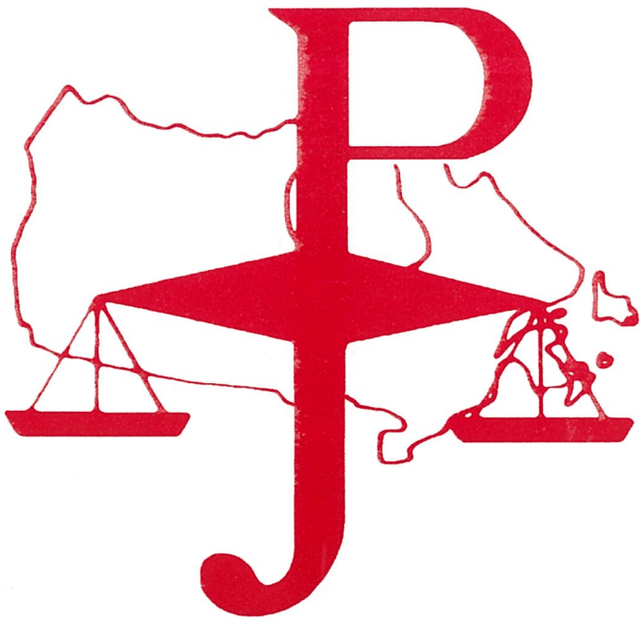

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PROVINCIAL JUDGES' Journal DES JUGES PROVINCIAUX

Justice without wisdom is impossible / La justice sans la sagesse n'est pas la Justice. - **Froude.**

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

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Hon. Judge Darwin James Greaves
Medicine Hat
effective November 16, 1998
Hon. Judge Paul Gordon Sully
Edmonton
effective November 23, 1998
Hon. Judge Michael George Allen
Edmonton
effective December 7, 1998
Hon. Judge Janet Dianne Franklin
Edmonton
effective December 7, 1998
Retirements/Retraites
Hon. Judge K. J. Plomp
effective October 31, 1998
(appointed supernumerary judge - November 1, 1998)

MANITOBA

Appointments/Nominations
Hon. Judge Glenn D. Joyal
Winnipeg
effective November 25, 1998

SASKATCHEWAN

Appointments/Nominations
Hon. Judge Rosemary Weisgerber
Prince Albert
effective September 16, 1998
Hon. Judge Clifford Toth
Estevan
effective September 16, 1998
Retirements/Retraites
Hon. Judge Eric Diehl
from full-time to *per diem*
effective November 30, 1998
Hon. Judge Harvie Allan
effective September 30, 1998

There were no other changes to the Benches in the Provinces and Territories reported to the Journal before the publication deadline. **Editor**.

He who has no poetry in himself will find poetry in nothing.
-Joseph Joubert

A king's castle is his home.
-Anon

Looking at the proliferation of personal web pages on the net, it looks like very soon everyone on earth will have 15 Megabytes of fame.
-M G Siriam

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EDITOR'S NOTEBOOK/REMARQUES DU RÉDACTEUR

In October I was in Calgary for Conference '98. In keeping with tradition, Friday afternoon was left open for attendees to do as they pleased. Optional activities were a visit to Lake Louise or an *Ascent* (read "hike") *of Tunnel Mountain* in Banff National Park. I chose the latter. Our host was the formidable Judge Manfred Delong. I had the pleasure of accompanying Judges Dianne Morris and Ross Moxley from Regina as we climbed about 1000 feet into the thin air of the Rockies (see, "View from Top of Tunnel Mountain" on page 35).

You can learn a lot about somebody when you "go to the mountain" with them. I learned that Judge Morris was going to "do" the New York Marathon on November 1 (she has since "done" it) and I also learned that Ross Moxley was *the Ross Moxley*. For me this meant that he was the Judge whose writings about his experiences in Northern Saskatchewan, collected in ***Court Comics: Tragedy and Comedy in Court,*** I had read to my delight several years ago. So taken was I with his writing at that time, that I featured an excerpt from ***Court Comics*** in the "In A Literary Vein" column in an earlier edition (See, "On Surrendering La Loche....", Volume 20, No. 1, Spring, 1996).

Well, our conversation eventually got around to what Ross had been up to lately. He nonchalantly told me about a recent trip

En octobre, j'étais à Calgary pour la Conférence 98. Fidèlement à la tradition, le vendredi après-midi avait été laissé libre pour que les participants puissent faire ce qui leur plaise. Les activités optionnelles étaient une visite au lac Louise ou une ascension (lire " grimpette ") de la montagne Tunnel dans le parc national Banff. J'ai choisi la seconde option. Notre hôte était le redoutable Juge Manfred Delong. J'ai eu le plaisir d'accompagner les juges Dianne Morris et Ross Moxley de Regina pour cette ascension d'environ 1 000 pi dans l'air raréfié des Rocheuses (Voir " Vue du sommet de la montagne Tunnel, à la page 35).

Vous apprenez beaucoup de choses sur une personne en " faisant de la montagne " avec elle. J'ai appris que la Juge Morris allait " faire " le Marathon de New York le 1er novembre (et elle l'a " fait ") et j'ai aussi appris que Ross Moxley était le " fameux " Ross Moxley. Pour moi, cela voulait dire qu'il était le juge dont j'avais lu avec plaisir, il y a plusieurs années, les récits de ses expériences dans le Nord de la Saskatchewan, réunis dans l'ouvrage *Court Comics : Tragedy and Comedy in Court.* J'avais été tellement captivé par ses écrits à l'époque que j'avais présenté un extrait de *Court Comics* dans la colonne " In A Literary Vein " dans un numéro antérieur (Voir " On Surrendering La Loche... ", volume 20, nº 1, printemps 1996).

Et puis notre conversation a finalement dérivé vers ce qui l'avait occupé ces derniers temps. Il m'a parlé nonchalamment d'un récent voyage qu'il avait fait dans les îles

END NOTES

1 Jerry Wetzel was the organizer and founding President of the first provincial aboriginal political organization in Newfoundland & Labrador in 1972. Between 1974 and 1990 he negotiated the recognition and registration of the Mi'kmaw people of Conne River, Newfoundland (the Miawpukek Band). The Miawpukek Band is the only community of Mi'kmaw people in Newfoundland whom the Government of Canada has recognized as Indians under the *Indian Act* since confederation in 1949, although there are several other Mi'kmaq groups in the Province. Mr. Wetzel obtained a B.A. (Hons) from Ohio University in 1969, did post graduate work at Memorial University of Newfoundland in Human Ecology & Community Development, 1970-72 and attended Dalhousie Law School between 1990-1995 obtaining his LL.B and LL.M degrees (Thesis: *"Decolonizing Taqamkuk Mi'kmaw History"*). He is a member of both the Newfoundland and Nova Scotia Bar Associations.

2 Green's discussion of judicial perspectives on First Nations' justice initiatives begins at chapter 5.

3 *R. v. Riche (S.) (No. 1)* (1994), 116 Nfld. & P.E.I.R. 293(Nfld. S.C.T.D.), at, p. 297.

4 *R. v. Nicholas* (1996), 177 N.B.R. (2d) 124 (Prov. Ct.), at p. 128.

5 *R. v. Taylor* (1995), 132 Sask. R. 221 (Sask. Q.B.), at p. 224.

6 *R. v. Taylor* (1997), 122 C.C.C. (3d) 376 (Sask. C.A.), at p. 408.

7 See chapter 10 for Green's discussion of methodological perspectives.

8 Green, R.G. *Justice In Aboriginal Communities: Sentencing Alternatives*, (Saskatoon: Purich Publishing: 1998), at p. 145-46.

9 Green, *supra*, at p. 159.

This is the spectacular view that the judges who made the "Ascent of Tunnel Mountain" in Banff National Park with Judge Manfred Delong had on the afternoon of Friday, October 9, 1998. The mountain was named because of the anticipated "tunnel" that Major A. B. Rogers said should be blasted through its peak as the Canadian Pacific Railway marched westward. The tunnel was never pushed through the mountain, when a more viable alternative was proposed, but the name stuck.

developing and implementing their own justice alternatives. Prior to these initiatives, Green's First Nations informants felt estranged from a foreign system imposed on their communities.

JUSTICE & POLICY ISSUES

One of the more interesting chapters in Green's book is chapter 11, "Justice and Policy Issues". The theme being developed in the preceding chapters becomes clear. Green sees the alternative sentencing methods being developed between First Nations and front line judges as a demonstration of the flexibility of the Canadian criminal justice system. In this chapter Green relates that the future development of such alternatives depends on:

- the cooperation of judges, crown prosecutors, courts of appeal and provincial departments of justice;
- additional funding by federal and provincial justice agencies to support First Nation justice initiatives via funding for employment and the development of support services to counsel and rehabilitate offenders in their own communities;
- judges, crown prosecutors, defence lawyers and First Nations peoples working together to develop alternative sentencing and mediation initiatives must be alert to ensuring that local politics and dominant family groups do not influence, control the development of such initiatives or have an impact on sentencing deliberations;
- First Nations justice groups being independent and capable of protecting victims and their supporters from retaliation during or after community sentencing is completed; and
- Courts of Appeal being deferential to community sentencing that is inconsistent with the principle of parity for the same offence.

Green also observes that challenges to First Nations sentencing initiatives may arise from challenges under the Charter or sections 25 and 35 of the *Constitution Act, 1982*.

SUMMARY

I highly recommend *Justice In Aboriginal Communities: Sentencing Alternatives* to anyone who wishes to familiarize themselves with the development of First Nations' alternative sentencing initiatives. Green has put together a very readable book that succinctly reviews the various initiatives being developed by First Nations as a step toward remedying the cultural struggles created by the Canadian criminal justice system in their communities.

My primary criticism is of the organization of the book and the identification of what I feel is the real underlying issue from a First Nations perspective—the recognition of an inherent right to self-government. This includes recognition and affirmation of First Nations' right to develop a justice system based on their own values and traditions. To his credit, Green recognizes that this is a vital issue, but states that it is outside the scope of this work.[9] Green's work does raise a fundamental question about First Nation justice initiatives: ***Should these initiatives be developed and funded on an ad hoc basis, or should there be a more principled approach based on section 35(1) of the Constitution Act, 1982?***

that he had made to the Cook Islands in search of "restorative justice". I didn't want to betray too much of my ignorance of the geography of the Cooks, but Ross was kind enough to explain to me that they are a coral archipelago of fifteen islands, located in the South Pacific. They are spread out over an area which is roughly equivalent to India, but populated by a mere eighteen thousand people, or so. The largest island, and the one which Judge Moxley visited, is Rarotonga. Being of the contemplative ilk, and driven inexorably by the Muse, Judge Moxley "had" to write of his experiences while in the Cooks. You can imagine my delight at hearing that! Well, I managed to wrestle the piece, entitled "A Prairie Judge on a Tropical Island - Searching for Restorative Justice", out of him. Elsewhere I have described Judge Moxley's style as "polished, but sometimes quirky". I stand by that description here. In fact, it is the style, as much as the content, that draws me to his writing. I commend it to you on the same footing.

