wrong English or something. Those are the other reasons Mi'kmaq people ended up in jail. But what we wanted to do was besides spending a lot of time dealing with them after the crime is committed we wanted to deal with them in the after care level

because we felt we had a much better understanding about reserve life and what's expected and so on, what level of behaviour is expected.

Despite the obvious need for translators, MJI soon found itself unable to sufficiently manage the program. With no administrative operating budget, MJI was hard pressed to pay their translators. Translators demanded payments, which put MJI in financial jeopardy while they waited for the courts to make payment for the service. This financial insecurity quickly trickled down, increasing trepidation in the translator cohort and causing maintenance problems. The training budget of the program was not renewed and the demand for translators unmet, as their membership, frustrated, declined.

After a call for applicants, three court workers were hired, and offices opened in Millbrook, Halifax and Membertou, a far cry from the original staffing requirements of five full time and ten part time workers. The one justice worker, who was hired to cover the five Cape Breton bands and the numerous courts therein, immediately became overwhelmed with cases. Within the first year of the program, he alone was handling more than two hundred cases per year. With so many cases, it was difficult to facilitate follow up and referrals. MJI justice workers had quickly become another cog in the mainstream justice processing machine, and subsequently had no time, or opportunity, to advance alternative Mi'kmaq practices, the central goal of MJI. Mainstream justice appreciated the Mi'kmaq justice workers because they reduced the number of failures to appear, provided services that meant fewer delays in court, and facilitated clerical support.

A contradiction emerged within the daily operations that troubled the workers; they wanted and were asked to provide victim services, but at the same time they needed to help those charged, and the nature of the adversarial system did not permit them to do

both. Victims were further marginalized in this framework, and no staff or programs were available to assist them.

In addition to handling daily court interactions, justice workers also provided a number of support services, such as emotional and therapeutic counseling, referrals to health and social service agencies, and even transportation to and from courts. In the case of the Cape Breton worker who lived in Eskasoni, his job became a twenty-four hours, seven days a week position. People would contact him at all hours of the day or night, and sought counsel whenever they met him at hockey games, or even at the local store.

As word spread about the Mi'kmaq Justice Institute, new demands for information regarding fishing and hunting guidelines, human rights, treaty rights and aboriginal title, put a great deal of pressure on the organization. However, they did not have the infrastructure, or the capacity to handle such requests for information and service. The mandates of the program quickly convoluted and case protocols were dispensed with as they tried to please everyone. The mandate to deal with any and all aboriginal persons in Nova Scotia reflected ongoing jurisdictional conflicts. Native Council complained that they made referrals to MJI that were not followed up and saw this action as representative of their historical alienation from on-reserve services. High caseloads forced a priority sequencing that reflected the on-reserve structure. Unable to help every aboriginal person, some people fell through the gaps.

Certificate Training and First Nations Governance

During March 1997, MJI explored staff expansion and training options and developed a program in conjunction with the University College of Cape Breton located in Sydney, Cape Breton. As with any new university program, the establishment of the

Mi'kmaq Justice worker certificate program took a great deal of time and energy. One of the goals in establishing such a program was to generate the formation of knowledge that would qualify the trainees according to standards acceptable to the mainstream society.¹²⁶ MJI wanted use the court worker training program to establish a First Nations Governance Advisory Service. This service was envisioned to empower Mi'kmaq communities in the development of an infrastructure for governance, leading toward self-governance, particularly as related to community leadership, legislature and judiciary areas; clearly not your average court worker training program. The impetus for the governance program stemmed from Indian Affairs directives pushing bands to exercise legislative powers under the *Indian Act*, and for enforcing by-laws, a process which some saw as a huge cost off-loading endeavour by the department, one that is disguised in more acceptable gloss as a push toward self-government. MJI picked up this thread from the Union, and manipulated the parameters to suit their justice needs while appeasing Indian Affairs.

Eventually, a justice training program ran with ten students, including the three MJI court workers. Unfortunately, few people were qualified to teach the Mi'kmaq content of the courses, and the executive director, already working at capacity, had to teach or else risk losing the program. The Board of Commissioners reluctantly decided that the Executive Director would take an active role in the instruction of the students beginning in May 1997, which took her away from her everyday administrative responsibilities. Thus the record keeping demands of mainstream justice and the government funders, fell casualty to desired program expansion. MJI was too busy to

¹²⁶ I am thinking of Foucault's analysis of discipline and the means of correct training in *Discipline and Punish* (1995).

verify the demand for the program, and without verification of its operations, funds were upheld. While the Mi'kmaq Justice Certificate Training/Governance Course provided the much needed, holistic training for justice workers, by the time the students finished the course requirements, the Mi'kmaq Justice Institute was in serious financial trouble. Fees owed to the University College of Cape Breton for students' tuition were not paid, and the students could not receive their certificates, nor could the Institute offer them employment as anticipated according to the original plan.

Redmond and Hillier conducted the first federal audit in June 1997, and made several recommendations regarding financial and staffing operations and management functions. They noted a shortfall in MJI staffing, arguing that in order to achieve its desired mandate to manage everyday business, they had to hire more staff. Without additional staff, the institute could not devote the appropriate amount of time needed for recording and maintenance of records. The audit also recommended an increased segregation of duties of the Executive Director, who was over involved in every project, and thus unable to spend the time needed for proper administrative duties. The federal and provincial government did not heed these early warnings, and failed to provide the institute with the core resources needed to ensure its success. Regardless, the people of MJI persevered. Between June and December 1997, the Executive Director and several Board members began preliminary work researching issues of Mi'kmaq customary law. The Executive Director and selected Board members traveled to meetings of the National Crime Prevention Association, Native Court Workers, and the Aboriginal Justice Directorate, promoting the program and seeking additional funding. Board meetings were held sporadically.

In June 1997, an agreement reached between Island Alternative Measures and MJI brought an additional program to the fold. MJI became responsible for the administration of the Mi'kmaq Young Offender Project [MYOP], a project originally under the Union's administration. Mi'kmaq youth in Cape Breton in trouble with the law were eligible for a Mi'kmaq program to address their problems. A Memorandum of Agreement was signed between the Minister of Justice and MJI to use monies to defray costs associated with continuation of MYOP, as a community based model for the Cape Breton bands. Prior to coming into the fold of MJI, MYOP, a strong program with a solid reputation in the justice community, had its own director, staff and mediation program, which were maintained under MJI, and after its collapse. It was not until June 1998, a full year after MJI began administering MYOP, that a Memorandum of Understanding was signed with the Provincial Department of Justice to authorize the delivery of young offender programs and the transfer of funds, typical of bureaucratic morass in which MJI had to operate.

Too Many Puppet Handlers

In early 1998, the Court Worker Certificate Training program continued and efforts were made to secure other sources of funding for MJI programs. Increasing demands on MJI by Mi'kmaq political interests to pursue areas of justice other than court worker, translator, and MYOP programs, diverted attention. Mi'kmaq political interests wanted MJI to develop, a para-legal research service, and Band Governance projects, through an expansion of Band by-laws, particularly in the area of Fish and Wildlife protocols and enforcement. While all of these endeavours were critical to Mi'kmaq legal culture, they emerged as clashes of legal consciousness, each embodied by different

political and interest groups, but all working toward the similar goal of Mi'kmaq juridical sovereignty. Too many puppet handlers pulled the MJI in different directions. Those that controlled the money were able to shift the direction of the program, and consequently, the mandates lost focus and moved further away from core legal cultural development.

Research conducted on Band Governance sought consultation from community members regarding who should administer resource use and enforcement. A final report submitted in July 1998, recommended utilizing the Grand Council as a potential enforcement / adjudicatory body for offenses within resource utilization and treaty-based rights. MJI took up this recommendation by designing and seeking funds for a training program in mediation for members of the Mi'kmaq Grand Council. The Mi'kmaq employment training service provided the funds, but the course did not materialize as other demands from Indian Affairs diverted their attention yet again.

This time DIAND requested MJI take on wills and estates as part of their mandate. They received funds to develop a training package and curriculum, which would allow MJI to provide expertise in the education and promotion of Mi'kmaq wills and estates, an off loading from Indian Affairs who found it very time consuming and costly settling estates. MJI sought a coordinator for this project. However, no one was hired and the Executive Director assumed that responsibility, but was unable to carry the task to completion. Prior research in the area of wills and estates found Mi'kmaq persons resisted the notion of making wills based on cultural concepts of death and inheritance that did not fit well with binding legal documents.

The MJI tried to fulfill the mandate of community networking by holding information sessions. The most successful endeavor was a national conference held in

partnership with the Aboriginal Justice Learning Network. Set in Membertou, Cape Breton, aboriginal and non-aboriginal justice officials and police, gathered for a three day conference called 'Aboriginal Peoples and the Justice System: Joining Forces'. Special emphasis was on elder participation, and on the themes of justice as community based healing. MJI used the conference as a platform for its agenda, that aboriginal people have the right and capacity to implement their own justice systems, from their own perspectives. They also wanted to publicize the fact that many of the Marshall Recommendations still needed implementation, and to bring to light that insufficient funding, and lack of government will were the biggest obstacles to their implementation. In a statement made by the executive director of MJI at the conference, she reiterated a sentiment widely shared among the Mi'kmaq, that the province must provide Mi'kmaq communities with the funding to develop its own justice system.

On the surface, MJI was making positive inroads with the mainstream justice community. In June 1998, the organization received the Canada Law Day Award, and recognition in the form of a 'Salute' from the National Strategy on Community Safety and Crime Prevention, by Minister of Justice Anne McLellan. Beneath the surface, ongoing tensions over money were exacerbated by the failure of the director to submit financial reports. Increasing demands for justice programs in the communities began to put pressure on the skeletal staff, and resources, stretched to their limits, started to run out.

The Mi'kmaq Young Offender program, initially located exclusively in Cape Breton, began a much needed expansion into mainland communities, without any significant increase in funding or staff. The three court workers, and the MYOP workers,

were over burdened and beginning to burn out. Financial instability added to stress levels. By January 1999, a marked increase in requests for Mi'kmaq Justice forums occurred as sentencing circles, and Mi'kmaq justice circles, were recognized by the courts and desired by community members for offenses committed by adults as well as youth.

The justice forums and justice circles held by MYOP require community participation, and coordinating preparation time poses specific challenges that are impossible to meet without adequate staff. Training and maintaining volunteers are difficult in small communities were one, the volunteer cohort is limited, and two, where people who have time to volunteer are usually unemployed and need compensation for their time. Initially MYOP enjoyed a large and active volunteer group in Membertou and Eskasoni; however, volunteer participation declined as MJI experienced financial and structural problems, which negatively influenced staff morale and capabilities in all of the programs under the umbrella.

In February 1999, there was a Board of Commissioners meeting during which a selection committee for new applicants to the Board was struck. In the past year, Board participation and membership declined as members were finding it difficult to schedule meetings, due to short notice given by the Executive Director, and due to their heavy workloads in their other positions. Board morale was dwindling as repeated efforts to secure core funding failed. Replacement of Board members was problematic as it was required to get representation from the original five Mi'kmaq political interest groups together to approve selections. This was never accomplished as Native Council had pulled out of the tripartite process.

In April 1999, MJI payroll bounced, and the translation services provided by MJI were temporarily suspended. By May of 1999, the staff had to be laid off, and the Mi'kmaq justice worker program ceased operations. In May 1999, alternative funding sources secured MYOP maintenance, and administration of MYOP reverted to the Union of Nova Scotia Indians, where it remains. It is the only program to survive the collapse of the Mi'kmaq Justice Institute.

MJI - Gone But Not Forgotten

Efforts made by the Mi'kmaq to justify, establish, and operate their own justice system stemmed specifically from the push of the wrongful conviction of Donald Marshall, and the Marshall Inquiry Recommendations. More generally, the Mi'kmaq demand the right to control their own justice in response to centuries of subjugation at the hands of the colonizers. Furthermore, the contemporary manifestations of systemic discrimination, racism and social inequality, suggest Mi'kmaq controlled justice is necessary. Symbolically, the Mi'kmaq Justice Institute represented an opportunity to challenge that inequality, and a chance for significant social change.

The evidence demonstrates the many obstacles the Mi'kmaq confront as they try to wrestle control of their institutions from the state. To use Bruce Miller's (2001) concept, the 'problem of justice' for the Mi'kmaq has forced them to focus on resolving the pressures and difficulties imposed on them by the dominant society at the cost of doing justice internally. Clearly the Mi'kmaq Justice Institute was confined in their attempts to accommodate the internal differentiation of emerging power relations within their communities, by managing relations with the dominant society and forced into establishing a system that met only external evaluative standards and principles. The

negotiations were one-sided. The governments manipulated the internal conflicts with a deft hand. The internal crises became elevated, distracting attention from the larger issues, and allowing the government to make their conservative offers seem generous. The reality was always, a take it or leave it attitude, which left little room for embracing the significant innovations the Mi'kmaq generated, and even less opportunity for real control and empowerment for the Mi'kmaq. As anthropologist Wayne Warry notes, "Any government reform is constructed on the conservative notion that Aboriginal people are poised to assume control over a Western system of justice" (1998:195).

The Mi'kmaq direct their resistance, and shape their legal consciousness, in opposition to the dominant society's shortsightedness. The failure of governments to understand that legal change in aboriginal communities can serve a number of imperatives of community development is a remarkable weakness in good government. Anthropologists, such as Warry and Miller, have found this to be a recipe for disaster, and in the Mi'kmaq world, it is perceived as another moment of 'they set us up to fail'. An executive of the Native Council commented on the aftermath of the Mi'kmaq Justice Institute:

And like if you look at the saddest thing about the demise of the MJI or whatever it was, is that, how you categorize its demise is the issue. Was it a demise because of capacity? Or was it a demise because of unclear direction, or because of political agenda. I look at this MJI as a demonstration project which failed miserably but why did it fail? It failed because it was never meant to succeed.

It did not have its act straight, not by the fault of aboriginal people. Itself it was a political nightmare, driven by aboriginal and provincial political interests and the federal government was just sitting on the sidelines saying let it go. But I do not think the community would be, and maybe I am speaking out of turn here to President Cook, but I do not think the community would want to get into another hell like that for two years and have nothing. I do not think aboriginal people in Nova Scotia no matter where they live want that. No one has right to play with peoples' lives like

that. No one has the right to say, I am going to provide services, and then not provide the services. No one has the right to raise the expectations of an aboriginal person and say we will provide you with court services and then not provide them that is tantamount to creating a denial. That is exactly what happened to Donald Marshall. He was denied the process.

As Warry found:

Given the social determinants of conflict, alternative justice programs must be flexible enough to assist in the re-weaving of the social fabric of communities. Aboriginal justice, therefore, cannot simply duplicate institutions or programs within the criminal justice system and should not be developed as an adjunct to existing criminal justice programs - for example, as a method of siphoning off 'less serious offences' or decreasing pressure on already overburdened courts. These may be the results of Aboriginal justice programs, but they should not be the rationale for the development of such programs (Warry 1998:195).

The programs critical to the cultural revitalization of Mi'kmaq justice did not have an opportunity to address the problems central in Mi'kmaq daily life, because the programs were too focused on reproducing mainstream programs, with Mi'kmaq names and symbols thrown in for good measure. However, the Marshall Recommendations, and the MJI, provided the seeds of change and the roots of power now manifested in Mi'kmaq legal consciousness. The collapse of the MJI was a devastating blow to all directly involved and to the communities in general. Indeed some of the blame landed squarely on the shoulders of the director. Several people mentioned they do not want to be associated with the taint of the organization, and have moved on to other work. However, the wider community sees its failure as just another government initiative gone wrong, another 'project' designed, as one interview participant said, "to make it look like they are giving us everything when they give us nothing". Despite the failure of the Marshall Recommendations to generate any long-term radical changes within Mi'kmaq justice at the present, there have been positive changes in community based justice. As Sider points out:

... Native peoples must continue to struggle and that these struggles must continue to divide native peoples, partly antagonistically, from one another. One reason why this is so is that none of the available strategies for coping with domination can possibly be very effective, or effective for very long. Isolation, confrontation, accommodation, opposition: all have their partial successes and their costs, their adherents and their opponents (Sider 1993:280).

Through the ongoing work of the Mi'kmaq Young Offender Program, and their continued resistance to the dominant society's control, avenues for community controlled justice are being made available through a number of exciting strategies and innovations. Mi'kmaq employ informal, culturally specific juridical mechanisms on a daily basis and MYOP has incorporated some these ideas, beliefs, and practices, and put them to use in ways that meaningfully address problems from Mi'kmaq perspectives. The strategies used include the points of isolation, confrontation, accommodation, and opposition.

Unama'ki Tribal Police Service and Eskasoni Court

Before moving on to the community ethnographies, I present a snapshot of the Unama'ki Tribal Police Service and the Eskasoni court, two final offshoots of the Marshall Recommendations that have profoundly affected Mi'kmaq legal consciousness and their legal cultural productions. The history of this tribal police program mirrors that of MJI, and it too is a program that was 'set up to fail'. Once considered the integral link in the movement toward community based justice, the tribal police service ran into funding deficits, lacked sustainable provincial support, and was forced to close after years of arduous planning and implementation. Unama'ki Tribal Police Service, like the Mi'kmaq Justice Institute, shut down before it got off the ground.

As Clairmont noted in his analysis of Native Justice in Nova Scotia after the Marshall Inquiry:

In the case of policing native people, community-based policing holds especial promise. Its focus on partnership and collaborative problem-solving with community interests is very relevant in a situation where significant native offences are of the social disorder type involving person with close ties to one another. It is particularly appropriate too since, as we have seen, existing police-community relations are so often diminished by a legacy of fear and stereotyping and clearly much greater depth of understanding has to be offered...Policing initiatives must include equitable and culturally sensitive delivery, directly linked to the participation of Indian people in the direction, administration and operation of Indian policing services They [Mi'kmaq people] want a policing style that is related to their needs and which is oriented to prevention and problem-solving (Clairmont 1992:21).

The Mi'kmaq had been lobbying for control over policing since the 1970s. It was not until Marshall that the demands were taken seriously. In response to, but not as a direct recommendation of the Marshall Inquiry, the Unama'ki Tribal Police Service [UTPS] began in 1994 under the umbrella of the federal First Nations Policing Policy. UTPS was to provide policing to the five Cape Breton Mi'kmaq communities. Control over policing was perceived as a catalyst toward self-governance for Mi'kmaq First Nations by the nation's leadership. It was hoped that UTPS officers would be able to look at incidents of crime as a problem, and in doing so, seek out the root causes of the crime so that appropriate measures can be taken to resolve the problem rather than merely punishing the crime.

Within the first three years of its operation, the UTPS had three different chiefs of police. The job was extremely challenging because of inadequate staffing to effectively police the areas under its jurisdiction, and inadequate funding to provide training and salary incentives to keep the staff they had (UTPS Business Plan 2001). UTPS was constantly fighting to gain legitimacy in the communities and faced opposition both internally and externally. In a letter to the Aboriginal Policing Directorate, UTPS described the challenges they faced:

The Unama'ki Policing Service is committed to providing quality policing, and especially community-based policing philosophy and practice, in all the First Nation communities it serves on Cape Breton Island. This is a significant challenge for our newly created police service since resources are quite strained, community expectations are quite high, and the levels of social problems and conventional crime are very high in our jurisdictions. The base complement is scarcely adequate for policing geographically dispersed communities where the level of conventional crimes and crimes of violence as auditors have shown is at least five times the levels encountered in the RCMP jurisdictions and three times that found in Municipal jurisdictions in Nova Scotia. As in many First Nation communities the demand/expectation for policing is quite high; **calls for service have increased 400% since the Unama'ki Policing Service began in December 1994** (emphasis mine)(in Clairmont 1999:7).¹²⁷

It was found that communities tended to report crimes more often when policed by UTPS, which gave the perception that crime was on the increase. Increased reporting required the availability of more police services. The main police station was located in Eskasoni, at least a thirty minute drive from Membertou, and forty-five minutes from Waycobah. One of the key complaints made by community members was UTPS's poor response time to their calls, and a lack of visibility in their community (Clairmont 1999:66). That these complaints were valid consequences of the lack of resources. They also mirror inter-community rivalries between Eskasoni and Membertou that manifest themselves in a number of different ways, from the adequacy of policing service, to sports competitions, to accusations about which is the more 'real' Mi'kmaq community, to competition over which organization is going to get the core funding.

In October 1998, the Unama'ki police station and lock up, located on the main street of Membertou, opened for business. Immediately it became the target of vandalism. Once set on fire by several disgruntled youth and since refurbished, it now sits empty, except when used as a fishery training program classroom. Currently Membertou is

¹²⁷ This letter resulted in a needs assessment and a community survey on community perceptions of policing and justice issues by Don Clairmont on behalf of Unama'ki Tribal Police.

policed by the RCMP, and there is a perception that while crime rates have not increased on the reserve, the number of people getting caught has increased due to that police presence.

In my interviews with Membertou residents, they raised issues of policing, and contextualized their discourses favouring community based policing in terms of ‘what happened to "Junior"’ [Donald Marshall] would not have happened if tribal police existed. They hoped that community tribal police would prevent discriminatory policing, end racism, and offer culturally sensitive community safety. There were many interesting contradictions involving community perception about the tribal police and the RCMP. For example, a single mother of two, this Membertou resident in her mid-twenties had problems with Unama'ki services. Despite the local sub-station, police officers were not in regular attendance at Membertou.

JM: What are your feelings about Unama'ki police?

They are slow. You could be killed by the time they get here. That night the drunk came to the door, I kept asking them to come, and told them I wanted the city because they are so slow. I will call Unama'ki first and if they are taking long I call 911, and 911 keeps putting me through to the dispatcher [tribal dispatcher]. You have to call Eskasoni usually, but if it is something serious, then I call 911. That lady said she would have to get approval or something to bring in the other police.

JM: That is a lot of red tape in an emergency.

Yeah.

Another forty-year-old, seasonally employed, male Membertou resident had different problems:

JM: What did you think of Unama'ki tribal police?

Ha, very funny. I did not mind them, but I did not like that time I got arrested. I was released at 4am, and I did not know what time it was. They normally let you out at 11pm or 12pm, and in the meantime, at that time there was no vehicles around. In Eskasoni, I got to East Bay at seven in the morning. I told my lawyer and my lawyer fixed that problem. He told the judge what happened. They reduced the charges down low because it was not

fair. So if they let go of somebody, to make sure they have a ride. They got the job to take you home really, that is their job and they were kind of rude. Not all of them, but one or two.

The following excerpt comes from an interview with a female elder from Membertou who once volunteered as a court and prison liaison person. She was greatly troubled by Donald Marshall's wrongful conviction.

JM: Do you think the Mi'kmaq community here should be able to make and enforce its own rules? Have your own justice system here?

I don't know. I really thought when we got the Mi'kmaq police we were all set, but then I knew how they worked. It was like these gentlemen that went into that force were very nice men, as soon as they don on their uniforms they were different all together.

JM: How so?

These men that I knew, especially in Eskasoni, not as much in Membertou, but the ones in Eskasoni, they were very kind and very nice. I guess that is how they are trained. I don't know but, they were cruel. They were too cruel. I have heard elders say in Eskasoni, you know women, men talking, 'that is not how you do it', 'that is not how they should be working'. They used to come up here when they were on their time to work, and I have never seen so much trouble. And now they are not here, and it is as if the calm has come back to Membertou.

JM: Why is that?

I don' know. Because they were very, I don't want to say violent, but it was just the way they showed themselves. I could not understand it. When I seen a couple of guys, and they are stopping our little kids on the road trying to search twelve and thirteen year old girls. They would not believe them, and I know these kids they don't drink, and their parents don't drink. And when a police officer stops you, that is the first thing, you can't do anything, at least at that time they think they can't. I think more of that should be taught and brought up in our communities, that they have no right to search you, or do they? I don't know.

I mean if you get a policeman from town, they don't search you right there, they take you into town. If you are lady they will get a lady officer to search. Right?

JM: They did not do that?

No.

JM: If you could tell them how to do it, [police the community] what would you tell them?

Well they were not that nice to their own people. For me, when you talk about Indian people, they are supposed to be kind, they are supposed to be understanding. We are supposed to be more spiritual. Your way of understanding, you go to the elders, and you speak to the elders, and this is

how they tell you, and this is how you do it. Once they had that power, that power, they were just all together different. I could pick out a few that were very nice, and there were some I could not understand. After they leave with their ordinary clothes on they would be so different. 'I am the authority'. They wouldn't say it, but it showed. And this is what strayed us in the first place from the police, and the justice in town. We didn't want them, we didn't want that bullying. We did not want these white people coming up here telling us what to do. But this is how our police officers behaved when they had the opportunity to serve us.

JM: So they were behaving like white people?

That's right, they were just, I don't how they were trained. It made it worse because they were our own people, and they would be more understanding. I find they did not even listen. I found that out when I talked to some people, they don't even listen, they just come into your house, they grab whoever they want and drag him out. They can just shove you aside without even standing there to listen, to talk to you, what you have to say.

JM: Before white police was there anyone in the community that had the power to help control disputes and help control problems?

One time ago? Well we had our own. It was a police constable, he was a big man, I remember him Mr.[]. There again you see the fairness. I imagine he was good to some people, and I imagine not good to some. I did not know that well myself that much. I hear people talking I guess. The law, it wasn't fair some people and for some people it was.

This resident neatly sums up the major contradictions with indigenous policing, court systems, and Mi'kmaq law ways or tplutaqan. Mainstream ways do not fit with Mi'kmaq ways, and when they are imposed on communities, no matter how dressed up to look like a Mi'kmaq process, they are not Mi'kmaq processes, and therefore tend to cause more harm than good. Programs that focus outward are problematic for Mi'kmaq communities. As anthropologist Bruce Miller notes, "Some efforts at justice are derailed by their attention to managing relations with the outside world, thereby eroding their capacity to come to grips with local issues of power and the critiques of their constituents" (2001:207). This has been the case with the Mi'kmaq Justice Institute and the Unama'ki Tribal Police Service.

Eskasoni Court

The Eskasoni Provincial Court, Marshall Recommendation #20, instituted in 1998, sits twice a month in the basement of the Mi'kmaq Lodge Treatment center. Temporary partitions maintain a level of privacy for clients of the treatment center and court proceedings. Formerly, Eskasoni residents traveled to the Provincial Court in Sydney. At forty kilometers away, those without vehicles or means to hire transportation, found it very difficult to attend. The relocation of the court decreased the number of bench warrants issued for failure to appear charges. Court day was originally every other Thursday. The day was switched to Tuesdays to avoid coinciding with the day after 'welfare Wednesday'; a day the presiding judge suggested resulted in a number of failure to appears. Welfare days in all communities tend to mark an increase in alcohol consumption, but they also mark the day when many Mi'kmaq families leave the community to go shopping in town to lay in supplies for the next two weeks. An interview participant who works in Eskasoni noted:

I know kids dread welfare day in Eskasoni because their parents go to town, get liquor and get drunk. They do drink on welfare day, but not everybody, that is a shift. The ones that are drinking on welfare day are the ones that have no kids. It is not a dreaded day so much. There is not so much neglect and the younger parents are more responsible, and they get a lot of help from their family.

A non-Mi'kmaq legal aid lawyer assigned to Eskasoni court describes her experiences working there.

JM: How do you find that court?

It is really unfortunate so many people are being charged. It works well for its purpose in that it was established in response to the Marshall inquiry, and I view it as a stop gap measure. It is held on the reserve in Mi'kmaq Lodge, and there is an aboriginal deputy sheriff, and the Unama'ki police who police the area. The charges are primarily from them. But it is a white judge, and a white prosecutor, and white legal aid lawyers, so the language barriers are there. There are translators, there is one who is there every week court is

held, unless there are problems. We have experienced problems since the demise of the translator service through the Mi'kmaq Justice Institute. I think there were funding issues.

Translation is an issue in any court where Mi'kmaq people are present. In terms of dealing with the court in general, it is a bit of a fallacy because we are still bringing our justice system to the reserve, and it is not what I think was envisioned by the Marshall inquiry in terms of actual aboriginal justice. There is however creativity in terms of sentencing. The judge has at least on one occasion made use of sentencing circles. Diversion is being used for adults and the Mi'kmaq Young Offender Project [MYOP]. There are strides being taken, but the language and cultural issues are really major in trying to deal with aboriginal people.

Below this lawyer highlights a point commonly raised by persons working within Mi'kmaq justice and the mainstream; that First Nations people are more likely to plea guilty to simplify the case so that they can avoid a long drawn out process, regardless of the consequences and regardless of their innocence. She clearly points out that translation is vital to the judicial process.

I am very mindful of the fact that there is no Mi'kmaq word for guilty, and that a lot of people just want to get it over with. I try to be cautious, if a client says I do not need translation I encourage them to get one, because even if they can speak English perhaps some of the finer points will be missed, or they will not be able to tell me the whole story.

What the translators provide is very significant for us.

JM: Do you have ideas of what would help fill the language gaps?

I wish we would have a Mi'kmaq lawyer who would take me completely out of the picture. I love it there, but it is a matter of trying to best serve the peoples' needs. They [Mi'kmaq lawyers] would be more in tune with the culture. I try to learn a few words and about the culture – understand, thank you, good morning. Legal Aid does have a hiring policy in place to hire indigenous blacks and Mi'kmaq.

Legal Aid may have a hiring policy; however, there are no Mi'kmaq legal aid lawyers in Cape Breton.

Most Eskasoni residents seem to favour the local court over other courts. There is a sense of ownership and some residents refer to it as 'our court'. Many of the people I asked about Eskasoni court laughed during their responses, with several people indicating

that humour was a major difference between the community court and the formal courts in town. A former youth justice worker with the Mi'kmaq Young Offender Program found the Eskasoni court to have a less intimidating atmosphere than the Provincial Court in Sydney.

JM: What do you think of Eskasoni court?

It is great. It is convenient. A lot of people are on welfare and they do not have vehicles, they have a hard time getting to Sydney court. Eskasoni court is not that formal or strict. When you walk in Sydney court you can hear a pin drop. When you walk in Eskasoni court it is like a bingo hall. It is the personality of the culture I guess. The judge knows. People do whisper. But people don't whisper in Sydney court because they are looked at with shame. It is relaxed.

All Mi'kmaq do not favor this relaxed atmosphere; some find it too relaxed, and therefore lacking sincerity and the severity associated with more formal courts. This translates into questions of efficacy. Several research participants have called Eskasoni Court a Kangaroo Court. As one female Membertou resident who works in Eskasoni notes:

JM: Do you hear about Eskasoni court?

Yeah they love going to it. They say it is kangaroo court. I have never been. It is a circus. People go there and have a good laugh. Its funny I guess. Eskasoni people say it is. If they are laughing about it I think it is not good.

A male respondent who had attended the court differed in his interpretation, finding the relaxed atmosphere more conducive to repairing harmed relations, something he has not witnessed in his many visits to mainstream court.

Eskasoni court is less intimidating. It is not like you see all these people down here [Sydney Court] being nosy, in Eskasoni everyone is there for a reason. It is a different atmosphere. I was there twice. You can see people making amends to each other right in the court. In the city court you are afraid the cops are watching you, and you are not supposed to be talking to this person. But in Eskasoni I have seen them laughing and making amends to each other. There is not a sheriff or two there. A lot of the people have been in the rehab, it is a familiar place, and there is a kitchen there, and it does not feel like you are in a box.

A worker at the Mi'kmaw Lodge finds Eskasoni residents benefit from the court being in their community. Again Marshall's wrongful conviction figures in this articulation, as are the other key events I associate with Mi'kmaq legal consciousness:

JM: What are people saying about Eskasoni court?

The majority of people rather have it on the reserve. Definitely.

JM: Why?

Those trust issues. As soon as you walk off the reserve, you lose trust.

JM: They feel more threatened by coming out to mainstream?

Yes.

JM: What is building that trust?

The trust is lost in history right, the history with the residential schools, and White Paper policy, and all that other stuff, Junior Marshall, racism. There is a lot of trust lost. Even the veterans that fought for Canada in WWI and WWII and they were promised farms and when they got back they did not get their land. Some people got CPs [certificates of purchase] but everything they were promised they did not get. So the trust is not there.

JM: Are there other things about the court people like?

The language. It's in Mi'kmaq. They offer translators. Judge is not Mi'kmaq and the Crown Prosecutor is not Mi'kmaq. We have a Justice of the Peace, Murdena Marshall. She is a judge. There are a lot of people capable of being a judge. The bailiffs are native. Probation officer is native, my wife. There are native lawyers out there now but they don't handle these cases. They are working everywhere else. There is no native legal aid.

I work with a lot of people in alcohol and drugs who are involved in the courts and their English is not great. They are strong Mi'kmaq that is their first language. That is where we miss the justice institute the most I would say. But the court in Eskasoni is a big plus.

A Mi'kmaq elder thought that the court has its merits in terms of convenience, and the ability of community members to support their family members should they have to attend a proceeding. But on the whole, the court does not offer any truly Mi'kmaq alternative.

JM: What do you think of Eskasoni court?

It is just a regular court. It is good economically so people do not have to travel. It is the same as any country court house. The only thing about it is that you have a support system. My son's community service order was not finished and he had to go to court again. I did not go, but my husband went with him, in town [Sydney] he [husband] could not go. The support system is available, and you are more apt to speak because the general audience is

your own people. When they go to town they just stand there. The atmosphere here is different. The people involved are all native, except for the judge and prosecutor. It is more comfortable.

JM: Are people better able to get at the root of the problem?

I think so, and they are able to speak for themselves, sometimes without a lawyer. Also they get to know the court personnel, and they know what to expect. They talk with each other with out the prejudice of law between them.

JM: Could they operate in all Mi'kmaq communities?

