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## Balancing the Scales: Understanding Aboriginal Perspectives on Civil Justice

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# **BALANCING THE SCALES**

## **Understanding Aboriginal Perspectives on Civil Justice**

A report from the  
***Civil Justice System and the Public Project***  
created from the views of Aboriginal research participants

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### **Acknowledgment:**

The *Civil Justice System and the Public* is a collaborative project. This report is made possible because of the contributions of many individuals. We wish to thank all of the Aboriginal people who have talked with us about their views and experiences of civil justice in Canada. We continue to collaborate with and learn from Aboriginal people across Canada as we work to bring about positive change to the system. We also wish to thank the following people for their contributions to the development of this project: our Research Partners; Research Directors Lois Gander, Diana Lowe, Teresa Rose and Barbara Billingsley; each of the Research Assistants who has contributed to the team and the Alberta Law Foundation, Social Science and Humanities Council of Canada, and the Law Foundation of British Columbia who have provided the funding for this project.

## **Who We Are**

### **The Canadian Forum on Civil justice**

The Canadian Forum on Civil justice is an independent organization working to improve the way the civil justice system in Canada meets the needs of the people it is intended to serve. The purpose of the civil justice system is to help people determine rights and peacefully resolve disagreements in non-criminal issues. We believe that the system can be improved and access to justice can be increased for all Canadians. Making positive changes in the way the system communicates with the people that use it, is one way to work towards this goal.

### **The *Civil Justice System and the Public Project***

The purpose of the *Civil Justice System and the Public* research is to hear about the experiences of people who have been involved in the civil justice system and to involve as many people as possible in making clear recommendations for change. We have used interviews, observations, questionnaires, focus groups and community workshops and case studies of good communication practices to achieve this goal. We visited rural and urban locations in Alberta, Nova Scotia, Ontario Quebec, Nunavut and British Columbia, and around 400 people have now taken part.

### **Action for Change**

We have many supportive partners in justice community organizations across Canada and we are working with these people to make sure our research findings are known and acted upon. We are not just creating one report, but many papers and presentations to address the interests and needs of different organizations and people. All the details about the *Civil Justice System and the Public* research, as well as our published reports, are available on our web site at [www.cfcj-fcjc.org](http://www.cfcj-fcjc.org).

## **BACKGROUND TO THE REPORT: THE ABORIGINAL RESEARCH PARTICIPANTS**

As we visited each of the *Civil Justice System and the Public* research locations in Alberta, Nova Scotia, Ontario Quebec, Nunavut and British Columbia we contacted local Aboriginal organizations. We talked with Band Councils, Native Friendship Centres, Aboriginal legal aid programs, Native court workers, Aboriginal child welfare agencies and individuals involved in court cases. About 30 Aboriginal people took part in our key contact meetings and interviews that were transcribed and analysed to provide the first draft of this report. Some were members of a First Nation, some were Métis and others were Inuit. They lived on and off Reserves, in large urban centres and small rural towns. Some people spoke with us on behalf of their organizations, others took part as independent individuals.

In Alberta, funding was provided by the Alberta Law Foundation to hold follow-up group discussions about the research findings from the *Civil Justice System and the Public*. This gave us an opportunity to take our findings back to participating groups and communities and allowed us to go back to those who had taken part for further input and suggestions and to make sure we are correctly representing what we have heard. Most importantly, we wanted to talk about the best way to work together towards bringing about changes to the civil justice system that are needed.

On March 1, 2006 we hosted an Aboriginal Community Workshop in Edmonton. Despite an overnight snow storm 16 participants from local Aboriginal organizations and programs were able to join Canadian Forum on Civil Justice staff to talk about the issues raised in our draft report. Forum staff learned a lot and the workshop participants told us that they especially enjoyed the opportunity to meet and talk with each other. This revised report reflects the input gained from that workshop.