But Judge Moxley wasn't the only judge to be drawn to the Far East to study other justice systems. Judge Maryka Omatsu is a judge of the Ontario Court (Provincial Division). She sits in the College Park Court in Toronto, ON. She states that Japan has the "lowest crime rate in the industrial world". In September, 1997, she spent three weeks in Japan trying "to acquaint myself with some reasons for this...." The result was a paper that she distributed at a panel discussion on international options for judges, which took place in May, 1998, at the Ontario Judges Association Conference.

Cook à la recherche de la " justice réparatrice ". Je ne voulais pas trop trahir mon ignorance de la géographie des îles Cook mais Ross a eu la gentillesse de m'expliquer qu'elles sont un archipel corallien de quinze îles, situées dans le Pacifique Sud. Elles s'étendent sur une superficie à peu près équivalente à celle de l'Inde, et leur population est de seulement dix huit mille habitants, environ. La plus grande île, celle qu'a visité le Juge Moxley, est Rarotonga. De nature contemplative et poussé inexorablement par la Muse, le Juge Moxley s'est senti " obligé " de relater ses expériences dans les îles Cook. Vous pouvez imaginer ma joie en entendant cela! Et bien, j'ai réussi à lui arracher son texte, intitulé *A Prairie Judge on a Tropical Island – Searching for Restorative Justice* (Un juge des prairies sur une île tropicale – À la recherche de la justice réparatrice). J'ai décrit ailleurs le style du Juge Moxley comme étant " châtié, mais parfois excentrique ". Je m'en tiendrais ici à cette description. En fait, c'est le style, tout autant que le contenu, qui m'attire vers ses écrits. C'est à cause de cela que je vous les recommande.

Mais le Juge Moxley n'a pas été le seul juge à être attiré vers l'Extrême-Orient pour y étudier d'autres systèmes judiciaires. Madame la Juge Maryka Omatsu est juge de la cour de l'Ontario (division provinciale). Elle siège à la cour College Park de Toronto, en Ontario. Elle affirme que le Japon a le " plus faible taux de criminalité du monde industrialisé ". En septembre 1997, elle a passé trois mois au Japon pour essayer de " comprendre les raisons de cela... ". Sa recherche a abouti à un article qu'elle a distribué lors d'une discussion plénière sur les options internationales pour les juges, qui a eu lieu en mai 1998, lors de la conférence de l'Association des juges de l'Ontario. Son article s'intitule : *Is Crime and Punishment*

It is entitled "Is Crime and Punishment Cultural?: A View from Canada and Japan". This paper is broader in sweep than the Moxley article, but a natural companion piece to it. Both appear in this edition.

I also bring you a book review, an update (as promised) on the election fortunes of Judge Judith Lanzinger, a speech which Dr. Sheilah Martin of the Faculty of Law at the University delivered at Conference '98, which will tell you what lies ahead for us as we head into the next millennium, and much, much more. As I write this, we are exactly one month away from Christmas Day. With a little luck, and a lot more effort by the printers, it will be on your desk before the festive season consumes you. Enjoy the read and the best of the Holidays to you and yours. Until the next time....

Cultural? A View from Canada and Japan (Le crime et le châtiment sont-ils culturels? Une impression du Canada et du Japon). Cet article a une plus grande portée que celui de Moxley, mais les deux vont naturellement de pair et sont publiés ensemble dans ce volume.

Je vous apporte aussi une critique de livre, une mise à jour (comme promis) aux sujets des péripéties électorales de Madame la Juge Judith Lanzinger, un discours prononcé par Sheilah Martin, Ph.D., de la faculté de droit de l'université de Calgary, lors de la conférence 98, qui parle de ce qui nous attend alors que nous mettons le cap sur le prochain millénaire, et beaucoup d'autres choses encore. Comme j'écris ceci, nous sommes à exactement un mois du Jour de Noël. Avec un petit peu de chance et un gros effort de la part des imprimeurs, ce numéro sera sur votre bureau avant que la saison des fêtes ne vous accapare. Je vous souhaite une bonne lecture et je vous souhaite aussi d'excellentes fêtes, ainsi qu'à votre famille. À la prochaine fois...

It's not true that I'm afraid to die, I just don't want to be there when it happens.
-Woody Allen

It is a strange desire men have, to seek power and to lose liberty.
-Francis Bacon

It is natural to die as to be born; and to a little infant, perhaps the one is as painful as the other.
-Francis Bacon

It is the province of knowledge to speak and it is the privilege of wisdom to listen.
-Oliver Wendell Holmes

Circles brought the community and the offender face to face in a session of accountability where the community assumed both authority over and responsibility for the offender.[6]

Judicial opinions about what sentencing circles are, fall into the methodological categories of "legal pluralism" and "reformist popular justice"[7]. In Green's words, legal pluralism recognizes that there is a need for interaction between the formal state-imposed system of law enforcement and local First Nation systems of law and social control. Reformist popular justice theory promotes maximum participation by the population in modern legal institutions by revising or adapting procedures to fit local circumstances. Control over change, however, whether approaching sentencing circles from the perspective of legal pluralism or popular justice, is still controlled by the state. It is interesting to note that Green cites no judicial opinion that considers the history of colonialism and post-colonialism with regard to the past relationship between the Canadian criminal justice system, First Nations communities and the role of sentencing circles. To approach the analysis of First Nations sentencing alternatives as reactions to colonialism leads to a realization that a de-colonizing perspective is also a valid, alternative, analytical perspective.

FIRST NATIONS PERSPECTIVES ON SENTENCING CIRCLES OR JUSTICE

Perhaps the best example of a First Nations diplomatic proposal inviting the Canadian justice system to work with them toward de-colonizing and mitigating the adverse effects of the Canadian criminal justice system in First Nation communities was that of the Git'ksan Wet'suwet'en. Green quotes from the Git'ksan Wet'suwet'en proposal made to the Government of British Columbia:

> The justice system brought to Canada by the Europeans has been very disruptive of both the individual and community life of its Aboriginal people. We propose to implement an alternative in Northwestern B.C. that will allow the dispute resolution laws and methods of the Gitksan and Wet'suwet'en people to interact with the provincial justice system in a way that does not undermine the integrity of either.[8]

This theme can be discerned throughout the statements of many of Green's First Nations informants. Green has reviewed several different kinds of initiatives that have been taken by First Nations: Sentencing Circles; Elders or Community Sentencing Panels; Sentence Advisory Committees and Community Mediation Committees. The initiatives taken by various First Nations reflects the education of First Nations leaders and their awareness of their own history; community needs; what indigenous peoples have done or are doing in other countries and the perspectives of resource people and other people from outside a First Nation who influence the thinking of First Nations leaders in relation to how they view their own situation. Green observes that no matter what approach a First Nation has taken to mitigate the adverse cultural influences of the Canadian criminal justice in their communities, all First Nations informants felt empowered when

English and Canadian *Consolidation Acts* of 1861(U.K.) and 1869(Can.). The sentencing principles established at that time stressed high maximum penalties, broad judicial discretion and few minimum penalties. When probation was added to the discretionary powers of a judge in the early twentieth century, a convicted accused could, for the first time, be given a non-custodial sentence. Prior to this development the convicted pleaded for their lives, sought the intervention of clergy, threw themselves on the mercy of a jury, or sought a pardon from the monarch. Sentencing based on the above principles and motives were foreign to First Nations living in extended family bands. These principles and motives are still foreign today in First Nations reserve communities that are composed of multiple extended family groups.

Green explores the recent changes in the Canadian criminal justice system with regard to sentencing alternatives. The new sentencing options reflect a mix of objectives. While the central principle is still deterrence, offender rehabilitation and reintegration in the community is now a competing demand on judicial discretion in a sentencing hearing. However, as Green points out, there is an ongoing debate within the Canadian criminal justice system about whether it is custodial sentences or non-custodial sentences that reduce the crime rate, if either has any influence on it. The new objectives of sentencing in s. 718 stress the denunciation of unlawful conduct, specific and general deterrence, incarceration of offenders only if necessary for public protection, offender rehabilitation, victim and community compensation, and the encouragement of offenders to publically accept responsibility for harm done by them. Against this background, Green then reviews the development of sentencing/healing circles in selected First Nations, in comparison to and as an alternative within, sentencing hearings in the Canadian criminal justice system.

Throughout Chapters 5-8, Green provides information on the various First Nations' sentencing alternatives that are being developed. In this commentary Green provides the reader with very interesting comparative viewpoints on how First Nations's sentencing alternatives are seen by judges and First Nations' justice personnel.

JUDICIAL PERSPECTIVES ON SENTENCING CIRCLES

Judicial perspectives on the use of sentencing circles are varied. Green has provided a number of judicial perspectives from across Canada on circle sentencing in his section on the "Status of Circle Recommendations in the *Criminal Code*".[2] Newfoundland judicial opinion sees sentencing circles as another form of diversion in the sentencing process rather than recognition of any differences between Canadian and First Nations' concepts of justice.[3] In an excerpt from a New Brunswick case, the judge saw that the use of sentencing circles by the Court as bridge-building across the cultural divide.[4] In Saskatchewan, one judge characterized the recommendations of sentencing circles as comparable to a pre-sentence report.[5] However, on the appeal of that case, the Chief Justice of the Saskatchewan stated that sentencing circles are far more important than a pre-sentence report prepared by someone from outside the community.

A PRAIRIE JUDGE ON A TROPICAL ISLAND - SEARCHING FOR RESTORATIVE JUSTICE

On one fine day in 1773, Captain James Cook saw protuberances of land interrupting the broad expanse of blue Pacific waters shimmering before him. "Blimey!" he exclaimed, as he lowered his telescope and consulted his map. "Jolly good! I've discovered some unknown islands!" Then, perhaps thinking of the fine meal of salt pork and weevily biscuits his cook had yet again prepared, he announced, "These islands shall henceforth be called the Cook Islands!"

Well, sorry, Jim, but those islands had already been discovered and they had been given names long before poor old Cook stumbled unwittingly upon them. But, of course, being European, James simply assumed that the members of the highly organized society of Polynesians that had occupied the islands since as long ago as the fifth century A.D. didn't know about their home already, or hadn't bothered to give it a name.

He also assumed that they would be more than comfortable with the idea of suddenly becoming part of the British Empire and he promptly unilaterally annexed them for the King of England. He succeeded even though his Spanish competitor, Alvaro de Mendana, had been 200 years ahead of him and Cook didn't even lay eyes on the largest island and the locus of the government

In 1998, Judge Ross Moxley of the Provincial Court of Saskatchewan travelled to Rarotonga, the capital of the Cook Islands, in the "the heart of Polynesia".The Cook Islands are a net of 15 coral islands in the heart of the South Pacific spread over an area the size of India with a population of 18,000 souls, no bigger than a small New Zealand provincial town. These unique and friendly Polynesians have their own language and government and enjoy a vigorous and diverse culture with significant differences between each island. Judge Moxley's purpose in going to the islands was "to draw from the experience of the Cook Islands to see whether there are lessons to be learned that could be applied to the Canadian justice system, particularly as it applies to people of the First Nations in Saskatchewan".The quest became largely a search for "restorative justice". The result is an enlightening and entertaining piece written in the polished, but sometimes quirky, style of Judge Moxley.