I think they could, and they should. Being tried in a foreign system, in a foreign place, is not good for someone hovering at the edge of balance of going to the good, or staying bad for the rest of their lives. It is an important time for the accused. The atmosphere can break them.

The court has been in operation for four years. As some people become familiar with it, there is a sense that some people are seen as able to manipulate the court toward favourable legal outcomes, without providing any resolution to the conflict that put them there in the first place. This is a phenomenon that has been noted with the Mi'kmaq Young Offender program as well. People seek loopholes in programs to try and control the outcomes, thus causing credibility and efficacy concerns.

I don't know. I have been to Eskasoni court with a few people a couple of times, and it is becoming a joke almost because we are community members, and we hear the stories the lawyers are presenting to the judge as defense, and I hear these stories, and the witness' stories, and you know they are outright, blatant lies. Listening, because I know the individual, I live in the same community. I know it is a bunch of crap from the lawyer, but as a community member I have no say. So how can you have faith in a system that is so easily manipulated?

JM: Are a lot of people using that court?

Usually people with peace bonds or impaired driving, assaults, B and Es [break and entering] and you see they will get a slap on the wrist most of the time. And then how are we supposed to find closure in that? My neighbour raped my other neighbour and he gets a slap on the wrist, and I am supposed to feel good about that? I am really disillusioned with that, only because the players are not of this community. The judge, the lawyers, the defense, they are not of this community so it is just a foreign system. It just saves on Indian people from traveling to Sydney. They are being prosecuted, or defended, or whatever, in a familiar setting.

JM: Are they getting less severe punishment here then they are in Sydney?

I have no comparison. When I have been there I just did not agree. The decisions were based upon lies, so how could the thing be just, or the punishment just?

JM: What could be done to resolve that?

Getting our own people in there.

JM: So having Mi'kmaq lawyers and judges?

Having Mi'kmaq lawyers and judges that are part of the community; that live in the community. You have to be here, you have to be spiritually, physically, emotionally linked to understand what is going on here. To be able to understand the context of what we are living here, because it is very different Jane. What is going on here, and how it is going on, is nothing like what is going on in the outside.

These examples demonstrate forms of resistance that challenge the structures of hierarchies of authority that have long been sustained by the hegemony of mainstream justice, the power of the judge, and the adversarial nature of the prosecutor. Courts demand a social interaction predicated on deference, respect, constrained emotions, a sense of seriousness that does not allow much room for humor, and, perhaps most important of all, relies on truth telling. That Mi'kmaq persons lie about the problems that brought them too court, is no different than other persons going to court wanting to protect themselves from punishment. However, in small scale communities, like Eskasoni, where people are more likely to know what has happened, cooperating in lies may be seen as an inversion of the authority of the court with the power of knowledge, of exclusive truth, held by community members, reversing or refusing to acknowledge the lines of authority held by the court (see Ewick and Silbey 1998). Even though they may be in crisis and conflict with each other, when faced with a common enemy, in this case the foreign legal system, community members can, and do, act in concert against the law. Having the court in the community provides a consciousness of opportunity to enact resistance. Perhaps bolstered by the familiar surroundings, peer support, and in knowing that failure to find justice in this court is not the fault of the participants, but the failure of

the foreigners for trying to impose that system where it does not belong, legitimates acts that ultimately may lead to further injustices. Opponents in court may shift from being community members in a dispute against each other, toward joining forces against the system. Because this system is representative of definitions and labels that have contributed to the domination of Mi'kmaq peoples, court experiences reify the positions of self and other, creating conditions for conscious resistance, both individual and collective. This is not to say that every case that goes before this court is an act of resistance.

When compared to the alternative in Sydney, this court is a preferred route, and people in general seem more satisfied with the outcomes. In an interview with the presiding judge, he noted that victims' relatives were more likely to attend the Eskasoni court, compared to the outside court sittings. He is a strong proponent of interpreters and court workers in court.

It is interesting that some Eskasoni residents do not see Mi'kmaq justice alternatives as more valid than the court procedures, given the emphasis on Mi'kmaq values and practices within the community at large. A surprising number indicated that that procedural conflicts could be resolved simply if the operation was indigenized, rather than changing the process itself. Indigenization schemes touted in the Marshall Recommendations have yet to materialize, even though ten years have past since the report. In fact, there is an increasing voice in Mi'kmaq communities that demand indigenization, particularly in light of the failure of the Mi'kmaq Justice Institute and the closure of UTPS, which some say, is a big step backward from the autonomous justice envisioned by others.

In addition to the Eskasoni Court, Eskasoni is served by a Mi'kmaq probation officer, a position recommended [#30] in the Marshall Inquiry. She is the only Mi'kmaq justice personnel working within the mainstream system in Cape Breton, with the exception of police officers, and the occasional prison liaison person. A fluent Mi'kmaq speaker, she resides in Membertou and has expressed that she would not feel comfortable being the probation officer for her home community because it would create conflicts. This complaint mirrors the complaints of the former court worker for Cape Breton who could not go anywhere without people asking him for legal advice and representation.

The probation officer takes care to help Mi'kmaq people have a voice in court. In her career, first as a Youth Justice Worker with the Mi'kmaq Young Offender Project, then as probation officer, she has found that one of the biggest problems facing Mi'kmaq people is that they do not speak out for themselves. With the closure of the court worker program under Mi'kmaq Justice Institute, many Mi'kmaq people are going to court without any protection or support, which leads to unfavourable outcomes and in some cases, unnecessarily unreasonable dispositions. In cases of domestic violence, police are required to press charges, putting family and domestic problems into an arena where resolutions tend not to be culturally specific. While banishment may have the appearance of being a Mi'kmaq juridical strategy, it was not generally applied as a strategy for interfamily problems, except in extreme cases, where outside interference is not welcomed, because problems are usually worked out between spouses and their extended kin. Large families find court induced separations difficult and impractical, for fiscal and personal reasons. According to the probation officer:

Family and common assaults are usually worked out. Judges have undertakings for when people are released and they are told, in the last few

months, I noticed the judge is sort of banishing some people from the reserve by telling people to stay out of Eskasoni until their next court day.

JM: So there are a lot of people going through now without any help?

Yes. And a lot of natives do not speak out. A lot of them don't speak out at all. I have people on undertakings. When they go back to court or when they are on probation, they were told to stay away from a person, like a wife or a girlfriend. I have a few of them that had a family of five. Parents bicker and one gets drunk, and one gets kicked out, and gets arrested, and goes to jail. And there is a mother with five kids and no support, and when the person gets out of jail he goes home, but the order says he has to stay away. Most times we have to take it back to court to get the judge to take it off. It was just a fight.

JM: The court needs some education too then?

Yes a lot of lawyers do not know much about native people, and the conditions on the reserves. They should at least know.

Eskasoni court offers a juridical venue that appears more sensitive to Mi'kmaq needs, and allows for the reparation of some relations between community members. The ways people talk about court indicate that it is far from a perfect solution to the problem of justice in Mi'kmaq communities. Of all the Marshall Inquiry recommendations it is perhaps the most conservative, and reflects more the mainstream legal consciousness than those of Mi'kma'ki.¹²⁸

¹²⁸ Wayne Warry discusses the conservative approach of the government and the Aboriginal Justice Directorate that funds and monitors only minor projects in aboriginal communities. Warry argues that "The lack of progress in this area is partially explained by the fact that the criminal justice system is inherently conservative, and a primary instrument of colonial practice" (1998:165).

Chapter Ten: Contemporary Urban Landscapes

In order to situate Mi'kmaq legal consciousness and Mi'kmaq justice practices on the ground, I present contextualizing layers of Mi'kmaq culture and social organization as witnessed in the course of my fieldwork. With these descriptions I hope to foreground the cultural contexts of Mi'kmaq legal consciousness, their juridical practices, and their sociocultural complexities. By linking together the descriptive recordings of activities, and their connections to Mi'kmaq institutions, my aim is to develop an analysis of shifting legal consciousness, as embedded in the practical constitution of everyday life, and to delineate the external and internal sociocultural forms that constitute those shifting ideas and expressions. Legal consciousness is shaped through competing discourses regarding the legitimacy, authenticity, and efficacy, of practices and values identified as Mi'kmaq, both within communities, and between communities and mainstream society. Articulated against mainstream values and practices as oppositional discourses, legal consciousness is significantly impacted by the perceived and real failure of the mainstream system to provide koqqwaja'ltimk, justice, for Mi'kmaq and other aboriginal peoples.

I present the dialectic between past and present cultural activity to illustrate how identities are negotiated, through competing legal discourses, within the context of Mi'kmaq culture. From oral traditions of precontact life, to the cruelties of colonization, to the wrongful imprisonment of Donald Marshall, these histories shape the public and private debates constituting the contests of justice production, and their contemporary justice articulations.

There are twenty-eight Mi'kmaq communities in Nova Scotia. Each Mi'kmaq community is unique, but they all share some common traits in the problems they need to address, the root causes of those problems, namely colonization, and the challenges of dealing with the power structures of the outside society, and the social inequality produced in those relations. Thirteen of these communities are First Nations, a designation that customarily describes groups formerly known as Indian Bands, an Indian Act designation.¹²⁹ The term First Nations is politically loaded, and has proponents who argue it reflects empowerment, plurality and sovereignty, and opponents, who suggest it causes further divisiveness and competition within one nation. There are five First Nation communities in Cape Breton Island. Two communities namely, Membertou and Waycobah [formerly Whycocomagh] are the sites focused on here.

Membertou First Nation

In 1915 an Exchequer Court of Canada report, under the provisions of section 49a of the Indian Act, recommended the removal of the 'Indians' from the reserve at the city of Sydney, Cape Breton, in the Province of Nova Scotia. The reserve, numbered 28 in the Official Schedule of Reserves, was located on the eastern shore of Sydney Harbour. In 1882, the land was acquired under a grant by the Dominion Government from the Province to settle the Mi'kmaq. The location of the reserve coincided with long established Mi'kmaq seasonal round and marine harvesting practices. The site was considered by the town officials to be an adjunct of the Eskasoni Reserve, 25 miles away, because the Grand Chief of the Mi'kmaq resided in Eskasoni, and 'only' a Captain or sub-

¹²⁹ The First Nations are Acadia, Annapolis Valley, Afton, Bear River, Chapel Island, Eskasoni, Horton, Indian Brook, Membertou, Millbrook, Pictou Landing, Wagmatcook, and Waycobah. The communities are: Beaver Dam, Caribou Marsh, Cole Harbour, Franklin Manor, Grand Lake, Graywood, Hammonds Plains,

chief was at the Sydney Reserve. When Eskasoni Mi'kmaq traveled to Sydney to sell the products of their agriculture and handcrafts, they stayed in this community. Unlike Eskasoni, the Sydney Reserve residents had no lands for agriculture, but some men were employed as labourers, and a few women did some charring and washing in the town. The population of the community was growing as young people met, married, and raised their families there. In 1887, the construction of the Cape Breton railway cut the land in two, making one parcel on the shore side uninhabitable. The other side of the reserve abutted on to King's road:

... [O]ne of the principle arteries of the city, a highway very much traveled and used by the public, and upon which a large number of fine residences are built. No one cares to live in the immediate vicinity of the Indians. The overwhelming weight of the evidence is to the effects that the Reserve retards and is a clog in the development of that part of the city ... the removal would make the property in that neighbourhood more valuable for assessment purposes, - and it is no doubt an anomaly to have the Indian Reserve in almost the centre of the city, or on one of its principle throughfares And while the Reserve is too small for the Indians actually in occupation, we must not overlook that all the Indians of Cape Breton who come to Sydney reside on the Reserve during the time of their visit. And looking to the future, made wise by looking on the past of this Reserve, it appears that the desirability of a larger Reserve, a matter of expediency now will become imperative in the near future This removal should be a place outside its limits (Micmac News 1974:4).

The townspeople wanted the community moved out of sight in order to proceed with their development plans. The majority of the Mi'kmaq did not want to be relocated because they considered this land their home, and were connected to it spiritually, physically, and practically. Furthermore, it was close to their places of employment in town. Other lands set aside for the community in Caribou Marsh, well outside the city limits were uninhabitable, but provided a source of timber, which the Mi'kmaq procured and sold to the steel and coal companies for fuel. The town officials selected a site at a

marginal edge of town for relocating the Mi'kmaq from the shore. Regardless of opposition from the Mi'kmaq, the community was moved to its present location, away from their traditional fishing and gathering grounds, to the outskirts of the Sydney. The consequences of this move remain to be fully elaborated; however, it can be said that the relocation effectively rendered the Membertou Mi'kmaq less visible to their neighbours, reducing daily interaction and subsequently the flow of information regarding employment opportunities. The ejection increased the alienation of this community from mainstream society, and created serious economic consequences. To this day the band is seeking compensation for the removal from their traditional lands.

The community of Membertou is now located east of the harbour, adjacent to the city of Sydney, in the traditional district of Unamaki [Foggy Place] or Cape Breton. As mentioned in the chapter on Donald Marshall's experiences, it is an urban community that experiences a surprisingly high degree of separation from the surrounding town, considering the close proximity of the two societies. Membertou's population is 621 according to the 2001 census, showing a population change of 1.5% from 1996. Its registered population is 925 according to 1999 band lists, indicating that approximately 300 band members live away from the community. In the 1996 Statistics Canada census, 32% of the population, or 200 people, indicated knowledge of an aboriginal language, a number that is increasing with the implementation of effective language retention programs.

There are 217 private dwellings in the 0.45 square km land base. It is a small but expanding community. In summer of 2002, the first sidewalks along roads modified with speed bumps for traffic calming, lead to the newly constructed elementary school,

gambling houses, gas bar, chicken shop, and Union of Nova Scotia Indians headquarters.¹³⁰ There are four or five intersections marked with stop signs that read NAQA'SI, [STOP in Mi'kmaq]. The roads are often crowded with people walking, pushing strollers, riding bikes, and skateboarding. Formerly dogs roamed around freely but a recent band bylaw ended their freedom and reduced the number of dogfights and 'weddings'. Dogs now have to be licensed and tied up.

There is only one road accessing the community, Membertou Street, which turns off Alexander Street, a busy thoroughfare to downtown Sydney. At the opposite end of the community, across large fields and forested lands, are the Cape Breton Regional hospital, and the TransCanada Highway, but no road connects them at present. As Membertou's population grows, these lands will provide space for additional housing. Currently part of this land is considered for park development, a project that hopes to blend Mi'kmaq cultural aspects with eco-tourism and local non-Mi'kmaq interests.

The first building encountered upon entering the community is a bright white Catholic Church, located prominently up a hill and named after St. Anne, the patron saint of the Mi'kmaq.¹³¹ Across the street from the church is a gas bar and convenience store where there are often long line-ups of townspeople looking for cheap gas and tobacco. Most Membertou residents are employed within the community. Few people are employed off the reserve. One female elder, a life long resident of Membertou, suggested that few people want to work in town.

¹³⁰ Several community residents were outraged over the speed bumps and took jackhammers to dismantle one bump. Eventually the bumps were found to be too high and were modified and there have been no further public demonstrations. The bumps have effectively calmed traffic, particularly the speeding of non-residents, the reason for their implementation.

¹³¹ In 1972 Grand Chief Donald Marshall Sr. requested Sunday church services be conducted on the reserve for the residents who were attending church off reserve at St. Anthony Daniel's. The community wanted

Indian people do not like to work outside the reserve. They like to be inside the reserve because they got easy life. They don't have experience outside the reserve, they don't know how hard it is. Inside it is the laziest way, and they can goof off, come in late and all this crap. Half of them are drinking or sick. If they work outside this reserve they will never make it. What happened here they are too soft with them. The boss is too soft cause Indian and Indian. I worked my ass off at the hospital scrubbing, I worked in a convent and I scrubbed floors there, and I worked in hotels. I never missed a day. If they went out there they would not make it you have to be on time, you have to be sober, clean. They don't know. I don't think it will change. Easy money, they get away with it. Lot of them hired for the power line and half come home because it is too bossy for them, it is too hard.

This woman has taken common stereotypes held by non-aboriginal peoples, appropriating them to understand why people do not generally work in town. She highlights notions of difference between Mi'kmaq and non-Mi'kmaq. There are very few non-aboriginal people living in the community, and those that do live with their Mi'kmaq partners. One Mi'kmaq woman, whose partner is non-Mi'kmaq, reported being the target of vandals, which she attributes to her partner's ethnicity. They have since moved out of the community. Some residents do not mind if non-Mi'kmaq live in Membertou, providing they do not access resources set aside for Mi'kmaq. Others express hostility at the idea of non-Mi'kmaq enjoying the 'benefits' of community life, such as welfare, and other financial subsidies, and feel they should not be allowed to reside in the community.

Along the main street, throughout the core of the older neighbourhood, and into recently constructed subdivisions, are multiple family dwellings, apartment complexes, bachelor units, and single family homes that are brightly painted, some with fenced and landscaped yards, and other yards are bare, without sod. Housing remains a contentious issue in all communities, as population growth often exceeds housing allotments. While overcrowding is an issue for some communities, it is not a health crisis in Membertou.

their own Sunday because St. Anthony Daniel's congregation was growing and there were limits to the

Sometimes conflicts emerge over caring for property. The band owns most homes, but individuals invest in personalizing them and develop a sense of possession that is not in any way discouraged, except by financial institutions, which will not guarantee loans on homes in aboriginal communities because of ownership issues. Some homes are passed along within family lines, and the family deals with disputes over entitlement, or if necessary the band will step in and mandate transfers of property. When relationships end, as in separation or divorce, contests over entitlement to property occur. There are no well defined mechanisms of how to deal with allocating band / family property. Usually these events work out over time, but sometimes people use court orders to facilitate reluctant individuals toward making settlements or enforcing agreements.

One block down the main street is the band office, the biggest employer in Membertou. It contains the offices of a number of Mi'kmaq organizations such as the Mi'kmaq Culture and Heritage Association, and Membertou Economic Development. The front steps of the band office double as a congregation place where people hangout, watch the traffic, drink coffee and gossip, before and after conducting their business. Behind the band office is a large complex that houses a gymnasium and the senior's center. Next door are the children's day care centre and the ball fields.

Membertou has a number of sports teams, baseball, hockey, basketball, bowling, darts, and pool, are the most common. Beside the large parking lot of the band office is the newly built Membertou Wellness Centre, offering holistic health care facilities, with a doctor's office, and nutritional, mental health, and substance abuse counseling services.¹³²

services the priest could provide for the Mi'kmaq who attended there. To this day services are held locally.
¹³² As part of an infrastructure program the Wellness Centre was opened in 1999 to improve health delivery services for Membertou. It was built by Caribou Marsh Enterprises. It has nine offices, a board room and reception area, two doctor's offices and examination rooms. It houses a dental therapy unit, Medical

Membertou has recently opened two gaming buildings and is planning to build a retail mall and gas bar where the community borders on the town. Revenue from gaming goes into community economic development. The Union of Nova Scotia Indians head office is located on the reserve in another newly constructed complex called the Veteran's Memorial building. There is also a new elementary school in which Mi'kmaq language and culture are central to the curriculum.¹³³ Local businesses include several convenience stores, a gas station, a barber shop, furniture and office supplies, medical supplies, home oil delivery, parcel delivery, construction management services, computer products and programming, web design, plumbing and other construction services. A community radio station recently hit the airwaves.

Snapshots: Community Perceptions of Trouble

Membertou experiences periodic flares or cycles of trouble. Troubles described by the residents range from vandalism, to gang activity, to idle youth struggling with boredom and substance abuse. Assaults are not uncommon. The majority of criminal activity involves alcohol or drug use. Other problems stem from family feuds and personal rivalries. Over the past few years there have been suicides, murders, serious assaults, domestic and sexual abuse, and other types of conflicts. The following

transportation, Brighter Futures program coordinator, a community health nurse and representative, NADACA counselling services, adult care workers and prevention workers from Mi'kmaq Family and Children's services

¹³³ The Mi'kmaq signed an agreement with Indian Affairs and the province in 1997 transferring jurisdiction for education to the Mi'kmaq. Funding was to flow directly from the federal government to aboriginal communities and covered elementary, secondary and post-secondary schools. This elementary school is a result of that transfer agreement. Not all resident's children attend this school, some continue to go to town schools. There is often controversy over the quality of teaching and the applicability of the curriculum but the staff work hard to maintain high education standards. This school deals with community specific problems related to economic hardships of some of the families, a large number of single parent families and children in foster care by offering breakfast services for example. The staff is also trained in understanding the effects of fetal alcohol syndrome. School curriculum involves bringing in respected elders to share their wisdom with the children to help bridge generation gaps. The curriculum includes Mi'kmaq history, language and uses references that are culturally specific.

perspectives offer glimpses how the residents account for troubles that shape their legal consciousness. A female respondent from the youth cohort said:

JM: Do you hear about young people getting into a lot of trouble up here. What happens?

People are always fighting. No respect really these days for elders and stuff.

JM: Why?

I guess you can call it a cultural crisis that we are in. There is no respect, me I still respect anyone that is older than me. I will do anything for them. But some people it is just, there is no values from broken homes. They don't learn how to respect, or learn how to develop respect. You don't get that same, from young people, you don't get that same respect, they break into elders' homes. It is awful, I pity them.

Another female youth respondent noted:

There is a lot of underage drinking, a lot of assaults, people fighting other people. I don't really know. I used to be out and see everything happening, and now I just try to mind my own business. I am not so nosy. I find when you are younger you do not really think before hand, you just act on impulse, you think that nothing can hurt you. When something happens to you, you just kind of think about it now. I try to not put myself into situations that will have a long term effect or negative affect on myself or my family.

And a male youth perspective:

JM: What are some of the problems in the community?

Lots of problems stem from alcohol and drug abuse, gambling, the other problems stem from these kinds of things. With parents there is a lack of discipline with families. I don't know why, maybe because they are abusing themselves as parents, maybe they dropped out and they don't give a shit.

A middle aged, unemployed male with self-acknowledged substance abuse problems, from the grassroots cohort, said:

As natives we are very, very sensitive people. We take everything to heart and there are so many things that we have to look at and really work on even in the healing processes of people that are trying to get off drugs and alcohol. The healing processes there I don't totally agree with. I have been through that system also. One of the biggest things for me, and I will continue saying it, is that we have to teach them about our culture more so. I know there is a few native people in the education system that are just starting to pick up their native language and trying to study it and learn it and understand it. Good luck to them because there is no better way than learning the language

growing up with it and experiencing it. It is not just words it is much more than that. Even people I talk with today that are into teaching and learning the language, they will never fully understand me when I speak it because I am talking about the whole concept right around.

Another middle aged male, seasonally employed said:

JM: Are more people using court to solve problems, for peace bonds etc.?
I find they are using it more. I have had peace bonds even with my mother-in-law. I find it helps solve the problem a little bit between my mother-in-law and me. She put a peace bond on me and it kept me away from her but our relationship today has gotten stronger because she trusts me more now and I never retaliated and it was booze really.

JM: Is booze the big cause?

Booze and prescription drugs.

JM: What contributes to people using?

Not enough to do, a lot of them are drowning themselves out, they are not getting off their asses to do stuff.

JM: Why aren't they motivated?

There are two sides, the working class and the welfare class. A lot think it is better to stay on welfare because if they work they have to pay mortgage and lights and all this stuff so a lot of them don't bother looking for work, it is taking care of. When all the children are taken off welfare August 1st, there are going to be a lot of changes. There might be a lot of bootlegging going on. I don't know. There might be a lot of drug dealing to get what they are losing out on. The work force up here are all hand picked by the Caribou Marsh Enterprise. It is the big employer besides the band.

A male elder indicated he was in favour of community based justice:

JM: Do you think you could make rules and laws to help the kids, community management of problems?

If you have community circles or a reserve magistrate or a justice of the peace even. There are Justices of the Peace assigned here. The Chief is a JP for signing warrants but a JP for hearing cases we have not got. We should have and I think you can keep your enforcement confined to the reserve and through these talking circles the elders will decide the punishment and also you will be faced with whom you have hurt or the victim impact. It can be done because a lot of these crimes done around here are not serious. The serious ones happen when somebody gets killed or near killed and those are normally your older people, older men doing that.

A female elder:

JM: How would community justice work?

I guess it could be worked out in a lot of ways but they have to move together, they have to work together. They have to have that source of

understanding that we are working for our people for the betterment and the good. We are not there to destroy everything that we have, that we have worked so hard for. We have to keep it in tune with other things in our communities. It is very hard. It would be very hard. You have to be a very dedicated person to be able to do that and to not take sides. That is an awful thing, you can't take sides once justice is going or it is going to backfire on you. I guess that is why it was so hard for the police and the judges one time ago, they did not understand us. They did not know our backgrounds. They did not know where we came from or what was the law. They did not know the Indian Act. They did not know nothing. And yet we thought we had all the rights and we still do today and I imagine we do. But it seems like every time we have a right coming to us then they tear it down again. So when you grow up like that and just when you think you have it, it is taken away from you then.

JM: How do you keep going?

I don't know that is what it is. You just don't think about it anymore and you just hope for the best. Because if you really thought about it you would be so mad and you would be a really angry person and I for one do not want to go around being angry all the time or take it upon my shoulders because that would be an awful burden to carry. So if anything good comes for us and it is done right then I am happy for it but if it doesn't get done, I think we just have to work harder again. But it is sad, it is very sad.

Interviews showed the range of concerns of Membertou residents, and the various discourses they use to articulate their legal consciousness. In Membertou, Mi'kmaq legal consciousness has no distinct, binary boundaries separating Mi'kmaq law ways from the larger mainstream society, however historical relations of oppression, and denial of socioeconomic equality, complicate the boundaries between Mi'kmaq and non-Mi'kmaq. Culture loss, family breakdown, employment issues, substance abuse and boredom, are among the top explanations for why troubles exist in Membertou.

A theme commonly expressed was concern over youth without effective parenting. Respondents indicated that parents are less involved with their children, and younger people are getting into trouble because they have lost a connection with the community, they feel isolated. Parenting problems are often associated with intergenerational impact of residential school and socioeconomic distress, which

contribute to wrongful behaviour. Commonly heard sentiments such as the teenagers are aggressive and violent, they have no respect, support the notion that families in crises and the decline of respect are the root causes of crime. In general, most problems were associated with youth out of control, bored and without any recreational opportunities, substance abuse and unemployment problems, all of which were couched in terms that reflected a loss of culture.

Youth violence is not constant in Membertou. There was a period in which young people were attacking taxicabs as they drove onto the community. Youth threw rocks and sticks and abusive language at the drivers, who became so intimidated that they refused to take people directly to their homes, leaving them at the entrance to the community instead. Late one night, a female elder was dropped off on the road alone, which angered the residents at both the taxi company, and at the youth for instigating the event. In all Mi'kmaq communities youth restlessness is seasonal, with summertime being a period of heightened delinquent activity.

Sociocultural and Spiritual Milieu – Informal Juridical Practices

Membertou is a busy community. School events, church outings, weekly recreational programs for youth, mentoring programs, monthly elders' meetings, language classes and traditional ceremonial events, as well as work, occasional community feasts, life cycle rituals, allow for the construction of community spirit and awareness, and play a part in the production of Mi'kmaq legal consciousness. A weekly newsletter is delivered to each home, and e-mailed to members living away. In the newsletter job and training opportunities are listed alongside church news, birthday announcements, local advertisements, instructions for waste disposal, fund raising events, powwow dates,

health and cooking tips, phone numbers for the hospital taxi, sports news and accolades.

Periodically the newsletter contains requests for help in solving a crime, usually theft or

vandalism, such as:

Notice: During the early hours of July 4th, someone suspiciously removed my dark green plastic patio table from my premises. If any has seen the same, please contact. July 6, 2001.

Missing: A bike taken from my yard. Bright pink with little blue light. My daughter is heartbroken. Please return. No questions asked. Thank you. July 6, 2001

Another strategy is to use elder power in appeals for the return of goods as this letter

from a grandmother demonstrates.

Missing: A bike was taken that belong to my granddaughter. She loved her bike. She earned that bike doing her best in school. So the one who took her bike, I hope you have a heart somewhere in your body and return it to her. I would like to see my granddaughter driving her bike when she comes to visit me. July 6, 2001.

This letter also justifies the girl's ownership of the bike by stating that she earned it for hard work. People who are considered to have more than others are often the people targeted for thefts. Theft is sometimes justified as 'they can afford it,' meaning they can afford to replace the object. Sometimes theft is couched in terms that suggest the wealthy are deserving victims, because they have too much. People generally do not accuse individuals outright, but offer opportunities to return valued items without risk of revenge and 'no questions asked'. Sometimes the wording of the requests suggests that the author is apologetic, but requires help in solving some dilemma.

Other letters of general admonishment incite people to question their 'bad' behaviour, and urge people to change their attitudes and actions for the betterment of the whole community. For example, two years ago during an outbreak of vandalism and elder terrorism, cautionary letters were submitted to the newsletter. These letters

reminded people of their teachings and values, particularly their responsibilities toward elders, which were framed in appeals to Mi'kmaq traditions and the goodness of the old ways. Other letters have asked people to change specific behaviour, for example, a regularly vandalized store sign caused the frustrated the owner to ask the public to come together to help put an end to the property damage, appealing to respect as a tool for improving society. He also appealed to heightened communitarianism as upholding the old ways.

The newsletter offers members opportunities to publicly air their views and address problems in an acceptable, and somewhat indirect forum. In a recent edition, a community member stated in a letter addressed to the re-elected and newly elected band council members:

Our community is moving at a quick pace, which requires an open mind and "up-to-date" ideas to steer towards a future which considers everyone's well-being. In the process let us not leave our language nor our linguistic concepts behind. Incorporate as much of our all encompassing Mi'kmaw concepts leaving many of the inadequate, European (English) concepts to the "Qame'kewaq". Give up most talk of "saving our language" and actually begin to utilize as many concepts as possible where once we were made to feel ashamed to do. Lead the younger generation in this new millennium whereby our language is deemed important by you, the leaders of Membertou (Bernie Francis July 5,2002).

Additionally the newsletter is a public venue for giving thanks. When a community member has passed, a letter usually appears from the family thanking everyone for their support. The newsletter offers a predictable and vital link fostering communitarianism, and ties to cultural values upheld by the community. It is also a tool of indirect confrontation as it makes troubles visible, opening opportunities for discourse, and avenues of informal management. When wrong doings occur in Membertou, it is rare that someone does not know what happened. People talk, and through their talk situations

are often confronted, and then resolved or not. Newsletters help validate confrontation in socially acceptable ways, and provide a window into Mi'kmaq legal consciousness and their various discourses.

The Catholic Church and Mi'kmaq Spirituality – Competing Traditions

The Catholic Church has a strong presence in all Mi'kmaq communities. In Membertou, church news is a regular feature of the newsletter and helps the congregation follow the biblical calendar. St. Ann's Day celebrations are held locally in addition to the larger event at Chapel Island. Each year a group of Membertou seniors raise funds for a bus pilgrimage to St. Ann de Beaupre, Quebec. Most children are baptized, and godparenting is a vital institution. Accumulation of godchildren is something of a status symbol. The late Grand Chief Donald Marshall, for example, had over one hundred godchildren.¹³⁴

The life cycles marked by the church are widely celebrated in the community. Large family parties often celebrate First Communion and Confirmation rituals. Most people favour marriage ceremonies in the Catholic Church over any other religious observances. Recently a move is afoot promoting Mi'kmaq 'traditional' weddings, in which the union is validated by the Grand Chief, or other spiritual leaders, rather than a priest. Noel Knockwood, Nova Scotia's first aboriginal sergeant-at-arms for the House of Assembly, and appointed spiritual leader of the Mi'kmaq, is lobbying the provincial government to recognize traditional Mi'kmaq marriage ceremonies performed by spiritual leaders. When I asked interview participants what they thought of this idea, most

¹³⁴ The practice of god parenting, in addition to its religious connotations, or perhaps as a result of them, may also be read as a way of distributing wealth as it is customary for god parents to give presents of money or material goods as well as instruction and protection. "Hey Godfather, got money?" is a phrase I have heard repeated many times and if able, godparents usually comply.

people in Membertou expressed mixed feelings, seeing a traditional ceremony as a novelty, and something one could do in addition to a church marriage. Younger people tended to be more in favour of having a choice, but elderly people generally rejected the notion as having any legitimacy.

People are known and evaluated based on whether or not they attend mass regularly, and if they participate in any church based community functions. Some people suggest that going to church has a lot to do with 'living right'. A surprising cross section of people noted that it is hypocritical for members who do not 'live the right way' to go church and make the appearance of 'living right.' There is an implication in my Membertou interviews that people who don't go out to church are more likely to have trouble in their families, are fighters, or have substance abuse, or other problems, and that they are perceived as not setting good examples for their children, particularly by those that attend church.

The church is a place some people avoid, not for any particular religious reasons, but because they are in disputes with other community members and do not want to have to 'shake hands with the enemy' because they run into them at church. Contrary to the avoidance mechanism, for some, the church simultaneously offers an environment in which disputants can meet and shake hands. It provides a safe place for confrontation. These sentiments are heightened in the rural communities because the options of where to go to church are limited. The church, as one focal point of social interaction, provides a venue in which community members assess each other in regard to ideas about right and wrong behaviour. Being visible in church, for some, implies that there is nothing to hide, and reduces suspicion regarding what goes on in the privacy of the home.

The people of the church, such as the priest, are not usually drawn into dispute management, as they are not members of the community. This is in contrast to many non-aboriginal community based justice processes where church groups are often involved in restorative justice. If priests are consulted about problems it occurs privately, rather than in any public forums. On the other hand, members of the Grand Council, whose roles are currently perpetuated through their church activities, are sometimes the people drawn into localized disputes, especially interfamily disputes between siblings or cousins, usually middle aged and older. These kinds of disputes often reflect conflicts over where to hold a wake, or estate concerns in the event of a death. In Membertou the Grand Council members reported not being too involved in any local disputes during and previous to my fieldwork, except for isolated cases.

