

# **RE-INVENTING CRIMINAL JUSTICE:**

**THE ELEVENTH NATIONAL SYMPOSIUM**

## **FINAL REPORT**

Fairmont Winnipeg  
Winnipeg, MB

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# Reinventing Criminal Justice: The Eleventh National Symposium

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## Decolonizing the Criminal Justice System

Fairmont Winnipeg, January 17-19, 2019

In January 2019, the National Criminal Justice Symposium convened for the eleventh time. The Symposium is an annual forum for criminal justice practitioners, professionals, researchers and other expert to share off-the-record, candid perspectives and solutions regarding the challenge of fashioning a responsive, accessible and accountable criminal justice system.

Every year, the Symposium focuses on a different aspect of reinventing and improving the criminal justice system. This year, Symposium addressed the relationship between the criminal justice system and Canada's Indigenous peoples, holding an initial discussion about constructive ways in which the system must be decolonized. More than 100 participants attended the Symposium, which was chaired by the Honourable Raymond Wyant and facilitated by Harold Tarbell.

### Background to the discussion

The groundwork for this Symposium was laid one year earlier at the Tenth National Symposium, at which a plenary discussion was held to consider Indigenous Justice as the theme of a future event. The theme had been proposed in acknowledgement of the failure of many of the reforms of recent decades to make a real difference to the overrepresentation of Indigenous people in the Canadian criminal justice system.

Following this discussion, Symposium organizers identified a steering committee with Indigenous and non-Indigenous representation and tasked the committee with development of the 2019 Symposium. The committee held a number of principles to be important in organizing the event:

- The Symposium should be designed in partnership with Indigenous people and particularly the Nation or Nations on whose traditional territory the event would occur;
- Significant Indigenous representation at the event, including people from outside the system, was essential for success;
- The Symposium location should consider areas of higher Indigenous population;
- The event format should be culturally appropriate and provide a safe venue for dialogue.

In its initial discussions, the committee agreed that the focus of discussion should be the challenge of "Decolonizing Criminal Justice." Winnipeg was selected as the site of the Symposium. Derek Nepinak, former Grand Chief of the Assembly of Manitoba Chiefs, kindly

agreed to assist the committee in working with local First Nations and Elders to design a culturally appropriate program.

### The concept of decolonizing criminal justice

Recognizing and building on the substantial work which has already happened or is happening in Canada in terms of understanding the Indigenous experience of criminal justice, including the work of the Truth and Reconciliation Commission and its Calls To Action, various commissions of inquiry, and the federal government's recent commitment to full recognition and implementation of Indigenous rights, the Eleventh National Symposium was designed to take a constructive approach in identifying and recommending practical steps which may be taken to decolonize the criminal justice system.

Since 1945, Indigenous people have been and remain overrepresented by a wide margin at every stage of contact with criminal justice in Canada, whether measured in terms of contact with police or with respect to those remanded in custody, charged, convicted, or receiving a custodial or community sentence. Indigenous people are far more likely to be victims of homicide, sexual assault, or other serious violent crime. Indigenous women and girls are heavily overrepresented in missing persons statistics. The differences between the Indigenous experience and that of other Canadians are not marginal, but normally by a factor of several times. For example, Indigenous women are six times more likely to be murdered than other Canadian women,<sup>1</sup> and (as a provincial example) Indigenous people in British Columbia are more than five times more likely to be incarcerated than the general population.<sup>2</sup>

The relationship of Indigenous people and the criminal justice system cannot be understood without recognizing Indigenous communities' experience of the state in Canada, as it expanded through colonization and subjected (typically disenfranchised) Indigenous people to the economic and social preferences of the colonizing power. This includes the original massive disruption of Indigenous society through allocation of land to European settlers, and more recent, heavily damaging disruptions to Indigenous culture, language and family life brought by the systematic removal of generations of children into state and/or church care under the residential schooling approach and (since the 1960s) the child welfare system. While these may be civil justice issues from the perspective of law, the damage to individuals and to community resilience has been so profound that how the courts address questions of land, governance and family for Indigenous people are of enduring relevance to the criminal justice system.

Decolonization may be understood as “a long-term process involving the bureaucratic, cultural, linguistic and psychological divesting” of colonial power relationships and assumptions.<sup>3</sup> With respect to the Canadian criminal justice system and Indigenous peoples, the beginning point for the dialogue is the observation that the system, like most forms of Canadian government,

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<sup>1</sup> [“Indigenous people six times more likely to be murder victims: Statscan”](#), *Globe and Mail*, May 15 2018.

<sup>2</sup> [“Strategic plan for the justice and public safety sector 2019-22”](#), BC Justice and Public Safety Council, March 31 2019, p 22.