En 1998, le Juge Ross Moxley de la cour provinciale de la Saskatchewan a fait un voyage à Rarotonga, la capitale des îles Cook, " au cœur de la Polynésie ". Les îles Cook sont un chapelet de 15 îles coralliennes au cœur du Pacifique Sud. Elles s'étendent sur une superficie égale à celle de l'Inde et leur population est de 18 000 âmes, de la taille d'une petite ville provinciale de Nouvelle-Zélande. Ces Polynésiens uniques et sympathiques ont leur propre langue et leur propre gouvernement et ils jouissent d'une culture vivante et diversifiée, qui se différencie nettement d'une île à l'autre. Le " motif " du Juge Moxley pour aller dans ces îles était de " s'inspirer de l'expérience des îles Cook pour voir s'il y avait des leçons à prendre qui pourraient être appliquées au système judiciaire canadien, particulièrement en ce qui concerne les Premières Nations de la Saskatchewan ". Cette enquête est devenue essentiellement une recherche sur la " justice réparatrice ". Le résultat est un article révélateur et divertissant écrit dans le style châtié mais parfois excentrique du Juge Moxley.

headquarters of the group, Rarotonga. Finding that place for the Brits fell to the mutineers on the famous ship Bounty, though for some unknown reason, they failed to pass on news of their discovery to the British Navy.

For many years, the British had other colonials to civilize (Canadians, among others), so it wasn't until 1888 that they arrived to strip the Cook Islanders of as much of their language, religion and culture as they could. Of course, they brought along those handy (for a tropical island) wigs and gowns, and from foggy old London came the equally foggy (to the Maoris, if not the British), and old, British system of justice. The people of the islands have vigorously embraced Christianity, but I wondered if the British justice system might have been welcomed with somewhat fainter enthusiasm. They have now had thirty years to put their own stamp on it. I decided to go and take a look.

The purpose of my investigation was to draw from the experience of the Cook Islands to see whether there are lessons to be learned that could be applied to the Canadian justice system, particularly as it applies to people of the First Nations in Saskatchewan. "What similarities," you might ask, "could there be between people living on the frozen plains and dwellers on a tropical paradise?" This was my question and you, like me, may well be surprised to know that there are remarkable parallels.

The greatest similarities are not in the cultures of the two groups, but in what happened to those cultures after the Europeans arrived. The first of them to arrive in the Cook islands were traders (Cook himself came there to re-provision his ship). Though they were for the most part a brutal lot, the early traders had little impact on the culture of the Islanders - indeed, they were generally oblivious to what, if any, religion was practiced in the islands. It was the missionaries who followed them, outraged at many things, not the least of which was what they regarded as "outrageous promiscuity", who, without so much as a shot fired, struck a near fatal blow to the culture of the Islanders. Sound familiar?

With remarkable alacrity, the people of the Cook Islands were converted to Christianity, helped along by devastating diseases the missionaries and traders had brought and by the successes these early missionaries had in converting a few zealots from among the Polynesians. Those diseases struck the islanders just the way they struck the natives of North America. The population was decimated, halved first, and then halved again. It is impossible for someone who has never experienced such a holocaust to comprehend the devastation to a society that would ensue, but it is easy to understand how it would undermine the authority of religious and political leaders. Not only would it make the most devout believer question the old religious beliefs to see family and neighbors dying off *en masse*, but the leadership, being older, would likely be the first to succumb. The deaths of spiritual and political leaders is ostensibly the most destructive thing that can happen to any culture.

Once having established Christianity, the missionaries began to exert an ever tightening control over behavior. The people were encouraged to dress like Europeans, they were moved to new and different communities, and even the housing became European. In short, the Islanders, as with North American natives, were persuaded that their traditional ways were wrong, barbaric and pointless.

developments in Canadian and First Nations communities.

The title, *Justice In Aboriginal Communities: Sentencing Alternatives*, demonstrates the author's perspective on his subject. In Chapters 1-4, Green summarizes the evolution of sentencing principles in the Canadian criminal justice system. He stresses that the conventional justice system already makes use of community and victim participation through mediation and diversion programs. Thus, Green argues circle sentencing, which permits participation by the victim, the perpetrator, members of their families and members of the community is not a radical departure from existing programs, nor outside the authority vested in judges under the *Criminal Code.*

This is a legitimate perspective and an appropriate analysis, but both initiatives originate from within the Canadian criminal justice system. Is circle sentencing just another alternative sentencing method that can be applied within the ambit of a judge's discretionary authority? Or, is it a unilateral act of decolonization by First Nations? Is it an informal de-colonizing partnership between First Nations and officers of the Canadian criminal justice system who recognize that First Nations values and methods of social control are different from those which the Canadian criminal justice system is based on? Or is it a step toward the recognition of First Nations' Aboriginal right to build their own systems of justice? These questions are not raised to negate the value of Green's publication or to criticize his perspective, but to provide an alternative critical analysis from an Aboriginal perspective for readers to consider.

An underlying, but important issue that emerges from the information provided by Green from my First Nations' perspective is: What does the acceptance and use of First Nation sentencing alternatives by Canadian Courts represent?

- the further assimilation of First Nations into Canadian institutions, or
- the first steps in the development of a separate justice system for First Nations?

Ross Gordon Green has, in a few short pages, provided an effective review of the development and use of sentencing circles by Provincial Courts in Canada. His discussion of the evolution of the English Criminal Law system as an adjunct to and extension of the centralized power of the monarch provides some background for a cross-cultural contrast when he later discusses the negative consequences when this system of norm enforcement is applied in First Nations communities.

Green notes that the central objective of the English criminal justice system has been deterrence by punishment. This is consistent with an underlying theme that English authorities viewed their own citizens as expendable. In the past, English citizens who were convicted of infringing a law laid down by central authority were removed from their communities either by death, transportation, or a lengthy prison sentence. The accused were not expendable to their families, but to the central authorities their punishment was to be an example to others - thus they were expendable for the maintenance of central authority. However, as Green notes, the harshness of the English/ Canadian criminal justice system was mitigated to a large extent after 1861 by the codification of sentencing principles in the

BOOK REVIEW

Ross Gordon Green, *Justice In Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998).

Reviewed by Jerry Wetzel, Sole Practitioner, Miawpukek Reserve, Conne River, Newfoundland.[1]

> If one says, "We are so flexible we can absorb First Nations justice initiatives within our way of doing things" are they not also saying, "Our justice system is greater than yours and we can accommodate your wishes without changing our way of doing things"? Would it not be better to say, "Come friends, we are willing to help you find your way back to your own laws and ways of dealing with your people in a way that will be fair to all of us"?

INTRODUCTION

The organization of this book required a little more thought. The introductory chapter should provide the reader with a methodological perspective on how the author approached the analysis of sentencing by Canadian courts in First Nations communities. A brief review of three possible methodological frameworks is provided in chapter 10. However, by then the reader has been presented with the evolution of sentencing alternatives in the Canadian criminal justice system and case studies of alternatives to standard sentencing procedures being developed by selected First Nations. Had the author provided alternative analytical frameworks in the first chapter, the readers' critical mode of analysis would have been prompted in their interpretation of the case studies and comparisons made between sentencing

This is a review of Ross Gordon Green, *Justice In Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998) by Jerry Wetzel, a Mik'maq lawyer, who works as a sole practitioner with offices in Grand Falls-Windsor, NF and on the Miawpukek Reserve, in Conne River, NF. He says of this book: "I highly recommend *Justice In Aboriginal Communities: Sentencing Alternatives* to anyone who wishes to familiarize themselves with the development of First Nations' alternative sentencing initiatives. Green has put together a very readable book that succinctly reviews the various initiatives being developed by First Nations as a step toward remedying the cultural struggles created by the Canadian criminal justice system in their communities. My primary criticism is of the organization of the book and the identification of what I feel is the real underlying issue from a First Nations perspective—the recognition of an inherent right to self-government."

Il s'agit d'une critique du livre de Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Justice dans les communautés aborigènes : Options en matière de détermination des peines) (Saskatoon : Purich Publishing, 1998). Cette critique est rédigée par Jerry Wetzel, avocat Mik'maq, qui exerce à titre autonome dans ses bureaux à Grand Falls-Windsor, et dans la réserve Miawpukek, à Conne River, Terre-Neuve. Voici ce qu'il dit de ce livre : " Je recommande vivement *Justice in Aboriginal Communities: Sentencing Alternatives* à tous ceux qui souhaitent se familiariser avec le développement des initiatives de détermination des peines des Premières Nations. Green a compilé un ouvrage très accessible qui examine brièvement les différentes initiatives mises en point par les Premières Nations dans le but de remédier aux conflits culturels engendrés par le système canadien de justice pénale dans leurs communautés. Ma principale critique concerne l'organisation de l'ouvrage et l'identification de ce qui est selon moi la véritable question fondamentale du point de vue des Premières Nations – la reconnaissance du droit inhérent à l'autonomie gouvernementale. "

But there were similarities between the cultures of the islands and the prairies as well, at least in how they were more like each other than like the British culture into which every effort was being made to assimilate them. The Cook Islanders were organized into clans. They had chiefs. There was no private ownership of land. Personal property held little importance. The religion was highly spiritual, with great reverence for ancestors. History was kept orally since there was no written language. They created beautiful and sophisticated art and crafts that were closely connected with their religion. It was a society made up of great travelers and remarkable navigators. All these things the Cree, for example, had in common with the Islanders. And, of course, both cultures had their own justice systems.

The difference is that in 1965, the Cook Islands gained internal self-government that included the justice system. For many years New Zealand has had nothing to do with law making, but it still has considerable involvement with the administration of the justice system. There are still two permanent judges, both appointed from New Zealand, who preside in regular Superior Course sessions. Appeals are to the Cook Islands Court of Appeal that consists of three New Zealand judges. All of this makes practical sense in a country that has a land mass the size of Rhode Island (though sprinkled over an area of the Pacific equal in size to Western Europe) and a population of only 20,000. The justices of the peace, though, are Islanders. They have jurisdiction over most criminal matters and in particular the young offenders.

On my arrival at the Rarotonga airport at 5: 00 a.m., my host, Hugh Baker, met me at that ungodly hour accompanied by his mother. She was there simply because she enjoyed meeting new people. As we waited for other potential customers, we chatted. Cook Islanders, I was to learn, chat. I explained why I was there. "The justice system!" grandma Baker exclaimed. "You shouldn't study ours, you should fix it. They put the wrong people in jail all the time and the bad guys get away with anything." That is just the sort of complaint you get on coffee row in Saskatchewan. This critique of justice systems must be universal!

The following Monday, I climbed on my bike and made my way into Avarua to commence my quest for restorative justice. Restorative justice, as anyone with even a faint knowledge of the Canadian justice system of the '90s knows, is the cant for consensus sentencing which generally attempts to integrate the offender with his family and community rather than punishing him in a way that further alienates him from them. Some cultures place that emphasis in sentencing, and claim more positive results than we achieve from our own adversarial approach where punishment and retribution play a prominent role. I knew that New Zealand had adopted some elements of restorative justice from the New Zealand Maori culture with positive results. I thought that the Cook Islanders, from whom the New Zealand Maori are descended, with their many years of independence, might have some lessons to teach Canadians. Hence my search there for restorative justice.