In Membertou the local priest is popular and a common fixture at community feasts and events. He wears symbols of Mi'kmaq culture on his vestments, such as a stole embroidered or beaded with Mi'kmaq motifs, or a chasuble made from deerskin. He will often burn sweet grass, and hymns and prayers are recited in Mi'kmaq. Some middle aged residents who were not exposed to the Mi'kmaq language because they attended public school off the reserve, or because their parents went to residential school, find singing in the choir has helped them to access their language, expanding their lexicon, and increasing their speaking confidence. Overall, the church plays a number of juridical roles in the community, and Christian beliefs are writ large in Mi'kmaq legal consciousness.

The other end of the spirituality spectrum is less consistently visible within Membertou. Mi'kmaq spiritual practices such as sweat lodge ceremonies, drumming

groups, peace pipe and smudging, exist in Membertou but seem to go through cycles of increasing and declining popularity that follow moments of crisis and calm. Mi'kmaq spirituality is closely linked with discourses of healing and restoring balance. In moments of crisis however, the response in the past five years has been a turn to what many term traditional practices and teachings, or healing ceremonies. The healing discourses are emerging from the residential school survivors gaining their voice, and the utilization of the Healing Foundation programs, as well as the spread of self-help paradigms, and the revalorization of formerly stigmatized aboriginal ceremonies.

Healing discourses were facilitated in Membertou by an event that has shaped Mi'kmaq daily life. When a group of five young people, aged nine and ten, were found to be acting on a suicide pact in the late 1990s, the community intervened with appeals to tradition and notions of healing. The band contracted a Mohawk spiritual entrepreneur to visit the community and offer some instruction in pan-Indian healing. Using Longhouse traditions and Plains concepts of the medicine wheel, ceremony and naming were proffered as ways to help youth foster positive self-images as First Nations peoples, and to provide mechanisms for handling and preventing crises. One family in particular continued the teachings and use sweat lodge, pipe ceremonies, and feasting, as methods to integrate youth and elders, providing them with instruction in aboriginal holistic religiosity. Mi'kmaq concepts were blended with the pan-Indian images of the medicine wheel to help ground the new ideas in familiar contexts. Sweat lodge ceremonies, a cleansing ritual used by the Mi'kmaq for centuries, were peppered with symbols of western ritual performance. Children were taught how to make medicine bundles,

protective amulets worn by pouin, to help them feel safe, and to give them something concrete with which to address their anxieties.

We have ceremonies every Saturday night and the children come and bring their medicine bundles which are really important because that is what they pray with and give them contact with creator and spirits.¹³⁵ They learn to take care of their sacred bundles. All of us are pipe carriers.¹³⁶ The children run the ceremonies. They bless you with the water. They fan you and do the singing. They are not just watching. They are active. They do sweats and take care of the fire.

JM: How many come?

It varies. Those that are consistent are about ten to twelve. They are between nine and twelve years. One seventeen year old comes. These kids are not generally in trouble. We invited the kids that were in trouble and they came for awhile. I need to go see them individually to invite them back, to let them know we still pray for them. It is a place for children and elders coming together. You do not see that too often. We often keep them separate in activities, but we have to bring them together so the wisdom can be passed on. We do not value our elders as much as we should.

Ceremony is used as a route to help kids in conflict, but it is not mandatory, or formalized in Membertou. These ceremonies have developed a reputation among the Cape Breton bands as opportunities for healing, particularly for those interested in cleansing through the sweat lodge. They are gaining some purchase in Membertou. Members of the same extended family practice fasting rituals and ceremony according to a lunar calendar.

There is considerable skepticism and negative gossip about the traditional and ceremonial practices in discourses of authenticity. I have heard several well-regarded community leaders suggest that the sweat lodge is not real for Mi'kmaq, despite historical

¹³⁵ Ceremonies are held regularly only during the warmer months, throughout the winter activities become more sporadic. This pattern is opposite to that of the Coastal Salish in the Northwest Coast, where winter marks the height of their ceremonial season (see Bierwert, 1999, Miller, B. 2001).

¹³⁶ Pipe carrier concepts vary tremendous cross culturally and within culture groups. The Mi'kmaq used a pipe tradition for peace ceremonies and in negotiations. Smoking the pipe was a significant point of protocol. Grand Chief's, for example, carried pipes. Contemporary interpretations have tried to level off the hierarchical structure associated with pipe carrying in order to make this aspect of ceremony more accessible.

evidence indicating its use in Mi'kma'ki for centuries. Others complain that restrictions surrounding the use of the drum, pipe and sacred fire, are not followed closely, and this potentially causes spiritual harm. While the children are not generally discouraged from attending, the more conservative Catholics call it hocus-pocus, and frown upon adult participation. In sum, ceremony is tolerated by all and embraced by a few, but is sporadic enough so that it has not become too great a threat to staunch Catholics. Indeed I see an increasing demand for it as media images positively portraying indigenous spiritual practices become more pervasive with Aboriginal Peoples Television Network, cultural revitalization programs, and the affirmation of Mi'kmaq treaty rights, instilling pride in Mi'kmaq spirituality. Disclosures of residential school abuses have also led many to doubt the sanctity of the church, and young people do not find the comfort that some of the elders find there. Healing discourses play large in these ceremonies, and they are being looked to as alternatives to help restore community balance as they offer venues for internal reconciliation, a topic explored further below.

The newsletters, church activities, traditional ceremonies, recreation and educational activities are reflected in the sociocultural and spiritual milieu of Membertou. There are ongoing projects for cultural revitalization which reflect important concepts of Mi'kmaq justice. During the construction of the Mi'kmaq Justice Institute [MJI] programs, the Mi'kmaq were concerned with developing 'customary laws'. The MJI asked Bernie Francis, a Mi'kmaq linguist and Membertou resident, to define some Mi'kmaq justice concepts to help frame the customary law component of the institute. One such project is the renewal of a forgiveness feast called Wi'kupaltimk or sometimes

called maw-mijisultimk. The feast was an annual event which represented a blending of Christian and Mi'kmaq ritual. According to Francis the feast happened New Year's Day:

Members of our communities would meet at a designated place such as a church or a school. Women would bring cooked food and baked goods while tea was brewed on the spot. After eating, prayers would be offered by the entire group. It is immediately after this point that the 'apiksiktatultimk' (the forgiveness part of the ceremony) would begin. While everyone stood in a circle the Chief would be first to walk around to each and every person, shake his/her hand, (sometimes embrace) and ask for forgiveness for past wrongs for both intentional and for inadvertent ones. (This is one instance where by a chief shows his/her humility by being off the pedestal). The Chief would be followed by the councilors who in turn would be followed by the remaining community members. This ceremony is non-adversarial in nature. No one is placed on the spot or made to lose face in any way with one exception: If one is unwilling to show forgiveness one is seen in such as to have a huge spot light shine on him/her. From this point on until the next New Year, one will be given the feeling of having been ostracized in a most inimitable way that only our people can do. Wi'kupaltimk then, can be used as a basis for adapting and further developing the concepts Nijkitekek [that which heals] and Apolsiktuek [mutual forgiveness] on a smaller, more focused setting which would mirror modern day Mi'kmaq society (Francis 1996:2).

Such cultural productions, emanating from the Marshall Inquiry, help shape Mi'kmaq legal culture and consciousness. An annual New Year's Eve feast honors community members. The forgiveness ceremony is not always replicated and people have commented that they would like to see it revitalized. Now people just go for the food, according to some residents. Others feel that those most in need of attending such ceremonies likely choose not to go. However, among some Mi'kmaq, like Mr. Francis and his family, this practice is being re-rooted in their legal consciousness and celebrated as 'how to live right'.

Governance and Juridical Discourses

In terms of traditional governance, the Grand Council currently has a subdued presence in Membertou. Formerly the home of the late Grand Chief Donald Marshall, who held the position from 1964 until his passing in 1991, the Grand Council once had a

more discernible community role under his leadership. It was Grand Chief Marshall's position to promote Mi'kmaq unity and justice among his people, which he did with great success by revitalizing October First as Treaty Day, and ensuring St. Anne's Mission at Chapel Island, continued as the highlight of Mi'kmaq annual spiritual gatherings. The Grand Chief was well known and respected across social and class boundaries. He garnered attention because he was Donald Marshall's father, and through his vociferous contests against treaty infringement, and in fighting for Mi'kmaq moose hunting rights against the powerful sport hunting lobby.

The late Grand Chief helped shape Mi'kmaq legal consciousness by instilling a rights discourse and teaching his followers how to fight oppression. Tired of mainstream denial of Mi'kmaq treaty rights, despite successful legal action in the Simon Decision 1985, which allowed the Mi'kmaq to exercise jurisdiction over organizing their traditional moose hunt, the Grand Chief became involvement in a public protest, an act of civil disobedience. The Grand Chief and others asserted their legal rights to control a traditional hunt, which the province and the Department of Natural Resources had blatantly ignored. Grand Chief Marshall issued hunting passes to family heads. Family heads were then to determine who would benefit the most from harvesting moose. This action clearly represents a revitalization of the previous socioeconomic duties held by the Grand Council, and symbolically provided a direct challenge to the province to recognize their leadership and autonomy. The Grand Council members were exerting their governance outside of the Christian realm in which colonists and missionaries had contained them. In addition to the hunt, the Grand Council instituted internal policing, a strategy which reflected a revitalization of the warrior society, whom were very active

supporters working closely with the Grand Council in this protest movement. The following is an excerpt from a press statement released by the Union of Nova Scotia Indians describing the protest hunt lead by Grand Chief Marshall:

Hunters will be asked to voluntarily observe all the provisions for the protection of everyone involved although provincial laws do not apply to Micmac's in the area of hunting. Organizers have indicated they will have qualified and trained Micmac law enforcement officers to ensure safe hunting practices are properly considered and who shall maintain a reporting procedure as to the number of moose harvested. The hunt is for subsistence purposes and clearly not a sport hunt by individuals. In addition, emphasis should be placed on the use of the entire carcass of the moose and not just the meat (Alex Christmas, President of the Union of Nova Scotia Indians 1988).

The Grand Council publicly upheld the view that Mi'kmaq residents were outside the reach of mainstream society's laws, a sentiment long embedded in Mi'kmaq legal consciousness, but which required revisiting in order to perpetuate the willingness to fight for recognition of treaty rights. The Grand Chief also spoke out against the mainstream justice system denouncing the wrongful conviction of his eldest son. The very public presence of the Grand Chief increased the profile of the Grand Council in his home community, and across the nation. After his passing, the position of Grand Chief went to Ben Sylliboy of Waycobah, leaving one Keptin and the Putus, the record keeper of the Grand Council, to maintain the spiritual side of the sociopolitical traditions in Membertou.

Generally people do not seek out the Grand Council in Membertou for the resolution of their disputes. The Grand Council members do have active roles in the church and in salite' or funeral rites of community members. As mentioned in the section on the Mi'kmaq Justice Institute, funds were sought for mediation and dispute resolution training for the Grand Council, so that they may take up their traditional roles managing

resource, territorial, and socioeconomic disputes and spiritual problems. Some community residents and some Grand Council members met this training with skepticism, issues that will need to be addressed in the future. Rather than helping with interpersonal problems, Grand Council members indicated they felt more comfortable focusing on managing resource issues, and infractions against community agreements. One community resident pointed out what he perceived as the advantage of having Grand Council members involved in community based justice over band council involvement.

JM: Should the Grand Council be playing a role in justice?

Definitely. It would keep the politicians out; keep the councils and chiefs out. They are more neutral. But say politically someone got in trouble and the politicians did not like this guy and they wanted him out and they can get him out, whereas the elders and the Grand Council would be more neutral and keep politics out of it and I think that is good.

He appeals to the seemingly universal notion of neutrality as being a necessary aspect of justice. He also reiterates a widely shared assumption of the neutrality of Mi'kmaq Grand Council members, failing to see that they too are members of particular families, and particular communities, and that they may have biases. Membertou residents have mixed feelings about the involvement of the Grand and band councils in community based justice. Those that favour band involvement are more likely to have good relations with band councilors and the Chief. Those that favour Grand Council involvement are more likely to adhere to traditional practices.

Politically, Membertou appears to be almost free of the problems that plague Waycobah in terms of accountability, accusations of financial mismanagement, and a lack of fiscal and political transparency. Chief Terry Paul, who has held office for ten straight two year terms, making him one of the longest continuous chiefs in the province, and nine elected councilors, govern the band according to Indian Act of Canada

legislation. Elections are held every two years for the entire council, but have not brought about a significant turnover of members during the last three elections. This consistency has worked well for long term development strategies that are often disrupted in councils with high turnovers. A management team of a Chief Executive Officer, and a Senior Advisor, work with the directors of all major programs in health, social service, finance and education. There are a variety of programs and services for Membertou residents including education access programs, social security, health, human resources, and recreation. The Chief Executive Officer oversees all community owned business and operations, particularly fishing, gaming and construction services. Membertou is experiencing an economic boom due to the successful development of a number of business partnerships through its newly formed Corporate Office.

The Corporate Office opened in November 2000, as a division of Membertou Development Corporation to manage the band's business interests including seeking contractual relationships from both government and private sectors, and assists start-up ventures. Key business alliances include fisheries marketing and processing with Clearwater Fine Foods; offshore /onshore catering with Sodexo-Marriott; financial and business training with The Aboriginal Network, in which Membertou provides capacity building training to First Nations governments; and civil and industrial engineering in partnership with SNC-Lavalin. The band successfully acquired ISO 9000 certification, an achievement which brought the Minister of Indian Affairs Robert Nault to congratulate the band in person. The ISO certification created an accountability mechanism by which the band reports their progress in monthly updates to the community and welcomes feedback and questions from their membership. The band reveals its financial statements

publicly on its website. The band has also benefited significantly from the 1999 Supreme Court of Canada Marshall Decision, in which Mi'kmaq treaty rights to access the commercial fishery were upheld. Currently the band is involved in the development of a Mi'kmaq cultural and heritage museum, a project with herbal medicines, and they are expanding their interests in environmental issues with the clean up of the Sydney Tar Ponds, one of Canada's most toxic environmental hazard sites. Membertou band is also participating in the gas distribution and pipeline development off Sable Island, forestry projects, and design and construction related to municipal services.

Membertou band council takes great strides to maintain their distinctiveness and independence by participating in the marketplace. As Brian Hosmer notes, economic change mandated cultural adaptations and altered political institutions to fit new circumstances, but indigenous culture is central to the choices made, and cultural priorities are shifted to accommodate those changes, thus rejecting that assimilation is inevitable (Hosmer 1999). In Membertou there is a dynamic relationship between cultural values and financial stability that shows a dialogic process of change, an ethnogenesis of sorts. Membertou's newfound economic success has challenged the institutionalization of underdevelopment embodied in Mi'kmaq culture as a result of colonization, by providing community members with the opportunity to embrace their cultural identity, and simultaneously participate in enterprises, as they resist assimilation and break the cycles of dependency.

The band executive is very conscious of the contradictions, and work to make the processes of economic decision making and the implementation of alliances in ways that reflect Mi'kmaq values, and meet culturally acceptable goals. Preservation for the nation,

ideas about conservation first for future generations, listening to the elders, and operating, where possible, on consensus building rather than competition are central management themes. But these processes are very new, and youth caught in the progressive movement between welfare dependency and asserting more productive identities, find themselves without sufficient cultural capital to acquiesce to the rapid changes that have not fully wiped clean the associated dysfunction of colonial stigmatization and stereotypes.

Young Mi'kmaq experiencing a breakdown in family cohesion due to economic marginalization, express confusion over notions of communitarianism. Challenged by the seductive commercialization of individualism, they experience internal conflicts in which they view their own lives as inadequate. Some feel disconnected from their elders, who have been assigned the monumental task of perpetuating cultural continuity even though some of them lack the resources to do so. These tensions further complicate the messages sent to youth. The feelings of inadequacy generate a sort of empty-centeredness, a circumstance in which indigenous view their own lives as inadequate compared to their ancestors, but which are compounded by elders' feelings of inadequacy too (O'Neill 1996). As a result youth violence and substance abuse, generational gaps are pronounced in Membertou as they struggle to work through the contradictions of the past and present in periods of rapid change. They want to adopt the categories and symbols of the colonists without capitulating to symbolic domination, and as such, these may be seen as discourses of resistance (see Keesing 1992).

As Membertou's population continues to grow, and relationships between the community and the outside remain troubled, competition for jobs will increase, and continue to cause internal strife. One incident two years ago involved the brother of a

band council member who felt he was not given his fair share of employment. The council member brother refused to use his position to show favoritism by getting his younger brother a job. Mounting tensions of unpaid bills and increasing substance abuse problems triggered an attack on the council member and his colleague that resulted in serious threats, an assault, property damage, fear, and hurt feelings. The incident also triggered a split in this large family because some members were quicker to forgive, and others chose avoidance. The unemployed brother refused to go through a community justice process, instead choosing town court, and was given a conditional sentence; a sentence that was not wholly satisfactory to those involved because he often ignored his conditions. Eventually his breaches were discovered, and he had to serve the rest of his sentence in prison. Here he explains why he chose the mainstream way.

There are situations where I was allowed to be sentenced by the native way or the non-native way and I knew I was guilty I waived my right to be tried by the aboriginal way.

JM: Why?

To get it over with I guess. I didn't know anything about it. I knew about the circle and stuff but a lot of things were not major enough for me to take it there. That and I figured I would get sentenced in the white court, settle it that way, take my probation, do my time and get it over with.

JM: Faster and less painful to go through mainstream?

I think so.

JM: Going through a Mi'kmaq system, what would that have meant for you?

Probably trying to prove to myself that I am not the type of person that just, maybe I thought I was going to be asked to do more. It would have been tougher. They would have been on my case. Even to go sing in the choir I find it hard, the elders are there, my mother is there. I have a nun over here telling me don't listen to them and it almost seems like the same thing. It is too much sometimes.

Our elders and lot of them are blood, and they sit and talk and they are not listening to the sister that is there that volunteers her time to help us. She said she was getting discouraged. I almost told her I wanted to go to a different church on Easter at that.

JM: With mainstream you have a better idea of what your outcome is going to be but going to the aboriginal system you just don't know?

I just don't know, they might send me up the mountain or something.

This gentlemen's comments provide insights into the challenges of community based justice. The preference for knowable outcomes in the mainstream court, appear to contradict those who fear they cannot achieve justice outside of the community. One of the pull factors of community based justice is the opportunity to make amends and restore balance; but what those processes are, remain elusive until after the fact. Here those values are rejected in favour of predictable outcomes, and a desire to get it over with.

Actively creating jobs and promoting post secondary education to improve individual socioeconomic status has helped to reduce crimes associated with poverty, but has not eliminated stratification. The 'haves' and the 'have nots' do not clearly follow family lines in Membertou. Extended families that are generally known to have accumulated wealth, also have members who are considered destitute, or suffering from substance abuse problems that render them unable to work. The band council makes efforts to balance out job assignments among all eligible members, and tries to avoid favoritism. Employment and training opportunities continue to be largely seasonal and oriented around fiscal year funding, and unemployment insurance, and thus openings can be rotated among families. But an ever widening pool of workers increases opportunities for dissatisfaction among members who feel they have been overlooked. There are four large and politically powerful families in Membertou. Periodically members from particular families will be targeted for vandalism and violence by members of families that historically are 'have nots'. These patterns also reflect longer standing family feuds that stretch back over multiple generations, with the current generation picking up the tensions of the past, justifying acting out when they feel they are being wronged, or not

given their 'fair share'. A number of recent disputes in which violence occurred showed such links.

The Chief and Council hold general meetings to which the band members are encouraged to attend and to bring issues or concerns to the public forum. The band holds plebiscites to vote on important issues. For example, when the Marshall decision on commercial fishing was announced, the federal government offered individual bands interim fishing agreements. The interim process called the MacKenzie process, named after the federal negotiator in charge of convincing the bands to sign on to short term access and capacity building agreements under federal regulations. In response to the process, the band held a plebiscite for the members to decide whether or not to sign. During the first vote the membership was evenly split, and the band did not sign as there were concerns that signing prejudiced and infringed on treaty rights, and may cause problems for future legal action. In the next round a year later, once the agreements were renegotiated, another plebiscite was held and the band voted to sign, which led to a number of fishery training for procurement and processing jobs. While accountability is comparatively high, not many other bands have such open financial records, there remain accusations of patronage and favoritism that are present in any community government.¹³⁷

¹³⁷ See Tord Larsen who highlights problems of consensus when competition for scarce resources is highly politicized and where unequal access causes conflicts over membership particularly when negotiating ideas of individual and communal rights, the boundaries of public and private, are contentious in Mi'kmaq

The Problem of Justice in Membertou

This section explores the problem of justice in a Mi'kmaq community.¹³⁸

According to interview and survey data, most people in Membertou feel comfortable and do seek out the band council for help in personal matters, in dealing with property and some domestic disputes, and for protection. As one elderly woman stated, "We depend on chief and council very much, for everything". While not all persons who have sought out the band's help are satisfied with the response, and or outcomes, there is a general sense that is a helpful body that is usually fair. People would rather go to the band for help than to any town organization or court. Taking legal action in this community is usually a last resort, and one often avoided for matters internal to the community. However, evidence is present of young women periodically using peace bonds as a way of controlling hostilities between feuding parties, to justify avoidance, and to prevent further violence (which usually precipitates the bond issuance).

When members get into trouble outside of the community, they are less likely to take their troubles to the band, unless they are civil cases, or violations of human rights. The more legally savvy folk will take civil action independent of the band's assistance. For example, an elderly woman slipped in a bank and sought damages in a civil suit without band interference.

communities (1983). Also see Jo-Ann Fiske's work about pragmatic strategies for community improvement and internal confrontation in BC's Carrier communities.

¹³⁸ I am borrowing Bruce G. Miller's phrase. Miller suggests: All communities face significant difficulties in reestablishing internal control over the practices of justice and in thereby regulating their own membership. There are significant problems concerning the degree to which what is called traditional practice can be brought into the present and, perhaps more fundamentally, concerning what traditional law and practice might have been. Additionally, the "problem of justice", referenced in the title (of his book), is also one of resolving the pressures and difficulties imposed on indigenous communities by the dominant American and Canadian societies (Miller 2001:5).

In response to an open-ended survey question that asked "What role, if any, do you think the Chief and Council should have in justice activities?" the following range of answers were offered:

- They could help because they know what goes on and they know and understand the people more
- Policy only
- A little, they should keep up with the community
- Since they run the community they should have a say on how the activities are ran
- Somewhat an important role, such as roles models and unbiased opinions
- They can assist with and approve sentencing and supervise their sentences

Some people are adamant in prohibiting band involvement in justice matters once they go to court. In one case a woman was upset with the band interfering in her son's case once it was in court. The band made a request of the court on behalf of the community, to reprimand her son outside of the community until he could prove he was no longer a risk to Membertou residents. This episode took place after a protracted period of vandalism, and escalating violence involving gang-like activity and substance abuse. In other words, it took many wrongdoings before the band sought to remove this young offender from the community. Only in extreme conditions will they approach a mainstream judge.

The band itself was not prosecuting the youth; he faced charges from the police. Although eligible for diversion to the Mi'kmaq Young Offender Program, the youth decided to take the court route rather than face the community. He breached probation on several counts, and ended up in juvenile detention in the south end of the province, which ultimately fit the band's request to have him removed for a period of time. The band council usually votes on such matters, and passes a BCR or a Band Council Resolution.

Resolutions to remove offenders from the community are rare. Feelings are mixed regarding the power of the band council and their level of involvement in particular cases. The woman mentioned above, resented their involvement, and took it as a personal affront. She felt the band was showing favouritism. She did not think it appropriate for the band to participate in what she considered a private family problem. This event strained relations between her family and the band, for a period of time. Upon the boy's return, the community watched him closely, and attributed any new troubles to his presence. Over time the surveillance decreased and life returned to normal, as there were no further troubles.

Other band members expressed frustration with the lack of political interference, particularly with the problem of drug pushers and bootleggers. Most people articulated the desire to get rid of the people who sell contraband. Who these people are is common knowledge. Although there is an unspoken code to prevent the sale of drugs and alcohol to minors, youth easily access dangerous substances. According to Unamaki Tribal Police members, in Mi'kmaq communities, people under the influence commit 95% of the crimes. Members approached the band council to address this issue, but the band cannot act without the police in such criminal matters. They appear powerless to bring about changes, which some members interpret as 'turning a blind eye'. The police respond by saying they do not have the resources to catch the players and thus situation remains unchanged.

In other disputes, such as those over equitable allocation of scarce resources, the band is looked to, to mediate and monitor that each person gets their fair share. Tobacco quotas are a case in point. Stores compete for customers and use tobacco pricing to do so.

Each band member has a tobacco quota. Loopholes in the distribution process allow for some members to obtain more than their fair share, thus giving them a competitive advantage. When discovered, other members challenge the band to investigate and correct the problem, appealing to equal allocation as justification. Letters are sent to the band council revealing the misdeeds, and the band councils respond with improving allocation systems, at least for a time. This process allows for tensions between members to be diverted through the band council, rather than by face to face accusations and confrontations.

In a focus group session with the Chief, the executives of the band council, and Donald Marshall, the following issues were raised about community based justice and the band's role.

Our biggest need right now is public education. A year or two ago we at the band council had a request from an individual whom wanted to do a community sentencing. The director of the Mi'kmaq Young Offender Project came to our council and asked us to participate, and to support and endorse it. At the council meeting we had a sharp debate about it. Some of us felt we should do this community sentencing circles and get it out of the court system. For us to have input and get involved with it. But there were other people on the council who said it was better to leave it in the courts and have them do it outside. We had a debate about it and after we talked about it, the members of council who were concerned with it came around and said it would be better if we dealt with it.

This statement is evidence of the challenges of setting up community based justice. There is a lack of awareness of the options and opportunities a community can implement. There is also the challenge of coming to an agreement about what to do, and how to do it. These problems are compounded by the lack of resources to carry out the agreed upon mechanisms, and to bring them into the community. These are further impeded by the challenge of creating, and then maintaining, legitimacy within diverse

communities, particularly as the track record for sustainability has been so dismal that the spirit to commit to new programs has been seriously compromised.

The second issue that developed was the victim's family who initially agreed to have it taken out of the courts and into the community. It took a little bit of explanation to the families that it would be actually tougher in the community than in the court. So when the issue came up we had to do a lot of education within the council and the community to really explain what community justice is. So one of the things that we lack the most is education. We have no materials, no one to come into the community to explain why it is better that we take over certain issues. Maybe there are other issues we should not do.

For this group, community ownership over all of the processes was very important, and made more apparent the consequences of the closure of the Mi'kmaq Justice Institute. When the Mi'kmaq Justice Institute [MJI] was operating, they received a significant number of calls requesting information on human and treaty rights, previous court decisions, and how they would impact a Mi'kmaq persons encounters with the mainstream justice system. The requests point to an increasing desire among Mi'kmaq to use treaty based arguments, and claims to distinctiveness in their litigation. MJI did not have the resources to adequately investigate each claim, let alone back them up with treaty claims that would hold up in court, further perpetuating the frustrations of individuals wanting to access the benefits of their special status, and clarification of their rights as they searched for justice. Mi'kmaq justice programs need to address two major education threads, internal program construction utilizing practices that have culturally appropriate meaning and efficacy in dealing with local problems; and strategy building for dealing with the external system. These threads are rife with contradictions as Mi'kmaq legal consciousness is constructed within and against these threads in efforts to find sources of justice that are legitimate within the communities.

JM: What would you suggest to be the best way to get that information out there?

It would have been best if it came out through the Mi'kmaq Justice Institute. I would not want to see the province or the feds do it. Not the band council but I would like to see a Mi'kmaq Justice Institute as neutral and independent, but that had a vested interest. I feel that the immediate is the need for more public education on what the program is about, not only for the outside, but for our people too, the benefits of it. Justice is served when people are more involved in it. The regular court system is really hard. It is hard for everyone, but much harder for our people, especially the ones that don't understand the language that well.

The conflicts of the mainstream justice system for Mi'kmaq persons go beyond language barriers. The entire procedure, and the tenets upon which they are formed, are also alien and yet also embraced in local discourses of community based ideal forms of justice. Mainstream justice processes are generally perceived to fail at getting to the root of problems, and fail to include family and community, factors that Mi'kmaq juridical practices have always encompassed as central to dispute management. Courts are seen as intimidating and adversarial.

Understanding the proceedings in court is difficult even for people well versed. It is a different type of language; our people need to be educated on that. I think that the usage could go a lot further than just that. I would like to always find out what the root causes are of why people get in trouble with the law. Start with that and work at trying to keep our people out of the system from the beginning. Create programs that help out people from getting in trouble with the law.

In a separate interview, the Chief made the following comments:

I have lots of experience where people from the band ask me to go to court. I attend these. Even though I am not the one who has to go before the judge I still feel intimidated. It is adversarial. We started justice circles and alternative types of meting our sentences, and if you can get people to agree to sit down with a number of laymen, to see if we can come up with a good way of repaying the victim and the community. MYOP did. Everyone is worth dealing with. Some people have more problems than others, but look at the environment. Once you realize the environment that our people live in you will not wonder [how they end up in trouble]. I grew up in that, and I certainly know the reasons. If they came from a better social and economic

environment they would not be here and that is a large piece of it. It certainly did not start with this generation and we are paying now. Institutes like Mi'kmaq Justice are very important for our people. It has to have a lot more commitment from the government.

A lot of our people do need interpreters, they speak English of course, but understanding it is another thing and you know how the law goes. The language of the law, I get confused, we need to get a better understanding of why things happen. But better still is how to prevent these things and they need to be incorporated into the institute too, preventative measures.

JM: What would that look like?

We have to get to the root of the problem and deal with it. All the years I have been Chief I keep preaching we need to fix the lack of opportunity. It is deliberate, why do we have reserves? In Africa there are game reserves, is that what we are? It is the attitude of the government, it has been going on so long that it comes naturally that there are reservations and there are Indians, not from India, no one bothers looking at that. The source of our problems is that we don't have an identity. Even our people call ourselves Indians and we are not Indians, like where that comes from. May be it started the apathy that happens. If a person promotes something so long it becomes fact or truth even if it is not. When we identify ourselves in our community we look for a band number, why? To get government services. There are a whole bunch of reasons we need an MJJ. In the meantime we have to just keep going until the root of the problem changes.

JM: When you attend court were people satisfied with the outcomes?

In the majority of cases I feel they are not satisfied. It is a different world in court and they will do anything to get it over with, and the fastest way to do that is to plea guilty, whether you are or not. Even our concept of guilt is much different from larger society.

JM: How is it different?

Well we don't feel it. Guilt is a new thing. It comes from different values. If we stuck to our values, the way we respect, we would never get to that feeling because you don't do anything to make you feel guilty. The way our system was, our values, when we had to punish somebody it was very spiritual.

JM: What were specific Mi'kmaq values of justice?

For example we are a sharing society, in times when people would go astray and take things without asking thinking that was part of the sharing when it is not. Part of the respect is ensuring that you don't take things just because you feel like it. There has to be a process in place. What we used to do to help individuals get respect back once they lost it by getting them to do chores for the person who was wronged or the community to show that they are back in a respectful state. We don't have that anymore. Now we have steel bars to keep your feelings and values in there and it is so foreign to how we resolved our problems. When people get incarcerated there is big opportunity for them to get worse. They learn bad things in jail, it is not progressive. My son was in jail and he told me that the unspoken rule in that kind of society is very predatory.

JM: Do you have ideas about how Mi'kmaq values could be put in a community process?

Until we are really able to govern ourselves we need to re-educate ourselves to find out what our true identity is. Part of that is getting our language back, to get as much education as we can in the larger society without losing our identity. That is what is pivotal in what is wrong with us. When you lose that you just become more dependent. We are so dependent on the government and a lot of us would be lost if funding were cut and that is not a good situation. We need to relearn how to look after ourselves within larger society in a world where real things are happening. We cannot put blinders on and say, that is them not us. It does affect us. If we relearn our culture then we begin to get our identity back from there we get pride, which motivates us to move from a welfare state to a self-sufficient state. Things that happen to us affect us as a whole. We have to get motivated. The Marshall decision gave us hope.

The Membertou band council wants to have more direct involvement in community justice. Here they point to one of the critical contradictions of the mainstream justice that makes it unpalatable for Mi'kmaq communities, the idea of visibility. Justice processes were never hidden in the past. Efficacy hinged on accountability, transparency and community involvement in the juridical processes. By removing those processes from the community, the correction of wrongdoings, and the balancing of harmed relations, which affect all members of these highly integrated societies, cannot be carried out in meaningful ways. The lessons learned from the wrongdoings about the root causes, and about the socially acceptable patterns of interaction, cannot be transmitted to other members of the community. By becoming invisible, the public is made private, the collective becomes individual, and the community, as a whole, is powerless over the outcomes and the protection of its relations necessary for ongoing production.

One of the problems we have is that we feel justice is not a part of us. The only time we ever get involved in justice issues is when the victim or accused families come to us as a council and ask us to get involved. We do not get involved with the judges, prosecutors, legal aid – we have no contact with them. The only time we deal with an issue is when they come to us. So we have no control or say over justice in our community and that is crazy.

Maybe one of the first steps is to make it visible. To have it happen in the community then maybe people will feel a part of it. Other than contact with the police it is outside of us.