<sup>3</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, Zed Books, London 2012

arrived intact in Canada as part of the broader colonial apparatus but was not restricted in its impact to matters of criminal wrongdoing and natural justice. Instead the system was interwoven with and upheld various other colonial institutions, such as education, differential/exclusionist treatment under the law, the franchise, child protection, the role of the church in society, and cultural suppression. The impact of these colonial practices on Indigenous communities was profoundly disruptive and often devastating. This disruption continues today.

Decolonization of the criminal justice system therefore is about taking positive, practical steps to undo the enduring disruptive effects of the system on Indigenous community and culture, around the basic question: what would it mean to do things differently? Decolonization is also about recognizing, speaking and accepting the truth of what the Indigenous experience of the colonial justice system has meant for Indigenous communities, culture, and individual well-being.

## Symposium Proceedings

### [Welcoming reception: setting the stage for the gathering](#)

Hosted at the Canadian Museum for Human Rights, the welcoming reception began with an opening prayer by Métis Elder Norman Meade.

The Honourable Senator Murray Sinclair welcomed all those attending the Symposium with a presentation setting the stage for the sessions to follow. Reflecting on the difficult conversations now happening in Canada regarding the truth about how Indigenous people have been treated, he pointed out that “truth is hard, but reconciliation is even harder.” His key themes – resonant of the Calls to Action in the Truth and Reconciliation Commission of which Senator Sinclair was Chief Commissioner – were as follows:

1. **Self-determination, Self-government:** A key recognition is necessary: the existing justice system does not work for Indigenous people. And a key part of that recognition is that reconciliation will never occur if one side sees it as a matter of rights and the other sees it as a matter of benevolence. A quick fix of the existing criminal justice system cannot rectify this. Rather, a separate way of doing things that works for Indigenous people is needed. That separate way, however, can be embedded within the Canadian constitutional system.
2. **Separate Legal Systems:** When considering a separate legal system for Indigenous people, it is likely that the essential differences between the existing criminal justice system and a system for Indigenous people will be found in areas of administration and process (e.g., sentencing). In other words, “the ways people are treated” in the legal system. In terms of ensuring the systems function together, thought must be invested in the points of contact and process (e.g., jurisdictional issues). This is not an impossible goal. Solutions have been found in other countries which function with multiple legal systems.

3. **Change is Coming:** (especially given demographic issues within the Indigenous communities, rising levels of education). All in Canada need to understand this, recognize we all have different experiences, and educate ourselves about those differences. Ask yourself: “If that were me and my nation had been colonized, what would I want the legal system to do to protect my rights?” We need to figure this out and if we don’t, change will not be evolutionary, but could be explosive. “Think about how we change things so things work out, positively and within control.”

These themes proved to be the cornerstone/foundation for the two days to come.

#### Opening prayer and cultural protocol

Elder Mae Louise Campbell began the first full day of the Symposium with an opening prayer. During her prayer, she stated clearly that we must change way we think. She reminded the participants that the old goal of the criminal justice system is punishment and the reason for that punishment is that the punisher has something damaged or wrong in his or her spirits. Until people are healed, and take rightful place in communities, nothing will change. She stated that we must bring the feminine way of thought to the discussion, particularly Indigenous matriarchal intelligence. Her remarks were followed by a Pipe and Water Ceremony, conducted by Elder Walter Swain, the caretaker of the pipe, and accompanied by Karen Swain.

#### Session 1: What if nothing changes? Indigenous people and the criminal justice system

Using Saskatchewan and the Indigenous population of that province as an example, Lynn Barr-Telford, Director General HJSSB, Statistics Canada, provided a review of over-representation of Indigenous people in the criminal justice system – looking at today and projecting into the future. Her look into the future provided two lenses: What if nothing changes? Specifically, what if the educational gap between Indigenous and non-Indigenous people was reduced?

Looking at the current situation in Saskatchewan, Indigenous people are seriously over-represented in correctional institutions – they represent 70% of the inmate population, but only 16% of the general population of the province. On any given day in Saskatchewan, 2% of all Indigenous adult males are incarcerated in a provincial institution compared to 0.1% of all non-Indigenous males. Ms. Barr-Telford mentioned several key findings.

- First, the study revealed that Indigenous youth return frequently and regularly to the system.
- Second, material deprivation was far more severe in terms of income and housing, for example, for Indigenous people than non-Indigenous people.
- Third, rates of substance abuse and gang involvement were much higher for Indigenous people versus non-Indigenous people.

If nothing were to change in Saskatchewan, a microsimulation demonstrated that the number of people having contact with the police for a criminal offence in Saskatchewan will grow from about 37,000 people in 2011 to more than 46,000 people in 2036. The vast majority of the

increase in people having contact with the police over that period will be borne by the Indigenous population, rising over that period from 59% of all such contacts in 2011 to 70% in 2036. However, if the gap in educational attainment between Indigenous and non-Indigenous people were reduced, the projections shift considerably.