In June 2006, Mary Stratton, the *Civil Justice System and the Public* Research Coordinator had the opportunity to attend an “Aboriginal Law Training Conference for Legal Advocates” which was hosted by the Legal Services Society of British Columbia and sponsored by the Law Foundation of British Columbia. The approximately 70 (mostly Aboriginal) participants from all areas of British Columbia were all involved in providing support to Aboriginal people involved with the legal system. Topics discussed at the conference included current issues faced by Aboriginal clients and legal advocates, legal services resources, Aboriginal child protection programs and other family law matters, housing, restorative justice, residential school compensation process and wills and estates. The many perspectives and ideas presented and discussed at this conference further underscored the key points already outlined in our draft report. The information gained from this conference has informed this report. In September 2006 we held Community Workshops in Nunavut and with representatives from Inuit and Aboriginal organizations in Ottawa, which also informed the final version of this

report.<sup>1</sup>

We realize that in terms of understanding Aboriginal views about the civil justice system this is just a small beginning; however, several of our justice community partners have already expressed interest in receiving the report and we are sharing what we have learned so far in the hope that it will help us find ways to work together to create a process of civil justice that is fair equal and accessible for Aboriginal Canadians.

## **WHAT ABORIGINAL RESEARCH PARTICIPANTS TOLD US**

Identifying current problems and challenges is an important step in bringing about change. Recognizing the diversity of experiences and perspectives about problems and possible solutions is also vital to successful change. Aboriginal research participants in the *Civil Justice System and the Public* identified seven major areas in which they experienced barriers to accessing civil justice. These barriers are: social discrimination, differences among Aboriginal cultures and populations, processes of civil justice that are incompatible with Aboriginal traditions, language, geographical dispersion, issues concerning child welfare and guardianship, and inadequate support services. At best, the presence of these barriers leads to negative communication experiences for Aboriginal people involved in a civil case. At times the barriers prevent communication altogether. This report looks in detail at what Aboriginal participants had to say about these problems. It also speaks of the great dedication and inspiring strength of many Aboriginal people working within their communities for spiritual healing and social justice. Whenever possible we use their own words to illustrate what they said.

### ***1. A social context of discrimination***

It is well documented that Aboriginal people in Canada are subjected to systemic discrimination and overt racism. This context was mentioned by all of the Aboriginal people participating in our research, captured in our participants' stories and observed by our research team. Their experiences with the civil justice system occur in this context.

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<sup>1</sup>The Community Workshops in Rankin Inlet, Iqaluit, and Ottawa were made possible by a Northern Research Development Grant from the Social Sciences and Humanities Research Council of Canada. A report focusing specifically on issues for access to civil justice in Nunavut and for Inuit living outside of the territory is at the draft stage. Participants in the Ottawa workshop asked that we also incorporate some of their feedback on the circumstances of Inuit people living in Ottawa into this report.

## **Participants said**

*I'm standing on the corner waiting for a bus. Somebody stops. "How much?" This is what you get....Police will stop you. " Can I have your ID? You're prostituting....If they see you are Native, they'll suspect you are doing something wrong. It's altogether white society mental thinking.*

*This is big in this community, because with myself growing up as a Métis facing racism. And my children are facing this still to this day, and I can see it in the community itself, and I know it's not just coming from community members. It's coming from a lot of the agencies; it's coming from our legal system here. And, you know, if we take steps to bridge a gap between these two cultures, here, then I think it's very important.*

*A lot of times things that happen aren't culturally sensitive....With the Aboriginal society, there is a lot of different mannerisms that we have and I think sometimes that's taken as being disrespectful in a courtroom, and that's not it at all.- in our culture that is a sign of respect, you know....[like] nodding - acknowledging that I'm listening to you talk - sometimes that is taken that I know what you are saying.*

## **2. Differences among Aboriginal cultures and populations**

*They think, "Indians they're all the same." They have no idea of the numbers and the variety and...if you do it one way here it doesn't mean it's the same everywhere....And so it isn't an easy thing to do but...at least if you're in Blackfoot country understand the Blackfoot traditions. Or if you're in Cree country understand the basic Cree. I mean, start somewhere.*

As Aboriginal participants in the *CJSP* research pointed out, there are many different customs and protocols among Aboriginal groups and as many varieties of social experience as among non-Aboriginals. Assumptions that all Aboriginal people are the same are wrong, potentially harmful, and lead to inappropriate programs and policies. Participants in the Edmonton and Ottawa Community Workshop emphasized the importance of recognizing the range of Aboriginal perspectives and representatives from Inuit organizations suggested that the lack of recognition of Inuit culture, geopolitics and social and legal needs is particularly acute.