The band council also recognizes that political involvement in justice may be seen as a conflict of interest. Articulations of notions of justice as neutral and apolitical, attest to the power and hegemony of mainstream justice, embedded in Mi'kmaq legal consciousness and ideas of legitimacy. Despite the political involvement in prior justice practices, it is hard to for people to reconcile that interconnectedness today, particularly when the outside society places great emphasis on its claims that separate the social fields of law and state. There are concerns over chiefly and political responsibility when family members are involved, and given the large extended kin networks the likelihood of encountering a family member is high. A further tension emerges from individual human rights, such as the right to privacy, and how those rights translate into a communal justice process. People often use confidentiality as a protective device, cloaking them from the glare of community in moments of wrongdoing, a strategy which counters community judicatory processes.

In order to combat increasing youth vandalism and violence, the band implemented a security guard system. People were hired from the community, given a short training program on safety and took to patrolling the streets in teams during the night, particularly on weekends, on ration payment days, and during multi-community festivals such as powwows and sports tournaments. The security system is seen as an effective and independent preventative system that offers most community residents a sense of security. In addition to the security system, youth programming combats the charge that there is nothing to do in Membertou; boredom is often among the top

explanations for why youth get into trouble. The band does not work alone to solve community problems, the social service and health programs also facilitate community building and address the problem of justice.

Membertou was home to the Mi'kmaq Justice Institute, during its brief existence, and is Donald Marshall's home. Marshall's experiences with the Canadian justice system have left a legacy of tension between the mainstream system and the community. Not only Marshall's family, but also the entire community of Membertou shared in the suffering caused by the injustices of blatant racism, and colonial domination epitomized by his wrongful conviction. Every tragedy and wrongdoing has a ripple effect in First Nation communities, as the interconnectedness of Mi'kmaq consciousness, with their lived experiences remains, contrary to colonial efforts to dominate and assimilate through compartmentalizing society their into discrete categories. For example, the labeling, segregating and separating of spheres of interaction, such as justice from spirituality, economy and polity, do not make sense within Mi'kmaq legal consciousness. Every research participant in this community was extremely wary of the mainstream system.

To resist outside domination, the Mi'kmaq actively produced their cultural understandings of themselves against the larger society. Articulations of the Marshall Inquiry and the Mi'kmaq Justice Institute are just two such productions for Membertou. The closing of the Mi'kmaq Justice Institute and the failure of the Province of Nova Scotia to execute the recommendations, have resulted in a heightened sense of ongoing injustice for Membertou residents. Membertou has limited resources for community based justice, and they continue to be alienated in the mainstream process. The Mi'kmaq Justice Institute was to provide public education to facilitate the implementation of

community based justice, and to provide a clearinghouse for rights based complaints and research. However, this did not happen. There are no Mi'kmaq probation officers or lawyers serving Membertou. When the Mi'kmaq Justice Institute closed, the court worker who supported Membertou residents was no longer available, leaving people in conflict with the law on their own. A sense of futility contrasts all of the hard work that went into the creation of the institute, and the Marshall Inquiry, and these failures resonate throughout the community. People commented that the government appears as not wanting the Mi'kmaq to succeed in creating their own justice system, and are complicit in setting them up to fail. Such perceptions built into legal consciousness, help foster discourses of resistance. With the recent Supreme Court Decision on fishing rights, Marshall's name and experiences expand within the legal consciousness of Membertou residents. Marshall, a son of Membertou, is synonymous with a wide range of legal discourses.

Membertou's close proximity to the city projects a perception of an apparent decline in 'Mi'kmaqness' when compared to those communities that are more isolated, where visiting traditions, language, traditional lifestyles of hunting and fishing, and community cohesiveness, appear heightened. Due to a large majority of persons being educated off reserve, language retention is lower here than in other Cape Breton communities. Seen as being more modern, but less Mi'kmaq, poses certain challenges for the people of Membertou, and affects how their legal consciousness are shaped. Some interview participants felt they were 'looked down on' by other Cape Breton bands because they cannot easily converse in Mi'kmaq. These perceptions trickle over into how

people feel about the potential for community based justice to work in Membertou as the following woman attests:

JM: What if there was a Mi'kmaq controlled justice system here?

It could be a possibility but I don't know if it would work because it's hard here, because we were never, we are surrounded by, we are situated right in the city. We have non-native people all around us, and not very far, like at the shopping malls and everything we go to. With Eskasoni it is all cultural. It is all Mi'kmaq culture there, all around that whole big area. Maybe it can work there but I don't think it can work here because you are intermingling with non-native people on an everyday basis, even on the reserve.

JM: So how would that keep it from working?

Because we are a small community, we have a big community outside us and like um, I just don't think it would work where we are brought up here all our lives and I don't know. We just got used to the non-native ways with the justice, and like I got charged and it was regional or city police. I got charged and I was terrified of what happened and it worked for me. It worked for a lot of us, like the ones that I was telling you about that main group. We have all been charged, we have all been put in jail but we were put in jail in town. We had to deal with law in town. There were so many of us in that age group that were charged with assault, and everything, and now we are all straight.

This chapter has focused on the community of Membertou, an urban community with a strong political leadership and positive economic development. The closure of the Mi'kmaq Justice Institute was a blow to recognizing the full intent of Mi'kmaq interpretations of the Marshall Inquiry Recommendations, and to community empowerment. The community wants to have control over justice, but there are competing visions of what those processes should be, and who should be in charge. There are doubts about the efficacy of traditional justice, just as there are doubts about mainstream justice. Rights and self-governance discourses are strong in this community, particularly after the 1999 Marshall Decision. Membertou residents mediate their gender, class, and ethnic identities within networks that blur boundaries between Mi'kmaq and non-Mi'kmaq, while trying to reconcile with the past by looking toward productive futures, free of the shackles of dependency, but maintaining distinctive traits of Mi'kmaq

culture. The multitude of informal juridical practices available in the community fosters unique sets of legal discourses that shape Mi'kmaq legal consciousness.

Chapter Eleven: Contemporary Rural Landscapes

Waycobah First Nation

In this chapter I briefly describe the ethnographic landscapes of a rural Mi'kmaq community in Unama'ki [Cape Breton], to compare and contrast the settings in which Mi'kmaq legal consciousness are constructed, articulated, and contested, with those of the urban Membertou. In Waycobah informal justice mechanisms differ from Membertou because the forms of dispute and the resources used to manage them differ.

Location and Description

Waycobah First Nation is located on the southwest end of St. Patrick Channel of the Bras D'Or Lake, in central Cape Breton Island. Traditionally the area was a seasonal gathering locale where families would come together to fish, collect berries, and hunt. The waters are full of salmon, trout, codfish, eels and shellfish. Blueberries, strawberries, blackberries and raspberries grow throughout the territory. Moose, deer, rabbit, and bear hunting remain popular sources of food for the community. There is a pizza shop that does a steady business. The scenery is magical with a mountain range framing the background with community nestled at the bottom, bordering along the shores of the lake. The Skye River offers a great place to jig and fly fish. The lake freezes over in the winter, and eel spearing and smelt holes can be seen dotting the surface in the late winter. Eagles abound in this region.

There are approximately 700 band members in Waycobah First Nation. The band has experienced a population change of 10.6% since the 1996 census. There are 165 private dwellings spread over a land area of 7.36 square km. Fifty-five of the dwellings are in need of major repairs. More than two hundred of the residents are under fourteen

years old, and only forty-five residents are over fifty-five years. 83.5% of the population indicated a knowledge of aboriginal languages with 66.1% stating that they speak aboriginal languages in the home (Statistics Canada Census 2000). Linking language retention to maintaining traditional teachings and values, Mi'kmaq teachings are emphasized in local school programs. Children call elders Nsukwis and Nklamuksis, or Aunt and Uncle, to show deference and respect to older persons.

Trans Canada Highway 105 runs through the community and figures large in the social landscape. According to an elder woman who grew up in Waycobah, the highway, built in the 1940s, has changed everything.

Seems to me it is not the same where I came from. There is more death. Highway kills everything [her daughter and son in law were killed in a head on collision just outside Whycocomagh]. Whycocomagh [Waycobah] is not same as one time. There was a gravel road when I left. The Trans Canada ruined everything in that area. It is really different.

The highway has resulted in a number of tragic deaths. Pedestrian accidents, hit and runs, driving while intoxicated, vehicular manslaughter, high speed chases, transfer truck accidents, all reverberate throughout the tight knit community. While conducting my fieldwork in Waycobah, one man died on the highway in front of his home. Several months later, another community resident killed a young man as he crossed the road on his way home from visiting a friend. Further down the road yet another Mi'kmaq man was killed by a person driving while under the influence. The highway is a constant source of antagonism and is symbolic of non-aboriginal interference.

Along the highway are single family homes, an old band office, which is now a Mi'kmaq fisheries building, and the community hall, where weekly bingo games and special events are held, for example the annual Princess Pageant, salite' and wedding

receptions. Roughly in the middle of the reserve, along the highway, is a big white Catholic Church, located prominently at the top of hill; behind it is a graveyard. In the windows of the church hang locally made dreamcatchers, the ubiquitous symbol of aboriginal handiwork. As with Membertou, the church and gaming halls are focal points of community social activity. A Waycobah elder she discussed how the community and the church have changed over the years. In our conversation she pulls out several major themes shaping Mi'kmaq legal consciousness: forgiveness, sharing, the impact of centralization, and ideas about traditional governance.

At one time there was no priest but the people gather every Sunday and pray. They must have been religious people and there were a lot of people that can say the prayers, they know the bible with the hieroglyphics, and they pray every Sunday in Waycobah. There was no mass the priest only come once or twice a year. Everything is exactly like mass. The Grand Chief was leading it and a prayer group praying and singing like a high mass. Wouldn't it be nice if someone recorded it? May is the month of Mary, and they go every Sunday evening, and October and Christmas they have a feast and they go to house to house like the names John, Moores, Steven, Theresa. They make a cross and a medal, and the person that receive it in the house make a meal, and they dance, and eat, and they go same name one night, and next night some other name.

They don't do that any more after centralization everything change, even the Indian prayers, the priest say they have to learn English now after the nuns came. They cannot receive Holy Communion, they have to learn English. Today they say it is too bad you didn't teach us prayers, and I say yeah it is too bad the priest did not want any body to learn Mi'kmaq, they had to learn English to get your first Holy Communion. That is why we lost all these prayers and customs. It is funny they did not keep it on the other reserves, like the customs when someone gets a present, because not everyone went there [centralization in Eskasoni].

JM: Maybe people could not provide the food for it?

Oh they could in them days. There was lots of eels and rabbits. We would make stew. It would go onto five o'clock in the morning, and you would not see anybody drinking in them days. There was nothing, it was just plain good times. They do that without the priest. That was why they were so close, because they prayed together and stayed together. Year round the religious things was very important. Even lent prayers, every night in houses in three groups on each end, and in the middle, and then way of the cross. You do the Apiksiktuek, forgive everyone before you can go to the way of the cross. On

good Friday the Grand Chief would open the thing like the priest do and they pray and sing and they have that in Mi'kmaq, and he would be the first one go in, and then the captain and then the men older then younger and then the Grand Chief's wife then older women and they all start on their knees from the door to the altar.

JM: They don't do that any more?

I don't think they go to church. They were religious, and they were scared of the devil, and today no one is scared of the devil. Everything was together on the reserves. One time I used to go and visit and visit, like a cat.

Turning up into the subdivision area there is an elementary school, an old fire hall refurbished as a gym, and several homes. Down the subdivision is a large, modern band office complex, built within the last three years. Inside the band office are the health services of Waycobah Wellness. Behind and beside the band offices are the powwow grounds and sport fields. On the other side is the new fire hall, which houses the fire truck and the ambulance. Next door is the Unama'ki Tribal Police substation with a lock up for wrongdoers. In an interview with a volunteer jailer, I was told that things were pretty quiet and that he had only been called in once over the past year to watch a prisoner. People are put in the lock up for their protection when they have had too much to drink, or for assaults. There was a death in custody of a mid forties male last year. The police were not found complicit in the death, which was attributed to health problems; however, some community members do not agree with the findings, and have asked for the case to be externally examined.

Further down Subdivision Road is a newly built section of the community where multiple family units house young families, single parent families, and bachelor suites, in a series of townhouse and apartment complexes. Kids play road hockey and skateboard along the road and in the parking lot of the band office. There are new streetlights, but no

sidewalks. There is a dog by-law enforced by the dog control officer, who resides in the community.

Back out on the Trans Canada Highway there is a high school that was once a restaurant and a basket shop. Googoo's basket shop is a longtime fixture of Waycobah and boasts the largest handmade basket in Nova Scotia, which sits out front of the store. Also out front sits an artificial horse, and a birch bark wigwam. Occasionally tourists will climb on the horse for photos, much to the amusement of the locals. Basket making, bead work, quill work, and leather work, are vital aspects of small cottage industry in Waycobah. There are only a few elders who still do basket work, and they have labored hard to pass their skills on to young people. Several times a year, workshops, often in conjunction with Healing Foundation initiatives managed by the Wellness workers, provide opportunities to share the traditions. One elder responded to my question about Mi'kmaq law ways with stories about baskets and work.

JM: Are there laws or rules that are just part of Mi'kmaq way of life?

I don't think so it, it is just like custom. Way back, when they had Indian day school, I was only twelve when I quit school, because them days you had to make baskets. If it was not for making baskets we would be naked. My father would go sell baskets and that is the only way we could get clothes. My brothers and sisters and I would make the baskets all day, and we had the little farm.

Past the basket shop is the local shopping center. Ten years ago the former chief of the community built a gas bar and convenience store. He later added a used car dealership, and a pizza shop. The chief left politics and the band purchased the business. Video lottery terminals were added and the store continued to expand. It was the first business in both Waycobah and Whycocomagh village combined, to have an instant teller bank machine, installed just two years ago. The gas bar, recently refurbished, juxtaposes

the older buildings in the area. Beside the gas bar is a small engine repair shop. Other services in Waycobah include home oil delivery, construction and trades work. Further down the Trans Canada Highway, neighbouring on the reserve lands, is the village of Whycocomagh.

Relations with Other Communities

Adjacent to the Mi'kmaq community is the village of Whycocomagh, a community comprised primarily of people of Scottish and Irish descent. Periodically disputes flair up between members of the village and Waycobah. The local Legion is a gathering spot for both communities. Generally there is not a lot of mixing between the groups. The legion has always been an interesting study in relations, and when fights break out they are usually between First Nation and non- First Nations. It is unusual to see any Mi'kmaq person employed in the village, even though Mi'kmaq spend the majority of their money in the village grocery stores and at the pharmacy. In a conversation with a young couple in their early twenties, with a new baby, they talked about their perceptions of the village and Waycobah.

JM: Does anyone work in the village?

Male: No.

JM: You know I don't ever remember anyone working in the village?

Male: no Indians ever worked in the village and that's all the time, except her, [points to his partner] this summer.

JM: Where do you work?

Female: In the [gas station]

Male: And the woman does not think she's native [chuckles]

JM: How does she not know where you live?

Female: She asked where my parents are from cause she knows I am not from here, and I go by my step father and say I'm from Boisdale [a non-Mi'kmaq community].

Male: And Sydney and Boisdale are not reserves eh!

JM: Is that why you think you got the job?

Female: Yeah honestly.

JM: If you said your parents were from Waycobah, or from the reserve?

Female: I don't think I would have got it.

JM: Is that not prejudice?

Male: Yeah, they are still like that.

Female: They are not prejudice to you, no. [not directly, implying partner]

Male: There are some people that make it bad, like I know there is like the gas station there and there are some natives that have bad alcohol and they go buy Listerine. [name omission] is a gas station where they sell gas, oil, stuff for service you know, but they have a shelf loaded with Listerine. Just Listerine. And you know who is buying that.

JM: At the [name omission] gas station? I never noticed that.

Male: There is a shelf right behind the counter, you know what I mean. Yeah mouthwash, why would they have that? Just look behind the counter there, there is a whole row. Same with the other station there and the convenience store, and he is pretty bad too. One time ago he would not let a woman use the bathroom there, she was just from the reserve here, and she needed to use the bathroom and he said no. He did not want to let her use the bathroom and it wasn't the booze or anything.

In the years that I have lived in this area, I have witnessed a number of events that demonstrated discriminatory treatment of Waycobah community members by village and other non-Mi'kmaq in the area. I have heard Mi'kmaq people complain that when they walk into a store or local business, people will stop talking, or they will avert their eyes. Sometimes Mi'kmaq people reported they are treated suspiciously, followed around like they might steal something. Others, when seeking medical help, have been approached without respect and presumed to be abusing medications, and have to endure a number of questions in order to validate their requests, while members of other communities do not have to suffer such inquiries. I have also heard several complaints about the way medical professionals behave toward Mi'kmaq persons, treating them as second class citizens and without dignity. Such behaviour reinforces feelings of inadequacy, preventing those needing help from seeking it. These sentiments are reflected in Mi'kmaq legal consciousness, and serve as partial justifications for community based justice because

external prejudices shape Mi'kmaq/white relations, including justice, and are perceived as determinants in whether one obtain satisfactory results in the mainstream system.

There are also rivalries and jealousies over resource use. I have heard non-Mi'kmaq complain bitterly about Mi'kmaq fish and game harvesting for ceremonial and food purposes. Several months ago a sign posted on Hunter's Mountain, a favoured and sacred moose hunting location for Waycobah residents, read 'Save the Moose Kill the Indians'. As treaty rights become entrenched, permitting Mi'kmaq access to scarce resources, these tensions are mounting, and are felt throughout the community. In my years as an eel fisher in this community, gear conflicts were a constant issue.

Governance and Juridical Discourses

A Chief and six council members govern Waycobah. Chief Morley Googoo has held five consecutive two year terms. Five of the six council members share the same last name Googoo. Currently his leadership is in question as the band is under investigation for financial misuse, particularly over funds missing from an annual fishing derby.

Waycobah holds plebiscites to ratify significant issues. One plebiscite was held to decide whether or not to ratify a federal fisheries deal stemming from the 1999 Supreme Court Marshall Decision. The membership voted in favour of signing. The agreement provided the community with short term capacity building, and was to create an estimated forty-one jobs. Profits from the fishery were to be reinvested in job and housing projects on the reserve, where housing shortages are a major source of contention for the growing community. Protesters against signing picketed the band office, and distributed flyers asking people to vote against the deal because of concerns over diminishing treaty rights. The local television station broadcasted an information panel to

help inform the public about the benefits of signing.¹³⁹ The community signed, and now people are questioning where the funds have gone. Waycobah is in the midst of an accountability crisis that has implications for band council involvement in community justice. In Waycobah, people are more inclined to speak out and challenge the local government. For example, one community member uses letter writing campaigns to challenge the policies and fiscal activities of his band. He wrote a scathing letter to a local newspaper that circulates throughout Inverness the county where Waycobah is situated, and surrounding counties. He is a university educated, occasionally employed, middle aged father of six, who describes the problems as follows:

Right now the Chiefs and Councils are taking the money and distributing it amongst themselves, and the people are poor, and they are still in poverty, and it sickens us. When we know that Junior [Donald Marshall] had fought for this for so long, and went through all this for his people, and then the crooks come in when the battle is done. The crooks come in and start filling their pockets up and it is the ones in poverty that he was fighting for.¹⁴⁰ Now we know our own people are the ones who have turned white on us. And we did not expect that and how lost and divided our people are. Half of them do not even know about the money that is being stolen off their people. I said Grand Council can no longer be these people that go and pray in the church and at mission, we got to act as a traditional government the way our ancestors ran the whole system. They are intelligent enough, smart, and brave enough to do it. We as Mi'kmaq people have to take everything aside, and push everything aside, and concentrate on rebuilding back our nationhood, and bring it back to the way it was. Think about it, the Americans, when they declared independence, wanted to sign a treaty with us. That is how powerful we were, it was not about fear. It was about living in integrity and honesty. It was not like I will conquer you. It was nice, like we will take you in, and you can live amongst us. That was the power. As they diminished in numbers those things started to disappear, but now they are increasing for the last few decades, and I noticed it is coming out. What I needed to happen, like little plants, the blade is just starting to grow, and you

¹³⁹ The community station offers a typed feed of information on a rotation. Announcements, tips, points of interest are typed across the screen with music in the background. Local companies advertise and community members can submit articles and personal ads either for free or for a nominal fee. I have seen lost articles posted. There are similarities between the television station and Membertou's newsletter.

¹⁴⁰ This person is referring to the Marshall Decision on Mi'kmaq Treaty rights to access the commercial fishery.

want to grow it some more, and make sure it blossoms, but the sun is blocked by policies. I cannot control the sun, but I wish the people would smarten up. Every day I fight the government. That is my twelfth article since the gaming agreement was signed last year, voicing out and bringing the truth out. All these deals they are all made in the back rooms, the hotel rooms. Eight million dollars is missing out of our funds last year. I fought with Indian Affairs, fishery, I was like a dentist pulling a tooth just to get out the information that should be out in the first place.

In addition to fisheries issues, another recent band controversy involves the allocation of a license to sell liquor. The Nova Scotia Liquor Commission announced it would allow agency stores in communities that are at least twenty-seven kilometers from outlets. Whycocomagh and Waycobah were established as a potential site. Five local businesses entered into the competition, including the band owned gas bar. The band council sent around a letter stating the benefits for Waycobah if the community was awarded an Agency Liquor license. The benefits ranged from: additional revenue, to higher traffic volume for other store products, increased revenues would flow into the community for future investments and business ventures, to job creation and reducing dependency on the government for program dollars. Furthermore, it would be ground breaking as it would be the first agency liquor store operated by a First Nation. The band also listed a number of disadvantages if they did not receive the license. However, they did not address any disadvantages if it was awarded to them.

The community, on the other hand, had many concerns. The issue generated a great deal of controversy. The people were divided on whether or not to support the band's bid, and were upset that the band decided to go ahead without first consulting them, or holding a plebiscite to determine the level of community support for the venture. One university educated, unemployed, married mother of four said:

They want to get a liquor store in Waycobah, and I am totally against it. The community heard about it in the newspaper. We are very upset we were not consulted. If they want to take money they should add it onto the school for kids. They want to put that store right beside the high school. How easily kids are getting cigarettes, kids are going to get liquor. Usually they should have a plebiscite and referendum. I cannot understand why they are not asking for that today. Because the community does not want it, all these decisions are being made and I can't believe it.

A female elder attributes local crime to alcohol abuse. She inverts a negative stereotype to position herself against the proposed liquor store. The concern she expresses over not being included in the process demonstrates how isolated some elders are feeling in the fast paced world of First Nation business development. Here she accuses the band council of not following traditional protocol that includes elders in all major decisions. It appears in this case that the band may only use elders when it is convenient to them, and as a path of least resistance.

If there was a crime it was because the youth had nothing to do but get into drugs or alcohol, there is no entertainment. Elders say to the youth there is always something to do. There is crime and if they break into places I blame it on the alcohol and the drugs going around. We have too many pushers on reserve, too many bootleggers. Now they want to put up the liquor store. Chief and Council want it because it is going create good for us. We have a lot of alcohol. Maybe it will stop the bootleggers, but people will still go to the liquor store. It is bad enough when you look at the store, at the kids waiting for adult to get them cigarettes. Now they will wait for a six pack, and being on the Trans Canada highway, where are you going to see a lazy, drunken Indian? This is what people usually refer to us as, lazy drunken Indians, and now Chief and Council are trying to put the liquor store on the reserve. I am so against alcohol because I have gone through an alcoholic husband, and this is why I am so against liquor. Yes put it in Waycobah but it will not make any difference. The TCH is most dangerous. They are going to walk there and who knows who is going to get killed on the road again. I think they should, the Chief and Council, should have approached us elders, anything like that our elders should be approached on it. That is what should be done. They never consult elders on anything at all, and they just get on with what they want to do. The elders are not approached. The elders do talk about it. We were here first. They don't have their voices heard. I myself would like that. I am pretty well up there, I would like to have my input to chief and council, but they would not like what I have to say to them.

Despite the band council's efforts they were not awarded the liquor store license, much to the relief of community members, who cite alcohol and drug abuse, along with family feuding, and political favouritism contributing to social inequality, as the major social problems in Waycobah. In an interview with the Chief he made the following observations about his community, and the challenges he faces in trying to bring about positive change.

The biggest thing is to have people talk about it. That is the biggest shortfall. No one wants to talk about anything anymore because of the politics involved. The open mindedness to talk about any issues is very closed because of social issues. The forums become complaining sessions rather than how to fix things. Before anything, the community effort or support has to exist. The whole society is claming up and keeping to its own. Too many social issues, and not enough money, even when you look for volunteers. Even five or ten years ago you had tons of volunteers. People really wanted to work on projects but now this has changed. This is a trend in every community.

JM: How do you account for that?

We have only so much money for so many jobs. In Waycobah many people do not have jobs now. There are lots of students who are going to be coming to your door for jobs. There is no other money to hire them. People are getting envious, jealous, and frustrated that a person is working and they are not. So people make their own little groups and they secretly rebel against each other, but still be polite. They will elect another chief and council and expect to get jobs. I want to bring in major projects for people who want to work, and if that does not happen I do not want to be Chief, because I will not be able to meet the demand of jobs. No one sees this other group coming up. And then there are those who do not want welfare any more. At the start, welfare may be fine, new house and bills paid, but when you see someone else getting more things [because they are working]. The base line poverty level works against you when you go out and work because you start counting how much is the difference between now and then, and it works to say twenty dollars more a day, and it discouraged you from working. There are not enough jobs. There are a lot of tensions.

JM: Does this come out in conflicts?

In some cases yes, but more it comes to people feeling very suppressed. That the whole society in turning into haves and have nots, and your whole sense of community. That dependency feeling stops a lot of these issues and initiatives that we want to talk about from flourishing because everyone is angry about something.

JM: What are the biggest social problems that need attention?

Housing of course but that is a problem everywhere. I could say jobs, employment, but there are two parts. One is the jobs, and two is to break away from the system. It is not easy. When a person decides they want to start working at age 24 or 25, they have three kids, and grade nine education. A minimum wage job is not good enough, they want a \$500 a week job. But they have got to understand that they have no training, no experience. It becomes a social problem, how can they break away. That commitment, and time, and sacrifice they have to make to get that job. Right now with fishing, everyone wants \$100,000 a year salaries. It does not matter if they have university education or not, because you live in the have not for so long and when the opportunity is there everyone is pursuing that dream. It is not enough at the end of the day. There is a lot of work even though it does not sound like much work.

The ration / welfare cycle is a vicious circle in all Mi'kmaq communities, and is particularly devastating for young people who grew up in families that survived on bi-monthly payments, with the band subsidizing all other expenses. In the current generation of young adults, there are many whose parents had very limited job opportunities, and were wholly dependent on the band. Youth in this cohort find ration payments to be a rite of passage, marking the child's advancement into adulthood. The payments constitute a right, a small piece of compensation for all of the past wrongs that the larger society has wrought upon them and their ancestors, and as such, there is little motivation to deter one from starting the cycle.

Furthermore, as the Chief noted, jobs are scarce, but the rules around employment and receiving the 'compensation' are strict. If you work, you pay your own way, light bills, heating oil, clothing, food, and at the end of the month there is little left. When compared to the person who has not worked all, but has his or her bills subsidized by the band, and uses the 'compensation' for personal consumption, it appears unfair. This is a reality that does deter some young people from seeking employment. This problem is further complicated by the fact that the social economy on reserve does not have the

capacity to support its growing membership. Add to this the reality that outside society is still not fully welcoming to aboriginal peoples due, to ongoing systemic discrimination, which place Mi'kmaq people at a disadvantage in the competition for employment, regardless of their qualifications. A young man from Waycobah explains this dilemma.

JM: What is it like living here right now?

It is not too bad. I find there are a lot of benefits with heating, lights and oil and that. Like some of us will have to pay for propane and my electricity soon. As soon as you get a little bit of income they make you pay for everything now.

JM: Is that hard or fair?

When you are not making so much, when you are only making \$100 more than welfare would give us, so they expect us, with that extra \$200, to pay for heat and propane and lights, and that costs us more than what welfare. People do not want to work because as soon as they make a little money they are cut off everything.

JM: So that would be an incentive for people not to work?

Yeah, like me right now I am making that money. Just to be better for us I am planning to go back on welfare because I would save. I won't have pay. I won't have to worry about how much light I use, about the stove, the propane, and the oil. I won't have to worry, like right now I have been practicing shutting the lights off and that, but it is hard.

JM: It is hard. What about in terms of cooperation and peacefulness of the reserve, is there cooperation, or are people fighting a lot?

Right now it is not too bad. Before when the fishing came out there was a lot of fighting over boats and CPs [certificates of property] and there was a lot of fighting about that.

This is a widespread problem that exacerbates favouritism claims, because not all people are eligible for additional subsidies to ration payments, and the band does not have the funds to meet all requests. The allotment system is not transparent and people see their neighbours getting material items when they do not. An interview with a man in his early twenties reveals some of the political and socioeconomic issues he sees as relevant in his community.¹⁴¹

¹⁴¹ This person ran in the last election for a council position which he narrowly missed by three votes. He noted that the biggest obstacle to getting elected is the ability to do favours for people. If you have money you can get elected.

JM: Is he a popular Chief or not so popular?

One time ago he was popular, when he was young, but this year there was too much, like the fishing made a lot of people angry, so he wasn't too popular this year. Personally I can't see anybody running this reserve anymore because I don't think anyone is really worth it.

Well he got a brand new band office, new fire hall, ten new mini homes and new houses this year. He was a good chief when he first came in, now we have street lights like we never had before. We got a new band office, fire hall, we got a fitness centre, we got everything you know, police station and lots of new houses and subdivisions, like the ball field that area if all fixed up, so he made an improvement on the reserve. He helped fix my house, and he created jobs, like landscapers. Like a lot of people here on welfare they are not well educated to get jobs off the reserve, that's another thing to eh. You know people that ain't that well educated that they come back after high school, they come back to the reserve and collect welfare. Its easy money, right. You don't really pay for anything because you are on welfare, so that is another downfall there too. He did a lot of stuff for the reserve, but lately he has been messing up. I guess that's other people bad mouthing him too. They are saying he bought that bar in Halifax with some of that fishing money, the fishing derby money. There is a lot of money that went missing. But you could see where it is going, now we own Rod's One Stop [local store and gas bar], they bought that fish market at the causeway, that's a couple million there. The way I look at it the bar in Halifax is the reserve's.

When I asked questions about involving the chief and council in justice matters

the general response was no, they should not be involved because there is too much favouritism.

JM: Should community control justice?

I don't think so, there is favouritism in the community. Just like chief and council. For example his daughter got a house just like that and he came in council his second daughter got a trailer, second term his daughter got a trailer. People that need it don't get it. Council members get their families homes faster.

JM: Other ways favouritism shows itself?

Family, in jobs. It sometimes causes tensions.

The concept of justice as neutral came up often, as people indicated a preference for a separation of political, family, and social ties from juridical processes, because who you know is thought to determine what kind of justice you will get. That the chief and council have too many family ties, and would sway the community to protect their own,

and seem immune to the law themselves, were sentiments widely expressed. Other community members argued in favour of having them handle justice issues because they were elected to serve the community.

The current Grand Chief of the Grand Council resides in Waycobah. The Grand Chief would like to see the Grand Council participate in justice, not necessarily the interpersonal problems of community members, but more toward the regulation of resource use, a traditional role of the Mawio'mi. In an interview the Grand Chief discussed his role and the perceived traditional role of the Mawio'mi and the local elders.

JM: Can you see the Grand Council as becoming the Mi'kmaq Nation's court system?

It would be good but we need to get some training on that stuff.

JM: What kind of training?

Being more, learn more about the law and the justice system.

JM: Would it be like creating a Mi'kmaq justice system?

Yeah, that would be one of the sources I guess.

JM: Are there ways from the past that were used to straighten out wrongdoings that could be used today?

Yeah, like in the old days elders used to decide what was going on in the communities, they would make the decisions about what would happen to the person who disobeyed the law, our own law.

JM: What sorts of things would happen?

Either they would put him some restraint on him. Like prevent him from fishing for a while, suspend his license until he respected what he was doing.

JM: What are people looking for from you?

For guidance, and to set the guidelines to conduct the fishery and even the moose hunt. They say you guys should clamp down on those non-natives that are going out there with the native, just using them.

Community members tend to support the idea of the Grand Council revitalizing this aspect of their former roles. When the Mi'kmaq Justice Institute was operating, a band governance survey indicated that their form of leadership was best suited to handling national jurisdiction issues related to resource management. A male elder

favoured Grand Council revitalization in order to check the power of the Indian Act elected chiefs and councils.

If I can get the power of the Grand Council back in some way in the system of the Indian people I would suggest people, let's say. Chief and council can do anything to the people on the reserve today. They even steal money and stuff because they have nobody they are scared of. They are not scared of nobody. I hoped that people would get together and make the Grand Chief to be able to tell them I am the Grand Chief and you are dealing with my people, you are dealing with my people, and you are a politician, and you are elected by the Indian Agency, and I am the people. You handle my people right or I will shut you down, and that is the kind of power I need to see the Grand Chief.

JM: How could they get that power back?

The people have to do it.

Most Waycobah members see members of the Grand Council as spiritual rather than political leaders. Characteristically they are presumed to be able to offer good advice, act as keepers of peace, and would make a good national government, as they are perceived as being more neutral than chiefs and councils, largely because they are not paid, and 'do not buy votes'. Some people reject these claims, citing a false objectivity, because they too have family members involved in disputes too, and their neutrality in fact may be considered an elitist neutrality. Elitist neutrality is form of nonaligned status that needs careful consideration when assessing power relations in any dispute management scheme, particularly those claiming legitimacy based on ties to a distant past.

The Problem of Justice in Waycobah

The problems most noted by Waycobah residents include bootlegging, drug dealing, substance abuse, gambling, vandalism, underage drinking, impaired driving, child neglect, and feuding. In Waycobah there is no local court and people have to travel

to the town of Baddeck, about a half hour drive, to attend court. Waycobah people expressed mixed feelings about the court system. Most people said they did not feel comfortable or did not understand the process, and others commented that they did not feel like their claims were taken seriously. As one woman noted, the court process removes dispute management from the community and hides the remedies. People are not aware of outcomes, or even the problems that are taken there.