## Session 2: Let's be frank: How is the justice system working or not working for Indigenous people where you are?

The first discussion session of the Symposium asked participants to consider in small groups what the situation was like for Indigenous people in different parts of Canada when it came to criminal justice: what was working, and what wasn't.

Overarching/repeated themes of this session were:

- **There are no “pan” solutions for decolonizing the criminal justice system in Canada.** In other words, what might work in one Indigenous community may not work in another. Each community must be approached as unique. Further – differences between rural and urban communities were discussed with a focus on Indigenous people living in urban environments and those living on reserves.
- **Change is essential.** Whatever changes may be made it is critical to keep in mind that the system must be tailored to those using it, as opposed to those running it. Many examples were provided. One fundamental example exemplifies the tenor of the discussion: Consider a single mother who cannot afford to lose her job. Assume she is charged and convicted of an offence. How can the system be tailored so that she can get to court and serve a sentence and still maintain the job that sustains her family? How can the current system change its methods of operation so that those coming into the system do not need to change their lives?
- **There is a vast collection of “lacks.”** Many parts of the justice system were found to be wanting. “Lack” was a word repeatedly used and pointed out in a variety of contexts, including lack of funding, lack of Indigenous representation, and lack of cultural awareness. These “lacks” had profound impacts throughout the justice system. For example, lack of funding translated into, for example, a lack of interpreters, a lack of Gladue report writers, a lack of Indigenous probation officers. A lack of Indigenous representation in those involved in the justice system (police officers, lawyers, judges, for example) meant a system that wasn't trusted. A lack of cultural awareness translated into a fundamental lack of understanding of the risks Indigenous people face when encountering the justice system and an inability for all to connect in a meaningful way. This results in a lack of trust for and in the system by Indigenous people.

### What is working:

Many positive comments were made about initiatives that were driven by the Indigenous community – including:

- **Cultural awareness education.** There was general agreement that education provided to non-Indigenous people on cultural awareness “worked” in terms of connecting communities and building positive relationships and cultural competence. A key example was the provision of cultural awareness educational programming to Crown Attorneys across the country. All cultural awareness programs must include a full discussion of racism to contribute to a move toward cultural competence.
- **“Navigators” in the system.** In areas where “navigators” informed Indigenous people about the system they were entering, this aided those people who were naturally distrustful, scared and feeling oppressed by the system.
- **Restorative justice approaches.** Restorative justice approaches, which reflect an Indigenous approach to justice, have helped to prevent recidivism. Those collaborative and restorative approaches, oriented towards repair of relationships rather than retribution and punishment, include healing and sentencing circles, use of community experts to inform the process (e.g., Elders), diversion programs and specialty courts (e.g., Gladue courts). Further, a restorative justice approach can have the additional benefit of serving to connect and reconnect people to one another and the land.
- **Delegation of issues back to Indigenous communities.** Many times, it was remarked that a “top down” approach of imposing changes to the system or installing new programs without consulting with and delegating to Indigenous communities simply did not work. Governments need to be going to communities and taking the lead from communities in the design of grassroots, “ground up” changes and programs.
- **Apologies.** For example, apologies from government leaders are significant. In addition, an official apology tends to enhance cultural awareness within the non-Indigenous community.

What is not working:

Many examples were offered of impediments to the provision of justice to Indigenous people:

- **Under-funding of initiatives:** Many important initiatives were under-funded. The examples included Gladue writers and interpreters. In Nunavut, for example, the ordering of pre-sentence reports was discouraged for lack of funds and, similarly, lack of funding meant no Gladue writers and, therefore, no Gladue reports. Further, the allocation of existing funding was also criticized: why is so much money devoted to incarceration, when it could be shifted to a restorative justice process that might keep offenders out of jail?
- **Underrepresentation – lawyers, police, judges:** Many stated that a fundamental mistrust of the legal system by Indigenous people stems from a lack of Indigenous lawyers, judges and police within the system. In the example of the Manitoba First Nations Police Service, the goal of the Chiefs in Manitoba communities has been to offer Indigenous policing staffed with Indigenous officers. Progress has been slow, with many questions still unresolved, including jurisdiction issues and concern about “the confines of the colonial system.” Progress continues, however, and approximately 70% of staff are now from the community – and committed to restorative justice processes, including the seven teachings and the medicine wheel.

- **Overrepresentation in jails:** Overincarceration of Indigenous people was raised often as proof the legal system is not working for Indigenous people. Many reasons were offered for this situation. “People plead guilty even before the defence has looked at the evidence in the case. They want to get back to their communities.” “Racism is not addressed across the system.” “Racism contributes significantly to the attitudes underlying over-incarceration of Indigenous people.” “Mandatory minimums increase the problem of incarceration.” “How do we make connections between marginalization factors and the causes that make over-incarceration occur?”
- **The current risk assessment system:** The risk assessment process in the current system was criticized for leading to over-incarceration. The restrictive thinking that underlies it tends to hobble other initiatives intended to support Indigenous people. The example of problem-solving courts was offered. Often, if an accused person has a previous conviction, they cannot then be diverted into a problem-solving court.
- **Delays involved with the Gladue process:** In some cases, Indigenous defendants are opting out of the Gladue process because of delays.