## **Participants said**

*The only people that were there that were non-Aboriginal were the people that run the businesses, like the stores...there was no alcohol,[ no problems], no nothing. Had one policeman and he was our friend. We didn't know what he was there for. He was a policeman and he had his little house and I guess he had a little cell in there but we never knew anything about it. [laugh]. Well, nobody ever started any trouble....And everybody had a strong family and it was big families. Those people worked hard....So where did these things go wrong? Now, you tell me. Because that was, you know, we*

*were all happy! And I never knew anything until I come to this city in 1956 then I knew what was going on. And when my brother came to me in 1972, he was working for the Métis nation and he said to me "It's time you went to work for your people". I said "What's wrong with my people?" [Laugh] I didn't know.*

*People assume because you're Métis or Aboriginal, you know, you're an Indian and you don't know what you're talking about and you don't have feelings....my mother used to tell me not to tell anybody we were Native. You know why? Because there is so much discrimination that other people laughed at us.*

*I would just like to add that when we were growing up there was eight of us and we had a whole range of skin colours. So, some people were very identified and other people could pass and blend in [as white] and when I would go shopping with my sister, who was much more visible than I was, you could see the difference in how people treated us everywhere. And one thing I've learnt over the years is that no matter how much empathy I have for my sister...I can not [deny] myself of the benefits that come to me because my skin is white and I have a different experience than my sister did. And you know, there is a difference.*

The severity of the discrimination Aboriginal people routinely experience from non-Aboriginal people is well illustrated in the above quotes. Our research participants also told us about cultural tensions and power hierarchies that exist among Aboriginal peoples. Some tensions relate to different cultural customs among bands and nations, others to tensions that arise between parents and children as they try to negotiate the social discrimination they face. Other issues are related to Aboriginal political hierarchies.

### **Participants said**

*Everyone was sitting in a circle and they were passing the pipe around, so I took the pipe [laughter]. I didn't mean to [be culturally insensitive] - and in a gym full of a hundred people. I hadn't asked permission - I didn't know. [and then another Aboriginal participant remarks that "he should've made it clear to start with...he'd seen there were women sitting around."]*

*Also, when you are growing up you have to fight your parents and the white society off and on, to get truth. And it's even harder because you don't simply want to do that, but at times you don't have choice if you want to be safe.*

*You know, the community system is gone...certainly there should be dispute resolution mechanism in all of the communities. I mean, we've got Elders...dispute resolution bodies could be assembled from that experience. So I mean it does take some political will to put those in place and a political leadership who will not step on that body....You know...the first time a decision comes up...that is not favourable to the Chief or the Council some groups...troop off to court to have [it] overturned.*

In addition to the above examples our researchers were also told about the following

kinds of issues: members of one Band speaking in negative terms about another Band in the same area; Aboriginal participants living off Reserve repeatedly said that their issues and concerns were different and less well addressed than those of First Nations Reserves; Inuit participants emphasized that both their culture and their circumstances were different from those of First Nations groups; several participants spoke of competing programs to meet Aboriginal needs especially relating to child protection issues. The constant need to raise awareness about cultural and contextual differences among Aboriginal peoples creates a tension that can discourage collaboration among Aboriginal groups.

### **3. Incompatible concepts and processes of civil justice**

Our participants told us that the concepts and processes of the Canadian civil justice system are often at odds with those of Aboriginal cultures. They said that the civil justice process is not understood for all of the following reasons:

- ❖ *A negative history of involvement with the “law”* (treaties, residential schools, criminal justice, child welfare system).
- ❖ *Legal language and formality*: Aboriginal participants expressed concerns about the complexity of legal terms and procedures, as well as the formality of the court. Such concerns were expressed in all of our interviews with members of the public across Canada and by many of our justice community participants as well. For Aboriginal people, issues of language extend far beyond these common concerns and are addressed further as a separate issue later in this report.
- ❖ *Oral versus ‘paper’ traditions*: The legal system relies on the filing of complex documents and the following of written rules and procedures that severely restrict the telling of the story behind the legal problem. Aboriginal traditions place important value on oral accounts.
- ❖ *People do not know where to turn* when they do need help from the justice system. This is especially true for women if abuse is involved. They may turn to the criminal system for protection, but do not know to turn to the civil system for their rights in terms of child maintenance, spousal support or property (housing). This is especially so when one parent is in a southern location and another is in a northern one.
- ❖ *Legal conditions differ*: Depending on status and location, Aboriginal people are governed by different legal conditions. For example, on Reserves goods cannot be seized and there are no mortgages. This precludes any related civil actions. Suing another member of the Reserve for damages due to injury almost never



happens, in part because it is not the approach of the community, but also because, “why would you want to sue somebody when there is nothing?”<sup>2</sup> Nunavut is the only Canadian jurisdiction with a unified court system, which is still in the process of developing its own rules and procedures that aim to accommodate traditional Inuit practices. However, Inuit from Nunavut living outside of the territory will be governed by the rules of law relating to that jurisdiction. As a consequence, legal problems become complicated and even more than usually bewildering for the individuals involved.

### **Participants said**

*Can I point out one more thing? There is something in this professionalism. They always want paper [laughing and pointing at the researcher's papers] This is a very real concern....[we] make a verbal agreement. It's real.... The oral society is not recognized.*

*And they don't solve anything. The kids are now flown away - they used to go to residential school - now they go into care.*

*Court isn't a hearing to determine who is right and who is wrong. It is part of the punishment. I think that is unfortunate.*

*You ask, “what could we do?” And I think that the only way you can really resolve these things in any meaningful way is to get out of the existing court system.<sup>3</sup>*

Most of the Aboriginal participants felt that there is no experiential distinction between the criminal and the civil systems of justice. Instead of leading to a fair resolution to a problem, involvement with the civil system is “part of the punishment.”

*All these time frames and rules that don't fit for our people. I mean I talked to someone today who - her children...were apprehended in [small town] while she's here in [urban centre]....They've been made Crown Wards; they make kids Crown Wards really fast now.*

*Last year my ex trashed the place. He's got anger problems. So I called the cops of course...and [then] I couldn't believe it - [child services] started going to my kids' schools, my work....I said are you here to help me? Or my husband with his anger? Nothing. They*

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<sup>2</sup> There is more discussion of the personal injury issue in some of the Nunavut interviews in connection with the alien concept of suing, but also as a possible means to make workplaces safer. There is also discussion in non-Aboriginal interviews from small communities about the problems of suing another community member and of being a witness in a civil or criminal case.

<sup>3</sup> There are a variety of views about this, however, reflecting a multi-perspective debate about the alternatives such as abolishing, re-building or reforming the civil justice system. Nunavut is in a unique position to provide models to the rest of Canada as the territory develops a civil justice system of its own.

*dropped it....I felt, "My God, are they checking me to see if I'm a good mother or not? That's how I felt. More guilty.*

#### **4. Language barriers**

*When you look at the English language and the Native language – two different understandings, two different meanings.*

Participants in the Edmonton, Nunavut and Ottawa Community Workshops heavily emphasized the importance of recognizing language as a major barrier that must be addressed if Aboriginal Canadians are to have fair and equal access to civil justice. The issues are far more complex than just English reading literacy. Already addressed is the problem faced by most Canadians in understanding legal language and concepts. The incompatibility between traditional Aboriginal cultural concepts of justice and those of the legal system create an additional barrier to comprehension. There are insufficient resources for translation and interpretation, which is expensive and difficult as there are numerous different Aboriginal languages with few corresponding concepts for legal terms and rules.<sup>4</sup> Nevertheless, what we observed and heard underlines that making legal rights known in a language that is understood is vital to access to justice.