JM: Are many going to court from this community?

Yeah but you never hear about it. If you go to court on Friday you would be shocked there is so many people's names called. The only reason I have gone to court so often is because of my uncle. You see a lot of Waycobah and Nyanza [Wagmatcook First Nation, the neighbouring Mi'kmaq community] people. A lot of them driving while impaired, caught with liquor, most alcohol related. People keep it quiet. We will know if something drastic happens, but they don't usually talk about what went on.

The court system does not satisfy their needs, nor is it culturally sensitive. This person explains that the power of the judge, rather than the judicial system, is the deciding factor in whether outcomes are fair or not.

JM: In general do you think the mainstream system is fair to Mi'kmaq people?
I don't know, yeah its pretty fair. With Dad, well what happened was all fair. You know Dad. He went to court, he did some pretty wild stuff and like he got away with a lot of stuff like, because his lawyer is good and stuff. Some people say like seen a gun and he puts it to a face, and he only gets six months that is pretty fair you know.

Yeah, it's fair you know. Like Dad never served any long times. But there was a judge one time ago, it depends on the judges. Judge [name omission] he was in Baddeck. He was nasty. He hated Indians. Its up to the judge its not up to the criminal codes and everything like that.

Yeah what the judge thinks about your race and you, your own, how you present yourself. This judge hated my father put him in jail for everything, but as soon as we got the new guy, Judge Ross. He came to Baddeck. I don't think he is racist at all. Even that Judge [mentioned above] got taken off the court for saying some stuff he should not have said.

A single mother, university educated and working off reserve, did not think the courts were accessible to Mi'kmaq people, and therefore could not offer any remedies.

JM: Are Mi'kmaq using court more or less?

Less.

JM: Are they solving problems on their own or is the mainstream not useful?

Didn't someone say a native can't charge a native, especially if you live on reserve. That is what I heard. It is a deterioration [deterrent] for anybody trying to do anything. It was told to us. Something happened to my sister here and when we went to take it to court they said you can't charge a native.

JM: That would stop people taking court action.

Like with assault or sexual assault there is hardly anything done, you know what is going on and no one is doing anything about it because it doesn't go to court. It doesn't stay. I don't know if it is evidence, or witnesses, or police force.

JM: The court doesn't offer a good outcome?

No.

In First Nation communities, ongoing daily interaction occurs between people affected by offender behaviour. Unlike mainstream communities, there are fewer exit options for both wrongdoers and their victims, due to a plethora of cultural and economic reasons. In Waycobah, the Mi'kmaq Family Treatment Centre, which operates under the auspices of Mi'kmaq Family and Children Services, offers a residential program for victims of domestic abuse, using a holistic healing philosophy based on concepts of community healing. The workers of this organization want community based justice to handle sexual assault and domestic violence issues because the mainstream system does not adequately serve Mi'kmaq people's needs. The directors of the program discussed the challenges they face in helping the community move toward healing paths that frame their juridical discourse. There were two program directors in this interview, number one is the primary program coordinator and number two is the outreach worker.

2: There is such a big link about confidentiality but we have to work together and share information.

1: We cannot affect family violence unless we look at it holistically, like everything else, justice. We need to look at prevention as much as intervention.

2: Individuals who are not healthy know how to get around the system. We are system oriented, operating separately. If we came together we could get better referrals.

JM: What roles can the community take in justice?

1: People have no faith in justice. Family violence, women get the shit kicked out of them and he gets probation. That is not justice. That is not a rebalance. That is what traditionally happened, a rebalance of things. We do not get that in mainstream. It is more empowering to go through a circle. It is more strengthening for her. The thing is to set it up that way so it is, not just for youth. Women should be allowed to go through that process too. It takes a whole team to help empower them. It is so hard to get him into an anger management program or for him to take responsibility for his behaviour and to get her prepared so we can balance that.

JM: Is there a willingness to participate?

1: There is no system available so they have to go through court. They do not care.

2: Several things happen, sometimes the police do not act. If it does get reported it sometimes gets thrown out because some steps were missed, or the woman will drop charges. There is almost a double system, one for non-native and for native people. And judges tend to be more lenient toward native people and the crimes that they do. So there is no faith in the system. Sometimes the police do not show up.

1: But the problem is no one complains. People call us for help and we suggest they lay a complaint but we cannot force them to do that and they say nothing will happen anyway, there is totally no faith or confidence in the system and it stops right there.

1: The average person is so disempowered. They feel no sense of power that everything is against them. Plus responsibility, we have such a lack, such non-responsibility, that someone else will take care of it. I don't care. They leave it others who they feel have power to change.

2: Programs for justice I feel the court worker program was understaffed. One person cannot do such a large area. There is an education process that has not taken place with the non-native systems in terms of educating judges and lawyers and that is a big part of why we have such problems with the legal system. When you look at other provinces' programs, like Quebec, we don't even have that. We have the court worker program and it is not to the magnitude it could be. We need elders involved in sentencing circles. We do not have elders that can take someone away for three months and teach about honour and trust and responsibility. So when he or she goes back to their family they will be violent. We do not have that extended support program to tap into to do it.

JM: Could something be developed?

1: We need a healthy elder.

2: A place where people feel safe enough to go, like a healing lodge, removing someone from the violence. By locking them up there is no place to take them to get support and counseling to find out what happened, before they get

JM: Are there any reintegration processes now?

1: Women batterers just get a slap on the wrist from the court and say it is up to her to decide if you can come home or not. She just says, because of the imbalance of course he can come back and that is it. We have no control over it. We could really help.

2: There are no programs for sex offenders. That person comes right back to the community.

1: Sometimes the community banishes them.

2: Or they just don't talk to that individual or ignore them and hope that by the time they get the message that they are not welcome they will voluntarily leave.

1: But that does not deal with the problem. They need to solve the problem. They cannot just keep pushing it to someone else's back yard. And if this person keeps moving no one is there to follow up and say we do have a sex offender here. In the non-native system they follow him. But in Indian country he could get lost real quickly.

JM: How could it be made valid and legitimate in the community?

EG: I would like our ideal of justice, the balance coming back to the community. The community has to stand up. They have to agree that this is not acceptable. We have a woman getting the shit kicked out of her in her front yard and three or four neighbours watching and not doing anything. They see it, even family members know it is happening and they do not do anything. It is not acceptable but people are just scared. We had elders come to interagency and say they have seen it but they are too scared to get involved. The whole system has to change. They have no confidence in that non-native system so no one does anything. If I could change it we would make it a holistic system. First we have to have contact we cannot do anything without that. So bring her here and there has to be a place for him too because jail is not going to solve anything. The family has experienced trauma. The community has been traumatized too. The elders and children also experience it, everyone shares the pain. Everyone has to work to solve it. Then once they are separated, deal with everyone's issues and then bring them together. In a room full of supportive people. She needs to be able to address the damage to her spirit and her mother has to be held accountable to it to and the rest of the family addressing the offenders and then they have to speak and take responsibility and then there has to be follow up and support. The community has to recognize what happened and start to restore their faith in the process. So that when it happens to someone else they have some process to turn to.

2: There has to be a strong message from the interagency, the chief and council, elders, there should be a sign in each community that we do not tolerate violence, or drugs and alcohol. But they do.

Within Waycobah, there are mechanisms to deal with crimes against women, contrary to the restrictions placed on community based justice by the Nova Scotia

Restorative Justice process, which has a moratorium on dealing with such cases. The mainstream system proves, time and again, not to serve Mi'kmaq community needs in this regard, and these community based programs can, and do, offer viable alternatives.

The above excerpt demonstrates the effects of long term colonial relations that have disempowered this community, and also states clearly that crimes within Mi'kmaq communities, affect everyone directly, and indirectly. In order to heal or repair these relations, it is argued, the community must be involved, and justice must once again be interconnected and reintegrative. The notion of healthy elders is an important insight.

While elders are often upheld as the carriers of wisdom and able to correct disputes of all kinds, uncritical appeals to their abilities lead to internal conflicts over the legitimacy and efficacy of their decisions. The above statements also point to the challenges of supporting a legal consciousness that not only rejects mainstream justice but requires something to embrace that is Mi'kmaq owned. Clearly Mi'kmaq legal process is in a liminal stage here, caught between the failures of the mainstream system but without having tangible processes to grasp at home. These problems are articulated within the legal consciousness as the desire to solve their own problems but lacking the confidence and the means to do so. Developments in dealing with domestic violence demonstrate a form of resistance against the restraints and limits of the outside system and present Mi'kmaq processes, no matter how vague, as superior alternatives if only control could be wholly placed in their hands.

The Problem with Policing

The Unama'ki police, who were well liked by some, and despised by others, are now gone from this community.¹⁴² The major complaint with the tribal police service in this community was family favouritism. People argued that their calls and complaints did not receive adequate attention because they were not from the right family or were not relatives of the member. Several members of the police force grew up in the community and have childhood enemies there. Community members complain that they do not respond promptly to calls from families they may have had historical disputes with.

They have a lot of fear. They are afraid of people. The problem is they grew up here, they have enemies here. So if it is their enemy that calls or someone they are scared of, they avoid going there.

One woman, whose son was in a fight with another youth, described how the police treated him.

I heard they grabbed my son and they threw him in the police car and he is only fourteen, and that other boy is fifteen. I said there are even murders around here and no one ever got treated as bad as my son. Unsolved murders. I asked another police officer, I felt like I should get a lawyer because I know they treated him wrong. That is one example of who you are matters how you get treated by the police.

One time my brother came here drunk and I called the police officer to get him away, and he said he would be right there. My brother was drunk, trying to get in, and he bothered the girl next door, and he was scaring the kids, and I asked him [the police officer] to come again. I called him again. I told him that is okay, I will send him [brother] over to your girlfriend's house. He only lives across the street.

A lot of incidents are family related. It depends on who is filing the complaint, like someone dropped an egg on them and the cops would be there in minutes, but others that wait days and weeks. I filed a complaint when I was drinking one Friday night I threw my husband out. Monday morning the cop said he got a fax and I told him we made up.

¹⁴² It is ironic that shortly after Unama'ki was dissolved a court case in this jurisdiction finally ruled on January 25, 2002 that the Unama'ki Tribal Police Service did have jurisdiction off reserve and could therefore pursue charges against people who commit crimes on reserve but live outside the community. At issues in the case was whether or not the UTPS had authority on the Trans Canada Highway outside of reserve boundaries. Confusion over jurisdiction likely contributed to problems in trying to solve the numerous highway deaths in the communities.

JM: Unsolved murders?

There are about nine people that got killed on the Trans Canada Highway and no one charged. A lot before Unama'ki. I don't know if the Indians are not important enough.

People often complained about the quality of police service in this community and thought they were incapable of solving major crimes. The lack of operating resources of the police was submersed by the construction of the new facilities. People saw the building and assumed service would be available promptly, twenty-four hours a day, but this was not the case. The force did not have a full compliment of officers and they relied on RCMP resources for working through major crimes, such as the vehicular deaths, which are then handled outside of the gaze of the community. Another resident talked about the problems with the police, and described action taken by local members of the warrior society to try to get some answers as to why suspicious deaths were not being adequately investigated.

Indian Affairs and the commercial crime unit of the RCMP in Amherst and Halifax met. We had meetings and we said you better wake up because our people are dying here. There are questionable deaths that happened here in the last year, [name omission] death, [name omission] death, and no one was charged and [name omission] got beaten up in the police station and no one did anything. There is no justice. They throw us Unama'ki tribal police force but they don't do nothing. They throw us human resource development, they throw us titles, but they don't represent nothing. There is no meaning to it. These are not things that we want. People go over there to get a job but they do not want to work at the job they just want to get paid. There is no meaning in the infrastructure that exists. It is sad.

A series of tragic deaths plagued this small community during the period of my fieldwork. In total, eight deaths by accident, suicide and illness, occurred in a sixteen month period. In May 2000, a twenty-five year old male, who was a popular musician, was struck and killed by a car driven by another resident. He was waked in the home of

his Grandmother. This case is sensitive and contentious but demonstrates a series of juridical mechanisms present in Mi'kmaq communities for dealing with crisis.

JM: What are the informal ways people deal with problems. Like with the accident, what happened?

She was asked to leave. She was more like alienated. She was not treated the same. The family of that boy that was killed is too big, and the mother, they could not look at each other. They could not look at each other without thinking about what happened and it was her decision to leave. She was putting herself into more shit because she was still drinking and popping pills. But what she did, she could have gone sober or something, but she didn't. And that is what they seen [family of deceased] and she was still driving around, that was another thing and the family did not like that.

JM: She did not lose her license?

No

JM: Was the community cold to her?

Yes all except for her family. They were the only ones talking to her.

JM: Did any of her family leave with her?

I don't think she lives with her mother anymore.

JM: Did her family feel the burden of what she had done?

I think her family felt it yeah, but right now the young guy that was killed and the woman's family they get along. It was her they were always sticking up for her once she was gone it was back to normal. It was mainly her, seeing her driving around.

JM: Would people do anything overt to her like stop talking to her?

Some of them did.

JM: How does the community let people know when they have done something wrong?

They tell them. Especially when that one person walks in the room, either she has to leave or the people that were there that were not talking to her they would leave. Shunning.

This evidence of informal mechanisms to manage disputing and bad behaviour is replicated in a number of stories, which told of how people are ostracized from the community. Moving away is one option, and several people have been forced out of Waycobah by peer pressure and social shaming. Band council resolutions also order some people to leave. This case is not resolved and formal charges have not yet been laid. The driver has left the community with her children, and it is unknown if she will

return.¹⁴³ There has not been any talk of reconciling the relations at this time. There are times when informal, non-violent processes are unsuccessful in mediating disputes, where the dynamics of disputing shift and people find ways of accommodating broken relations and living with the consequences (Caplan, 1995). In a similar case occurring in a different community, a woman wanted to repair relations with the victim's family after being involved in a vehicular death and impaired driving charge. The woman suggested a healing circle to help bring her back into the fold of the community from which she had been ostracized. The family refused to participate, and withheld any opportunity for healing. Again the dispute was not resolved.

Another informal process is feuding. Family feuds are characteristic of most First Nation communities I have worked in, but they are particularly salient in the juridical landscape of Waycobah. The familial tensions emerge in every discussion and in a variety of contexts, usually politically and economically motivated, or through some misunderstanding, as one woman explained to me.

JM: What causes disputes?

Family feuds. Misunderstandings, communications problems someone not taking something the right way, they end up one person fighting and usually the whole family ends up getting involved.

JM: What are fights about?

Say someone got beaten up for no reason, the family would bring family members from here or other communities and would do something to that person's family that had beaten up the person, and it goes on and on.

JM: Does it ever break even?

For awhile, it will calm down and then start up again.

JM: Are some families well known?

You don't mess with certain groups, you don't get involved.

JM: In the middle of dispute how do people behave?

Paranoid, watch your back, scared for your kids, scared to send them to school, scared to walk on the road.

JM: It affects the kids?

¹⁴³ There was a similar case in another Mi'kmaq community. The wrongdoer sought to heal relations through a justice circle, but the family of the deceased refused.

Most of the time. Say my daughter hit someone else's kid. That child's parents or grandmother or sister or aunt will come after you because they didn't like your daughter. Well these people came after me and someone in my family will come after them.

However, other forms of rivalry such as those that deal with matters of the heart complicate some cases. The following case describes a dispute that has turned into a family feud. It involves retaliations and various efforts at trying to remedy the situation, which have further polarized these families and their allies.

An Example of Family Feuding

One night in 1997, a group of young men beat a man severely. As result of the assault the man was hospitalized with a life threatening brain injury. He survived the beating, but never fully recovered from his injuries, and now has motor skill and memory problems. The community was horrified by the brutality of the attack. The man, known to drink too much, was generally harmless. The story has it that jealousy over a suspected affair spurred the attack. The affair was blamed on the victim's drinking. The Unama'ki police tried to investigate the crime, and the RCMP became involved; however, a code of silence quickly enveloped the community, and although speculations were made about who was responsible, there was no direct evidence linking any one to the crime, and no one was talking. People were taken into custody for questioning but no one was charged.

As time went by members of the extended family of the victim started retaliatory actions against those they knew, or assumed to be responsible for the beating.

There was couple of them that said they did him in good that night. One guy went to Truro he had two broken legs when he got back. I happened to be at the hospital when they brought the young fellow in. His son was at the hockey game and he came up and said to the guy, "I heard there was a bad guy on the reserve that was beat up right deadly," and the guy said "yeah, we did a good job on him," and that is all he said and they pounded him real good and snapped his legs.

This led to counter attacks by family members of the victims in the second level of the dispute, entrenching sides, and producing a great deal of tension in the community.

My nephew got beat up two years ago. Then my brother in law got runned over by the family there. Still in the same family. He took the truck and ran him over right off the road. Then two others got in a big fight over all of what happened. The son of the one that got runned over and the guy that runned him over. Because my relative knew that family was responsible for my brother getting real hurt. But it bounced back because my relative ended up hurting this guy real bad and he ended up in the hospital. My relative got charged and got one year probation.

Periodic violence such as fighting, running people off the road with cars, and threats of violence have plagued the community over the past several years.

JM: That is a lot of different incidents that happened over your brother. How is he today?

He is doing good. A lot better than in 1997 when he could not look after himself and could not walk. He can walk, but when you have brain stem damage it affects your leg and your speech. Once in awhile I will ask him who hurt you like this and the only thing you will get out of him is I don't know. I would drive him up Subdivision Road to jog his memory and ask him if he knew this guy here and he would say oh nice guys. That is what RCMP warned me about because brain stem damage they don't remember things. But he can tell you what happened ten or twenty years ago. He went into a coma and the trauma and they are still running loose around here. There are going to find someone yet. One fellow he got out real fast to the army and now he is back but you don't see him going out anywhere. First night they had a fight with the same crew. Someone is going to get hurt again or someone is going to come out dead.

JM: What would you like to see happened to those involved?

Being my brother right, now, where I still have that hate and anger in me, I would like them to serve what my brother is going through. They almost killed him and they are still walking around. Maybe if they weren't let out [telling what happened] and said who did it. If they let us elders take these young kids here now that they came out, but right now no one has admitted anything. I would like to see it looked into and see who did this wrong and let them serve what has been done. Let them be put away. If they were ever found put them in the slammer.

JM: One left did any others?

No they got braver, they got away with it.

JM: Comes around goes around?

I believe in that very much and it helps me a lot and it is going to come around and it is going to come around hard or slow and it will take forever for them to die and they will suffer for it. God will make them suffer as long as my brother suffers. He is not going to let them out of this world fast like that, no way, what goes around comes around.

One of the disputes ended up in a circle process. This also caused some conflict because not everyone involved in the various disputes had that option. Others had to go to court, and while the details of making the decision to pursue circles in one case, and not others were not clear, among community members the situation appeared to be one sided.

JM: Are there sentencing circles or justice circles in this community?

I heard of one I thought it was not fair because they were doing this person, but they wouldn't do it to another person. Like this guy's situation, he was able to go to an elder's circle and chief and council. And that got me upset because I knew there were other incidents where they would not have suggested that. Considering the situation, it was one guy that went to the circle and I thought my Uncle was going to court and they would never want to do a circle for him. I felt it was unfair.

JM: What was the outcome of that circle?

Good for him, some people were pretty upset about it because a lot of people had to go to court. I don't know how it worked out with the incident with the other guy involved. But this guy he had community service it was decided by an elder and a cop.

JM: Should chief and council be involved?

Our chief was going through a case himself, it is hard to say. I think it is elders and it should also be the elders from Eskasoni switch, nobody from the same reserve because half is related to one another.

I interviewed an elder who participated in this circle. It was the only circle of its kind conducted in Waycobah so far. He describes his experience:

I was involved in a circle. I had two guys that beat each other up. They tried that here but I never seen it again. The way this happened, there was a family involved in it. A father and mother sitting in it and I know those people and I know the boy since he was little. Then it would have been even harder for me if there was another couple of the other kid was there and they look at you and said your kids are no better than me, you know, what are you doing judging us. It was really hard for a person like me, I don't know about the others. But to face those people, the parents and they want to protect their kid they don't want them to go to jail. The only way you could say your opinion about the fights. I think the guy got away with it, beating up

a guy, with that system. There was a woman there from Inverness Court House and it was just a committee of elders. They were just trying it out and I think there was a magistrate there from the Court House. This was at the band office last summer.

JM: How did they get in touch with you?

I guess I am the elder and they called me up and see if I would get involved. I would like to see something working but I did not see that was working at all.

JM: What was not working?

That system was not working, the set up. Just as I said the parents were there and I know those people and the couple they look at you and they know my kids and they know me and in your mind you think they are saying you are no better than us why are you judging us. You had to be careful what you say.

JM: It was uncomfortable?

Yeah I was uncomfortable.

JM: What happened to the fellow?

They took our idea of what could be the judgement of it and I think he was just a community thing, you work so many hours in the community and he almost killed a guy you know. He ended up in the hospital.

JM: Is there anything in the community that he could have been given beside jail time that would have satisfied you?

Well, see that kid is, I think he is married or is shacking up and he has a little kid. And they brought the little kid over, the little girl, and they were all setting you up, and it is kind of hard, being set up. I did not like it that way. He land this guy in the hospital. They were after each other for a year or two years. He beat his uncle up one time ago, and then the uncle is crippled up and they have that thing on him, so this guy would go after him when he is drunk. What I heard they met each other somewhere and this guy was in the court there and he came out and he was watching for him coming out of the ball field and was all drunk and beat him up and kicked him. He did not even know he got beat up so bad. The cops picked him up and said you got beat up and he said who beat me up? He should have been charged because he kicked the guy and he beat him up when he was drunk you know, he should have been charged but he got away with it.

JM: How did the community feel about it?

There is still a feud going on. It did not solve anything.

JM: Is there any way to solve that feud?

That I don't know. I seen a feud going on these reserves ever since I remember. Just got to live with it I guess.

The elder's example provides important insights into how the power relations within this community work. Consequently his discomfort produced ideas about alternative practices that need further exploration, and also demonstrate that legitimating

law ways in communities that are divisive is especially challenging. His discomfort level, and the pressure he felt to comply with what the group wanted, even though he felt more should have been done, indicates serious flaws in the process. These flaws reveal the consequences of uncritical use of elders as the primary juridical mechanism because elders too have history and connection to the community, and by their status alone do not enjoy immunity or protection from people avenging perceived attacks made on their kin, whether it occurs in a circle format, or under cover of darkness. These excerpts point to the challenges of capacity building and the problems of inventing legal processes in a community where past grievances and divisions are entrenched. It is very hard to develop community acceptance when in the midst of family feuds, one side always seems to lose.

Conclusions

Like Membertou, Waycobah residents argue that the mainstream justice system is not accessible to them. They are frustrated and feel their problems are not legitimate or taken seriously by police, or within court procedures. The role of law in these situations of domination have been ambiguous and contradictory for the Mi'kmaq, and yet the Mi'kmaq have persisted in their resistance of dominant society by creating law ways that suit their changing needs and interactions. The unevenness of juridical practices, both internal and external, is a problem in this community, and the local fractiousness and jealousies between 'haves' and 'have nots' exacerbates local collective action. However, as Miller cautions,

Claims to the sacred nature of justice practices and to primordialist discourses that uncritically incorporate concepts of healing, restoration, and elderhood without due regard for the relations of power between the various segments of the community potentially undermine the capacity of tribal governance to recognize diversity and community members' sense of fair, just participation in their own governance (2001:6).

In Waycobah and Membertou First Nations, the justice landscapes are complex and fluid. I have examined disputes and local problems within these communities, within the context of their social, political, spiritual and economic organization, and well as within their historical contexts and geographical locations. These descriptions show how the events of colonization reinforce standards of evaluation of Mi'kmaq status as lesser within the mainstream justice system, and provide evidence of the various juridical discourses the Mi'kmaq employ in response. The power relations revealed here show social relations in action, as people try to find remedies for their troubles both within their communities, and between their communities and the external society. Rights discourses and healing discourses are evident in both communities as the Mi'kmaq form legal discourses in opposition to those imposed upon them. The wrongful conviction of Donald Marshall is firmly embedded in their legal consciousness and is evidenced in Waycobah discourses as much as in Membertou. The choice to seek remedies with or without the band council playing a leading role, seem to depend on whether the band council is perceived as neutral and transparent, as is the case in Membertou, or controlled by a powerful family and consequently subject to accusations of favouritism and corruption, as in Waycobah. Where scarce resources are more evenly distributed, appeals to the band for juridical assistance make sense. In both communities, the role of elders and the Grand Council are posited as the keys to traditional community approaches but, as demonstrated here, pose numerous problems and the communities remain split on what are the best tactics.

Community members in both research sites have mixed feelings regarding the Grand Council and its role in Mi'kmaq juridical practices. The Grand Council is well

regarded among the majority of members, but is seen as a largely spiritual organization with limited political power. In general people want the political power of the Grand Council to offset the power of the Indian Act chiefs, and to force the outside world to respect and honour Mi'kmaq traditions. However, these desires run up against contradictions within the Grand Council as the traditional spiritual leadership, and the power of the Catholic Church, a non-traditional religion, in which they are deeply embedded today. These discourses are raised often when discussions turn to what is the Grand Council today, particularly in reference to rights and resource use, which tend to silence and blur the Catholic connections in favour of promoting the Grand Council as the rightful treaty protectors and the most just adjudicators.

Both communities demonstrate that Mi'kmaq justice is culturally produced and that these productions become heightened as their valued components are challenged from outside and thus must be articulated within.

Chapter Twelve: Koqqwaja'ltimk - Mi'kmaq Legal Consciousness

In this chapter, I summarize the central threads of legal concepts and discourses articulating Mi'kmaq legal consciousness. These concepts are found in the social practices and relationships that historically shape and reshape Mi'kmaq juridical institutions. These productions provide examples of how Mi'kmaq memories and experiences are constructed and mobilized to produce culturally meaningful justice processes. The key concepts and values addressed here are oral traditions, forgiveness, healing, and elderhood. I conclude with a brief discussion of the Mi'kmaq Young Offender Project to demonstrate how Mi'kmaq communities take their values and concepts of justice and apply them in meaningful and practical ways. By understanding social institutions in terms of social reproduction, we are able to see them less as things and more in terms of forces. "Forces facilitating certain practices, often by means of 'order' and regulation, and just as surely preventing other practices, closing certain social spaces, inducing disorder and deregulation"(Smith, G. 1999:11). These forces help shape and articulate convergent and divergent forms of Mi'kmaq legal consciousness and produce justice practices that attempt to reconcile with, and across, Mi'kmaq legal consciousness.

Mi'kmaq Justice Concepts

Oral Traditions and Family Law Ways

In 1994, the Mi'kmaq of Nova Scotia signed an agreement with the federal and provincial governments granting them control over education. Each reserve in Cape Breton created schools or expanded existing schools as a result of the agreement and took

control over curriculum. The new curriculum has a strong emphasis on Mi'kmaq language, which was not lost, despite many attempts to eradicate it by way of government policies, including the Shubenacadie residential school. Efforts to sustain and expand Mi'kmaq language use are successful.¹⁴⁴ Language is where a great deal of 'traditional' juridical knowledge and values are embedded. The revitalization of language is a critical factor in addressing generation gap problems that have plagued community cohesion and communication. Revitalizing language also produces new challenges. As one woman from Waycobah noted, "now the children can speak Mi'kmaq but their parents cannot".

Within the language are many clues as to the legal values and concepts upheld by members of Mi'kmaq culture. As Conley and O'Barr note, "in any culture, a full appreciation of the law, and its power, depends on a thorough understanding of everyday linguistic practice" (1998:115). Oral traditions of the Mi'kmaq provide sets of rules, which govern daily activities. Family members teach these rules, and through rituals of observation, apprenticeship, and learning through experience, they become reinforced. These sets of rules are glossed as, 'Mi'kmaq Sacred Teachings', and involve seven stages of life and seven sacred gifts: love, honesty, humility, respect, truth, patience and wisdom. According to Murdena Marshall, a Mi'kmaq elder from Eskasoni, the oral traditions are the foundations of Mi'kmaq tribal consciousness and contribute to Mi'kmaq uniqueness. She described concepts ranging from animism of all things, respect for human and spirit worlds, respect for elders, language as sacred, sharing, ceremony, rituals

¹⁴⁴ Mi'kmaq language courses are part of the elementary school curriculum in community based schools. The University College of Cape Breton and St. Francis Xavier University also have Mi'kmaq language programs. On Membertou Reserve there are periodic language lessons made available to the general public. Also available are a series of language tapes created by Mi'kmaq linguist Bernie Francis and various Mi'kmaq / English dictionaries.

for death and dying, female power, visiting customs, child care, to dream interpretation and humour, as central to the rules that govern daily interactions.

These concepts embrace moral values that help people work out their ongoing relations on a day to day basis. Justice is not a separate entity, but part of the everyday lived experience. The Mi'kmaq term koqqwaja'ltimk embraces the concept of 'being treated justly' in every encounter. Some Mi'kmaq articulate koqqwaja'ltimk as a process involving returning to the oral traditions in which problems of Mi'kmaq social order and disorder were worked out, especially within families. Mi'kmaq justice is family based. Families are responsible for passing on the teachings of the oral traditions. Talk is the mechanism by which family troubles are worked out, and who your family is matters.

Contrary to popular generalizations of aboriginal culture as non-confrontational, non-interfering, and non-coercive, Mi'kmaq work toward koqqwaja'ltimk through a variety of discourses that range from liberating to conservative (see Abel 1981, Havemann 1988), and from therapeutic to rule-centered (see Conle and O'Barr 1998, Merry 1990, Miller, B 2001, Warry 1998). They emerge from sociocultural process and asymmetrical power relations. Sometimes uncritical appeals to harmony and primordial states are made in order to heighten justification for oppositional stances.

We need our own justice system that runs with oral traditions. That means they view what they consider as crime and the severity of crime. We know the protocols of punishment but the non native law needs to understand that our way of punishment may not be perceived by them most of the time or all of the time. Handing out punishment and incarceration is not the answer. When someone is injured emotionally, spiritually, physically, there has to be some form of healing included in the package: the accusation, the admission of guilt the remorse and the restitution. In order for crime to take a back seat we have to teach that punishment is not important, healing is. That we have to restore the community back to its natural harmonious state that existed prior to the injury.

We have to look for our own ways to administer justice, for alternative to appease the spirit not the law makers, if a person is not spiritually content his heart will harden in prison and he will be a different person when he comes out. It would deprive people of their growth. Learning processes can only be acquired through life interaction, not a book. Your depth of knowledge is measured by how well you behave in situations affecting people.

Oral traditions, together with the sacred teachings are revitalizing the koqqwaja'ltimk complex in Mi'kmaq communities. Koqqwaja'ltimk contains notions of balance, to realize imbalance when wrongs have been committed. Part of the balance is achievable when relationships to the spirit world, and the natural world, interconnect with the human world. As one female respondent states, these balanced connections are critical to Mi'kmaq identity. A university educated, single mother, from Eskasoni, she argues economic marginalization and alienation from the land, are the major contributing factors to social dysfunction in her community.

My research has told me that when we are working and are reconnected with the natural world, understand the fundamentals of that relationship as a system of coexistence, cohabitation, co everything, once we can define ourselves in terms of the land and resources, because everything of who we are is defined in terms of the land, our language, our spirituality, everything is defined in that context and our relationship to it. But the current and past education systems have shifted that concept of what being human is about, it is domination, control, isolation, and that is what is wonderful about poverty, it also isolates people severely. That isolation contradicts who we are. We were a collective society. We survived millenniums by living together, cumulative knowledge and experience but that is all broken up because of poverty and hopelessness, and then they wonder why the kids do wrong.

Family cohesiveness translates to community cohesiveness and sets the framework for survival as a collective society, collectively sharing in the resources and mediating relations with the outside world. Within the oral traditions are the rules that guide these relations. When relations are broken, there are mechanisms, verbalizations

and actions, to produce behaviour according to notions of *koqqwaja'ltimk*, to ensure each party, whether they are spirits, humans, or resources, are being treated justly.

Language based concepts pose a different set of juridical problems. Besides being the foundation of legal culture, Mi'kmaq language can also be a source of conflict. A female Membertou resident, who works in Eskasoni, a Mi'kmaq community considered to be more traditional than the others, feels tensions between the communities are based on power struggles over language skills, and the possession of specialized knowledge. Physical attributes also play a role in one's status. Different markers of identity are at play in determining how 'real', or authentic, or culturally, connected one is.

That is what I don't like about Mi'kmaq people, there is so much discrimination amongst themselves. You are discriminated because no one in Eskasoni likes Membertou. So, from one First Nation to another, there is discrimination if you are a non-speaker. If you are like me, half-white and half-Indian, if I was dark, I wouldn't be [discriminated against] as much. The big thing in Eskasoni is being a non-speaker. They look at everybody in Membertou as non-speakers. It has nothing to do with being Indians. That is why it is important to have your language and get that back.

JM: How is it demonstrated?

Verbally all the time. I hear people say things to me and they say they are only saying them in fun but when you are called a zebra.

JM: Do you speak?

No I don't speak, I understand quite a bit. I say words time to time but it is hard to speak when people make fun of you, laugh at you. Some people are just not good at other languages, and when I try, I sound funny. They don't encourage you. I think anyone who is a speaker, the only way they can teach others, is if they speak it. In a room full of speakers as soon as one white comes in they switch.

There are some Mi'kmaq that don't like to share their knowledge, they like being in their own little group and make fun of you, and they think you don't know [emphasis mine].