### Session 3: What does it mean to decolonize? A perspective from medicine

Participants heard remarks from Dr. Janet Smylie, a member of the Métis Nation of Ontario and a research scientist at St. Michael’s hospital, Centre for Research on Inner City Health (CRICH), where she directs the Well Living House Applied Research Centre for Indigenous Infant, Child and Family Health. In her presentation, Dr. Smylie focused upon the impact of colonization from the perspective of health and well-being of Indigenous and non-Indigenous people. She contextualized her presentation by outlining three key decolonizing dilemmas:

1. **The limits of externally imposed models:** An externally imposed system (be it health or legal) will not lead to thriving communities. Simply increasing medical doctors will not improve health levels of Indigenous communities, for example. Systems must be culturally appropriate to the people they serve.
2. **Racism:** Racism, is the elephant in the room. Indigenous people anticipate racism when going to the doctor – just as they do when they enter the justice system. This arises as a result of the many negative images and stereotyping of Indigenous people that regularly circulates in Canada – and can result in the humanity of Indigenous people being forgotten by those serving them. Because of unconscious and implicit assumptions, racism is both harmful and life threatening in the health system. Research has indicated that if poverty and racism disappear, health disparities disappear.
3. **Discomfort with discomfort and fear of difference:** The majority of people hold implicit associations regarding race and these implicit biases affect how people treat one another. An element of this is the discomfort people feel when dealing with others of a different race or culture. For Indigenous peoples, the imposition of western knowledge systems and particularly the use of western “science” to demonstrate the supposed inferiority of Indigenous peoples and Indigenous ways of knowing constitute acts of epistemic racism.



After setting out these dilemmas, Dr. Smylie posited a collection of actions to overcome them and move to reconciliation. As a general approach, she encouraged participants to develop the ability to sit with their discomfort. Developing that ability is a critical mechanism for reconciliation. The actions she outlined included:

- Reading the Truth and Reconciliation Report to learn about the history and human narrative of cultural genocide in Canada.
- Building awareness of our unconscious biases, through the skill of self-reflection which is based upon an understanding of power differentials.
- Building cultural safety – which takes individuals beyond cultural awareness and the acknowledgement of difference, beyond cultural sensitivity and the importance of respecting difference, beyond cultural competence which focuses on skills, knowledge and attitudes.

Focusing on initiatives undertaken at Toronto's St. Michael's Hospital concerning training development of professionals, Dr. Smylie outlined the systemic changes necessary to successfully integrate change. The entirety of the organization must be involved – and Indigenous cultural competencies in all domains of the organization must be identified and measured. Common pitfalls include underestimating and underutilizing local Indigenous community knowledge and skills, underestimating the time and investment that may be required to build needed relationships, underestimating the complexity of Indigenous community knowledge systems and protocols, and underestimating the importance of context to services (which in health means understanding the social determinants of health).

#### Session 4: Journey map of an Indigenous person in the justice system

Danny Kazuo Morton, Legal Counsel, Ministry of the Attorney General in Ontario took participants on a tour of the "Journey Map" of an Indigenous person within the justice system.

The types of discrimination faced by Indigenous people are varied and numerous and run the full course of the justice system. In each distinct phase of criminal justice, Mr. Morton summarized these challenges as well as highlighting promising initiatives across the country for each phase.

- **Investigation, arrest and charge:** over-policing, lack of Indigenous police officers, challenges understanding rights (including right to counsel), lack of interpreters, displacement from communities, delays for bail hearings.

**Promising practices?** Initiatives include pre-charge diversion to restorative justice, access to Indigenous Victims Services and Family Information Liaison Units, video and telephone bail hearings from remote communities, and bail program staff in First Nation communities.

- **Application of Gladue to bail and barriers for release:** bias, racism, discrimination, transportation issues, difficulties obtaining sureties, housing challenges, questions re the

application of Gladue to bail issues (and, if it does apply, how?). This is compounded by the often-insufficient quality of Gladue reports. Indigenous people – if released on bail – will typically have more bail conditions than a non-Indigenous person. This means Indigenous people are more likely to breach those conditions – and all of this is compounded by several facts: Indigenous people are more likely to be homeless, to live in poverty, and to have difficulty finding a surety.

**Promising practices?** Initiatives included Indigenous Bail Verification and Supervision Programs costing just \$8/day vs. \$235/day for remand, early diversion to restorative justice programs, Gladue courts with summary Gladue reports tailored for bail hearings, and support in the courts provided by Indigenous Court Workers.