#### **Participants said**

*As an Aboriginal police officer told me: one day he and his partner were arresting five Aboriginal youth who did not speak English. He took three of the youth and read and explained to them their rights in Cree. These three did not incriminate themselves, but the two youths dealt with by the white officer incriminated everyone. They did not understand their rights or the system process, and so effectively they had no rights.*

*But it's the whole question of literacy.... I mean, in order to achieve some things, people will sign anything. But, I went through a presentation yesterday...by the Federal Government and it was pretty sad about the literacy level in [this province]. People might get a document and they can read it, they have no idea what that thing meant....Then there's a lot of people who can't read it period!*

*If you haven't got someone explaining all the time, what do these document mean, or you have somebody interpreting the wrong way, that affects what your reaction is to*

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<sup>4</sup> Language issues are especially acute for the Inuit. The most common first language in Nunavut is Inuktitut and many Inuit residents are unilingual. Interpretation services are essential for most Inuit to understand their rights and any legal process. Inuit who are residents of Nunavut but temporarily transported elsewhere for health or legal reasons are entitled to interpretation services provided by the territory. Inuit who have left Nunavut and become officially regarded as residents of a Canadian province (such as Ontario) are not entitled to interpretation assistance from Nunavut. It was apparent from discussions at the Ottawa Community Workshops that urban Inuit fall through the jurisdictional cracks as territorial, provincial and federal governments, if they recognize the need at all, do not tend to view the provision of services as their jurisdictional responsibility.

*those...I think that literacy is a huge, huge [barrier]....But I think that the big issue in Aboriginal country is you speak one language, you don't read English and so I think that's something that really should be listed as a major, major barrier... an overriding one, above anything in place, if you don't know what it is and you have no understanding of it, that's a real problem.*

*And there's a concept of informed consent in civil law. And, the idea that somebody signed the paper without knowing what that paper means and then get caught up in the system. Yes, I think it happens to people who are poor as well as indigenous or people who don't have access to justice. But I think a lot of those things come together for Aboriginal, First Nations, Métis, Inuit, whatever. You know, there is that experience of not being literate. And I'm literate and I'm not sure I'd want to read 14-pages of social services gobblidigoo.*

## **5. Geographical dispersion**

Canada is a vast country with a diverse and dispersed population. Different geography means there are different social, legal and communication needs. Just like other Canadians, Aboriginal people live in large cities and small towns. Others live on Reserves, which may be close to an urban centre or extremely remote. Both researchers and research participants reported that public awareness about the territory of Nunavut is extremely low. Some people, including social service providers, are unaware that Nunavut is a territory of Canada. Participants in the Ottawa Community Workshop told us that in Ottawa, Inuit who are seeking assistance are quite often sent to immigration services.

Aboriginal people are more likely than the average Canadian to live in a remote area, and wherever they live are more likely to live in poverty. In both cases, they therefore have less access to transportation. Distance can make access to court services difficult to impossible, but even 20 kilometres can be an insurmountable distance without access to some form of transportation. Charges are laid and warrants for non-appearance are issued when court is simply inaccessible. Geography also impacts the form and availability of work (for example seasonal or periodic) and this may have a significant impact on the ability to provide child or spousal support. Travel costs are another factor that should be considered in deciding child custody and visitation. The rules and procedures of the justice system generally overlook the social realities of Canadian geography.<sup>5</sup>

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<sup>5</sup> As we have already suggested, Canadian geo-politics also affects the organization and delivery of justice. There is not one 'court system' in Canada, but several levels of courts in each province and territory, as well as some special Federal courts. Many courts also operate with "divisions" between criminal, civil and family law. This adds to the conceptual complexity of the justice system as a whole and gives rise to legal complications both within and between provinces and territories.

## **Participants said**

*[It's] a big problem the distance thing - the distance between places, you know? I mean transportation issues...if they can't afford to have a vehicle and that to get here for all the days they need to be, how they gonna be able to afford the services that they need to get their case in the system?*

*And you can't get a bus...or if you do, it's only on Tuesday. And even if you do arrange a ride and the person you arrange for a ride with doesn't show up, or their car breaks down - well, they tried, you know they had a ride and then like we tell the judge the circumstance why...they're not in for court and sometimes you get a reaction like, "yeah right!" or something - disbelieving it.*

*It's not like a road. It's a little trail and it's like three hours and they have to drive all the way to the courtroom.. If the roads are bad, you know? It's just crazy.*