Avarua, the capital city of the Cook Islands, has a population I estimate at no more than several thousand. It was not hard to find the Justice building, with the directions I got from the police station. It was a converted cold storage warehouse left over from a highly subsidized, but failed venture in citrus growing. It was found by going down the alley between the post office and the chicken restaurant. There were no signs but, as in many of my old haunts in northern

Saskatchewan, everyone knows where everything is, and signs are of little practical value. The justice building is not the only one that is modest in appearance, suggesting a questionable frugality by the spenders of public money. The Parliament Building is a converted bunkhouse left over from the construction of the airport.

From that day on, I spent at least a few hours of each working day meeting with justices, probation officers, lawyers, jailers and administrators. No doubt, some of the novel things they were doing had little practical application to Canada and, as to others of their practices, I was baffled at first why they did them at all. The judges flew thousands of kilometers from New Zealand although there were lawyers on Rarotonga who were qualified. Eighty per cent of all criminal cases were heard by justices who had no legal training. Jail was a common disposition and the local jail was housing 40 prisoners when I was there. Trials and sentencing hearings were adversarial, conducted just as they would be in Regina or La Ronge. A recent aggravated assault trial was being widely reported in the paper. The accused had been given a sentence of four years in jail, and the victim was quoted as being outraged at the lightness of the sentence. "This is just like home," I mused. "Where's the restorative justice here? After 30 years, they've maintained the British system as intact as we have in Canada, with many of its warts and carbuncles."

Youths in the Cook Islands are defined in the legislation as aged 16 and under. In 1967, the newly established independent Parliament passed what was then, for a British Commonwealth country, radical and even daring legislation. It created committees on each major island. Each committee has a chair and a community representative, both of whom are chosen for the respect they command in the community. As it has evolved today, the Minister of Justice looks for persons with sufficient time on their hands that they can be called upon often and on short notice to participate in a meeting about a young offender. They must be able to bring to it not only knowledge of the community but also knowledge about youth. The Rarotonga chair was a retired probation officer and the community representative had recently retired as school principal. They were chosen as well for the energy they had as relatively young retirees. The rest of the committee consists of the investigating officer, a probation officer, the youth, of course, and the parents. The parents are vital, and they are required to come. If they don't, as one probation officer told me, "There'll be a warrant issued and we'll have them there within fifteen minutes. This is a small place. We know where people are."

If the chair orders, others may be required to attend. Another, more responsible family member is a likely addition. The victim may also be invited. At the hearing, the focus is on trying to find out what is wrong at the family level. If it is seen that the parents are being irresponsible, they can be 'admonished', fined, or made to pay restitution. If they need help, that is offered, and the extended family is often called upon for support, counseling, or even to take the young person into their home. If the youth is the focus, he, too, can be admonished and the people I talked to insisted that admonishment, which seems like the much scorned 'slap on the wrist', actually works. Or, he can be made to do community service work, abide by a curfew, attend school and a range of other things.

All of these decisions are arrived at by discussion, which eventually leads to consensus. Given the range of persons in

President's Report / Rapport Du President

In this 25th Anniversary year of the CAPCJ, we can look back with pride at the progress the Association has made, moving from police and magistrates courts with lay judges, to the well-respected backbone of the judicial system in Canada. Provincial Court Judges are now considered as professionally competent as Superior Court Justices. Making judicial history, we created precedent for systemic judicial reform; instigating change, we effected that change. Our principled approach for an independent judiciary is now an internationally recognized and lauded model. We can be very proud.

Unfortunately, however, our judicial focus is still diverted by the on-going litigation between provincial governments and judges, the issues now being: compliance with Commission recommendations, retroactivity and costs. Also creating tension is the lack of government funding for the CAPCJ. This seriously impacts the delivery of our education programs, the bilingual nature of our organization and the very essence of the way we conduct our business. We must work more efficiently and effectively, and at the same time, persuade governments more funding is essential.

These challenges are significant, but not insurmountable. The CAPCJ will continue to work hard to effect change in ways that strengthen and enhance Provincial Court Judges' effectiveness in their service to the public. With your courage, support and perseverence, the Association's next 25 years will be exciting and professionally stimulating.

En cette vingtième année d'existence de l'ACJP, nous pouvons regarder avec finerté les progrès que nous avons accomplis. Nous sommes passés des cours policières et de premières instances, où pouvaient siéger des gens san formation juridique; à des cours respectées qui sont le pivot du système judiciaire canadien. Les juges des cours provinciales sont maintenant considérés aussi compétents que ceux des cours supérieures. Fait marquant dans l'histoire judiciaire, nous avons créé un précédent avec les réformes judiciaries systémiques; nous avons instigué et mené à bien des changements. On loue et reconnaît internationalement notre position de principe sur l'indépendance judiciaire. Nous pouvons en être très fiers.

Malheuresement, nous ne pourrons pas nous concentrer que sur le point de l'indépendance judiciaire, tant qu'il y aura des litiges continuels entre les gouvernements provinciaux et les juges. Les points en dispute sont: l'acceptation des recommandations des commissions, la rétroactivité et la responsabilité des frais de cours. Une autre cause de tension est le manque de fonds gouvernementaux pour l'ACJP. Ceci a un sérieux impact sur nos programmes de formations, sur la nature bilingue de notre organisation et sur l'essence-même de la manière avec laquelle nous memons nos affaires. Nous devons travailler avec efficience et efficacité, et, en même temps, persuader les gouvernements que plus de subventions sont nécessaires.

Ces défis sont importants mais pas insurmontables. L'ACJP continuera de traviller dur pour mener à bien des changements qui reforceront et feront ressortir l'efficacité du service qu'offre les juges des cours provinciales au public. Avec votre courage, votre support et votre persévérance, les prochians ving-cinq ans de l'association seront excitants et stimulants professionnellement.

38. Johnson, p. 130.
39. Ramseyer, Mark and Nakazato, Minoru, "The Rational Litigant", Journal of Legal Studies, Vol. 18, No. 2, 1990. Cited by Miyazawa, Setsuo, "Administrative Control of Japanese Judges", Kobe University Law Review, No. 25, 1991, 45.
40. Japanese Federation of Bar Associations, "Report to the 9th U.N. Congress", Op. Cit., p. 50
41. Wagatsuma, Hiroshi and De Vos, George, Heritage of Endurance, Berkeley: University of California Press, 1984, cited by Miyazawa, "Challenge for Japanese Criminologists", pp. 48-49.
42. Op. Cit. Miyazawa, "Learning Lessons...", p. 46. Miyazawa argues that guns contributes to a culture of violence. He cites the U.S. homicide rate which is four times Japan's and the U.S. robbery rate per 100,000, 205 versus Japan 2 to prove his thesis.
43. 1) 1980-87 Japan's average unemployment rate was 2.5% as compared to Canada's 9.7%.
2)Miyazawa, "Learning Lessons" article at p. 48 and his Appendix 5 Table indicates that "Countries with higher crime rates show consistently higher unemployment rates".
3) Miyazawa, "The Enigma of Japan..." in Nelken (ed.), pp 204-207. Miyzawa's research indicates that: i) there is a "remarkably strong positive relationship between economic stress" and the killing of children; ii) "there is a positive relationship between the crime rate the indices of ecomic distress"; iii) "unemployment rates have a significant influence on homicide rates".
44. Miyazawa, Setsuo, "Learing Lessons", p. 49 and Appendix 7.
45. Miyazawa, Setsuo, "The Enigma of Japan", in Nelken (ed)., pp. 203-204.

We must respect the past and mistrust the present if we are to safeguard the future.

-Joseph Joubert

In no sense do I advocate evading or defying the law ... That would lead to anarchy. An individual who breaks a law that his conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

-Martin Luther King, Jr.

The most overlooked advantage to owning a computer is that if they foul up, there's no law against whacking them around a little.

- Porterfield

Man has his will - but woman has her way.

-Oliver Wendell Holmes

It is the true nature of mankind to learn from mistakes, not from example.

-Sir Fred Hoyle

attendance at these meetings, I was surprised to be told that consensus is always reached.

The last resort of the committee, after many meetings and call backs, is to send the youth to a judge. There again, the hearing is private and more in the style of a meeting - it takes place in the same room as the committee meeting. At last, in addition to all of the things the committee could have done, jail becomes an option.

In the Cook Islands, young people do the same things they do in Canada. They fight; they steal; they flout authority.... Yet, when I went out to the jail, there were no youths there. As the administrator said, "Yes, we get kids here on remand, but we have no serving prisoners. Jail isn't used much for kids. I've been here eight years. We haven't had a youth here as a serving prisoner since I started."

Winston Churchill once said that a society should be measured by the way it treats its criminals. There's another measure, and an even more important one. A society can be measured by the way it treats its young people. By that test, the Cook Islands is a marvelous success. Any society that can deal with its wayward youth by keeping them within their families and re-integrating them with their communities - getting them to adopt as their own the values of family and community - must be given high grades.

A justice system can't be assigned all the blame for a high crime rate - though it often is - nor can it take all the credit for a low one. But it can take some credit, so it too gets high marks in the Cook Islands. It is, by any measure, a low crime society. Statistics are a poor and often meaningless measure of crime. Sometimes pure anecdotal evidence tells the true story. The Cook Islands News, like any other newspaper, feeds consumer demand by reporting on crime. It included, the week I was there, in an apparent effort to fill its space, an item on dogs stealing kids' lunches from the school yard and the problem of truancy at another school. It might be argued that such reports say only that the editor had a sense of humor, but the Sheraton hotel matter cannot be dismissed so easily.

In the late 1980's, an Italian consortium, with the usual government guarantees, got the use of the Sheraton name to develop a large Caribbean style resort complex. While there were the usual questionable dealings (sand was shipped from Italy, to a place surrounded by the stuff, and all the labour was Italian), work went smoothly. It advanced until the glass was installed, ceiling fans were in place and the elegant Italian furniture, though crated, was on site. Then, suddenly, work stopped and the Italians went home. I rode past it on my bicycle on one of my round-the-island rides. The complex sits alone on a remote part of the island. The sign on this unguarded property doesn't say, "Keep out!" or "Trespassers will be shot!" as one might expect. Instead, it gently asks that users of the property do so at their own risk. I took this as an invitation to explore. I found that there was not one item of graffiti, and not one piece of glass had been broken in the six years that the place had sat there waiting for someone to turn the key. Try that in Canada. The Cook Islands is a low crime society.

The second topic of conversation as I waited with Hugh and his Mom at the airport was politics - what else, in a country where the perfect weather makes that topic meaningless. Hugh is a businessperson, and he has business's disdain for politicians and government. "There're too many of them, and all they do is talk, talk, talk and lead the

good life in a Rarotongan hotel." He may have a point. There are 28 members of parliament plus a prime minister, Sir Geoffrey Henry. My math tells me that means each parliamentarian represents fewer than 700 people.

Hugh had another point. It's a little difficult to escape the charge of mismanagement when a government gets to the point that it is forced to lay off half of the civil servants and impose first a 15% pay cut on the remainder, followed almost immediately by another 50% cut. That wasn't enough. The government was thinking of selling off its few assets. It wasn't selling the parliament building, and for good reason. What would a former workers' dorm fetch in a depressed real estate market? It was selling the airport, the harbor, the liquor board and the power generator. Nobody seemed too worried about the dismissal of 1500 bureaucrats, but there was great controversy about the sale of 'national assets'.