- **Overincarceration of Indigenous people:** Remand rates for Indigenous people are increasing across the country. In 2016/17, for example, 57% of all Indigenous admissions to custody are on remand. In terms of bail conditions, Indigenous people will have more conditions – and more onerous conditions – than non-Indigenous people. If and when those conditions are breached by an Indigenous person, that breach could be compounded by factors including over-policing, homelessness of that person, Gladue factors or displacement from the person’s home community. In some locations in Ontario, it is estimated that up to 75% of breaches are for breach of curfew, breach of rules of the residence or abstain from intoxicants..
- **Legal representation and Crown discretion:** There is a lack of mandatory training for Crowns and defence lawyers. This results in questions concerning the application of Gladue to Crown discretion and a general lack of knowledge about and support for restorative justice. For Indigenous people in the system, these shortcomings result in a distrust of the legal system and, often, automatic guilty pleas.

**Promising practices?** It is mandatory for every Ontario Crown to consider Gladue at every stage of criminal proceedings beginning with bail. This is a part of the Crown Policy Manual. Further Crowns in Ontario are required to take Bimickaway Cultural Competency Training. There are currently 58 restorative justice programs across Ontario – and research shows they both reduce recidivism and save money. Finally, there are 23 Revitalizing of Indigenous Legal Systems projects in Ontario.

- **Trial, resolution and sentence:** Challenges include long delays for fly-in courts at First Nations, the alien nature of the criminal justice system as experienced by Indigenous peoples, and underrepresentation on juries. Practical problems include the unavailability of Gladue reports and insufficient Gladue submissions.

**Promising practices?** There is growing awareness of the need for Gladue report writers, Gladue/Indigenous Persons Courts and aftercare workers to ensure that the information provided in the Gladue report is actually used.

### Session 5: An example of decolonization in child welfare

This session was a video interview of Allison Bond, Deputy Minister, Ministry of Children and Family Development, British Columbia. Ms. Bond was frank about the fact that the British Columbia government is currently not serving Indigenous families and children well, as evidenced by the fact that many more Indigenous children than non-Indigenous children are in care. Although improvements are being made, “we are failing, generation after generation.”

According to Ms. Bond, the first thing that must be done to reconcile is to recognize the harm and hurt the legal system still causes as a result of systemic bias. When you begin talking about decolonization, then the time is right and you’re ready to start the journey toward decolonization. But only if you can say that out loud. She states that we all need to reconcile personally and think about our roles. For those who have devoted their adult lives to a particular profession, such as social work, that truth telling is hard work.

She stated that those in the government and those providing services need to think about how reconciliation can be “seeped” through all the work that is done. Legislation can be changed, as has been done in British Columbia to allow proactive work and limited the paralyzing effects of privacy legislation, but culture must also be changed. Ms. Bond also spoke – as many during the day had before her – about the significance of cultural competence education and, specifically, experiential training such as The Village where the course participants learn how traditional Indigenous life was deconstructed by colonizers.

### Session 6: An example of decolonizing justice: the work of Mi’kmaq Legal Support Network

Judge Catherine Benton, Provincial Court of Nova Scotia, presented an overview of the work of the Mi’kmaq Legal Support Network, Eskasoni, Nova Scotia. Her presentation provided participants with an example of a restorative justice program led by the Mi’kmaw community.

Mi’kmaq Legal Support Network was initiated by a group of Nova Scotia chiefs to ensure fair treatment for Mi’kmaw people within the justice system. It is administered by Mi’kmaw or Indigenous people. It is based on the fundamental concept that crime is an offence against personal relationships and not just the government. The goal of MLSN is “it has to be made right.”

The work of the MLSN is founded on providing community solutions to issues within the community. Three programs are offered: court workers, court service workers, and customary law workers. Court workers help people understand their options on entering the legal system. They will accompany an accused person to court, refer that person to relevant services, and speak on behalf of that person if requested. Court service workers assist and accompany witnesses and victims to court and assist in the preparation of Victim Impact Statements. This is a recognition that all must have their voices heard in the process. Customary law workers provide information and support concerning restorative justice alternatives to colonial court processes, including various circles.

The types of circles include justice circles, healing circles, and sentencing circles. Justice circles may include the wrongdoer, family, community, and elders, and involves making amends. This circle can occur either pre or post the criminal charge. Healing circles can occur either pre- or post-charge with the goal of sharing the pain of the person who had loss or suffered trauma. Sentencing circles can occur as a result as a referral from court after a plea or a finding of guilt of the wrongdoer. None of these circles are meant to punish; rather, they are meant to restore.

### Session 7: How can we decolonize policing, bail and trial processes, sentencing, and jail/probation/parole processes?