JM: What advantage in not sharing?

By speaking Mi'kmaq maybe they feel like they are in power and they are better.

JM: A status thing, like they are more real?

Yeah. I am really the Indian and you are not.

JM: Does that affect kids?

Yes, Eskasoni makes fun of Membertou.

These contradictions make more challenging the creation of justice processes based on concepts embedded in the language. These interview participants represent just a small sample of the complexity of relationships between Mi'kmaq communities. Tensions and conflicts are not constant, but do emerge in larger inter-community activities like hockey tournaments, which are notorious for their bench clearing brawls, and over-involved fans, and also emerge when people of different communities come together to party. The insider /outsider boundaries are mediated by family membership. Who your parents are, matters. Family links are strong between communities and form positive bonds of alliance and camaraderie, particularly in moments of crises, and are the conduits through which communication networks are rapidly mobilized. These networks foster wider links across the culture group, bridging some of the gaps between and within communities, forging solidarities that supersede lesser fractious conflicts. Solidarity is also shaped by communal events such as salite', a Mi'kmaq funerary rite, Treaty Day, and St. Ann's Missions, where differences are put aside, if temporarily, to mark these special occasions as opportunities for unification.

Healing and Forgiveness

The Mi'kmaq rely on concepts of forgiveness and healing to restore broken relations through a number of mechanisms as a path to koqqwaja'ltimk. As with Membertou, the healing discourses are evident in all Mi'kmaq communities. Mi'kmaq Family and Children's services, as well as NADACA [Native Alcohol and Drug], support and promote therapeutic responses to justice. Therapeutic responses are popular remedies for many of the ills that affect Mi'kmaq communities. Most communities in the Mi'kmaq nation suffer from a comparatively high rate of youth suicide, mental health problems

such as depression, high rates of death due to injury, and children suffering from Fetal Alcohol Syndrome. Many of these experiences connect to the consequences of colonialism, and the resulting historical socioeconomic discrimination and marginalization plaguing aboriginal community health and well being (see Waldram 1997, Warry 1998).

The Mi'kmaq Family and Children's Services of Nova Scotia [MFCS], operates as a private child welfare agency under the Children and Family Services Act. Founded in 1985 and funded by the federal department of Indian Affairs, the agency is responsible for investigating allegations of neglect and abuse of children under the age of sixteen, living on reserves in Nova Scotia, and providing for children in care. The goals and principles of MFCS embrace community values and traditions, and rely on community consultation for building programs to meet community needs. They utilize holistic programming run by community members, who are familiar with the cultural idiosyncrasies and language. These programs developed largely in opposition to non-aboriginal people interfering family problems, and as a backlash against the ideology and methodology of residential school snatches mirrored in many child confiscation cases during the 1970s, 80s and 90s. Recently, the MFCS has targeted family violence, actively promoted a campaign of healing to break the circle of violence, and has opened a Mi'kmaq Family Treatment Centre in Waycobah First Nation.

The social service programs available across Mi'kma'ki, are addressing social problems, from substance abuse to physical and sexual abuse, more openly. By connecting the roots of these problems, not with some inherent weakness, or flaw within Mi'kmaq people and culture, but by acknowledging these problems are products of their

colonial history, the healing discourses provide empowering cultural productions in response. While these programs remain dependent on the external society for funding they are increasingly gaining control over their internal self-sufficiency. Federal transfer payments in health, for example, have freed some communities from the shackles of endless proposal writing, and restrictions on how monies are spent.

It has taken a long time and a great deal of perseverance, and resistance, to outside control before these programs gained acceptance in the communities. There are always criticisms from some sectors of society, but on the whole, they are considered better than the alternative, externally controlled programs. Their successes bode well for the future of justice initiatives, as their healing discourses are pervasive, and mirror those articulated within the Mi'kmaq legal consciousness, namely family, respect, interconnectedness, and healing relations. The director of the interagency and mentoring programs discussed Mi'kmaq justice in the following way:

JM: What are Mi'kmaq conceptions of justice?

It is all about healing. What you learn as a child, it is in the family. Sometimes you break away from the norms of your family; that may be good or bad. Justice is what you are taught at home, if you learn respect at home and carry those things with you, justice is respect for oneself and healing oneself. All of us have not had perfect lives, but if you can learn within the family and carry it with you, and live traditionally, it can be passed on. My father always said you have to love, it is very important. A lot of people do not have that in their lives and they become angry. It is healing, the traditional way. As interagency members we see all of that, healing ourselves, healing our families, and talking it out, and healing our extended families and our community members and taking that negativity away. If you show respect and love it spreads, that is where we are going to go with interagency.

By working together, these organizations try to counter the problems of bureaucratic complexity that have carried over into community organization from the Indian Act and the regulatory schemes of Indian Affairs. By uniting, they help stop the

overlaps and the gaps through which some of their membership fall. These gaps and overlaps are characteristic of complex bureaucratic structures that force internal and compatible organizations to compete with each other for scarce resources. They are marginalized within the bureaucracy and are subservient to a large, dominating social field, namely the Canadian government, and the Department of Indian Affairs. Another advantage of working together helps ease the rate of staff burnout and turn over, which historically, has been very high in these and Mi'kmaq justice programs.

The people who work in these programs are well versed in healing paradigms and survivor discourses pertinent to aboriginal justice. They are concerned with finding holistic healing approaches that are cultural meaningful, arguing in favour of programs to address the contemporary consequences of colonialism. One alcohol and drug therapist from Membertou describes how problems in the community upset the balance and impact everyone. He contributes the current problems to residential school experiences and argues for community healing as the way to combat those problems while recognizing the special challenges that healing involves:

It is like a barrel of apples, if you are bad and in the middle of it the apples eventually spoil. It is like a person in an alcoholic home. I look at every house on this reserve and somebody is afflicted, even with smoking, or on a diet, or someone is going through the change of life, withdrawing, someone needs alcohol. And if there is one or twenty others living with the one person doing this, they are all affected by that one person and every house I see is affected. In this community there is no balance because everyone is a bit negative and a lot of people that come from residential school, it's like alcoholism. The behaviour of the people that went to residential school affects their offspring and so on. A lot of them have fallen into that because of residential school syndrome.

JM: What would it take to get balance?

We need a lot more healing, and recognition, awareness, education. I find people are afraid of the challenge of healing. Even in the daytime very few people come here but they are the ones that are already into healing. But the others will go around, and as soon as it is after hours, or evening, they will

call. They don't like to be seen going for help. There is a lot of peer pressure out there for the young people and some people never grow. They talk about what happened way back when and they are trying to relive it. They are surrendering the years of youth and it is not a part of growth.

Some healing discourses blend with the Mi'kmaq concept of forgiveness. In searching for the roots of what they termed 'customary law', the Mi'kmaq Justice Institute turned to language. One of the significant concepts of koqqwaja'ltimk in Mi'kmaq legal consciousness is expressed in the term ilsutekek, derived from ilsut, "to make right". In order to make right, apiksiktuek, meaning "that which forgives" or mutual forgiveness, and nijkitekek, "that which heals", are two processes advanced by creating an awareness of the wrong, and an understanding of how to make it right (Francis 1997). In order for these processes to take shape, wrongdoers and those wronged, come together to talk it out. Forgiveness, healing and elders, were three of the most commonly articulated themes of Mi'kmaq legal consciousness

A Mi'kmaq elder explained the forgiving process to me.

We are a forgiving people. Once someone commits a crime and is remorseful, and gives restitution, it is forgiven, and forgotten. That is part of us, we cannot help that. We need to make the nonnative world understand that. It is their standards that we are following, and most of the time their standards do not apply because people just repeat the crime. Those standards are imposed. If we look at justice from within, that would make more sense than taking a model from Australia or Canada, and apply it to a group of people whose linguistics are in tune with creation, and it is their oral traditions which are motivated by the language that dominates their action. It is a whole new ballgame each time a sentence is imposed. We do not understand this crime business.

The Mi'kmaq generally define crime as an offense against relationships, not just a violation of rules. This concept became strikingly clear to me in a number of conversations. One interview stands out in my mind as an example of the power of forgiveness, and how, in small communities, forgiveness is sometimes the only way

people can continue living with one another, even after terrible things have happened.

The following excerpts are from an interview with a woman whose husband was murdered by another community resident. She describes how she came to terms with the crisis. Her example also represents using ceremony for healing. We began by talking about reintegrating wrong doers into the community. I asked what should be done to bring people back in and she told me about her experience, how she came to forgive, and what that forgiveness has given her, and her family, and her community.

If they are just let out [of prison] then what is resolved? There is still no healing. Some kind of healing, whether they sit, and confront, and talk, with the person they harmed in a talking circle. But at the same time, it should not be another trial. That is why ceremony is so important. The person who was wronged has to learn forgiveness. It is important to have forgiveness, and then confront, and then give that person the opportunity to say sorry, to make amends, not to just say it, but to feel it. To ask for true forgiveness. To go into a pipe ceremony, and sweat, and pray together.

JM: Have there been any reintegration ceremonies in this community?

No. Our people do not know enough about our ceremonies. When my husband died we had ceremonies that no one had ever saw. It was the first time the big drum was in the church. We had an honour song. We sang after the priest finished. We used sweet grass. I found a lot of comfort.

JM: You also made a lot of effort to heal the relationships with the families too.

I know deep down that I could not go on living if I could not forgive, and be angry, and I could not pass that on to my children. I watched people when there was a murder. The people who were wronged carry so much anger and hatred. It is almost like the person took my husband's life but I cannot allow him to destroy my life or my children's. Also I have to learn to forgive.

Someone said how can you do that? I had to do it for myself, and my children. I cannot go through my life hating because hate just eats through you, it will destroy you. It was important that I forgave.

I learned to forgive. It was two elders in Eskasoni whose son was beaten to death. When I watched the newscast they touched me so much because anytime something like that happens, the families are so angry, and they look for vengeance. I watched this couple and she said, "I have to forgive because we still have to live in this community. We cannot allow this to destroy us." When my turn came, I thought of this couple, I was so amazed they could forgive.

The use of ceremony is a practice commonly associated with ideas of healing in Mi'kmaq communities. The use of ceremony is contentious and not openly embraced by all. For example, the use of the big drum in the church is not welcomed by more orthodox Catholics who frown on blending traditions, just as traditionalists do not feel the church is the proper place for Mi'kmaq ceremony. These events do have an impact and their creative use fosters further cultural productions, and with each additional presentation, become more familiar, and part of the lexicon of healing and forgiveness in Mi'kmaq legal consciousness. They provide methods by which koqqwaja'ltimk may be expressed, challenged, and modified.

Forgiveness is embedded in other informal mechanisms that are constituted in Mi'kmaq legal consciousness, such as shaming and ridicule. A young woman from Membertou delineates the complexity of shaming and shunning in her community, and comments on the importance of forgiveness to ongoing relations.

JM: Do people ever use shame and ridicule?

There is shame and ridicule, and a lot of people who do that do not take a look at themselves. What about things you did wrong? You are not a saint, you are not perfect, but they do not think that way. It is just human nature. It happens, not just in native communities, it happens everywhere. I think when someone is shamed, like when they commit an act of sexual assault, or murder, or something that is not acceptable in the community, there is shame. They shamed the community, therefore they are shunned. You put shame on the community then you all ready carry the shame, but then the community shuns them.

JM: How do they do that?

By not waving to them when they go by, by putting their head down. Just like you are a bad guy, or girl, and you are judged right from that time. Then your reputation is shot and then you are shunned.

JM: Does that happen frequently?

There are people who are carrying that load, that guilt, the rest of their lives, and it does not help the reaction of people to not forgive, that hurts even more. When you learn to forgive you can move on. Because they are living with it, let it go.

The concept of forgiveness goes hand in hand with the concept of healing relations. Mi'kmaq people talked about healing in many contexts, such as healing the wounds of colonization, of residential school, of the broken treaty promises. As the stigma of residential school is replaced with discourses of healing, Mi'kmaq people are empowered by recognizing that they are not at fault. Much of the ceremony that has emerged, and the revitalization and invention of traditions, are couched in healing terminology. Healing discourses tend to contain notions of community sickness. Sickness is attributed, not solely to criminal activity, but also to a loss of identity. A woman from Membertou describes her sense of illness within the healing discourse.

Part of it is language loss and loss of identity. From my own experience when I was very young, I was very happy. It was not until I went to St. Anthony Daniel [an elementary school off reserve] that I found there was bigotry; that I was not worth what I thought I was. When I was here [in Membertou] with my parents, and friends, and extended family, I always felt loved and accepted. I was eight in grade four. I started feeling like I was less than others because of the history I was taught. We were also taught by nuns who were always quick to point out how the martyrs were killed by Indians. The only things about us were always negative, our language, and culture, was not valued. The other thing is the image. May be they do not understand their own history. People talk about warriors as aggressors. In traditional times people were warriors of peace, warriors for creator. I think the most important thing is to feed the spirit because if you do not do that, you will not survive. We are always using the mind to find answers, but I think the answers lie in the spirit world, and with the grandfathers and mother earth. Our society is very sick. There is so much anger, bitterness, hatred. I was very prejudiced, I did not like non-native people, but I realized it was because I did not like myself.

With respect to justice practices, healing is a metaphor that covers many circumstances, from murders to small disputes. Healing is talked about at individual, community, and national levels. In this excerpt a forty year old man from Waycobah describes community healing to help mediate traumatic losses.

JM: Do you know specific cases where things have been resolved through this [healing] process?

Yeah, a lot of the community things that went on. The most I remember the three kids that died around the turn here. The house burned, that was about thirty years ago. There was a lot of healing that has to take place with every death in the community. That is when the scars really start happening. There is a real difference between a little argument and that. You are expected in the Mi'kmaq world to resolve those little arguments amongst your selves. But in the community structure, when a death takes place, or rape, or murder, it takes the whole community to come together to heal that. We went through this with [name omission] death last year, and [name omission], and there was a whole bunch of them. [Name omission] hung himself, and [name omission] died in jail, and [name omission] died too. There were about seven that died in one year. The whole community had no choice but to put all the differences aside and deal with the healing part.

JM: How did they do that?

By putting their personal vendettas or feeling aside and just being caring about the family that was losing a member. By talking with them, and working with them, going through their grieving process instead of letting them go alone, you grieve with them, participate in their wake, staying up. That is the most important thing. A lot of people, when their relatives die, they do not want to fall asleep. You are told all your life, whenever they bring the body, they are not supposed to be alone, twenty-four hours a day, for three days, somebody has to be with that body. There is family, it is inherent in them, they have to stay up and they are falling asleep and the feel obligated they have to stay up with the body, so other members of the community come and stay with them. They feel like that healing takes place when they say I did not know this person cared so much for me that they would take my place, and help me go through this grieving because I do not feel like arguing with anyone because I lost a love one. And that is justice for us too. Once you know all these feelings are put down then you move on to other things.

Forgiving and healing, just as crimes, affect the entire community, and mechanisms of reintegration are developed in response to these crises. The concept of big-heartedness discussed in the chapter on traditional Mi'kmaq life ways, is still a model of the forgiving person. Healing and forgiveness are interconnected with concepts of sharing and respect. Justice as healing, carries with it specific connotations, that resist the external legal structure of codes, precedent, and punishment. Healing metaphors have their own time line and are not reducible to a sentence or a trial; relationships are not

repaired within a dictated period of time. A former Mi'kmaq Youth Justice Worker describes his perspective:

JM: What are the aboriginal perspectives compared to non-aboriginal?

Non-aboriginal perspective for justice is always structured to me and it is all about rights, and all about the punishment, about defense. When I look at the aboriginal perspective myself, I just see healing, basic healing. I try to pay back what ever the wrong was done, not to get away with it. Even in justice circles too, free mind, and free soul. I don't like using structure, paper and everything has to be on time or whatever, it makes it hard to cope and makes me confused. So I use a lot of my language around here in justice circles. But there are a lot of kids in Membertou who use mostly English. But there's lots of kids here, I feel, more free in talking in Eskasoni, that is better for me.

JM: Mi'kmaq is easier for you to work in?

Definitely, just the words and expressions. I share that experience with other youth agencies. Our techniques we use. I trust in my own Mi'kmaq thought and consciousness and I translate to them.

Most of the front line and social service agencies in Mi'kmaq communities embrace healing metaphors for justice. Mechanisms for healing are contested on the grounds of authenticity, often reflecting other social and political splits in the communities. Ideas about traditions are politicized, and value based as people struggle to find continuities with the past (Mauze 1997, Hobsbawn and Ranger 1983). They are political instruments for regulating internal and external relations, and provide vehicles for negotiating identities, all of which influence legal consciousness and the possibilities for justice. Traditions are often presented in dichotomous, oppositional models of traditional/modern, oral/written, myth/history but there are no sharp contrasts here. Healing metaphors are not just traditional rituals. They are influenced by much of the restorative justice discourses, and the alternative dispute resolution, new-age and self-help genres. They also contain important socioeconomic aspects, as this specialized knowledge of healing practices becomes criteria for employment eligibility in certain

justice programs, and is evidenced in the discourses of emergent justice entrepreneurs who can offer healing services as a form of dispute management.

A meeting was held in February 2000, titled, "Working Towards Harmony: Using Traditional Values for Community Based Solutions, to respond to an increase in youth violence in Membertou. Forty-four adults, twelve of whom were seniors, and twelve students discussed community accomplishments, visions for future, goal setting, and how to address current challenges. The mission of the Membertou interagency is:

To assist community members in finding integrative and holistic solutions to community problems. It is our belief that in order to create harmony and balance within a community, it is important that the members of that community provide their own solutions. It is also our belief that solutions must be based on traditional values, and must support Membertou's vision of what makes a healthy community (Interagency newsletter 2000).

Interagency meetings provide a forum for disseminating healing discourses, as educating community members in traditional discourses. One of the contributing factors to community breakdown is the lack of community ownership over justice programs. These meetings give people a chance to get involved and have a voice. The director of the Mi'kmaq Young Offender program urged communities end their complacency by taking a proactive role in teaching youth responsibility, and by including them in the process of community building. Crime prevention strategies were discussed with a view to keeping youth productive through holistic programs involving parents and implementing mentoring. Poor parenting is consistently revealed as the significant factor in youth troubles. Parenting issues go hand in hand with the legacy of colonialism and residential school syndrome. These issues have recently been a key target of interagency, resulting in the 'Positive Parenting' strategy, which is an education and support program.

It is difficult to get community members to attend parenting programs because of an assumed stigma that one is a bad parent if they participate.

As one single parent notes:

I do not know what is wrong with our young parents. When I was young, if I did something wrong an elder would come to my mother and tell her. I would be confronted and we would deal with it. But now if you go to a parent and tell them their child did something wrong and the parent will ask them if they did something wrong. The child will say no, and the parents will believe the child rather than deal with the problem, and they get angry with you for accusing their child. Part of it is that our parents carry guilt. It is a vicious circle. Because they are not there for the children because they are partying, they are not there to discipline them, and it goes from one extreme to the other. I hear parents swear at their children. We have to start with the spirit to heal.

Efforts by interagency groups to access the Aboriginal Healing Foundation funding to address intergenerational impacts of sexual and physical abuse, suffered by people in the residential school system, have also contributed to an increase in healing and forgiveness discourses. The Healing Foundation funds community services, life skills development, prevention, and awareness projects, traditional activities and training, and education. The elders at this meeting argued that they wanted a voice in community affairs. They are frustrated at being included and asked to share their opinions but fail to see any concrete changes as a result. The elders appealed to tradition arguing that forgiveness and acceptance is essential for youth to end the cycles of violence and for the realization of koqqwaja'ltimk.

Elders and Justice

Elders play a significant role in Mi'kmaq legal consciousness. Often depicted as the most legitimate juridical avenue for Mi'kmaq justice, almost every interview included mention of elders. There are distinctions between elders and seniors. An elder is one who

has the status of being a knowledgeable person and a senior is a person who should be treated respectfully, but who may not be knowledgeable, or of traditional orientation. However, elders are often reified in Mi'kmaq cultural conceptions, a reification that contributes to flattening out social status categories by contributing to presumptions that all elders are wise, good, and healthy, and hence make the best people to guide community based justice practices and make decisions. In the interviews, people tend to make uncritical appeals to primordial pasts, suggesting in prior times problems were few, families lovingly united, everyone prospered, and political leaders were older and honest. They often make claims that elders were paramount in their error free leadership and lived exemplary lifestyles.

These appeals to a harmonious and idealic past precipitate the call for elders, and the Grand Council, the traditional governing body, as the central players in Mi'kmaq justice and a return to the old ways. These appeals put a tremendous amount of pressure on the current generation of seniors. However, most elders I spoke with do not feel qualified, nor do they want the responsibility for justice. They feel it is better not to get involved in troubles directly, and yet conversely, they also claim to want a voice in community decision making. With the lack respect for elders by young people, identified by many as one of the root causes of wrongdoing, elder based justice is problematic. However, under heightened moments of conflict, selected traditions are reproduced as consciousness shaping ideas. In stereotypical portrayals, elders are the presented as local custodians of specialized knowledge and people of surprisingly consistent behaviour. An article in the Micmac Maliseet Nations News, provided the following description of an ideal type of elder:

An Elder is a person who has respect, knowledge, serves as an advisor and is not judgmental;

An Elder does not have to be of a certain age, however it is usually an older adult who is most likely to be identified as being an Elder;

An Elder is someone you can learn from, a person with wisdom and is willing to share this wisdom with others;

An Elder serves as a role model in the home and in the community;

An Elder is someone you admire and would like to be like as you mature;

An Elder is a good listener and knows the traditions and lifestyle of our culture;

An Elder is a good leader and can serve as a counselor;

An Elder should be a good story teller; and

An Elder is empathetic, understanding and has a good sense of humour (Staff Reporter MMNS January, 1997:14).

The following interview excerpt reveals the commonly shared notion that elders are key to justice processes of healing.

JM: Lots of talk about healing in justice and community in general, what are your thoughts?

I think healing has to come from the elders. It has to include youth and the whole community. In order for community to heal they have to be good role models, they have to lessen the harm of alcohol and drugs in the community and they cannot promote that. To me that is community healing. A lot of problems we have on the reserve are because of alcohol and drugs. If someone did not do a crime while they were drinking or high, it was usually done to stay high or get high. A lot of violence is through alcohol and drugs. We have powwows, Mi'kmaq gatherings, that is healing, going back to your culture. We have a lot of traditional medicines.

JM: Are they on the increase?

It is on the increase but we are losing our elders, and when we lose our elders, we are losing our, they are the teachers, and healers and medicine people, and the more we lose the more we do not try to retain that information. It is harder than to just say that, it is harder to do.

Two concepts that go hand in hand in Mi'kmaq articulations of legal consciousness are respect and elders. In addition to healing, respect is talked about as a natural crime prevention process. One who respects will not commit wrongs, neither will the healing or healthy person. Family laws are based on respect and are tied to concepts embedded in the language. The concept of netuklimk includes respect for resources and is indispensable to ideas about responsibility embodied in Mi'kmaq rights discourses. Many

of the problems in Mi'kmaq communities are blamed on a perceived lack of respect, be that respect for self or others, or a lack of respect from the outside society toward the Mi'kmaq. People often equate respect with proper teachings and proper teaching with elders' roles. A middle aged male from Membertou said:

JM: I hear some people say kids do not respect elders like they used to?
That is true but when they are in the circle they do, when they are put on the spot. But we are losing that respect in the community. When I was growing up I would never do nothing wrong, you never break a window or anything like that, just out of respect. Today it is not uncommon for a kid to break an elder's window or something. I think it is drugs, or alcohol, or attitudes. I think TV satellite, cable all the shows with crimes are changing our communities, even computers, people get on chat lines and have access to stuff we never had access to. When I was a kid, it was all sports on the reserve, either ball or hockey. Now it is all computer and video games, violence games, and playing with a gun on Nintendo.

A female Membertou resident concurred.

JM: Has crime increased in this community?
Very much increased, when I was younger there was a lot more respect for elders, for community, and definitely a loss of language.

A female youth from Membertou talks about respect as something she was taught and also as something that others have not been taught.

I find a lot of youth don't respect elders, that they think, like, I personally believe that respecting elders, I grew up learning that. I grew up that was just like a moral or something that is valued, to me anyway. I find, we were talking about it one time, and lot of people were saying some elders, if some older people were not giving respect, they think that, they say that no matter what, no matter what, if someone does not respect me, even somebody older, I have respect towards them. But if they don't show me respect I don't really bother with them. I just wouldn't go disrespecting them just for the spite of it. But some people think that some youth are not really taught how to respect their elders. They think that a person should respect them first before they give it. I guess they think it should be mutual. I could not say that if someone fifty or sixty years old just says something you should not really respond disrespectfully, you should not have any disrespectful response. There are no really respected older people, maybe some really older people, but for someone who is forty-five or fifty, people do not really respect the person that is that age.

As a key to justice process, elders are a central characteristic of Mi'kmaq legal consciousness. Elders are considered to be the teachers of Mi'kmaq culture, the vessels that have specialized skills identified as uniquely Mi'kmaq, such as basket making, knowledge of traditional medicines, some have spiritual powers and they can pray for the dying. People seek advice from elders whom are often considered as storehouses of all traditional knowledge, a resource that community members can access anytime they need. Elders are regarded as the people that can most effectively mete out justice. The following male from Waycobah describes how he sees justice with elders working. Elders teach you how to be respectful and when to take your place. This process is described as a spontaneous event.

Yes, the elders bring it upon themselves. They say it in a nice way they will not be mean about saying it, they will not look down on you or make yourself look down. It is just in a nice way, "that you are not ready but if I were you I would smarten up so that next time when there is a circle you will be asked to sit amongst the circle." There are these circles that take place. There is no set plan like we are going to meet at the Holiday Inn July 1st. No one sets the time. We feel that our ancestors all bring us together in some spiritual way and then you know it is time when everybody is there and who is doing the talking and what is being discussed. So there is no set agenda. What happened this week, or last month with this family and this family we are going to deal with this now because there is an argument between one member and that member and they are causing discord amongst the harmony of the whole nationhood because they are fighting. So we are going to have to rectify that and deal with that right now so that the harmonization can keep going. The ideal goal is to live harmony with everybody that is what justice means to us.

JM: How do they resolve or manage disputes between families?

The idea is the older the person the more wiser they are they are. They are ones that speak to the less older ones. If the older one saw discord within the community, he would talk to his younger brother, who is 60 years old and who would mention it to him in a casual conversation while they are doing something like changing a tire or washing the car. He would mention to him and he would talk to somebody, and tell them to bring them all together, some of our friends, key people which this incident has to be discussed. And tell them the elders wish to talk to you because they see this explosion taking

place, it is rumbling up, and they don't want to see no explosion. So round them up so we can find out what the problem is, so we can all talk it out in a non tension form. If they tell you to sit amongst them, you better act accordingly, like you don't raise your voice, like in a court, you don't get angry or upset or intimidate that other person while you are being told to sit amongst them. You say he done this to my wife, or daughter, or children, and he upsets me, and I feel like punching him, or beating him up, because he acted this way, and the elders would say okay let us talk to him. You sit there and they tell him, what is your problem, why are you acting this way? And then the truth comes up and he has the chance to speak and tell his side of the story and they will find a resolution, and say is this fine with you and this fine with you? And then put it aside, it is done, don't talk about it, and don't get upset over let's move on, that is how justice is to them.

These demands place extensive burdens upon elders, particularly those who have suffered through centralization and residential school, as they too have been forced to adjust to a rapidly changing world and may not be able to live up to unrealistic expectations. Elders are now caught up in conflicts over authenticity and whether or not it is contradictory for them to be compensated for their knowledge. For example, the roles of elders and teachings become complicated in the commodification of traditional knowledge, which skews people's perceptions of authenticity and identity. A thirty-five year old Membertou resident expressed her vision of the complexity of mediating between traditional values and the practical reality of financial needs. Concepts of sharing get convoluted in such circumstances and moral values become points of contention and grounds for disputing.

JM: What about using elders in justice programs?

Yeah it could work but today now this is supposed to be a learned culture by our elders, the older people, teach us this and tell us this and stuff like that. But it is money today. Everything costs money today. A lot of people are not going to volunteer their time unless they get paid to teach these young ones values. The only thing I can see that people don't charge is powwows, traditional teachings. They don't get paid. They may get money to feed people and stuff but they are not paid to teach young people traditional custom.

JM: Should they be getting money?

I don't think they should be getting money but no one is going to do anything if they don't get paid in today's society. If you ask an elder to come to a school and teach them they ask, 'will I get paid to do this?' On the other hand we spent hours and hours in a church to learn to sing Christmas songs. We learned them in Mi'kmaq inside out, and these people were not paid to do it and today they are still traditionally traditional people, they will teach you without being paid.

Colonial processes removed much of the responsibilities of decision making from Mi'kmaq communities and from the elders formerly responsible for deciding what actions family and communities take. Many elders feel isolated and left out of decision making processes and express frustration at not being included. This disempowerment has become heightened for some elders and is another example of the consequences of imposing a system that disrupted social integration in Mi'kmaq society. One elder from Membertou points out the exclusion.

JM: What about elders being involved in justice?

I think they should be notified. Elders now, maybe they don't know too much about justice. I think they should be involved, they should know what is going on because a lot of people don't know what is going on in justice. I do not know too much but I am trying to learn more and understand it

Another woman from Waycobah says she wants her input too.

I think they should, the Chief and Council should have approached us elders, anything like that our elders should be approached on it. That is what should be done. They never consult elders on anything at all and they just go on with what they want to do.

The elders are not approached. The elders do talk about it. We were here first. They don't have their voices heard. I myself would like that. I am pretty well up there, I would like to have my input to chief and council but they would not like what I have to say to them.

While many people talk about Mi'kmaq justice as using elders to make the process fair, legitimate, and Mi'kmaq, ideas about who is an elder and what that means are not clearly defined, despite valiant efforts (see above). Some people noted being afraid of elders, or thinking they were too strict or stern. Others argue their advice is not

relevant. Still others say that only a certain few respect elders, and that would be those people considered traditional, or in ceremony, or the family's that are in self-help. In Membertou, anyone over fifty years of age is invited to attend elders meetings, which are workshops and talking sessions designed to address the needs of their senior citizens.

Some people criticize the whole notion of elderhood. As one woman stated:

The whole business of an office of elders is on my nerves right away. That there is something specifically elders, like an office of senate or office of elder, there is no such thing. No, and if somebody considers themselves to be or others consider them to be that is fine. The native people themselves make jokes about it. My mother and my sister went to the native language conference, and I said, "did you have fun Mom", and she said, "yeah I went with the Alders." Making an Indian joke about it like alder bushes, and it is a joke. There is no office of elder. It is not specifically tied to anything. Some people want to tie it to age, these are the very white people, but there are also people that want to tie it to wisdom and but it is not one thing. It is a constellation of things. That is why I am talking about this consciousness, there is a consciousness of what an elder is, and the people that are elders feel this great pressure because maybe they are not elders in their own mind, and that shit counts. There is no such thing as a constructed elder, there is no Mi'kmaq word for elder, it has come to us and been imposed upon us, and that is where you can get money, for an elders conference. You can get money to send an elder to a conference and have a token elder every where. There is no construct that says elder. There may be, but it is my mind and it may or may not be written somewhere. Maybe someone more learned who contemplates Mi'kmaq consciousness on a daily basis would know what it is, but I don't know what. But I know what it is when I see it. Someone I consider to be knowledgeable and someone who I consider to be a worthwhile person that I want to listen to, and whose opinion I respect and there are some people who are alders, they are just a stick, and they don't mean shit to me.

As an oppositional discourse however, elderhood is vital to maintaining internal distinctiveness from the outside society, because they embody traditions and manifest ties to the past. These ties provide continuity with the past often demanded by outside society as the legitimating factor for plural justice systems. Just as healing discourses are central to countering the injustices of residential school and centuries of colonization, elder

discourses are integral to the community justice process. Healing discourses and elder discourses are often presented as traditional discourses, as something that was always part of Mi'kmaq juridical practice, and are tied to other visions of spirituality beside the pervasive Catholicism. These discourses often generate disputes rather than abate them, and are important signifiers of clashes of consciousness and internal differentiation.

Legal Consciousness in Action – The Mi'kmaq Young Offender Project [MYOP]

The Mi'kmaq Young Offender Project has been in operation since April 1, 1995.¹⁴⁵ MYOP was one of the forerunners in the area of restorative justice in Nova Scotia. It is the longest running community based Mi'kmaq justice program. It is the most successful program thus far, because it has managed to draw upon Mi'kmaq justice constructs that ring true to some community members and periodically mobilizes grass roots participation. The program is by no means infallible. It has many critics who argue it is but one person's version of Mi'kmaq justice, that, as a restorative program it is just a slap on the wrist. Furthermore, a significant number of Mi'kmaq people are not familiar with the program, nor aware of it as an option for youth in trouble with the law. However, that said, MYOP is flexible enough in its applications that it can mediate cases as diverse as resource infringement charges and shoplifting, and as complicated as historical sexual assault. This flexibility bodes well for future program expansion and for being more inclusive of Mi'kmaq community juridical needs and demands.

Initially it was a program under the mainstream's Island Alternative Measures Society, a youth diversion project that handled alternative measure referrals of first time

¹⁴⁵ MYOP now stands for Mi'kmaq Youth Options Program, a name change that reflects the ongoing construction of this program to find a niche within Mi'kmaq communities while mediating with external restorative justice programs in Nova Scotia.

offenders who accepted responsibility for their offences, and provided community service order services. The impetus for the program was a lack of culturally appropriate dispositions and probation orders for Mi'kmaq youth in the justice system, in Cape Breton.