One day, while cycling around the island, I stopped for a drink. I was the only customer, a common situation at the little shops sprinkled about Rarotonga. I chatted with the clerk. Unlike many Rarotongans, English was very much her second language. "Prime minister no good. No good to sell airport. Queen's Representative should fire him. Why he not do it?" The Queen's Representative (equivalent of our governor-general) I'd seen cruising about in his chauffeur-driven limousine with a crown on the license, speaking at the opening of rugby games and kissing babies. He had no more power than Canada's governor-general, and certainly couldn't fire Sir Henry for selling the airport. I expect the people will fire him at the next election, though, if he goes ahead with his plans, however sensible and necessary. Furthermore, Sir Henry wasn't doing himself any good when he called the head of the Council of Ariki (council of traditional chiefs, who in theory own all of the land in the Cooks, and which wanted to buy what the government was selling) naive and promiscuous.

"I think the kindest way that I can describe the bid is 'impetuous, if not naive,' " Sir Henry said of the offer. He went on to comment that, "We have no objection to Cook Islands ladies (referring to the head of the Ariki council) having foreign boyfriends." That sounds like political suicide to me, but then, what do I know about politics of either the Cook Islands or the Canadian variety, except that they are wonderful food for hearty discussion.

Would any of what I learned about Cook Islands justice be of use in Saskatchewan? The most that can be said is, perhaps. But the lesson that I do bring back is that different approaches to criminal law have validity. Lessons can be learned. To make our own system work, it must grow and change, and decisions on how it changes must draw on the experience of others - even those who live in a tropical paradise.

Having found my nugget of restorative justice, I spent the rest of my time exploring the island and wondering why it seems such an idyllic society. Not only is there little serious crime but there are few of the other irritants that could frustrate a visitor. No one trudges the beaches trying to sell useless trinkets to gullible tourists. There's no begging, no tipping, no bargaining. Tourists are treated not like 'marks' from whom to separate money, but rather welcome guests. I thought of how to describe it. It reminded me of Salt Spring Island with white sand beaches or New Zealand without wind. It's Tahiti without commercialization - California without crime - Hawaii minus must also share some of the credit. These factors are the result of public policy decisions and not culture. They are therefore transferable between societies.

[1]. This work in progress was prepared by the Honourable Maryka Omatsu, Judge of the Ontario Court of Justice (Provincial Division), for distribution at the Ontario Judges Association Conference, panel on international options for judges, May 1998. An earlier version was presented at the Japan Foundation, Toronto, Nov. 7, 1997. Thanks to Judge Bigelow for help with this paper and to Heather Vaughan, for her assistance in compiling the Canadian statistics. Any errors of course are mine.

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[19]. Johnson, Elmer, Japanese Corrections: Managing Convicted Offenders in an Orderly Society, South Illinois University Press, Carbondale, 1996, pp. 206-207.

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[25]. Osanai, Satoru, "Fifty Years of Japanese Constitution and the Supreme Court", Chuo Law Review Vol. CII, No 11.12, Chuo University, Tokyo, 1996, p.10, citing Colegrove v. Green, 328 U.S. 549 (1946).

[26]. Benedict, Ruth, The Chrysanthemum and the Sword: Patterns of Japanese Culture, Charles Tuttle, Rutland, Vermont, 1946, generally.

[27]. Miyazawa, Setsuo, "The Enigma of Japan as a Testing Ground for Cross-Cultural Criminological Studies", in Nelken, David (ed.), Comparing Legal Cultures, Aldershot: Dartmouth, 1997, pp. 199-200. Miyazawa argues that Japan is not a reintegrative society, but that Japanese conform because "they know that conformity will be highly rewarded while the consequences of non-conformity are enormously costly."

[28]. Japan Federation of Bar Associations, "A Report on the Application and Practice in Japan of the International Covenant on Civil and Political Rights", Tokyo, 1993, pp. 15-20.

[29]. Johnson, p. 129.

[30]. Miyazawa, Setsuo, "Challenge for Japanese Criminologists: Learning Lessons from Japanese Experience in Policing Crime", Kobe University Law Review No. 24, Kobe, 1990, p. 46.

[31]. Johnson, p. 133.

[32]. Human Rights Watch, pp. 43-46.

[33]. Human Rights Watch, p. xi.

[34]. Japan Federation of Bar Associations, "Report to the 9th U.N. Congress", p. 23.

[35]. Miyazawa, Setsuo, "The Enigma of Japan" article in Nelken's, Comparing Legal Cultures, p. 201.

[36]. Japan Federation of Bar Associations, "Report on International Covenant on Civil and Political Rights, p. 103.

[37]. Fuchu Prison publication, Fuchu, p. 3. Japanese corrections sends to Fuchu prison convicts who "have advanced criminal tendency, lack the desire for rehabilitation and are difficult to treat. Many are members of criminal organizations, stimulant drug abusers, alcoholics or vagrants."

12. Women:

Japan's reported numbers of crimes against women is low relative to Canada.

However some of the Japanese figures may reflect low victim reporting and low police follow-up, as police are reluctant to respond or to become involved in spousal disputes. There is a Japanese adage, "When husbands and wives quarrel, even dogs back away." However the main reason given for divorce in some 180,000 Japanese cases each year, is the husband's violence.

13. Juveniles:

Japanese juvenile crime (under 20 years of age) is low but accounts for 30-60% of all arrests. In 1981, 1.7% of juveniles were arrested for juvenile offences.

The Japanese Federation of Bar Associations attributes " a lack of structure, a lack of a sense of norms, and play that involves lawbreaking"[40] as causes of juvenile delinquency.

Japanese young offender "trials" are conducted by a judge, with the accused, his family, two mediators and no prosecutor present.

CONCLUDING THOUGHTS

Of industrialized countries, Japan has long had the lowest crime rate for many decades, a low incarceration rate, a high ratio of police to civilians and the toughest gun regulations. Japan is a stable, prosperous, homogenous society, and compared to other first world countries, Japan has greater economic equality due in part to a lower unemployment rate. There is community involvement in policing and in the rehabilitation of young and first offenders. There is a greater discretion and willingness on the part of the police, prosecutors and the courts to exhaust other remedies before imposing a jail sentence. Japan's unique culture is based on social solidarity and strong family and community bonds.

Crime prevention is assisted by effective policing at the local level, tough gun regulations, a public belief in self-correction and a tradition of saving face and maintaining one's family honour. There, offenders are urged to confess and seek leniency. Faced with an apology and often restitution, tradition requires society to assist in the offender's reformation. Japanese culture also explains the social expulsion of recidivists who have not taken advantage of earlier overtures of rehabilitation. Repeat offenders can look forward to an old age spent in solitary isolation in spartan prisons.

Sociologists correlate crime with high male unemployment rates and social alienation. Yet a Japanese study conducted in one of Tokyo's poorest wards, Arakawa, found that despite the residents' poverty there was no marked increase in the crime rate and that the residents maintained positive attitudes because they believed that things would improve.[41]

Cultural differences help explain Japan's low crime rate, but

- Japan's tough firearms regulations[42],
- lower unemployment rate[43]
- greater social egalitarianism[44] and
- high saturation community policing[45]

fifty years - Mexico without garbage and grinding poverty.

How did it come to be that way? There are at least two reasons. From what I have seen of New Zealanders, they might have been very benign and non-condescending colonialists. But a more likely reason is that the Islanders have withstood the shattering forces of colonialism without losing control of their land. Land, as I mentioned, remains theoretically owned by the Ariki. It is parceled out to members of the particular Ariki's clan, and them only. Land controlled by a particular family is passed on by a consensus-seeking conference on the death of each individual. It can't be sold to non-islanders, only leased, and then for a maximum of sixty years.

Beyond that, it may just be the strength of the culture from which all this goodness sprang. Whatever it is, my greatest wish is that somehow the Cook Islanders hang on fiercely to what they have, even if it means living at the level of near subsistence that many of them do now. All the thousands of American and Japanese tourists who will inevitably discover the Cooks and swamp the place with oh-so-tempting tourist money will test that strength, at least as much or more, than those nagging missionaries and the bewigged lawyers did more than a century ago.

I got a chance to test my theory that the Cook Islands is Hawaii fifty years ago. I landed at Honolulu International Airport at five a.m. for my nineteen-hour stopover en route via Vancouver to Regina. I had decided to rent a car, drive out of the city, have a much needed snooze, then ramble around Oahu. By 5:45, I had found my way to a freeway and was heading, in the pitch darkness, to wherever it would take me. Before I got far, I saw ahead of me some sort of Disney World marvel - a huge band of lights winding off into the distance. Suddenly, it dawned on me. This was the oncoming side of the freeway, six lanes wide, with bumper to bumper headlights as far as I could see - Honolulu rush hour at 6 a.m. In Rarotonga, the speed limit is 40 kph. The mopeds drift on by at half that speed. There are no freeways in Rarotonga. Honolulu is a snakepit of them. In the time since I'd been there, they'd made a Los Angeles out of Honolulu. I pray to all the gods of Polynesia that a similar fate does not befall Rarotonga.

Fifty hours after I climbed on the Boeing 747 at the tiny Rarotongan airport, we broke through the thin Saskatchewan clouds. While I had been gone, it had snowed - tons of snow. White stretched off to the horizon, a bleak and forbidding sight to any Cook Islander. But I could distinguish Buffalo Pound Lake, then Last Mountain Lake, finally Lumsden, Craven and even Kannata Valley, our second home. It felt good to be home.

Over the loudspeaker came an announcement. "We're approaching Regina and will be landing soon. We have a special announcement. Our captain, who has been flying for forty years, is retiring. This is his last flight. We ask you to join us in wishing him well." By this time, our captain was on final approach. He rounded out, and with barely a whisper, the plane touched down. It was a landing to make any pilot shout with joy. We all clapped. I think our pilot was glad to be home, too.

Everything has its beauty, but not everyone sees it.
-Confucius

IN A LITERARY VEIN

The Stars in the Bright Sky

Magistrate **Anne Middleton***, who is married to a clergyman, recalls events one Christmas.

In Tyneside, I was used to answering the door to faces familiar to many a magistrate the length and breadth of this land. They had been up before some of our colleagues for many a drunk and disorderly, not a few criminal damages and even the odd handling and as they stood on my doorstep you could smell the beginnings of another D and D.

The routine rarely altered: these wanderers mapped out their perilous routes (Skye down to Portsmouth via our Newcastle cul-de-sac), then asked for the vicar and, if he was out, remarkably would offer to put up with money as a substitute for my husband. That was my cue to say that I never gave money (had they not read the wayfarers sign by our gate that spelt "cheese sarnies"?) whereupon they settled with the same remarkable ease for the aforementioned menu. One time I ran out of cheese and the Aberdeen-to-Brighton wayfarer threw the alternative jam sandwiches in the bushes: "Do you think I was brought up in a slum?" My children have not enjoyed jam sarnies since.

One Christmas, I answered the doorbell to a sallow silent man. He started asking for the vicar and as I wondered if there was any cheese in the fridge I saw out of the dark behind him the whispering shapes of an excited group of singers poised for their first carol. Shame and confusion! "Not only have I failed to recognise a member of our church choir but - forget the cheese, are there enough mince pies to go around?"