Small groups considered these four specific areas. What follows are the highlights of the discussion and comments provided by the participants. Not surprisingly, there was significant overlap in the suggestions for the ways to decolonize these four distinct areas:

- **Recognition of the hurt.** The journey toward decolonization begins with the recognition of the harm and hurt the entire legal system has caused and still causes. Systemic bias lies at the root of the hurt. The journey toward decolonization can only begin when everyone can say that word out loud. While some improvements are being made, the system is still overall negative. Witness: the number of Indigenous children currently in care.
- **Reconciliation.** Reconciliation must occur on a personal level. One must think of one's role in the legal system – and about how we can “seep” reconciliation through all we do. It's one thing to change legislation, but first culture must change. All need to recognize that we can become trapped into a racist, patriarchal, colonial system – and we need to think outside of that system and encourage others to do the same.
- **Education.** Experiential cultural competence training was seen as the effective “gold standard.” It occurs when living in a community – not simply parachuting in – and involves not only learning about culture and history but meeting with elders, going to baseball games, attending funerals. The training must be much more than simply “check box” training – and must be provided to all within the justice system – including police, Crowns, defence counsel and judges, for example. Cultural competence training should be designed, delivered, and facilitated by Indigenous people.
- **Counselling.** Recognition must be given to trauma counselling for Indigenous people involved in the legal system – from those accused of crimes to victims of crimes to witnesses of crimes.
- **Funding.** Funding is a challenge at every stage of the system. For example, without adequate funding, Indigenous police services often do not have the capacity to conduct complex investigations and outside non-Indigenous police must be called in. Another example is the challenge of maintaining financial support for sentencing circles in a community. Similar comments were made concerning the bail system. If Indigenous communities are expected to support people accused of crimes within the community, then those supports must be adequately funded. Another example was that interpreters are often not available due to lack of funding.

- **Indigenous services and service providers.** “Diversity recruiting” means there is proper representation of Indigenous people in all positions within the legal system – and, in the best situation, those people should be recruited from within their own communities. Decolonization will not be achieved by “painting things with an Indigenous lens” – there must be substance. At a minimum, court workers should be available to explain the existing court process to accused and others involved in the legal system, including victims and witnesses. Similarly, partnerships between government and service providers within Indigenous communities should be Indigenous-led whenever possible.
- **Use of technology.** Given the remoteness of many Indigenous communities, the better use of technology was frequently raised. Video appearances were suggested to replace in-court appearances for both accused persons and witnesses – thus keeping people in their home communities rather than flying them out.
- **Bail.** Many issues were discussed concerning the challenges of the bail process, including the fact that the colonial system of bail is alien to Indigenous culture. The fundamental question: how do we keep an accused person in their own community and how do we keep victims safe? A possible answer: Turn responsibilities back to each community to develop a framework that fits for that community. To do that, communities must be supported, safe houses created, and all involved in the process fully trained and funded.
- **Trial process.** Comments concerning the trial process echoed those made concerning other elements of the legal system. To ensure the process is a restorative one, the community must be involved at every stage along the trial process. If this is not done, the power imbalance imposed by the colonial system cannot be corrected. The courts have power, the Indigenous people do not. And that begins at the most basic level: language. People need well trained interpreters to clearly and thoroughly understand the process.
- **Sentencing circles.** Sentencing circles were generally seen as a positive development in terms of restorative justice and repairing relationships. Each individual community dealing with a set of individuals should be allowed to define how the circle will be constructed – courts should not be defining the parameters of the circle. Proper funding must be in place to ensure a program of healthy sentencing circles. For example, all parties involved in facilitating the circle should be properly compensated. All should be properly educated and trained in terms of the impact of the circle on victims, the community and cultural issues. Language issues should be handled so that all understand the process and proceedings of a circle. The current system of mandatory minimum sentences was seen as a serious impediment to the workings of sentencing circles.
- **Probation.** Access to probation officers in the current system is inadequate and often necessitates offenders leaving their communities. Questions were raised as to why people within the community should not be trained to take on some of the tasks currently carried by a probation officer.
- **Build in Indigenous knowledge.** Traditions such as the medicine wheel should be the foundation of the legal system for Indigenous people. It is essential to have a system that recognizes the suffering of all involved in the criminal justice system – victims and accused persons. In the example of the wheel, consideration must be given to all of the four needs as illustrated by the wheel: balancing physical, emotional, mental and spiritual needs.

### Evening session: Dinner address

Lenard Monkman, who is Anishinaabe from Lake Manitoba First Nation, and the co-founder of Red Rising Magazine, delivered the keynote address at dinner. His magazine has earned the reputation for being unfiltered and uncensored – and able to tell a story about what is happening now, and what is happening next. That also described the well-received remarks Mr. Monkman delivered – strong and pulling no punches about the issues the Indigenous community faces currently, and where he sees Indigenous youth involving themselves in the decolonizing movement.