P1<sup>6</sup> *Those three hours -*

P2 *Two and a half on a really good day.*

R *And you know the road well, right? [laughter]*

P2 *And where the RCMP are.*

P3 *What RCMP? [laughter]*

*There are First Nations' agencies all across [the province] and they are delegated by the Minister to deliver services [only] on the Reserve. They call it a geographical boundary. That is the problem the agencies have with the law and the system. The province is saying, "This is your Reserve and you can only provide services and apprehend children on the Reserve. So say the kid goes to town...and is abandoned there...you can't go and apprehend that child because you don't have the authority to do it...[but] the province never listened, the Minister never listened."<sup>7</sup>*

*So let's stick with child welfare. And somebody's children have been apprehended, and they apply for a legal aid certificate, well we would ask them for copies of their civil forms - well how are they going to get them here, and how they are going to get them photocopied? They may or may not go to the band office; it depends on their relationship with the band office. So what we would do then usually is go to our community legal worker, and say, "We haven't issued a certificate for this because -" and then the next time the community legal worker is in the community, they can go and get it, but they're only up there every three months or so too. So that's another gap - blocked service. E-mailing is not generally widely available although we're working on*

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<sup>6</sup> P stands for a participant in the interview, and this is a group interview. R stands for the researcher.

<sup>7</sup> In fact, this participant goes on to explain that neither the Native child workers nor most judges actually abide by this geographical boundary because it makes so little sense. The worker concerned does apprehend Reserve children in towns and the court puts them into the care of the First Nations agencies. He mentions a tribal council elsewhere that have a formal agreement in place to return children. There is a lot of positive feeling about the initiative and the relationship with the circuit judges.

*the technology for ourselves internally. But it's not – the average person in one of the remote community probably doesn't have Internet access, although the band office may have it.*

## **6. Child welfare and guardianship**

*I'm a residential school survivor....That's a huge issue right now for our community. I don't know if the justice system...realizes the damage of residential school. What it did to our people, like it broke up the families...We're just making our way back. And.... [there]is the issue of...50,000 children that went through residential school and never made it back home.*

Child welfare and guardianship was the issue we heard about the most in the CJSP interviews and has subsequently been identified as the most pressing legal concern by Aboriginal participants in the Edmonton Community Workshop and the BC Law Training Conference.<sup>8</sup>

Participants told us that many Aboriginal people who are now parents were seized from their communities as children and forced to attend residential schools. Forced to forget their native language and their cultural heritage, they grew up in a harsh, often extremely abusive, institutional setting that robbed them of any experience with nurturing, parenting or community. As the participant quoted above said, this generation of parents struggles to make their way back and discover how to be nurturing parents. But their own children are too often removed from their communities by child welfare agencies. Aboriginal child welfare and family court workers spoke emotionally of the continuing, and often avoidable, harm to Aboriginal children that results from insensitive Canadian legislation and court proceedings. Aboriginal parents face the emotional trauma of family court proceedings in the context of social discrimination and language and cultural barriers we have already described.

### **Participants said**

*A lot of Native moms, when they do come into [the city] to face [court], they just give up right then and there...If they are dealing with the Reserve...you would go and talk to them and say, go and get a lawyer and you will work this all out. But most of them, when they come to the city, the system is there and so they go, well, that is just another system and their kids are gone and they are never going to be successful. So then they just give up and walk away from it.*

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<sup>8</sup> It was also identified as the most pressing non-criminal *court* issue by the planning committee for the Nunavut workshops and by participants in the Nunavut and Ottawa workshops. However, many participants in this workshop series identified understanding basic human rights as the most important *legal* issue for Inuit.

*You know it's very difficult for children who get apprehended from a community... they're flown out of the community, and the people are – they don't know what to do .... the first thing they have to do is they need to know what to do. And often their voluntary care agreement is put down in front of them with no access to a lawyer...then they have to get the matter before a court. Well there's no court up there. So the matter comes before a court in... some place where these people aren't. And the people have to file an answer within 30 days in order to get served with anything that's going to happen after that. Well how do they file an answer? They don't even know that they're supposed to, they may get served with the form and the answer forms are there, but they don't know what they are, and probably nobody in the community knows what they are. So we just did a workshop with our community legal workers saying – okay here's the time frames. When somebody tells you their children have been apprehended – let us know right away, because we can help out by at least making sure the answer gets filed so that they're on the record, and they're knowing what's happening.*