" The holly and the ivy" covered my red face and then my three-year-old was asked her favourite carol. She only knew one, " Away in a manger, no crib for a bed". We all stood round the half-lit doorway, mouthing the familiar words without thinking. The sallow man stood slightly apart from his fellows and for a time viewed us all as if from a great distance. Then with infinite sadness and deliberation he began to join in the Christmas carol, which, more than all the others put together, oozes with childish memories, with lost innocence and stars in bright skies.

The choir briskly discharged their final carol, "We Wish You a Merry Christmas", and they were off to their next port of call, bumping into the returning vicar on the pathway and leaving the sallow man on the doorstep. He did not want money. He did not want food. He did not want a bed for the night. He had left Durham prison that morning, ignored his probation officer and then reluctantly found that he needed help to sign on for benefits - easily done for him next day. The reason for his long

in total isolation. In 1993, seven were executed.[32]

9. Civil Rights:

In Japan there is less emphasis than in Canada, on individual and civil rights and there are many fewer procedural protections. This has led to complaints regarding forced confessions because of police interrogations involving physical and mental abuse. There is a lack of legal representation to persons held by the police while under investigation and suspects can be held up to 23 days in police jail house custody.[33]

Bail is permitted only after the offender has been charged and those freed must pay very high bail bonds. There is no system for filing complaints about arrests.[34]

10. Prisons:

Japan is criticized externally by Human Rights organizations and internally by academics and the Japan Federation of Bar Associations regarding its disregard for human rights. On the other hand, Japan has few jails (59) and they aren't full (at 70% occupancy). Japan has had no prison riots since the period following WWII.

Japanese prisons are criticized for the use of solitary confinement, the prohibition against speech or making eye contact, the restrictions on contacts with the outside world, the brutality of the guards, the myriad of "rules enforced by draconian discipline", censorship of mail and lack of exercise. In the Japanese prison "there is no meaningful treatment or real therapeutic activity. Work is forced labour and at the same time serves the security of the institution. Only 2.8% of inmates receive vocational training and just 1.2% participate in education programmes."[35]

The philosophy is to create the "feeling that liberty is deprived, pain is inflicted and that this is not a place to come back to again."[36] Yet the recidivism rate for prisoners at Fuchu prison, Japan's largest jail, is 100%[37] and the national average recidivism rate for those who have been incarcerated is 58%.[38]

11. Legal Profession:

Annually only 700 of the 20,000 Japanese applicants pass the bar admission course. The successful candidates then spend two years at the national Judicial Research and Training Institute for practical training as a judge, prosecutor or lawyer.

Upon graduation, some 60-100 will be recommended by the Supreme Court to the Cabinet as assistant judges. Once appointed, a judge spends 10 years as an apprentice, assistant judge. Thereafter, judges are re-appointed every 10 years with mandatory retirement at age 65 and 70 for Supreme Court judges. Judges are life-long civil servants, sent around the country initially for 3 year stretches. In Japan, there is greater bureaucratic supervision of judges and critics say less concern for the doctrine of judicial independence. Control is exerted by the General Secretariat of the Supreme Court, leading to "highly predictable court decisions".[39] However, despite daily scandals involving corrupt politicians and corporate executives, there are few if any allegations of judicial impropriety.

Japan has 2,800 judges, slightly more than Canada with 2,500.

disputes are settled through a trial and 10% through consultation with a lawyer.[22]

Litigation against the government is extraordinarily low in Japan. For example, it is 800 times lower in Japan than that of the former West Germany. Critics attribute this to the judiciary's support of the government.[23] In fact the state wins over 90% of all lawsuits in which it is a party.[24] The Japanese Supreme Court, described as conservative, has been "very cautious to avoid what former American Supreme Court Justice Frankfurter called the 'political thicket'".[25]

6. Confessions:

Japan has been described in the literature as a country with a "culture of shame".[26] . Braithwaite, John, Crime, Shame and Reintegration, Cambridge University Press, 1989, p. 100. This tradition has been attributed as the reason why most accused confess to the offence and ask for leniency.[27] Prosecutors are reluctant to proceed against an offender without a guilty plea, with the confession being described as the "king of evidence". All guilty pleas are "trials" and the law requires independent proof in addition to a confession. On a guilty plea "trial", the sentencing and evidence supporting the conviction are heard together.

Critics however, allege that there is a large number of wrong verdicts due to coerced confessions in Japan.[28]

7. Sentencing:

The Japanese emphasise a young or first offender's rehabilitation. There is no legal possibility of a jail sentence for a person under the age of 20. Most adult Japanese offenders are given suspended sentences.

In Canada, 56% of the fines were less than $300. One-third of the fines were imposed for impaired driving offences. Less than 1% of convicted persons were ordered to pay restitution, although property offences constituted the greatest proportion of offences.

The median Canadian sentence in prison was 90 days for crimes against the person and 34 days for property offences.

The typical Canadian convict is under 25. In Japan, the mean age is 40, and 55% of prisoners are between 30-50 years of age.[29] Japan sends 2% of convicted accused to jail versus 33% in Canada. These differences, i.e., older convicts and less use of jails in sentencing, support this observer's conclusion that the Japanese are generally more reluctant to send someone to jail before other avenues have been tried.

Canada's incarceration rate at 115 per 100,000 is the 5th highest in the industrialized world.
The Japanese believe that jail sentences are "not a significant crime-preventive factor...and severity of punishment does not appear to matter much, because prison terms are relatively short in Japan."[30]

However, Japanese repeat offenders are 64% of the jail population and 32% of them are yakuza (Japanese Mafia).[31] To this observer, jails are used by the Japanese for punishment and for societal protection. Efforts at rehabilitation are put in out-of-prison sentencing.

8. Death Penalty:

Japan has the death penalty for seventeen crimes. Presently 57 persons are under sentence of death. Prisoners often spend 20-30 years on death row. Most live

stay in Durham was locked behind the set face but the burden of whatever he had done hung like a frosty fog around him as he waited by our door.

And to think that in the morning he had slopped out in the stench and din of Durham prison and that by the evening had found himself with a load of Christmas carol singers performing "Away in a Manger" at a vicarage door - and that he could hardly endure the sadness of what had never been.

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* Anne Middleton is a voluntary, part-time magistrate in England. She was appointed to the North Tyneside bench in 1977, Tyneside being an area of high unemployment, poverty and a cheerful community spirit. After 15 years, with her husband's change of job, she joined the old railway town of Swindon's bench and now, with yet another move, she is a magistrate in Inner London where, in contrast to Tyneside and Swindon, interpreters are in high demand. This piece first appeared in ***The Magistrate***, Vol. 53, No.10 (December/January 1998), p.275, in the column "Retiring Glance".

ELECTION UPDATE!!! VOTE

Those of you who read the article in the previous edition of the Journal (Vol. 22, No. 2, Summer, 1998) by Judge Judith Lanzinger, "A Personal Reflection on Judicial Elections", will realize that the vote took place on November 3, 1998. You may not be aware of the outcome of the vote - regrettably, Judge Lanzinger went down to defeat at the hands of Lucas County Commissioner Mark Pietrykowski, by a razor-thin margin. Of 225, 465 votes cast, Judge Lanzinger, who was on the Republican ticket, received 112, 141 to 113,324 for her opponent. The difference of 1183 votes represents a scant 0.01% of the votes cast. Judge Lanzinger was stoic in defeat observing that there are many things worse that one has to accept in life than electoral defeat. She resolved to return with vigour to her job as Common Pleas Court Judge and do the very best job that she could for the people before her. Our hats are off to Judge Lanzinger for the valiant effort that she made in this behalf and for allowing us here in Canada to look in on and up close to her as she went about the business of campaigning for office.

INTO THE NEXT MILLENNIUM

DR. SHEILAH L. MARTIN, Q.C.*

FRIDAY, OCTOBER 9, 1998

As we approach the end of this millennium and prepare for the next, there is the urge to confront our histories: to assess where we have been, to gauge what we have learned and to prepare for the next step. We attempt to derive some meaning from the past and to heed the admonition that those who do not understand the past are destined to repeat it. However, history abounds with lessons ignored. Santayana's famous quote was written in 1905 but it did not prevent the Great War from having a sequel, or stop the killing fields of Cambodia or the ethnic cleansing of the former Yugoslavia. Perhaps we are slow learners. Perhaps the problem lies in the process of trying to find the one lesson history teaches. It may be that it is futile to try to discern some objective truth beyond the bounds of time, place, culture and myth.

With this in mind, perhaps all that is possible at this juncture is to take a snapshot of modern times and to look forward to future challenges. To some the year 2000 is a computer problem. To others, the date has a solemn, indeed sacral significance. Those who believed that the second coming of Christ, predicted in the book of Revelations was scheduled for the year 1000 wonder if they may have been off by ten centuries. There are also those for whom the year 2000 is principally a marketing opportunity. Packages of M & M candies now state that they are "the official candy for the next millennium".

Today I have been asked to offer some observations on judging in the next millennium. While there are many specific issues which arise, I would like to focus the frame of our snapshot on the many powerful

*Dr. Sheilah Martin is a professor in the Faculty of Law at the University of Calgary. She is a former Dean of the Faculty and the recipient of the Distinguished Service Award for Legal Scholarship from the Law Society of Alberta. In October, 1998, she made a presentation to provincial and territorial judges in Calgary for Conference '98. Her speech was broad in scope and covered the breadth of this millennium, with a look into the next one. She described it as "a snapshot of modern times and ...(a) look forward to future challenges". The upshot of her examination of this disparity is her conclusion that judges of the provincial courts "have demonstrated that they have the character and commitment to advance the interest of equality into the next millennium and beyond".

*Sheilah Martin, Ph.D., est professeur à la faculté de droit de l'université de Calgary. Elle était auparavant doyenne de la faculté et s'est vue décernée le " Distinguished Service Award for Legal Scholarship " par la Law Society of Alberta (Société de droit de l'Alberta). En octobre 1998, elle a fait une communication aux juges provinciaux et territoriaux à Calgary lors de la conférence 98. Son discours était d'une grande portée et couvrait toute la durée de ce millénaire, en jetant également un regard sur le prochain. Elle l'a décrit comme " une prise de vues des temps modernes et... un regard vers les défis futurs ". La conclusion de son examen de cette disparité est que les juges des cours provinciales " ont démontré qu'ils avaient le tempérament et la détermination pour faire progresser les intérêts de l'égalité dans le nouveau millénaire et au-delà ".

3. Police:

Generally Japanese are co-operative with police and prosecutors. 80% of suspects are prosecuted without arrest, and only 19% were held for longer than 3 days.[12]

Japanese practice saturation policing. There, police visit all households in their jurisdiction 1-2 times a year, and regularly travel the streets on foot or by bicycle. Stations (not much larger than corner stores) are located in all neighbourhoods and police together with neighbourhood committees, made up of housewives and seniors handle local problems.[13]

Perhaps the general feeling of personal security is a result of the higher police clearance rates (i.e., rate at which suspects are found and prosecuted) in Japan as compared to Canada.

However, a Japanese critic pointed out that the West German police are twice as productive as their Japanese counterparts, given that Japanese police have fewer and less serious crimes to investigate.[14] Perhaps that argument can give us comfort in Canada.