By recounting his personal story, he told the participants about his start on the path to helping his community – utilizing and relying upon the experiences he lived through and the need for Indigenous youth to reclaim their identity, culture, all the while bringing forth new ideas to change their communities. He spoke of the ever-increasing group of young, educated Indigenous people carrying the torch for change, and, in particular, stepping up to be critical of existing colonial structures in this country and building pride in being an Indigenous person.

### Report-back from Day 1

Mr. Tarbell introduced the day with a summary of the four key themes heard and repeated by many voices, from many disciplines throughout presentations and small group discussions:

1. The fundamental issue: decolonizing is understanding the relationship amongst justice systems. This includes two elements: first, the issue of “fitting” Indigenous issues into the current criminal justice system and, second, the issue of reconciling ourselves to distinct Indigenous justice systems. And, finally, considering how and if those systems can work together.
2. We need to change our thinking and recognize our bias and racism. To that end, we know that good education works (e.g., education re cultural competence, cultural safety and humility).
3. BUT – good intentions and dialogue are not enough, albeit critical. We need to start with recognition that we have caused harm. That does not mean we become mired in the past. Rather, it means we use that information to move forward in a good way. (“The past is a great place to learn from, but not a good place to live.”)
4. Solutions and strategies cannot be imposed top down. That is a lesson learned often. Solutions involving decision making, design and implementation must come from the ground up. However, we must recognize that there are many different grounds – as there are many different and unique Indigenous communities. Always remember: “Nothing about us without us.”

Mr. Tarbell pointed out that following the presentations and table discussions of the previous day, and given the substantial but still limited Indigenous participation at the Symposium, it had become obvious that the goal of the Symposium was not to develop a set of recommendations. Instead, the event would serve as a place of information gathering, upon which further work may be built.

### Session 8: Justice, decolonization and the rights of Indigenous peoples

Following Mr. Tarbell's introduction to the morning session, the floor was turned over to two speakers: the Honourable Steven Point (former tribal chair of the Stó:lō Nation and Grand Chief of Stó:lō Tribal Council, and former Lieutenant Governor of British Columbia), and Ovide Mercredi (former National Chief of the Assembly of First Nations).

Each man spoke about his own past, how that past informed his opinions and concerns about the current legal system, together with hopes and visions for a future Indigenous justice system. On a number of issues, the two panelists were in agreement.

The next generation of Indigenous leaders coming up are marked by confidence and an ability to articulate what is on their minds and ready to change the system. That was seen in Lenard Monkman's presentation the previous evening. "Our people are rising," said Mr. Mercredi. Young Indigenous leaders, explained Mr. Point, "are coming up marked by confidence."

The current legal system needs to be changed as at this time, it does not reflect the needs of Indigenous people. "The police are not ours, social workers are not ours...they are following guidelines and policies created by someone else. And the agencies are often under-funded and under-staffed," according to Mr. Point.

The assumptions made concerning Indigenous people by settlers were wrong, beginning with the assumption that Indigenous people did not have their own legal system in place before settlers arrived. The systems – legal, education, etc. – imposed on Indigenous people discounted the humanity of Indigenous people and licence was taken to debase Indigenous people as human beings. Mr. Point noted that many Indigenous children of his generation were taught not to speak unless spoken to. He recalled that, as a result of this teaching, Indigenous children were often referred to as "slow" at school because they so seldom spoke. The education system did not understand Indigenous people and assumed they had no culture worth protecting. When they arrived, colonists assumed the land was *terra nullis* – and treated the people accordingly.

This resulted in a distrust of the legal system imposed on Indigenous people because of a lack social contract between non-Indigenous and Indigenous people. Like the school system, the legal system did not understand Indigenous people, did not value their culture and made no effort to do so. Just like his experiences with the education system, as a judge Mr. Point found that Indigenous people would not talk. White society is hierarchical and authoritarian. When

settlers arrived in Canada, he recounted, they thought they'd "just talk to Chiefs and get things done." But that assumption of native leadership was wrong. Chiefs were just spokespersons. And all the other assumptions were wrong too – those about education, child rearing and the role of women. Since everything was built on those (incorrect) assumptions, everything needs to be decolonized.

Mr. Point and Mr. Mercredi disagreed as to whether there can be much hope placed in the system's ability to be decolonized. Mr. Point expressed his belief that an Indigenous justice system can live side by side with the current legal system – and can be accomplished by all working together. His concern with separate systems is the issue of segregation, which he believes could breed more racism and discrimination.

Conversely, Mr. Mercredi was clear that from his perspective the only way forward is the evolution of a separate Indigenous justice system, distinct from the existing colonial system. He spoke about First Nations in the United States that have created their own successful alternative justice systems. He then told of the many transitions he has seen in the Canadian legal system over the years, with decades of talk about restorative justice, reconciliation and now decolonization. Further, many recommendations have been made by commissions and at conferences concerning self-government in Canada – but to no avail.