The Union of Nova Scotia Indians administered MYOP in Mi'kmaq communities. By 1998, the success of the project made it a suitable program to come under the umbrella administration of the Mi'kmaq Justice Institute [MJJI] resulting from recommendations from the Royal Commission on the Donald Marshall Jr. Prosecution (1989), and as a result of dire need in the Mi'kmaq communities to gain control over justice processes. While with MJJI, MYOP participated fully in the institute's mandate to bring justice processes into First Nation communities, to build solid relations with mainstream justice, and to develop community based, culturally appropriate and meaningful Mi'kmaq alternatives to mainstream justice. When the Mi'kmaq Justice Institute folded, MYOP managed to survive and reverted back to a program under the management of the Union of Nova Scotia Indians. MYOP falls under the restorative justice rubric.

As these significant changes in policy and political organization were taking place, the alternative justice movement was gaining momentum in Nova Scotia. According to Jackson (1992) opposition to the adversarial justice system, which features the state as the victim and punishment as the cure, in a relatively narrow adjudication process separated from community, precipitated the development of strategies supporting the philosophy of restorative justice. Restorative justice is commonly conceptualized in two ways, one as a process that brings together all stakeholders affected by some harm

that has been done to discuss the harm, and come to an agreement as to how to right the wrongs. The second concept focuses on the values of restorative justice that distinguish it from "traditional punitive state justice," where justice is about healing relations rather than punishing offenders (Braithwaite and Strang 2001).

The reality of restorative justice in practice often falls somewhere on a continuum between the extremes of restorative process and values and state instituted crime control, and coercive force through penal institutions. The diversity of groups and their reasons for supporting the restorative justice movement are expansive, but tend to be intersected by the perceived benefits of the restorative process, which are also wide ranging, and namely directed at the desire to reduce crime, repair relations, and minimize criminal justice costs. Although such claims have not been clearly proven as products of restorative processes, restorative justice is increasingly, and often uncritically, looked to as a better alternative to mainstream justice.¹⁴⁶ Other intersecting points reflect the values restorative processes are said to embrace such as democracy, healing, social support, nondominated speech, and communitarianism and apology, amends and forgiveness, and to transform civil society into one where social justice is equally enjoyed by all.

Restorative justice is said to emerge from ancient concepts in which groups managed their relationships by defining crime as a violation of relationships, similar to Mi'kmaq juridical conceptions noted earlier, and employing practices to heal, compensate and restore peace within the group. A central premise is the notion that violations disrupt relations for all community members, regardless of their direct involvement in the precipitating incident. In the 1960s and 1970s, alternative justice programs such as

mediation, victim/offender reconciliation, family group conferencing and diversion, modified ancient philosophies into applicable modern forms. Hudson and Galaway define restorative justice practice based on three elements:

First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders and their communities to find solutions to the conflict (Galaway and Hudson 1996: 2).

Victim participation is a contentious issue across most restorative justice programs, including aboriginal programs. Clairmont, in his analyses of justice reform, denotes that the major push factors driving the alternative dispute resolution movement are widespread dissatisfaction with the mainstream criminal justice system, including corrections, particularly the lack of successful rehabilitation, costs, and protection of civil rights. Whereas pull factors stem from a more general sociocultural movement of the 1960s, toward reconciliation and mediation, and through the activities of religious-based organizations such as Quakers, Mennonites, Victims Movement and others (Clairmont 1996).

Restorative justice has its critics, and some suggest there is a danger in the quest for consensual and informal community controls. The fundamental problems emerge from idealized restorative justice processes where:

The community is conceived as a non-coercive space that regulates autonomous individuals through freely chosen, agreed-to and peaceful solutions. Communal orders are not coercively imposed, but develop spontaneously from the 'bottom up'. The community, thus defined, stands opposed to coercively engineered state

¹⁴⁶ See Laura Nader's work justifying her critique of restorative justice as a legal hegemony. She argues it is important understand culture as a form of control that has become especially relevant to happenings in law in terms of power differentials and social distance.

control by creating domains of free association that empower members to develop common, agreed-upon ways to regulate themselves (Pavlich 2001:56).

As criminologist Bob Ratner suggests, this may be more about control through community rather than actual community control (Ratner 1999). Others see the problems in the state off-loading institutional reform onto communities. This is particularly challenging for First Nations, where resources are extremely limited, and where mechanisms for criticizing internal leadership and governance practices, are not clearly delineated, due to an absence of sovereignty (see Miller, B. 2000). Some critics argue that the restorative justice processes become less effective when the state is the offender, and where more complicated demands for reparations dealing with human rights violations, are tangled by debates surrounding individualism and communitarianism (see Cunneen 2001, Miller, B. 1997).

In Mi'kmaq communities, the restorative justice process tries to meet some of the challenges outlined above. The Project Management Committee, consisting of representatives of the major Mi'kmaq political organizations, provides supervision, direction, administration and advocacy for MYOP. Chiefly support is critical to maintaining a justice program particularly within a tripartite process. The provincial government is notorious for continuing to make decisions affecting Mi'kmaq justice programming, without consulting them. With Mi'kmaq leadership involved, MYOP has a greater chance of standing up to unwanted and imposed changes from the outside. One of the project managers notes:

We want to keep MYOP in the Union of Nova Scotia Indians as much as possible, with Confederacy of Mainland Mi'kmaq support on that. Because there tends to be, from my own dealings with government, there tends to be too quick a judgment call on the failure of the institute [MJI] and a bleeding it out over to whatever justice initiative they possible can. Just so they don't

have to bend the policy and rules and government, just so they can say we don't have to look at MYOP and make a separate justice system for the Mi'kmaq. Because the name is tarnished now, by association with the institute, even though MYOP did come through as best it could, it managed to hang on to things even when the institute was falling, even though it was under the auspices [of the MJI].¹⁴⁷

MYOP consistently has to do battle with the provincial department of justice to justify its continued presence and its requests for funding. The standards by which MYOP is evaluated are western-based notions of statistical effectiveness and efficiency. It is particularly absurd that the government is not more willing to ensure support for community based programs as they move toward broad based restorative programs themselves, and given the history of Mi'kmaq relations with the mainstream justice system.

Back to the numbers thing, my position has always been I think it is wrong for government to always come to the table with it is our way or no way, and their way is this numbers game. The whole purpose of MYOP is because somewhere in government, and somewhere in Mi'kmaq organizations, there was a recognition that the general justice system for youth was not working for Mi'kmaq kids. So when you look at that alone, that should tell you, you need to approach Mi'kmaq justice differently than the regular justice system, and yet I find MYOP is Mi'kmaq in name alone. It is just a Mi'kmaq rubber stamp on the front of it and we are still in the same old shop of youth justice, and there is no going outside the policy, and that is the principle problem of the growth of young offender. We have to always keep coming back and measuring against numbers, when in fact, we should be measuring against youth crime, how well the community feels, and perceives, about youth justice because of the program, is it working? Do people feel like, yeah I am doing better because of MYOP. That is the true test of the program. I mean satisfaction. If you have people participating and the program still is just white justice, people will just say, "no I don't want my kid going through MYOP. I will go to IAMS because it is no different." Put emphasis on criteria we measure by in the community, rather than government's numbers they just play that numbers game.

MYOP resists ongoing state regulations that interfere with the goals of Mi'kmaq self-governance. As Nova Scotia implements its own restorative justice process, the

¹⁴⁷ The rise and fall of the Mi'kmaq Justice Institute are discussed in chapter nine.

department of justice has begun placing further restrictions of the types of cases it deems suitable for MYOP to handle. MYOP was moving in the direction of conducting adult cases, and has successfully conducted sentencing circles for a number of serious offenses that mainstream restorative justice now claims are too volatile for communities to handle. Perhaps mainstream restorative justice does not want to lose out on a potential client base and is restricting MYOP from handling adult cases so that they might benefit from the resource pool.

MYOP has demonstrated some success in dealing with adult cases, and with serious sexual offense cases. Sexual offenses and domestic violence are areas where the province is not able to practice restorative principles at this time. Within Mi'kmaq communities, these issues are also controversial; however, during interviews with the agencies that deal with the victims and offenders of such crimes, they indicated a strong desire to keep the option to bring these cases to a community process. They argued that the mainstream system is ineffectual and does not provide any healing process, for either offender or victim. They suggested the Mi'kmaq system has greater potential to do so in holistic ways that can break the cycles of violence. More community consultation needs to take place before MYOP actively pursues these offenses with any regularity, as the necessary infrastructure is not currently in place to handle the load. MYOP staff feel capable of doing these offenses, but realize the vital link is community willingness.

Negotiating Mi'kmaq justice identity has been a challenge for MYOP workers, a contingent of four people, who carry out community based justice practices for the entire province. They are the only Mi'kmaq justice program currently in operation, with the exception of occasional justice entrepreneurs, who conduct healing and talking circles for

cases that fall outside of MYOP's mandate. MYOP however, is not letting Nova Scotia dictate its total mandate. MYOP was the first restorative justice program handling repeat offenders, and continues to facilitate ground breaking cases, as they move into new areas of dispute management. They are constructing contemporary justice narratives that look inward toward managing internal relations, and focus on real community control over assets and resources by utilizing concepts of forgiveness, healing, restitution, and symbols of Mi'kmaq identity to reinvigorate, and legitimate, community based justice practices (see Miller, B. 2001).

I do not like the name sentencing circle. It has become this name that is common in Canada and the States for First Nations, with respect to our process of accountability of crime and victim. And that in itself is kind of where I have a problem with the name. What is a sentencing circle? Are we giving a sentence to someone? And when you say sentence, it reminds me of the overall justice system, and isn't the whole purpose of the circle reconciliation, and responsibility, and accountability, by community, as well as victim. I wonder if the name sends the wrong message. Maybe we are sending a sentence, but it is becoming such a proactive word in non-native justice. It is becoming synonymous with whatever system, not a Mi'kmaw system. They have adopted it now and just because it is a sentencing circle does not mean it is a native system. I would like to see ownership of a community name on it. Justice circle is not too bad, but I don't like the idea of sentencing circle. When I think about justice, we have our own justice words and it does not have to be a Mi'kmaq word, but I want to send the perception out there that it is not so much about punishment and crime, as it is about ownership and accountability (MYOP project management committee member).

MYOP processes emphasize restoring relationships through justice circles.

Circles provide a forum that allows parties to deal directly with one another to discuss harmful consequences of the wrongdoer's actions, and problem solves to make amends to the victim and the community. The project has facilitated close to two hundred circles in the past five years. These circles seek remedies for root causes of wrongdoing rather than simply addressing an offense. Circles are not forums for determining guilt or innocence,

wrongdoers come to the circle when they willingly acknowledge their actions and desire to make amends.

Each process is unique and dispositions are flexible according to circumstance. The process involves talking out the problem with a group of community members relevant to the individuals involved. Flexibility challenges the structure of mainstream systems, as one project management committee member noted, the province, "thinks flexibility equals no accountability, but the accountability is within the community, but it really has to be much more flexible to do it."

Through these community processes, the community, families of those directly involved, wrongdoers and victims, are empowered because responsibility remains with the circle participants rather than with the state, when they work. Mi'kmaq justice circles are timely alternatives that permit participants to speak for themselves in a setting that is less adversarial and less intimidating, because it is familiar. Dispositions appear to be fair because they are negotiated more than they are unilaterally imposed. Although there are biases and prejudices, they are not the same as those externally derived, and are better mediated through shared knowledge of an individual's family background and contributing circumstances. This approach helps to create more meaningful resolutions and manageable healing plans. Justice circles are accountability building mechanisms.

Based on Mi'kmaq law perspectives, a forum of community members is convened, and a person who is willing to accept responsibility for the offense voluntarily participate in a discussion with significant parties about the offense and its consequences. The justice circle process moves beyond formulating a sentence, the process is designed to produce outcomes that improve the working relationship among participants; to create a better understanding and respect for the different circumstances and values of the participants; and to combine a broad range of interests in decisions that reflect the collective efforts of all participants. Reaching a consensus is not the primary objective; striving together to understand

each other, rebuilding relationships and generating healthy connections is (Personal communication, Marshall, P. 2001).

Each circle requires comprehensive preparation of the participants and considerable time commitments from volunteers, as only the facilitators are compensated for their time. For young offenders, parents are brought into the process, which may help address the parenting problems often cited as contributing to delinquent behaviour. Dispositions are made that place wrongdoers in community service programs that are culturally relevant and reinforce culturally sanctioned law ways. MYOP workers strive to gain legitimacy in their own communities rather than seeking it through mainstream courts.

Community support for the program, is often fractured, depending on relationships with the wrongdoer and victim, which often reflect wider family tensions. The organization has had a difficult time maintaining volunteer cohorts, as people lose interest, or become too busy. Several interview participants reported they became disillusioned with the process because it negatively affected their relationships with the people they were charged with monitoring. Another difficulty is high staff turnover, which reflects concerns over job security, and a lack of benefits, due to ongoing resistance from the external system to provide core funding to ensure MYOP's survival. The Nova Scotia government continues to treat it as a project rather than a program, a tactic of the government that tends to maintain paternalistic control and undermine self-government as it prevents independent development.

Despite these obstacles, or perhaps because of them, MYOP continues to be an organization of ongoing cultural production that utilizes Mi'kmaq legal consciousness as a way to appropriate the legitimacy, attached to the familiar, to authorize unconventional

processes that separate it from mainstream justice (see Ewick and Silbey 1998). Two recent cases demonstrates this process and also demonstrates the evolution of Mi'kmaq justice from a community based young offender program, to a program that can facilitate the management of a range of serious crimes, from historical sexual assault, to collective resources infringements. Both cases show MYOP and Mi'kmaq community justice as an essential component of self-governance.

Mi'kmaq Justice Circles

Mi'kmaq Justice Circles were formally accepted as an alternative to the Criminal Justice System in April 1995, upon the establishment of the Mi'kmaq Young Offender Project [MYOP]. The circles are a forum whereby a wrongdoer accepts responsibility for an offence, and voluntarily participates in a discussion with significant parties about the events, and its consequences. The director of the MYOP describes how a sexual assault case evolved to a circle process.

We have been preparing for almost one year. It was a referral from defense. He heard about the program and asked if it was appropriate. We were not doing sexual assaults but this is an incest case. When we went to speak with the victim, she was more supportive of this program than the 'traditional' mainstream justice system because so much has happened in her life. She defined who she is based on the abuse she suffered over those years and she really wanted that offender to know how much he shaped her life. She did not feel that he realized that by going to court, yeah he did a bad thing, but he would not realize the impact of what he has done to her personally. Based on that, we decided to take it on. In September we developed a working community made up of resource agencies and community people, and elders, who could contribute. We involved victims' services, MFCS [Mi'kmaq Family and Children's Services], a Women's outreach worker from transition house, NADACA [Native Alcohol and Drug], the school, and social work services. All of the helping agencies who have been in contact with the family. We want to protect the victim, but it might also be a generational problem within the family, and we want to set up the support so that should it occur again, there would family support for the fallout. When one comes out there are usually other disclosures. It all rests on the victim. It is a lot of responsibility to put on the victim. She can choose not to be a victim

anymore, she can be a survivor. I will facilitate the circle. I facilitate all of the sentencing circles so far.

The community was involved in this sentencing process. Representatives were drawn from police, social service agencies, and the grass roots cohort. The following excerpt is a police officer's account of his involvement. At first he was very reluctant to participate, he is a 'by the book' law enforcement officer, and the circle process was very new to him.

I am representing the police. MYOP is running it.

JM: Is it separate from the court system?

It coincides with it. The Judge and court reporter will be there. It is just kind of like a little branching out from the court. It is the community who has a say in what sentence is handed out here and the Judge is involved also.

JM: Are you getting any community feedback on this process?

It is great. We have great representation. A lot of community members will be there. I was a little apprehensive when I began this sentencing committee because of the crime. It is very sensitive. My feeling was that this guy was looking for a way to get off, a way to avoid any jail time. I did not have much faith in the community itself but since I began, and the more meetings I attended, I am totally of a different mind. I am impressed with the community and how serious they are taking this. I look forward to the meetings and forward to the sentencing circle.

JM: What are the meetings about?

Discussing how the sentencing was going to be handled, how it would evolve, every aspect of the sentencing itself, right down to the seating plan, everything. What to expect, who is going to speak.

JM: What shifted your attitude toward the community?

The more meetings I attended I was impressed by how the community were perceiving this. I thought they were also going to assist in getting this individual off, that they were not going to take it seriously, that they were going to pity this person and agree that he should just get a slap on the wrist. But the more we went into it, the more we talked about it, the community were equally shocked at what had happened to this victim as I was, and they shared my feelings, and that made me feel more comfortable.

I felt in the end, or right now anyway, that this guy is not going to get away with it, that the community wants this guy held accountable.

JM: That is what justice is for you?

Yeah, this guy is going to be held accountable for what he did to this individual.

He would not get that opportunity, or the community would not get that opportunity in a court setting. It would be one person deciding the fate of this individual and the whole community.

JM: Is this empowering the community?

Definitely. This is a first for Eskasoni and I believe of this type of crime is the first in the province. We are making history and I feel great about it.

JM: What are other benefits of this community based approach?

Giving the community ownership. The community is telling people out there that they are not going to allow these things to happen without having consequences to be paid for them. The community is telling offenders that if they commit offenses here they are going to be held accountable and responsible for them. That is the message I get from this. I see great things if these are to continue. I see it as healing too. The community is giving the opportunity for everyone involved to heal, the victim, the offender. It puts it to rest, to get over it, to move on. If this were not done through the sentencing circle it would be one person deciding the fate of this individual and whatever formula he uses. It would be just a judge making a decision and that is final. Here you have the community having an impact on what is going to happen, and that is a much better system.

An Eskasoni elder who participated in the circle describes her experience:

JM: Have you participated in circles?

Yes. I found them very good, they are emotional. They are personal. It was a long process, there was consensus reached at the end. We all had the opportunity to write three things that we would like to see as a sentence, like six months in jail etc. Everyone had their say. I wanted him to be incarcerated because I felt the crime was too severe, it was a nine out of ten, and I felt that incarceration had to happen. And not less than three months, and when he got out, there had to be conditions, curfew, 200 hours of community service. We had to because I did not want the community of Eskasoni to face me and say, "I knew it, he did not get a day in jail." I was really afraid of that and I knew the severity of the crime. He got two months and house arrest for twelve months and curfew for another eighteen months. When his sentence is over he has to do community service. The community felt it was adequate. I think incarceration was the green light for us, even if he spent three or four days in jail. We were all so under the microscope and anything that we do that did not satisfy, or was not on par with what would happen in Sydney, would be a detriment to the group. It is very important.

JM: Was it the severity of the offense that made community pressure so apparent or should every case warrant that attention?

It was severity of the crime.

JM: What about reintegration circles for offenders?

I have never seen one. If balance is not restored then it will happen again. If we had justice circles then we would not need reintegration circles. But for those who have been incarcerated, it could be a condition of release

providing they did not go through a circle to be sent to jail. They need to be introduced to their traditions.

When the time came for the circle to take place, the victim failed to appear, but an electrical outage required a postponement. Everyone was in attendance at the rescheduled time, including the prosecutor and the defense. It started at 9:30 am and went until 3:30 pm. The crown started by reciting the agreed upon facts of the case, then there were three rounds of the circle. The wrongdoer apologized during his first turn.

During the second circle, the wrongdoer began the round, and during the third circle, suggestions were made as to how to remedy the situation. There was an appearance of consensus among the suggestions that recommended the person to be removed from the community for a period of time. The prosecutor and defense did their summations and then the judge took a break to write his decision. During the judge's break, the bailiff tried to rearrange the chairs from the circle formation into a more formal, court-like arrangement, giving the judge a position of power and authority for the sentencing. The director of MYOP intervened and the chairs remained in a circle. The judge returned and delivered his sentence. Unfortunately the Judge made an error in sentencing because he cannot combine jail time with a conditional sentence for the same offence or charge. The probation officer for Eskasoni noted the problems this error caused:

JM: Have you done any sentencing circles?

Just the one in Eskasoni. It was good, but the outcome was not that good. He [wrongdoer] ended up doing time when he first got the conditional sentence, then his lawyer appealed it because you cannot have conditional sentences and jail at the same time. He won the appeal and it ended up the guy served less than two months in jail, and the conditional sentence was taken out. He had to serve twenty-seven months of probation. The community did not like that very much, the victim did not like it either but there was nothing they could do.

MYOP was breaking new ground circling this type of offence and demonstrated both the community's willingness, and ability, to handle the situation. The failure of the court to ensure the outcome was also productive, as the process epitomizes the contradictions between the two systems, and the challenges of trying to make them work together. The judge, who sits Eskasoni court, was called to the bench four years ago, and has been seen to recently shift his juridical strategy in Eskasoni. According to a member of the Unama'ki Tribal Police Force:

The judge at first began with a lot of incarceration. He was trying to send a message that certain crimes are not going to be tolerated, but over the past few years, I noticed he is turning to the community more, particularly in sentencing circles.

The Judge is a member of the working group for Nova Scotia restorative justice, which may, in part, explain his willingness to divert cases into a community process and to utilize conditional sentencing as an alternative to incarceration.

Another significant development in community based justice relates to another Marshall discourse. As result of the Marshall Decision in 1999, various bands entered into fishing agreements with the Department of Fisheries and Oceans [DFO] that facilitated Mi'kmaq access to their traditional resources, but forced them to comply with DFO regulations. A male member from one such community breached the agreement signed by his band, by fishing lobster with more than the allowable number of traps. DFO officers caught him. The Chief of this community approached the DFO to see if they would be willing to use a Mi'kmaq justice circle to mediate the charge. The DFO approached the crown and defense, and a judge sought counsel from the Aboriginal Justice Learning Network, a program of the Federal Department of Justice, to ask for

guidance. This was the first time a circle process was to be used for a federal regulatory offense. Aboriginal Justice Learning Network contacted MYOP who agreed to facilitate the process. The MYOP model is primarily designed for criminal offenses where there is a victim. In this case the victim was the resource.

A number of consultation meetings were set up with all parties involved, in order to instruct them on the process. The DFO officers, the crown, the wrongdoer, the Chief, and community representatives, met with MYOP staff over the course of several months. The participants included MYOP staff, the band Chief, the wrongdoer, two elders, a support person for the wrongdoer, counsel for the accused (Mi'kmaq), federal crown prosecutor, band fishery liaison, four DFO officers, a representative of band fishers, a community representative, and Donald Marshall. Marshall was asked to participate given that it was his case that precipitated this event and he had been an active member of previous Mi'kmaq justice processes. Grand Council members were also invited, but were unable to attend. Grand Council members have been included in other justice circles. The presiding judge decided not to attend the circle but would await the recommendations generated therein and make his decision in response.

In an interview with the facilitator she explained the challenges of this innovative process:

The biggest challenge or fear was that this topic often becomes volatile and is very touchy.¹⁴⁸ I was afraid it would turn into Jerry Springer.¹⁴⁹ Secondly, the officers were villainized by the community, and it was a challenge to have the group stay open minded and remember that the DFO was also taking a chance to try this, and to keep reminding everyone that DFO supported this

¹⁴⁸ The Marshall Decision resulted in a series of violent confrontations between Mi'kmaq and non-Mi'kmaq fishers and the DFO. The famous film footage of the DFO ramming Mi'kmaq boats is an example.

¹⁴⁹ A controversial television talk show host known for provoking guests and audiences into unruly frenzies over sensationalized topics.

[circle process]. Thirdly, the offender was almost canonized. It was difficult constantly reminding the group that the offender was not the victim and that he knowingly committed this offense. Even after I repeatedly asked the offender if he accepted responsibility the group still felt he was wrongly accused. The [offender], to his credit, repeated he accepted responsibility and was wrongful in his actions. I think part of this [challenge] came from [offender's] upstanding character and everyone found it difficult to believe he would knowingly do this, and secondly, the fact that people were looking to blame DFO in some way for everything that has happened in the past. The success was having everyone share their pain in a constructive way and having the opportunity to listen without being attacked. The other success was that [offender] and one DFO officer had an opportunity to rebuild a friendship that was damaged by this incident. That was very powerful.

The circle process followed several rounds where each person had the opportunity to share their thoughts. The process demonstrates the ability to heal relationships or least move onto a healing path of reconciliation. Here the reconciliation goes beyond the DFO officer and the fisher who in the end, "embraced in reconciliation of their differences" to the applause of the circle participants. There was consensus that the circle was a positive experience, one allowing parties with differing positions, to enter into an effective dialogue on a controversial issue, and set a foundation for future discourses on resource sharing, and the prevention of future disputes. However, an agreement was not reached regarding the sentence plan for the offender, as the participants were polarized in their views at to what they each considered fair.

Generally, participants of the formal system (enforcement) were in agreement that in order to maintain relationships out on the waters, a strong message of deterrence should be made. They were careful to mention that there is already much friction between non-native and aboriginal fishermen in the waters. To preserve peace and promote fairness they felt the offender should not be treated any differently due to his Mi'kmaq status. They also expressed that this circle model could be used to promote equality and fairness. Participants of the Aboriginal community viewed the circle process as unique to deal with this matter and asked the circle to consider the mitigating circumstances relating to the [offender's] persona and reputation. They suggested a less punitive sentence plan.

Instead of submitting a unified sentence plan to the judge, the circle submitted recommendations from each of the participants. The crown suggested a one week prohibition from fishing during the next season, a fine and a forfeiture of catch on a specific date. DFO articulated concerns regarding conservation, and argued that all violations of the federal regulations be treated equally, and without prejudice, in the eyes of the law. The DFO members agreed with the crown's recommendation but were resisting the recommendations of the Mi'kmaq community. The DFO's stance is puzzling in light of the Marshall Decision and demonstrates the Federal government's inability to respect cultural differences within their legal consciousness.

The First Nation community representatives wanted consideration to be taken regarding the personal suffering of all Mi'kmaq due to DFO regulations, and their alienation from the fishing economy. They also addressed the fact that the offense was out of character, and therefore the offender's past behaviour should impact the decision. They also cited the adverse publicity the case received, noting that Mi'kmaq fishers were criminalized in the media and the offender's reputation was damaged as result. While the community agreed a monetary fine was acceptable, they argued that the community was also a victim because the community agreement was breached, and therefore relations had to be made right. To make matters right, the fine could be channeled into the community for their collective benefit, rather than the Federal government.

The elders did not agree with a fishing prohibition because this was the offender's livelihood with which he provided for his family, and a percentage of his catch was to go to the community. A prohibition would thus be harmful to the community. Confiscating gear was seen in a similar light, being unfair in a community that is economically

deprived in general, and struggling to access resources. They too agreed a fine should filter inward, and one elder recommended community service as a way to hold the wrongdoer accountable to the collective. The community perceived the offense as a violation of trust and wanted to ensure that resource conflicts could be resolved peacefully.

All parties agreed that the process be used as an opportunity to educate fishers in both communities. This event was described as a healing process and a sharing process that was respectfully orchestrated. It demonstrates the coming together of differing ideas and cultures in an example of mediating relationships. The circle was entered into without prejudice to the future discussions for treaty rights and fishing agreements.

While no longer the trailblazer of restorative justice within Nova Scotia, MYOP is still one of the forerunners of aboriginal justice processes in the country. With program expansion and the ability to take on more serious cases in ways that are acceptable to both Mi'kmaq communities and mainstream justice officials, MYOP can once again lead the way in building healthy communities. Most significant in all of this is the fact that MYOP processes and remedies are imbued with Mi'kmaq practices, practitioners, beliefs and ways of life, something no other justice system can possibly accommodate. As such, MYOP is best able to mete out justice in ways that are meaningful and perceived as just and thus benefiting all those affected by crime. MYOP is successful in delivering culturally derived justice initiatives to Mi'kmaq in Nova Scotia through their Mi'kmaq customary and restorative approaches. Given the nature of reserve life within the Mi'kmaq nation, community ownership of juridical processes may be realized at even greater levels than in the general Nova Scotian population. Mi'kmaq restorative

approaches have the benefit of remedies that are imbued with cultural significance as well as community accountability, but as such they are challenged and contested. People continue to refuse the local system in favour of the mainstream system.

MYOP has developed strong working relations with the restorative justice program in Nova Scotia and have received the benefits of joint training and a sharing of developmental experiences. MYOP remains concerned with providing restorative justice processes that are tailored to the unique needs of Mi'kmaq communities and thus maintains an identity separate from the Nova Scotia model. This separation is necessary because to lose the Mi'kmaq justice identity to the mainstream restorative justice identity would be to lose a level of self-governance, and an important process for community healing. Melding the two systems would disrupt the momentum of institution building and cause problems of legitimacy, equity, and reduce the sense of empowerment that has been fostered by the independence of MYOP from mainstream. Mi'kmaq people want to control their own justice processes, and the above cases delineate the characteristics of Mi'kmaq legal consciousness in opposition to those of the mainstream players.

Conclusions

Mi'kmaq legal consciousness is much more than discourses of forgiveness, healing, and elder's dispensing advice and restoring relations. It remains important for social cohesion, group unity and ultimately survival that members be reintegrated into the group. Dynamic, flexible processes by which attempts to resolve problems are available through formal and informal practices ranging from talking, teaching, and ritual performance, to ridicule, shaming, gossip and ostracization. Some problems are quickly resolved through immediate confrontation, such as fighting it out. Others take longer,

employing hapenkuituik, the law of vengeance, that asserts great offences are to be avenged by the family wronged, in order to make even the relations, as embodied in the word asidolisk. These confrontational approaches, can lead to koqqwaja'ltimk just as the concept of forgiveness, apiksiktuek can.

Other examples of juridical practices in Mi'kmaq legal consciousness include beliefs in spiritual sanctions, ritual obligations, and worship. I was told stories that made my hair stand on end regarding the concept of 'what goes around comes around'. Some people talk about justice as handled by other than human forces, and use this talk to explain unexplainable events. For example, a woman steals a credit card from a deceased person and buys material goods with it. This behaviour is not condoned and some chose to shun and ignore her. Soon the woman became ill, but not with any identifiable illness, she became spiritually sick. It was thought that she became sick because it is considered morally wrong to steal from the dead. The woman did not reconcile her crime and eventually died. These events were described as 'what comes around goes around'. These stories have strong deterrent value in communities where day to day interaction is high and talk reflecting these ideas are commonplace.

Responsibilities for adjudicatory processes are discussed within the frames of legal consciousness, and debates exist over whether the Grand Council, or Chiefs and Council, if either, should be involved. The traditional government is often presented as more sacred, apolitical, and not likely to use their power for adverse purposes. For some, the Grand Council validates Mi'kmaq culture by its very existence, having survived over the centuries they should rightfully be adjudicating all Mi'kmaq legal issues. For some it represents all that is fair and just. Several cohorts use the Grand Council as an internal

mechanism for criticizing the Indian Act Chiefs, particularly when issues of corrupt leadership and divisiveness among the bands are raised. For others, the Grand Council has no meaning, and is considered powerless, archaic, and male dominated, and too Catholic, in other words, too far removed from its original state to have contemporary relevance.

In the eyes of government officials, Grand Council members are not seen as the legitimate leadership of the Mi'kmaq Nation. The government officials deal only with persons elected to leadership roles under the Indian Act. This problem forces community programs to be outward looking, and use negotiation strategies that satisfy external funding agencies, instead of focusing on building internal relationships, based on previously accepted norms and values of social organization. The rejection of traditional Mi'kmaq cultural constructs undermines Mi'kmaq society and forces it into relations of dependency by which outsiders can exert control by deciding who they will negotiate with and under what terms, thus causing the negotiations themselves to be power laden events where inequality is characteristic.¹⁵⁰

The goals of Mi'kmaq justice remain to reinstate wrongdoers into the community, to maintain and when needed, restore relationships with people, the land, and the spirit world. Of course not all disputes are resolved as evidenced in on going blood feuds and community fragmentation. Life is not, nor was ever purely harmonious, nor edenistic. The Mi'kmaq have sophisticated, flexible mechanisms for justice, legitimated because they are made meaningful by those participate and witness them. The flexibility of Mi'kmaq justice lies in its treatment of cases as they occur and within special

consideration of the context of each event and the players involved, rather than relying on precedent as the driving framework of adjudication.

For example, one case involves a community acting in concert to resolve a problem involving an unwelcome bootlegger on their street. Finding the band council refusing to help, and wanting to avoid police intervention, neighbours assembled and wrote a letter confronting the wrong doer. In the letter they identified the injury, that bootlegging was ruining families and killing the children. They named the crime, labeled him a criminal, and claimed they would not tolerate him selling booze in their neighbourhood. They gave him an opportunity to change his behaviour, but warned they would take further action if he continued to sell, and threatened him with force. All of the family heads living on the street signed the letter.

There was a bootlegger who moved into a section of Eskasoni and the rest of the community got upset. They thought of their space as a family section and one family got a petition together and confronted the person, told them they did not accept it and they wanted him out. Everyone signed and they took it to him and it worked. They tried to get chief and council, but they would not get involved in such matters.

This case is another example of confrontation in Mi'kmaq juridical practice.

These events empower community members to take responsibility for their lives and their environments. After centuries of paternalistic policies that usurped local power from mobilizing, these events are particularly exciting and meaningful. These concepts involve confrontation and intervention in periods of disharmony. They are part of the living law ways of the Mi'kmaq. The living law of the Mi'kmaq challenges the notion that state law

¹⁵⁰ June Starr and Jane Collier discuss law and legal forms as rising from particular historical negotiations between and among groups, or as resulting from particular systems of hierarchy and domination, as a historical product rather than a universal category (1989:24).

is the only legitimate source of law.¹⁵¹ Mi'kmaq legal consciousness is not just about criminal justice. According to a middle aged male from Membertou:

When I think of justice I also think of criminal that comes to mind first but when you think of the whole concept of justice in a broader view, and not just criminal, there is civil, family, all sorts of areas. That is what we needed the MJI [Mi'kmaq Justice Institute] for the think tank part, for people to contemplate it to see how it fits in our society today. Because the only place where there is program funding is criminal and that is the only one you see and the only one that is thought of as justice. But that is not justice. There is also the whole thing about treaties and all of that business. It is being hauled into criminal and it ends up and it is contracts, it might have been signed three hundred years ago. Justice is a broad topic and issues that gets reduced to criminal. That is why you need the whole thing. We don't tend to think of our lives as so compartmentalized as other people do, seems to me. I hate to use the old worn out holistic phrase and all that jazz, but it is true, and that is part of the Mi'kmaq consciousness people don't get. It is much easier to compartmentalize and put people in a category and then you can deal with it because then there is a department to handle it. I don't know.