4. Cost:

Relative to North America, Japanese government spending on the administration of justice is low. Police spending is a notable exception. 1990 data regarding population per police, indicate that Japan is a highly policed state. [15]

Justice Expenditures between the two countries illustrates the high cost of Japanese policing.[16] [17]

Compared to western countries there are far fewer Japanese judges (2,899). The number of Japanese judges is the same as it was 100 years ago and slightly more than Canada's figure although Japan's population (125,860,000) is over four times that of Canada. There are few Japanese lawyers (16,368) and even fewer women in the profession (1,200).[18] Contrast this with the province of Ontario which has more lawyers (27,879) than the entire country of Japan and as well as a higher female representation at the bar (7,982).

Japanese cultural tradition and history help keep public costs down. Probation officers (almost 50,000 are volunteers, who are highly respected members of the community, with only 1,000 salaried professional officers).[19] Mediators, who are involved in all cases in family and juvenile court, are public- spirited citizens. All volunteer officers and mediators receive out of pocket expenses. Half-way houses are privately owned and jails are workhouses, thus partially self-supporting.[20] There is almost no public support for legal aid. The Japanese government provides Legal Aid with $2 million annually for civil matters only. Support for indigent Japanese criminal accused is provided by the bar. (in 1996, 139 million yen or $1,390,000. Cdn)[21]

5. Non-Litigious Society:

There is a well documented Japanese cultural aversion to the settlement of disputes in the courts. The justice system is slow and expensive. To further dissuade litigation, there are high court filing costs (10% of quantum sought), no class action suits, and no contingency fees for lawyers. This reluctance to go to court, is referred to in Japan, as "20% justice". Only 10% of

second largest economic power, Japan is a society blessed like Canada with a high standard of living, but unlike Canada with a low crime rate, a largely intact family and community structure, low unemployment and relative economic equality.[3]

Japanese society, as one observer put it, is "honeycombed with community committees made up of private citizens and officials that consult on safety, juvenile delinquency, violence and child welfare etc.[4] "Neighbourhood police are very successful in catching criminals and victims expect to receive compensation from the offender. Japan has the "strictest laws on firearms ownership of any democratic country in the world."[5] Streets are safe and there is a public sense of safety, especially for women, children and the elderly.

Japan has been described by social scientists as a "reintegrative-shaming" society where apologetic offenders, once rehabilitated are re-admitted into the fold. I found this description accurate regarding first time offenders, but it does not apply to recidivists. Japanese society shuns and discriminates against repeat offenders and those persons classified as exhibiting "advanced criminal tendencies". The rehabilitation and life of such persons seem to be of little public concern.

Critics also point to Japanese violations of offenders' civil rights before trial, specifically to the lack of legal representation and the length of time spent in custody while police are conducting an investigation. After conviction, life worsens. Japanese prisons are work houses, where prisoners live in isolation, are prohibited from speaking and contact with others is extremely limited. Every aspect of prison life is regulated by rules, discipline and punishment. There are allegations of prison guard and police brutality.

I do not share the view of those, who seem to think that such harsh treatment should be doled out in Canada, but I am interested in what positive lessons might be learned from Japan. In the rest of this paper, I shall present some comparisons which I hope will assist thinking to this end.

FACTS ABOUT JAPAN:

BACKGROUND:

1. In Japan, crimes are classified as those against the State (eg. state secrets), society, or individuals. The Criminal Code and nine special laws stipulate "criminal offences". The "special laws" include offences relating to elections, automobile offences, income tax, narcotics and prostitution.

There is "leniency towards morals crimes (eg. homosexuality, prostitution, abortion)".[6] The Japanese Criminal Code prohibits plea bargaining,[7] motive must be proven as a fact as an element in sentencing and confessions must be corroborated with other evidence.[8] Japan abolished the right to a jury trial in 1943.[9] Virtually all jail sentences involve imprisonment with compulsory labour.[10]. Op. cit., Oda, p. 395.

2. Crime Rate:

Japan continues to maintain the lowest crime rate among industrialized countries.[11] Yet in Japan unlike in Canada, there are daily revelations on the front pages of the press of high level corporate white collar crime. Apparently Japanese prosecutors and detectives are encouraged to pursue white collar criminals and to leave street crime to the beat cop.

social trends which work against the judicial enterprise. As I hope to illustrate, many of the core characteristics and methods of judicial decision-making appear to be at odds with certain developments of modern culture. It is interesting to note that despite the strength of these trends, they have not succeeded in eroding public confidence in and respect for the judiciary. The need for an independent judicial forum continues to be recognized at both the societal and personal levels. In my view a most important factor underlying the court's continuing legitimacy is how it rises to the challenge of maintaining the best of traditional methodologies while redefining and enlarging basic concepts to ensure an inclusive and accessible justice system.

I would like to begin by suggesting what you already know and that is that judging is more difficult than ever before. As has been noted there are more responsibilities, tensions and expectations. Laws and society evolve rapidly, laws are increasingly complex, society is increasingly diverse, and the Charter expands the judicial mandate. It is also true that the public does not really understand what lawyers and judges do. At its most basic judges proceed on the basis of proven facts, argument and principle. Judges are required to listen to all sides and to reserve judgment, to contemplate and canvass all points of view presented. Judges are asked to put themselves in the shoes of each litigant and to try and imagine the case from their particular perspective and social condition. Judging involves a conscious commitment to rationality, to principle, to fairness, to duty and to doing the right thing. It involves making difficult decisions and providing reasons for them.

The underpinnings and methodology of judicial decision making can be contrasted with many of the current trends in Western culture.

Let us begin our review of these trends by noting the commonplace. We are in the Age of Information. Computer technology and mass media have greatly increased the type and amount of information available to the public. Everyone can know anything and the teacher is no longer the one person in the village with a book. However, access is not analysis. As data floods the senses and we become multi-media and interactive the tendency is to suspend analytical abilities, to not spot the junk information and seek authenticity and accuracy through other sources. The cynicism gained by understanding that pictures can be morphed, and proof manufactured is qualitatively different from the skills of critical thinking required in modern times. Students now create papers out of strings of quotations lifted from books they have never read and would be hard pressed to guess what century they were written in. In the 1995 Massey Lectures Canadian John Ralston Saul argued that increased knowledge has not made us conscious.

The frenetic pace of modern existence also works against analysis, sustained thought, deliberation and contemplation. Cars and planes are faster, communication is instantaneous. Everyone is expected to work with increased speed and do more with less. People watch multiple television programs at once, not only channel surfing by doing so in pictures within pictures. Tragically they do not miss much of substance. Television has not only reduced the attention span of viewers it invites passivity and intellectual decline. If Descartes had been writing today, during the cult of entertainment, he would have said "I **watch** therefore I am". While a free marketplace of ideas may never really have existed, it is now replaced by a competition between increasingly outrageous nine second sound bytes.

In the general Western culture feelings have displaced ideas and there is a retreat from principle. At the turn of the last

millennium it would have been almost impossible to find the word "I" used in a literary text in a manner connoting self conscious expression. By way of comparison, fast forward to the radical self-absorption of Woody Allen and Ally McBeal. A growing acknowledgment of group rights has not blunted the self-centredness and self-sufficiency of the new economy. Signs of civic mindedness are sparse and those who stand for public office are sometimes feared to be motivated by the allure of power alone. Recent cases of proven fraud on the part of certain politicians led someone to comment that a modern election is like a reverse lineup — you choose who is going to rob you.

Resort to principle has also fallen out of fashion. In part this may be because of the demise of trust in traditional structures or it could be attributed to the understanding that principles are hard to define and notoriously difficult to apply. Intense debate over what principles mean is a healthy sign. However, today it appears that people have become bored with lofty concepts and believe that there is no principle except politics. So often pragmatism prevails. While truth used to be a singular concept, the post-moderns caution that there is no capital "T" version of truth. There are many truths and they are created within particular social and historical contexts and not found in the great abstract beyond. However, to learn that a truth is partial does not make it a lie, it just means that it may not be true in all cases or for everyone. And when we realize that certain of our truths are not shared, there is no need for nihilism. It is the time for meaningful conversation to begin.

However, today we seem to have moved even further away from any shared understanding of truth and truth is often discussed in relation to what pollsters predict people will accept. A primary purpose of language has become propaganda, not communication. The existential gives way to the expedient and principle is made secondary to cost. However the human spirit needs more and we are bankrupt indeed if our only currency is money. There is a need to reverse the idea that justice is a commodity, rather than a cornerstone. When market forces and technology lead civilization it is not surprising that justice is presented as a side dish, served on the cheap.

Public cynicism results if people feel that they have been manipulated. And such feelings rarely stay contained to the originating source. For example, when citizens believe that a process of consultation is only used to give the appearance of participatory democracy, when the government's decision was taken long before and in a back room their distrust is likely to have a spill-over effect in the judicial realm. The failure to differentiate between the different role and mandates of various public institutions can be more easily explained if judges are mislabeled as political actors and treated as civil servants.

In this regard it is interesting to note how many members of the Alberta judiciary are reading a book about the misadventures of a group attempting to climb Everest. The book is called *Into Thin Air* and was purchased because they thought it described the fate of the Justice Compensation Committee's recommendations.

The modern climate has also fostered dichotomous thinking. Dichotomies provide the easy either/or formulation, without nuance and complexity, and allow a quick yes/no response. It is an approach which creates false divisions and disallows long answers. For example, the Clinton question is framed in terms of whether you are concerned with the sex or the lie — as if you are unable to grasp the possibility or scope of their interrelation.

If Western culture stands poised to meet the next millennium equipped with the devaluation of analysis, disdain for

IS CRIME AND PUNISHMENT CULTURAL?: A VIEW FROM CANADA and JAPAN[1]

As a criminal court judge sitting in Toronto, a daily parade of grim urban reality passes before me. Overwhelmingly the offenders that I see are poor, uneducated and unemployed. Many are mentally ill and off their medications or are addicted to either alcohol or drugs. The criminal justice system is slow, driven by process and paper, expensive to keep up and given the high percentage of repeat offenders, unsatisfactory.

For many decades, Japan has held the record for the lowest crime rate in the industrial world. In September 1997, I was able to acquaint myself with some reasons for this during a three week trip to Tokyo and Kyoto, through the auspices of the Canadian Government. There, I observed criminal trials, met with judges and lawyers and visited Japan's largest jail (Fuchu) and Tama juvenile training centre, outside of Tokyo.

A Canadian judge sitting in criminal court, spends most of her time determining guilt. Admittedly, advances have been made from the era when accused were thrown into vats of boiling water and those who died were declared guilty. In our courtrooms, the quest for the "truth" is arguably secondary to the correct application of a complicated formula (the "law") to sworn evidence, which if admitted, passes as the "facts". At the end of the day, upon a finding of guilt "beyond a reasonable doubt", some attention is paid to fashioning an appropriate sentence. More emphasis is placed on retribution, denunciation and deterrence. "Justice" is not a concept that merits more than a passing acknowledgment.