Questions posed in discussion included the following:

**1. What is one tip for judges in terms of decolonization? Something we can do differently right now.**

Mr. Point responded simply: Talk to the people behind the glass – they have great ideas. For example, talk to those entangled in the legal system about reducing bail conditions. "You've got to get out of the box in terms of conditions. These conditions keep judges busy." He pointed out that many bail conditions are about reporting which is not a possibility for those on street and without housing. Again, put simply, don't put Indigenous accused on unreasonable conditions. He reminded participants that many Indigenous people won't come into court and talk -- they're scared and intimidated by the complexity of the justice system. In fact, it's so complex, that many people don't even know what happened during their appearance. Again – his advice to judges was simple: "Stop talking mumbo jumbo. Stop this notion that judges are somebody special. Be a human being and give people a chance to participate."

Mr. Mercredi advised that judges need to ensure that the current colonial system doesn't become permanent. He advised taking interim measures to ensure this doesn't happen. "In my own view, if you are in position of power and authority, advocate for ameliorated system but also advocate for alternative system of justice which we have been advocating for so many years. We have ideas of how to better ourselves. For example, sexual abuse cases. There is a way you deal with it in your legal system and it does not result in restoring people, only punishing. Punishing is not enough, we need to give people a chance to do better."



## **2. Indigenous people want change. How do we recover from the legal system in which we are currently entrenched? And then how do we coexist together once that happens?**

According to Mr. Point, conflict resolution is not new to Indigenous peoples. He then went on to explain some of the basic concepts of an Indigenous approach to justice. Processes existed long before arrival of non-Indigenous people. “We know how to have many people living in one place. In our system, the worst thing you could do is to lie.” There no concept of theft, since property belong to everyone. Non-indigenous people thought Indigenous people were stealing from one another, “but we did not have that notion of personal property – everything belonged to everybody.” He pointed out those big differences in understanding that set up conflict between the Indigenous and non-Indigenous systems of justice. “We share, we don’t criticize. That approach minimizes conflict.” He advises that non-Indigenous people must learn about who they are dealing with in the Indigenous community: “We have our own ways of doing things. Justice doesn’t happen after events, justice happens before events. We have the tools, we have the ethos.”

Mr. Mercredi took a different approach to answering this question, focused upon the political steps necessary to replace the colonial system of justice with an Indigenous one. “We need a table and willing participants to negotiate with. We have Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Report, the Charlottetown Accord, United Nations Declaration of Human Rights. These are places of wisdom. We just need political will to set up a table with willing partners. We have to go beyond programs and services currently offered...If we want change, we will need to use a different form of authority...We don’t want to fully assimilate. We need to go beyond programs and services. Our people have their own inherent powers.”

### [Final comments](#)

The Symposium concluded with Mr. Tarbell asking the Indigenous participants to deliver final comments. Remarks made included the following:

- The Symposium was a good first attempt at this dialogue. But it must be improved with better Indigenous participation. Indigenous attendees are a relatively small minority of those attending.
- Indigenous people are struggling to get the colonial system leaders to listen. The Indigenous justice system is based on community-based healing. We need to move forward together. It can’t be “us versus them”. Indigenous people want reconciliation but don’t feel they are getting it from the other side. They are not being heard.
- Some questioned the possibility, or the good faith, of the discussion:

- How can one become a decolonizer if one was previously the colonizer? Decisions are made and Indigenous people are not invited to the table: they get only lip service.
- When I saw title of this forum – decolonizing justice system – it made me laugh. Because we can't decolonize the existing system. I don't leave my life experiences at the door when I enter the courtroom. All those experiences shape who I am.
- Restorative justice is not new to Indigenous communities, but governments are taking it over and institutionalizing it. "You can't take our ways of being and make them into a government program." The power for change has to come from the people. Restorative justice has to remain in the communities. If it is run by a government agency, Indigenous people will distrust it.
- Check your own bias. If you want to change, it starts with you. If I want my community to be better, it starts with me to change my community.
- We are going through a process of rethinking justice system in British Columbia. We hope to reach place where we reclaim the traditional laws we had. We had so many things that were taken away from us. It is so important to hear our stories – we need to lay our stories out – these are the issues, these are the things we need to have changed. We are currently working on our justice strategy. We have a relationship with federal corrections. We have formed a Memorandum of Agreement with them and that MOU is seen as a model. We can provide services to inmates. We do cultural ceremonies to thank the mother earth, ask that things go right. But there is still hurt for our people. We saw corrections staff mocking our cultural ceremonies and this means we are not willing to share (with non-Indigenous people). We are not going to share if we are going to be ridiculed. We are all taught to be equals. Please – get out of our way. Please – give us space. We have a lot of work ahead of us.

## Recommendations

By agreement with the facilitator, and in light of the limited Indigenous attendance at the Symposium, participants elected not to proceed with recommendations. Numerous participants expressed the wish that as a first discussion, the theme of this Symposium could be revisited the medium term with a follow-up event more focus on practical reforms.