¹⁵¹ I am borrowing Eugen Ehrlich's phrase, 'living law'. Ehrlich (1936) emphasized that behind state law and theoretically prior to, the façade of state law was living law, a complex but very real matrix of rule-governed practices and prohibitions without which no ordinary social relationships could make sense (McLennan 1995:46 in Nader 2002).

Chapter Thirteen: Conclusions

This thesis has examined legal consciousness as a site of struggle and as articulations of Mi'kmaq identity by examining historical and contemporary constructions of juridical discourses and practices in Mi'kmaq society. Mi'kmaq juridical experiences are culturally defined, enacted, and negotiated against a backdrop of oppositional politics in which the Mi'kmaq resist the destruction of their culture by outside influences. Ideas about justice are shared and disputed within and between culture groups, in the production of legal consciousness, as Mi'kmaq create institutions and programs designed to reflect their cultural understandings of right and wrong.

The preceding depictions are not meant to be representative of the entire Mi'kmaq nation for a given period, but are meant to give the reader an idea of how life was 'lived right', and how these ideas were communicated in Mi'kmaq society, and what happened when things went wrong. Legal systems do not necessarily need a separate space, conceptual or physical, culturally or institutionally, to exist (French 1996). Law ways and justice do exist without lawyers, codes, courts and cops.¹⁵² The Mi'kmaq had rules for making sure society worked in an orderly way at all times, and these rules or tplutaqan were passed on orally over generations. They had ways of enforcing the rules, and ways of dealing with people who did not follow them. These rules and their applications manifest as leadership, law, social control and decision-making. Where possible, I included descriptions of stories, cases, or juridical events, as a way to illustrate how Mi'kmaq legal consciousness was constructed through the experiences of day to day living, and in efforts to manage relations between individuals, the community, and the

spirit world. Justice is part of a meaning system, framed by culture, where symbols, rituals, and language, facilitate the creation of commonsense understandings that legitimate core values of the community, and the actions needed to protect and support those values. These law ways are informed by Mi'kmaq spiritual belief systems, their ways of social organization, economic and political practices.

I have argued that the productivity of culture increases at historical moments of heightened resistance because the valued components of culture are challenged, and threatened from without, and so must be articulated within, each individual identifying with or against relevant components (Smith, G.1999:57). It is within historical moments of heightened resistance and acquiescence that an analysis of Mi'kmaq agency was assumed in order to document creative processes of legal consciousness constructions and adaptations, and hence expressions of Mi'kmaq identity and resistance, the central objective of this thesis.

The important historical moments most frequently articulated in Mi'kmaq legal consciousness reflect the impact of colonization on Mi'kmaq life ways, and the impact of Donald Marshall's wrongful conviction. This thesis has examined early Mi'kmaq law ways, the impact of colonization on those law ways, and contemporary juridical discourses and practices. I conclude that contemporary Mi'kmaq legal consciousness may be examined as a site of struggle, in which oppositional discourses are manufactured in efforts to forge Mi'kmaq identities against those imposed upon them from the larger society.

¹⁵² See Malinowski (1966) *Crime and Custom in Savage Society* and Hoebel and Llewellyn's (1941) *The Cheyenne Way* for early anthropological analysis of rule making and breaking in cultures without western legal characteristics.

Legal consciousness is a process; it involves participation in the construction of legal meanings and practices (Ewick and Silbey 1998). The ways people understand and use law is what Sally Engle Merry terms legal consciousness, "the way people conceived of the 'natural' and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world" (1990:5). Legal consciousness as an analytical tool is used here to understand how Mi'kmaq people come to think about, understand, create and act upon, formal and informal laws that define social relations in everyday life (Conley and O'Barr 1990, Merry 1990).

Like law, legal consciousness is not separate from culture, but is rooted in the everyday, and thus responds to changes and flux that occur over time. While culturally constituted, it is also, culturally constituting. Consciousness are shaped by personal and collective experiences, and are expressed through competing discourses regarding the legitimacy, authenticity and efficacy of practices identified as Mi'kmaq, both within Mi'kmaq communities, and between aboriginal communities and mainstream society. Legal consciousness is historically situated, fluid, dynamic, and often contested within and between societies as individual and collectivities give meanings to their juridical experiences and beliefs. They are influenced by multitudes of local and extralocal sociocultural processes, daily events and historical contexts.

In Mi'kmaq society, the events of colonization, the treaty process, residential school, centralization, and the wrongful conviction of Donald Marshall, combine with larger relations of social inequality to form key cultural markers. Differing interpretations of these events depend of an individual's position in the collectivity. I examined these forms and expressions of legal consciousness, derived from the stories people told me

about themselves, their relations, and their legal experiences, and their beliefs about what Mi'kmaq justice means to them. The production and the reception of legal cultures are mediated through symbols, events, crisis, conflict, structural oppositions, all of which shape and inform identity and consciousness.

The interrelationship of kinship patterns, spiritual beliefs, traditions, juridical, political, economic and social structures that form the basis of culture, also inform legal consciousness. The social rules within these culture forms, define relations, and mediate how people get along in Mi'kmaq societies. In trying to understand Mi'kmaq legal consciousness, it is important to consider how each community understands and uses its cultural infrastructure, as demonstrated in the cases of Membertou and Waycobah. The organizing principles of Mi'kmaq justice are present in all cultural components rather than ones specifically designated as Mi'kmaq law. Comparing and contrasting them may help develop ways of understanding the legal frameworks within them. Thus, by examining political organization, family structures, religious systems, economic behaviours, ritual and ceremonial practices, we can then understand the differences and commonalities in how aboriginal laws and concepts are made meaningful for each community, and how they change over time.

The structural inequality of the Canadian justice system has produced a double consciousness for people who are dominated by the larger society. Mi'kmaq legal consciousness may be analyzed in two fields. The first field includes the consciousness shaped by experiences of the Mi'kmaq as they encounter the mainstream system, an external field. Mi'kmaq responses to the external field, discussed throughout, consist of a plurality of resistances against racism, against colonization, against injustices, but which

also are contingent on adaptive and accommodative strategies of survivance, mediating across class and power relations, age, gender and so on. Mi'kmaq justice needs and expectations are generally not met when Mi'kmaq persons encounter the Canadian justice system, and thus internal productions are required to counter these inadequacies.

The second field considers the internal production of legal consciousness; what strategies, motivations, and articulations are made, what memories are constructed, and mobilized, to create culturally meaningful justice processes within Mi'kmaq communities. The two fields, internal and external, are not separate, but form in relation to each other. The fields, rather than abstracting culture from social organization to uncritically contrast values and behaviours between Mi'kmaq and non-Mi'kmaq societies, allow for consideration of the diversity of legal consciousness within and between cultures, focusing the ruptures, contradictions and changes, as legal consciousness are produced and contested. Mi'kmaq legal consciousness may be produced as oppositional discourses to external society, but are not neatly dichotomous.

European colonial ideologies set up relations between colonizer and colonized as a hierarchical set of binary oppositions, in which one of the pair is always symbolically superior: time immemorial /discovery, communal/individual, primordial/modern, oral/written and law maintains its power by defining the categories and systems of meaning (Culhane 1998). Aboriginal distinctiveness remains an intense focus of contestation with the larger society and is indeed generated by the very social forces that seek to undermine it or destroy it (Sider 1993:280). Assimilationist colonial mindsets that propose First Nations should just become like the rest of non-aboriginal society, and ideas that an equal, impartial and unbiased justice system exists to mete out justice for all,

continue to permeate wider society, and are called upon as justification for a singular justice system. These ideals are perpetuated and maintained by the system through judicial interpretations and decisions, and it is against these ideals that Mi'kmaq shape and articulate, their legal consciousness.

Aboriginal communities consist of memberships that hold significantly divergent views of what are the problems of justice. The binary formulas commonly used to analyze justice culture by juxtaposing aboriginal against non-aboriginal 'systems' are simplistic and misleading, and serve to mask the ongoing creative processes that contribute to legitimizing and delegitimizing justice processes, and their attending legal consciousness within Mi'kmaq communities, and between Mi'kmaq communities and non-aboriginal society.

Binary schemata have been useful as preliminary analytical structures in that they highlight fundamentally different concepts of European-Western and aboriginal North American traditions. Comparative oppositional categories have long been utilized in legal theory, starting with Maine and Morgan, to delineate similarities and differences, such as ancient and modern, written and oral, codified and spontaneous or lived law. However, in the process of articulating differences in order to empower, or justify and rationalize, alternative justice programs of First Nations peoples, binary schemata have become culturally and historically generic, flattening out cultural differences between and within aboriginal communities and "promote untenable and misleading dichotomous analyses of evil Western systems and their opposite, holistic, spiritual, indigenous ones" (Miller 2001:10).

People do not choose unity or disunity in order to make themselves useful or to distance themselves from use; they split and combine from other causes and with

other outcomes in the balance. One of the pressures on native peoples that often engenders splits is the *changing* ways that ethnic otherness is integrated into, used, and also marginalized and made useless by the larger society, and the changing opportunities and costs this creates for native people (Sider 1993:281).

Thus while co-opting the binary schemata may be a political strategy of aboriginal communities to grab hold of their autonomy and control their histories, they are not the final solution in the development of contemporary justice processes. Dichotomous models are problematic because they restrict discussions to typologies that are justified and perpetuated by colonial processes, they offer gross generalizations that reduce aboriginal cultures to a handful of simplistic traits that produce reductionist and romanticized doctrinaire solutions to complex problems (LaRocque 1997). As Sider notes, aboriginal peoples have to continue to struggle because, "none of the available strategies for coping with domination can possibly be very effective, or effective for very long. Isolation, confrontation, accommodation, opposition: all have their partial successes and their costs, their adherents and their opponents" (Sider 1993:280).

There are numerous competing discourses complicated by the residue of colonial processes that submerge Mi'kmaq legality and consciousness within the larger society. By controlling legal definitions and processes, and by demanding participation and compliance within a justice system based on rules and ideals, not commonly shared within Mi'kmaq worldviews, Mi'kmaq practices and consciousness are also transformed by interchange with and within non-aboriginal society, the history of the Mi'kmaq Justice Institute is a case in point. Aboriginal resistance to the constraints of imposed identities and irrelevant practices have worked to transform external societies as well, for example the importation of restorative processes into the mainstream system.

While initially ghettoized and treated with a great deal of suspicion regarding effectiveness within the larger social structures, such 'indigenous' justice practices are now part of the Restorative Justice rhetoric, an inclusion which needs some careful unpacking, but rarely receives the critical attention it requires (Nader 2002). Because the Canadian legal system is a hegemonic system, it has the ability to absorb challenges to its legitimacy by slightly refiguring rules and regulations. By subtly altering the technically defined boundaries of its so-called legitimate action, it continues to perpetuate the image that it has the capacity for predictable impartiality and objectivity, and the ability to create justice for all. The notions of impartiality and objectivity represent a deliberate indifference to biography and personality, factors that cannot be separated from life events (Ewick and Silbey 1998). The power and pervasiveness of the Canadian justice system has certainly permeated aboriginal societies with the signs of Canadian legal culture to a much greater extent than have the signs of aboriginal justice culture, even within certain aboriginal communities, and yet Mi'kmaq law ways, from koqqwaja'ltimk, to apiksiktatultimk persist in new cultural productions, like justice circles.

It is widely held by members of both aboriginal and non-aboriginal communities concerned with justice reform, that using 'traditional' or locally derived aboriginal justice practices, in contemporary frameworks, will help address concerns of legitimacy, accountability, cultural appropriateness, and fairness. These concerns are often inadequately addressed when aboriginal peoples encounter the Canadian justice system. Yet, what are 'traditional' justice practices, and how are they made meaningful today, and who decides - are complex, politicized, and highly contested issues. These issues are

made even more complex by the fact that the distorting effects of colonialism are unevenly experienced and ongoing (see Monture 1999, Sider 1993, Wolf 1982).

Furthermore, there is significant internal differentiation and competing alternative strategies, which challenge notions of cultural homogeneity and consensus, often associated with First Nation communities. Local contradictions become subsumed in the idiom of community or First Nation. The community idiom generalizes aboriginal cultures, flattening discourses of both internal stratification and strife, which are necessary components of cultural production. As James Clifford notes, there is a fear of lost identity, a taboo on mixing beliefs and practices generated by the pervasive dichotomy of absorption and resistance in stories of culture contact and change (1988).

Simple co-opting of aboriginal people to support and enforce the Canadian legal system does not resolve the inherent contradictions of indigenization. Recruitment of indigenous people as police, corrections staff or counsel, leads to conflicting loyalties, undermines identities, and limits autonomy. Band-Aid measures such as cross-cultural education of decision-makers also do not address the inherent conflict in the systems of law. Rather, there needs to be real power sharing and implementation of alternatives for justice to be effective, lasting and fair for aboriginal peoples. Researchers of aboriginal law strongly support the development of informal, flexible, community-based, community-owned justice systems achieved by applying traditional or locally derived aboriginal legal principles within contemporary infrastructures, independent of the mainstream system. As anthropologist Bruce Miller suggests:

... that unless justice is practiced within a freestanding system associated with real civil and criminal control over community residents and over real tribal assets and resources, one can expect the discourses to continue to be outwardly directed and inadequate to the task of actually regulating local society. In addition, my

argument is that because tribes have assumed the mantle of nations, justice cannot be confined to concepts of the resolution of interpersonal and interfamilial conflict. Instead, tribal justice must incorporate its members' critiques of the 'state', in this case the tribe, in the process of revision of tribal public policy (Miller 2001:11).

Indeed the powerful and cohesive social structures of earlier Mi'kmaq cultural organization, addressed above, through which authority was invested to manage internal problems, were eroded by the redefining of Mi'kmaq families, polity, spirituality, work and education, by missionaries, colonial officials and settlers. Mi'kmaq identities continue to be constrained and distorted through discriminatory practices and by both voluntary and involuntary participation in the larger society. Such participation was necessary to survive, ironically, as Mi'kmaq. According to John Gledhill (1994)

Colonialism did not simply reduce indigenous forms of power to a theatrical shell of what had gone on before. It redefined society, forcing people to attach new meanings and practices to old identities Distinctive cultural structures inherited from the past leave traces in the present but colonial process also produced strong discontinuities in developments of institutions, practices and beliefs.

In the discussion on colonization, the Marshall Inquiry, and the Mi'kmaq Justice Institute, I have demonstrated how relations of ongoing state regulation interfere with the goals of Mi'kmaq self-governance, forcing justice narratives to be largely outward looking, primarily directed to managing relations with the dominant society, and thus not able to meet community needs and expectations (Miller, B. 2000, Warry 1998).

The relations within Mi'kmaq communities, and between Mi'kmaq communities and the external society, were delineated by examining various competing juridical discourses shaping and shaped by Mi'kmaq legal consciousness, and which influence the design, management and applications of justice internally. Following Bruce Miller and Wayne Warry, I make the argument for contemporary justice narratives that look inward,

toward managing internal relations, and focus on real community control over assets and resources in ways that are meaningful to Mi'kmaq, and can accommodate their cultural diversity in ways that are held to be legitimate by Mi'kmaq. This legitimacy is derived in part by incorporating opportunities for community critiques of the tribal state in the move toward broader Mi'kmaq sovereignty (see also Alfred, 1999, 1995 and Miller, B., Monture 1999, Warry 1998). A sovereignty that demands Mi'kmaq control over their justice processes in order to form mechanisms by which their leadership can be held accountable, and by which their resources can be protected, and by which koqqwaja'ltimk can be experienced.

Efforts by First Nations to control local justice programs meet oppositions at many levels, as we have seen with the failure of the province to support Mi'kmaq justice programs. The Mi'kmaq are struggling to regain control over their own legality and law ways in the face of conflicting internal and external pressures.¹⁵³ They rely on culturally available narratives of law to interpret their lives and their relationships (Ewick and Silbey 1998). These interpretations define legal consciousness that in turn shape local approaches. Approaches that can best correct the legal poverty created by the mainstream system for Mi'kmaq actors. Factors such as personal or family experiences with the Canadian justice system, class position, gender, age, spiritual beliefs, residential school attendance, language abilities, employment, political affiliations, community membership, status, family and so on, determine sources of authority and cultural

¹⁵³ See Bruce Miller's work *The Problem of Justice: Tradition and Law in the Coast Salish World*. (2001) Nebraska. Miller argues that the challenges of managing internal diversity in First Nations are often overlooked as communities must first meet state criteria for justifying community controlled justice programs. Such criteria, narrow in scope and homogenizing in the first place, becomes the very constrained framework in which justice programs are permitted and are incapable of addressing power dynamics and the intricacies of Aboriginal cultures central to justice on the ground. Miller's work significantly influences my analysis.

practices commonly recognized as legal.¹⁵⁴ Today there are many contradictions and clashes of consciousness within communities regarding what Mi'kmaq justice was in the past, and what it should be today. Understanding Mi'kmaq legal consciousness helps to frame the interrelations between informal and formal law ways of the past and the present.

In this dissertation on Mi'kmaq legal consciousness, I have demonstrated that Mi'kmaq legal consciousness emerged from the necessities of subsistence, survival, and getting along, and that the law ways of the Mi'kmaq were not a self-contained system of handling right and wrong. Rather, traditional law was a system of values embedded in social relationships. The social life of law was active in relationships that were fluid and dynamic, bending and stretching, as they are adjusted within transformative processes accommodating local needs. Maintaining the balance of those relationships was centered in the family and passed on through family teachings. As new incidents, environments, and institutions emerged, Mi'kmaq laws were socially constructed within a complex web of patterns, made palatable to the community, to address disputes and to regulate social, spiritual, political and economic interaction in ways that were meaningful and fit with their values systems. The premises of Mi'kmaq justice were both spiritual and practical and focused on the wellbeing of the community with the goals of reinstating wrongdoers into the community or finding alternative solutions to problems. Law was not a neutral regulator of power, but instead the vehicle by which different parties attempted to gain and maintain control and legitimization of a given social unit (Nader 2002:117).

¹⁵⁴ See Patricia Ewick and Susan Sibley's *The Commonplace of Law* (1998). On page 23 they state: "We conceive of legality as an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. Legality operates, then, as both an interpretive framework

Mi'kmaq law ways reinforced the power structures within their society and enabled them to prosper culturally, and from which they developed strategies of resource extraction and cohabitation that facilitated their collective survival, and their ability to identify themselves as a group. The social identities, which laws help create and invoke, were reinterpreted in everyday interaction, and in situations of conflict within and between Mi'kmaq society and other cultural groups. The Mi'kmaq once constituted separate and sovereign peoples, subject to their own law ways, and they wish to return to that empowered state.

I addressed the consequences of the clashes of legal consciousness as the Mi'kmaq entered the contact zone and experienced terrific socioeconomic and spiritual transformations in their encounters with missionaries, traders, military forces and eventually settlers, in their traditional territories. I briefly outlined British tools of colonization and their assimilation projects, namely treaty making, centralization, and residential schools, which characterized the criminalization of Mi'kmaq life ways within the development of a centralist justice system that rejected Mi'kmaq autonomy. Finally, I address the power relations that alienated the Mi'kmaq from equal participation in the Euro-Canadian justice system, and yet simultaneously caused suffering and silencing through its imposition during colonial processes. These processes created defining categories of binary oppositions that placed Mi'kmaq and non-Mi'kmaq in adversarial, us/them relations, binding the Mi'kmaq into positions of subjugation and inequality. The hegemonic force of British law however, resulted in colonial processes that increased Mi'kmaq cultural production, as the Mi'kmaq resisted that alienation by making demands

and a set of resources with which and through which the social world (including that part known as the law) is constituted."

for just inclusion, recognition of their human and treaty rights, preservation of their culture, and for plurality of justice systems. Mi'kmaq resistance to colonization is writ large in contemporary Mi'kmaq legal consciousness, and characterizes their juridical discourses and practices, and has since become hegemonic in its own right within Mi'kmaq society. By looking at the historical context of colonization, we can better understand the present context of legal consciousness.

I then used case of the wrongful conviction of Donald Marshall to epitomize the injustices experienced by Mi'kmaq persons as they encountered the hegemony of the mainstream system. I presented Mi'kmaq responses to those injustices, and demonstrated that these responses were directed at managing external relations, rather than focusing internally. In their constant struggles with mainstream society, the Mi'kmaq were unable to produce sustainable justice processes, because the structures of inequality were reproduced as legal actors were seduced by powerful discourses of neutrality, impartiality and objectivity. These objectives could not be realized because they do not reflect local diversity and power relations. The various strategies and programs the Mi'kmaq of Nova Scotia have implemented as they struggle to control local justice problems, after the Marshall inquiry, and up to the collapse of the Mi'kmaq Justice Institute, attest to these challenges.

I further explored Mi'kmaq legal consciousness through the ethnographic landscapes of two Mi'kmaq communities. I examined current Mi'kmaq efforts to reassert their identities by countering and co-opting those imposed upon them by dominant society, through an analysis of Mi'kmaq legal consciousness as articulated in the framing and enactment of local Mi'kmaq justice processes.

Instead of relying on inwardly produced legal constructs, communities were forced to focus on reproducing themselves in confining, reified binary oppositions that produced false us/them dichotomies. These dichotomies suggest that aboriginal justice is non-confrontational, non-punitive, non-adversarial, based on consensus and equality within an egalitarian framework as opposed to the confrontational, punitive, adversarial, hierarchical system of non-Aboriginal law.¹⁵⁵ These categories, recognizable to the external society as the only ones within which to legitimate their differences, tend to mythologize collective identities. The us/them relationship places significant pressure on First Nation communities to solve all the problems that mainstream adjudicatory processes cannot, and demands a coercive harmony that silences the voices of the less powerful within these communities. "The very distinction between internal and external is put into question as cultural concepts as well as economic and political models are borrowed, shared, and appropriated across a spectrum of power in Indian country" (Nader 2002:125). It is the consequences of colonization, perpetuated by the dominant society and its legal systems, that contributed significantly to many of the problems within First Nations communities. Appeals to some vague traditional justice paradigm, run by elders, to heal all social ills without considering the uneven effects of colonization and local power relations and diversity is irresponsible.

The view that is still with us today, of colonized peoples as primitive and disordered and in need of being transformed by plans that are fixed, abstracted and disembodied, is part of the culture of expanding capitalist economies with which such transformation is more compatible (Nader 2002:114).

¹⁵⁵ Various charts have been created to compare supposed Aboriginal and Euro-Canadian justice paradigms, such as Dumont's (1993) 'Zones of Conflict in the Justice Arena' in the Royal Commission on Aboriginal Justice and Sawatsky's trait list of Retributive versus Aboriginal models (in LaRocque 1997).

I argue that focusing on Mi'kmaq legal consciousness as a site of Mi'kmaq resistance reveals the complexity of Mi'kmaq juridical practices and ideas, as they are on the ground. Legal consciousness as a framework can delineate the conventional justifications people invoke in their patterns of private and public lawmaking. Analyses of the articulations of legal consciousness enable consideration of the impact of colonization, genocide and subsequent ethnogenesis on the making of Mi'kmaq law ways. Through these revelations, meaningful solutions that are flexible and adaptive to the local contingencies of Mi'kmaq daily and historical experiences, more accurately reflect the lived law of Mi'kmaq justice. It is not until the oppositions between 'us' and 'them' are destabilized that local contingencies can be revealed to show that Mi'kmaq legal consciousness is connected to everyday materialism, political struggles, resistance to colonial domination, and to power struggles, within and between their histories and futures (see Harris in Weyrauch 2001:xi). Taken together, these histories are central to the current articulations of Mi'kmaq legal consciousness as a site of resistance, and play critical roles in the construction of Mi'kmaq identities.

To this day, the Mi'kmaq continue to abide by a system of social control that is unique in their communities. It operates on principles of fairness and justice differing from those of mainstream society. There are numerous juridical discourses shaping Mi'kmaq legal consciousness, such as healing discourses involving spiritual balance, family law, and community based restorative processes. There are constitutional discourses including Mi'kmaq treaty rights and titles to lands and resources. And criminal discourses constituted by culturally imbued notions of right and wrong, and their remedies and others are embedded in Mi'kmaq language, and are expressed in a variety

of beliefs and rituals. Multiple forms of legal consciousness, emerging from historical sociocultural processes and asymmetrical power relations, are shaped and contested in public and private forums as the Mi'kmaq work to establish juridical processes that are meaningful and practical.

Critical questions of what Mi'kmaq justice is, how it works, and who should work it, have been asked in a variety of shifting sociopolitical contexts over time, ranging from precontact governance, to colonial treaty making, to contemporary resource management. Emerging in this creative process are competing discourses reflecting questions of legitimacy, authenticity, and efficacy of those practices identified as Mi'kmaq, both within Mi'kmaq communities, and between aboriginal communities and mainstream society (see Conley and O'Barr 1990, Greenhouse 1986, Merry 1990, Miller 2001). The Mi'kmaq have two main goals 1] to ensure better treatment of their people as they encounter mainstream justice and 2] to create their own system of justice in order to deal meaningfully with problems in their territories.

The premises of Mi'kmaq justice were and remain both spiritual and practical, focusing mainly on the wellbeing of families, and the survival of community members. Koqqwaja'ltimk is about relationships and maintaining balance through juridical practices reflecting the daily interconnectedness of Mi'kmaq physical, social and spiritual realms. Colonialism did not simply reduce indigenous forms of power to a theatrical shell of what had gone on before. It redefined society, forcing people to attach new meanings and practices to old identities. Distinctive cultural structures inherited from the past leave traces in the present, but the colonial processes also produced strong discontinuities in developments of institutions, practices and beliefs (Gledhill 1994, see also Fienup-

Riordan 1994). Evidence of family based dispute management such as avoidance, fighting, blood feuding, and ostracization are present in Mi'kmaq communities today.

Over the past decade a number of justice initiatives have been implemented in Mi'kmaq communities, ranging from the indigenization of mainstream programs, to attempts at codifying customary law, to programs of justice as healing. Initiatives such as Unama'ki Tribal Police, CLIF and Shubenacadie Diversion projects, and the Mi'kmaq Justice Institute, were ambitious but conservative projects that have all ultimately failed to achieve the main goals of Mi'kmaq justice. I agree with Miller (2001) and Warry (1998) that contemporary justice narratives are largely outward looking, primarily directed to managing relations with the dominant society. They generally focus conservatively on purported periods of some primordial harmony, or on limiting us/them dichotomies, and thus fail to consider issues of internal power and diversity, which are necessary for the establishment of meaningful, localized community based justice practices (see also Nader 1990). The most promising of the Mi'kmaq justice programs was the umbrella organization of the Mi'kmaq Justice Institute. Its mandate was to research, design and implement community-based justice. But due to a lack of government support and imagination, it ended up being an understaffed, glorified courtworker program that had to close its doors within three years because it was too busy managing problems within the mainstream system and could not focus on their own research and design aspects. By early 1999, it seemed the recommendations of the Marshall Inquiry were running out of purchase power with the provincial government.

This brings me back to Donald Marshall. Donald Marshall's life is very much a part of Mi'kmaq legal consciousness as demonstrated throughout this document. The

majority of people stated that the Canadian justice system became more sympathetic, understanding, aware of their cultural differences, less discriminatory and so on as a result of his experiences. While these are glossed as positive changes, a further consequence not yet addressed is a sentiment, but often repeated in interviews, was the perception that after "what happened to Junior" the court systems became afraid of prosecuting Mi'kmaq people. This has resulted in additional mistrust or a lack of faith in the system because people feel their concerns are not taken seriously, and the outcomes of conflicts are not adequately resolved. While the courts may be more understanding of the special circumstance of First Nations persons, they in fact become even less useful for adjudicating problems in meaningful ways, a situation, which further supports the move toward autonomous justice programs for First Nations.

JM: Should there be a separate system or should they work together?

I don't know. I think it should be. But you know what, I don't, I feel the justice system now you go to Eskasoni and everybody is getting away with everything. If you go to a regular white person who got a sentence from society and they take it to a penitentiary. But a native person they look at the culture and they kind of get away with things it is not your fault because of the past what happened those kinds of things like the Donald Marshall inquiry or the residential school, centralization, all those things.

JM: How does that make you feel?

I don't know I kind of feel good about it in a way, but in a way if you are a community member here in Eskasoni or any other community, and you see people walk away with everything, with crime. They will have a cut, or a probation, the only way they get remanded to corrections is if they breach probation, that is the only time. There is a lot of abuse of the law. I feel good about the law is recognizing our culture, our ways, whatever, they are recognizing our problems, our issues. But I don't think it will solve anything that way.

Marshall has also contributed to an expanded rights discourse among the Mi'kmaq. More people are standing up and fighting for their rights. The 1999 Supreme Court of Canada Decision on Marshall is another symbolic case that has transformed

Mi'kmaq justice. Marshall was arrested for selling eels without a license in 1993 and was convicted in 1996. The Supreme Court of Canada overturned the conviction in 1999 in a decision that has had significant implications for the Mi'kmaq Nation, and has altered Mi'kmaq and non-Mi'kmaq relations throughout Atlantic Canada. Mi'kmaq Treaty rights were recognized and upheld, guaranteeing the Mi'kmaq a treaty protected right to catch and sell fish and to earn a moderate livelihood. This case involved a completely different set of circumstances with different burdens, but the involved the same person responsible for transforming aboriginal justice across the Mi'kmaq Nation.

In trying to adjust to life outside of prison, Donald Marshall sought solace and healing in fishing, a practice to which he felt culturally connected, and which fulfilled the very practical need of earning money. That he was arrested and convicted was a complete outrage, and was yet another example of subordination and criminalization of Mi'kmaq activities by the dominant society. The decision resulted in volatile confrontations between various Mi'kmaq, the Department of Fisheries and Oceans, and non-aboriginal peoples over access to fisher resources.

Out of this event emerged a renewed rights discourse that revitalized Mi'kmaq claims for the right to control and regulate their resources and their communities. The case also was interpreted as validating traditional Mi'kmaq governance of the Grand Council. The Marshall Decision has both unified and divided the Mi'kmaq nation on many issues, and their communities are undergoing rapid change in response to the decision. A full treatment of this important case lies outside the scope of this dissertation; however, the life of Donald Marshall, and his impact on Mi'kmaq legal consciousness are central to this discussion. As Gavin Smith (1999) suggests, we must consider the

relationship between individual experiences, which are historically produced and socially mediated, and collective identity within various fields of power laid down by organizational politics and their limits. Marshall's experiences have proved to be important historical moments around which heightened cultural productivity occurred. They exemplify Mi'kmaq challenges to domination. The dominant society, by locking Marshall up for a crime he did not commit, and convicting him of selling eels, threatened valued components of Mi'kmaq culture, justice and treaty rights. These processes led to increased Mi'kmaq cultural productions as the components of culture were articulated within in order to resist those threats. Through this process each participant constructs a means for identifying with or against each relevant component of culture, which is a particular element of social control (Smith 1999:57).

Therefore, analysis of Mi'kmaq justice productions and legal consciousness cannot be removed the broader sociolegal forces of which they are a part. Local production of culture has given rise to policy responses, both internally and externally, and has produced a wide range of interpretations of both the prevailing situations, and of the past. Indeed, the most recent Marshall Decision has the potential to transform significantly the socioeconomic bases in Mi'kmaq communities, and importantly, for this study of justice, provides another momentous opportunity to rupture historical patterns of dependency and increase the capacity for governance among the Mi'kmaq, of which control over justice is an integral part. It is an exciting moment in Mi'kmaq justice history as communities take control over resources, and develop Mi'kmaq regulations, and Mi'kmaq enforcement, and Mi'kmaq juridical processes. These stories of Mi'kmaq legal

consciousness tell us about conformity and contest, resistance and solidarity, and survival.

I met Donald Marshall Jr. in 1991, about a month after his father, the Grand Chief of the Mi'kmaq nation, Donald Marshall Sr., died. In 1992, I witnessed an event that for me really brought to the surface the incredible and unforgivable violence done to Donald Marshall, and the Mi'kmaq nation, by the Canadian criminal justice system. It was at the St. Ann's mission, a spiritual gathering honoring the Mi'kmaq patron saint and the Grand Council annual assemblies. Many of the nations' members, Catholic or not, come together to at Chapel Island to celebrate the endurance of the great traditions of the Grand Council and the Mi'kmaq nation.

This was the first Mission since the death of Grand Chief Donald Marshall Sr. and the new Grand Chief, a position that is ideally passed on to the eldest son, was to be affirmed. It was here that I saw Donald Marshall ascend a stage and pass over to another, the symbols of Mi'kmaq traditional leadership, the title and position of Grand Chief, a position that Donald could not fulfill because he was sent to jail, and denied the opportunity for apprenticeship the position requires.¹⁵⁶ Today, more than a decade later, Donald Marshall, having won twice in the Supreme Court of Canada, has clearly emerged as a cultural icon of Mi'kmaq people, and perhaps, now stands as a symbol of justice rather than injustice. The time for the Mi'kmaq to experience koqqwaja'ltimk has arrived.

¹⁵⁶ Despite being removed from his family, community and culture for all of his early adulthood, Donald Marshall Jr. remains a fluent Mi'kmaq speaker.

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