On the other hand, in Japan, since guilt is usually admitted in 90% to 95% of cases[2], the court's primary role is as sentencer and thus more concerned with restitution, rehabilitation and prevention. As the world's

For many decades, Japan has held the record for the lowest crime rate in the industrial world. In September 1997, Judge Maryka Omatsu, through the auspices of the Canadian Government, made a three week trip to Tokyo and Kyoto in Japan. While there, she observed criminal trials, met with judges and lawyers and visited Japan's largest jail (Fuchu) and the Tama juvenile training centre, outside of Tokyo. She compares the Canadian and Japanese criminal justice systems and concludes that "(c)ultural differences help explain Japan's low crime rate, but Japan's tough firearms regulations, lower unemployment rate, greater social egalitarianism, and high saturation community policing, must also share some of the credit. These factors are the result of public policy decisions and not culture. They are therefore transferable between societies."

Pendant de nombreuses décennies, le Japon a détenu le record du plus faible taux de criminalité du monde industrialisé. En septembre 1997, Madame La Juge Maryka Omatsu, sous les auspices du gouvernement canadien, a fait un voyage de trois semaines à Tokyo et à Kyoto au Japon. Durant son séjour, elle a observé des procès criminels, elle a rencontré des juges et des avocats et elle a visité la plus grande prison du Japon (Fuchu) et le centre de formation juvénile de Tama, aux environs de Tokyo. Elle compare les systèmes de justice pénale canadien et japonais et conclut que " les différences culturelles peuvent en partie expliquer le faible taux de criminalité du Japon, mais la réglementation stricte des armes à feu, le faible taux de chômage, l'égalitarisme social et la densité des services de police communautaires jouent également un rôle important. Ces facteurs sont le résultat de décisions de politique gouvernementale et non de culture. Ils sont par conséquent transférables d'une société à l'autre. "

IN A LIGHTER VEIN

Do You Know His Honour?

A small town prosecutor called his first witness to the stand in a trial - a grand motherly, elderly woman. He approached her and asked, "Mrs. Jones, do you know me?" She responded, "Why, yes, I do know you Mr. Williams. I've known you since you were a young boy. And frankly, you've been a big disappointment to me. You lie, you cheat on your wife, you manipulate people and talk about them behind their backs. You think you're a rising big shot when you haven't the brains to realize you never will amount to anything more than a two-bit paper pusher. Yes, I know you." The lawyer was stunned. Not knowing what else to do he pointed across the room and asked, "Mrs. Williams, do you know the defence counsel?" She again replied, "Why, yes I do. I've known Mr. Bradley since he was a youngster, too. I used to baby-sit him for his parents. And he, too, has been a real disappointment to me. He's lazy, bigoted, he has a drinking problem. The man can't build a normal relationship with anyone and his law practice is one of the shoddiest in the entire province. Yes, I know him." At this point, the judge silenced the courtroom, adjourned the proceedings for a short time, and called both lawyers into his chambers. In a very measured voice, he said with menace, "If either of you asks her if she knows me, you'll be cited for contempt!"

They're Done!!!

Some courts use a bell to let judges signal to the clerk from their chambers. A young solicitor recently asked one clerk what the buzzing sound signified. "Oh, it's like a microwave beep," she replied. "It means they're done!"

It Means...

Some guidance for judges who must contend with the ever-expanding computer lexicon in their courtrooms: **ISDN**: It Still Does Nothing; **IBM**: I Blame Microsoft; **DOS**: Defunct Operating System; and, **WWW**: World Wide Wait.

Blissfully Wed

The judge asked the young lady why she had neglected to pay anything towards her outstanding fine for four weeks. "I got married about a month ago," she replied. "And I'm only now getting on my feet again."

principle, the focus on feelings, the ascendency of the personal, and a preference for dichotomous thought, we will not be adequately prepared. If one appreciates the extent to which these modern trends contrast with the core characteristics of the judicial role what may be surprising is not that there are questions concerning the judiciary, but that the public still maintains such a strong support for the contribution that judges make to society. Given the impact and direction of these trends there is, in my opinion, an even greater need for the legal profession and the judiciary to promote a civil society than ever before.

What the judicial enterprise offers is a process and a promise we will need on our journey into the next millennium. Canadian society has long recognized the need for courts. Individuals know the relief of turning to a neutral and independent forum for the problems they face. Those who have decried the courts for being soft on crime, find themselves far more favourably disposed to the presumption of innocence when they stand charged with an offence. There is a widespread recognition that there is something of enduring merit in hearing all sides, of formulating argument based in principle, of taking rights into account, of assessing the impact of actions and promoting personal accountability. The legal system is not only a moral force, it can be an instrument of social cohesion. There is something noble and proud in listening and giving people their due and their day, of believing the best about them until we no longer have a reasonable doubt otherwise. While it may be stretching to imagine that law, not Esperanto will be our common language, the test of a people lies in how they resolve their conflict. Do we want antiquity to judge our problem solving skills based on the *Jerry Springer* show?

This summer I read a book with the improbable title of: *How the Irish Saved Civilization* outlining how the Irish monks preserved the knowledge gained in the classical period against the raids of the Vandals, Goths and Huns. A few years ago Justice Sopinka argued that judges need not lead a monastic existence, but I do not think he would object to judges being the custodian of fundamental processes and principles.

In meeting the challenges of the next millennium the promise must be one of equal access to an inclusive justice system. The last quarter of the last century has demonstrated that absolute judicial neutrality or objectivity is not possible, or even desirable. In its place stands the obligation of judicial impartiality and a heightened judicial awareness of diversity. The Canadian Judicial Conference Committee on Equality has affirmed that the public has a right to expect that judges treat all people equally. Madam Justice McLachlin speaking to a conference on judging in a diverse society said: "It is beyond debate that the good society requires an impartial justice system that treats all who come before it as equals." An open mind need not be empty and the search for an enlarged mentality requires respect for the world view of others.

Equality in this context requires that the various life experiences of differentially situated individuals are taken into account at every stage of our legal process. Despite some recent modifications by certain members of the Supreme Court, the general thrust of the *Charter*'s equality guarantee is clear. Identical treatment is no longer all that is required under the rubric of equality. A formal view of equality must give way if there is to be a recognition of historically based social meaning. In short, there can be no pretending that race, culture, age, sex, sexual orientation and disability do not exist. The focus is not to be on difference but on comparative assessments which must focus on the social economic and political placement of groups.

In recent years we have been exposed to the dangers of stereotypic thinking. The use of encoded myths fall outside the need for careful analytic thought and fairness and we have discovered the insidious origins and the debilitating effects of stereotypes. What is startling about myths and stereotypes is the small number of words frequently employed in their expression. We have also been reminded that in a world of self-conscious diversity the admonishment that justice must be seen to be done includes an obligation to have a representative judiciary. In her article "The Fiction of Judicial Impartiality" the Honourable Judge Maryka Omatsu of the Ontario Court, Provincial Division addresses the justification for increasing diversity on the bench, pointing out that public respect for the law requires a judiciary that is more reflective, aware and sensitive to the people before the court.

We have benefitted from the extensive studies and insights of the Royal Commission on Aboriginal Peoples, the Canadian Panel on Violence Against Women and the Commission on Systemic Racism in the Ontario Criminal Justice System which explore systemic inequalities and highlights the problems which arise when a uniform standard is improperly applied to all.

A solid template for moving forward exists. Case law establishes that judges must employ *Charter* equality guarantees not only when dealing with a challenge under s.15, but whenever any other *Charter* right is implicated and whenever they conduct a s.1 analysis. The obligation to be mindful of equality also exist outside *Charter* cases. To act with constitutional conformity judges are to interpret and apply statutes or make decisions under the common law which respect equality rights. Equality is therefore integral to all substantive determinations across a myriad of subject areas.

(In family law, cases like *Moge* illustrate an emerging equality consciousness. There has even been an infusion of equality principles into criminal law. For example, when Madam Justice MacLachlin struck down the previous rape shield provisions under the *Charter* she referred to equality principles to analyze the previous state of the law and to create a new common law for the same purpose.)

Equality and diversity are also required in relation to legal process, procedure, evidence, fact finding and determination of credibility. In the *Delgamuukw* case, the Supreme Court addressed important issues about the rules of evidence and just whose traditions they endorse. The sacred oral histories, legends, spiritual songs and dance and ceremonial places were used in an attempt to establish occupation and uses of the disputed territory, an essential requirement for aboriginal title claimed in that case.

The approach of Chief Justice Lamer in this case and *Van Der Peet* was deeply sensitive to the role of diversity:

> "The law of evidence must be adapted in order that this type of evidence, meaning, oral histories, can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."

Equality and diversity pose many questions about procedure and practice which we are only beginning to explore. The *Parks* case dealt with the issue of whether prospective jurors could be questioned about their attitudes towards race in a case involving a black accused and a white victim. The *Williams* decision of the Supreme Court of Canada addressed similar questions in relation to first nations and took systemic racism into account. Similarly, in *R.B.J.*, Madam Justice Wilson addressed the needs of children and stated:

> "The credibility of every witness who testified before the courts must, of course, be carefully assessed but the standard of the 'reasonable adult' is not necessarily appropriate in assessing the credibility of young children."

The combination of diversity as demographic fact and equality as constitutional imperative calls for a closing of the gap between the ideal of equal justice for all and the experience of systemic exclusion. Equality, diversity and social context issues are everywhere and judges already do them every day. They are interwoven with issues such as sentencing, child welfare, credibility, relevance, harm, reasonableness and the like. Given the content and reach of s.15, the process of contextuals is a matter of legal accuracy, not political correctness.

Decision-makers are called upon to recognize diverse points of situation. "Context" is characterized by complexity and while there may be similarities to certain types of inequality, each prohibited ground of discrimination carries with it distinct enquiries and separate knowledge. These forms of inequality are not just lenses that we can use one at a time in sequence: it is better to approach them as transparencies set on top of each other.

Judges now aim to see the whole person, the whole picture and not just aspects of it. By seeing clearly, by considering carefully and comprehensively and deliberating with balance judges can strive to arrive at solutions which take into account the full complications of the case. Professor Richard Devlin suggests that the question "How am I to judge" should be reformulated by asking instead "How am I to judge another". This would emphasize the dynamic process of requiring a good faith effort to come to terms with another's belief or conduct as they understand them.

Justice Bertha Wilson in a 1997 lecture said:

> "It seems fairly self-evident that if we as judges are to discharge our responsibility to administer justice in a multi-cultural society on the basis of equality, we must make every effort to remedy our ignorance of cultural minorities. The more we know about different cultures, religions and ideologies, the less inclined we are to accept false stereotypes and a greater our willingness to tolerate the existence of beliefs and lifestyles outside our own culture. We must at the very least learn the basic norm and tenets by which they live their lives and guide their conduct. They can have little confidence in our judgment otherwise."

In conclusion, the process of judging can be improved upon and initiatives and alternatives are being considered. But there is every reason for this judiciary to stand proud and preserve the best of a method which has withstood the test of time. You know that process alone is insufficient, as reason and rhetoric have been used in service of slavery. The challenge lies in bringing equality values fully to the administration of justice. The promise is the pursuit of a fully informed and impartial judiciary which treats individuals fairly, and with respect, in an open and equal justice system.

Aristotle wrote "our characters are the result of our conduct". Judges of Provincial Courts in Canada have demonstrated that they have the character and commitment to advance the interest of equality into the next millennium and beyond.