*I didn't know my son got taken away until two weeks after. And I would never have found out if my daughter didn't go down there and her mom started acting funny saying my son wasn't there, he went camping two weeks ago. I was thinking, "who would let their four year old son go camping for two weeks?" So I got a hold of her caseworker and she said, "Oh, your son is in a foster home." That was kind of hard. I was expecting them to come back....I phoned her [the mother] about a month or two before...because her sister phoned me and said, "you better come and get your son because the boyfriend was being mean to him- was hitting him all the time. So that's how come I sent my daughter and her auntie down there to get him. And by then he's in a foster home....They could have got a hold of me if they tried.*

*Well, a lot of times they don't even know why they are going to court [laughs]. Or the papers are wrong. I've read papers that are not even about the client, it is about the spouse of the client. And then the lawyers are very, very hard to reach because it is all legal aid...I don't even have contact with them.*

Traditionally Aboriginal cultures have made child guardianship arrangements informally among relatives and community members. There is an expectation that these arrangements are temporary - just until the parents are able to resume responsibility. This leads to confusion around guardianship orders in the court system because parents will agree to an option allowing adoption, not understanding what a permanent order really means in the court system. Parents learn their children have been taken away from them permanently before they understand what is happening. Participants, who as Aboriginal lawyers, court workers and child protection workers "stood between the two worlds" of law and Aboriginal culture, expressed frustration with the contradictory and unrealistic nature of legislation or court orders that resulted in children being unnecessarily removed from parents and their communities.

## **Participants said**

*What I find that children services often will do is they will say "Ok, you can get your kids back if you sign this 3-months TGO with us." But its 14-pages long and you get people that'll sit there going "I will do anything to get my kids home. I will do a parenting assessment, I will do a site assessment, I will get a home city then and I will do this and this and this." When you look at it in the end, they can't make it to their access, to the visit with their kids because they've got so many other things on their plate. And so, how are you supposed to attend all of this counselling and all of these programs when you're supposed to obtain a job so you can have the money so you can have a home so you can feed your kids? And so, the measures of success are what's out of perspective.... And I've never met anybody in the aboriginal community that didn't want their kids back, ever, ever, ever, ever.*

*But you're also asking what could be done. Is it just looking at what the laws are, in terms of guardianship of children?....It's the norm in Aboriginal country - the grandma looks after the children...if somebody is sick, aunty looks after the baby. You're almost penalized if you wanted to do something in the Indian country because you know...they'll pay a perfect stranger to look after the children but they don't want to pay a family member. I mean, a family member still has to feed that kid, still have to buy them clothes and they still have to do all of those things. But our discrimination in Canada [authorities argue that to foster a child] you had to have a 1200 square foot house." Well, the houses they were building on Reserve were 990 square feet. "Oops, you just can't take that kid then". So, you know they never come out and said, "well, First Nations people can't take that child." It's just that they didn't qualify because their houses were too small. So, I think that if you were going to do something, one of the things you could look at, would be look at what the legislation is and look at what...are the barriers to Aboriginal people looking after their own children. When you're already poor to not be able to get money to look after your sister's 3 or 4 children...because I mean, children are the most important part of the community.*

*One thing I always wished that they would implement is the social workers just coming out of university...before they're degreed, is that they go out on a Reserve and spend a couple of months there and actually learn about the culture - see how the people live... 'cause I can tell you , I come from a family of seventeen. My mom and dad raised seventeen children. We used to live in a two-room shack...and in our bedroom there's all these curtains going different ways. So, blocking off, like, the bedrooms for the boys and the girls and the mom and dad. But, hey, we survived that. And right now, the social workers that go out and see Canadians - see people living like that now - the first thing is they're writing them up.. If they don't smarten up it's gonna be an apprehension.*

*The [private] Bar didn't want them as Legal Aid and I suspect...wouldn't have taken them if they were paying clients.....[and] Legal Aid, they just don't get it!" ...It was*

*appalling for me to stand between these two worlds and watch how inappropriately the powerful structure dealt with the tradition of the Cree community.*<sup>9</sup>

## **7. Inadequacy of support services**

As well as the problems with the civil justice process that we have already talked about, we also heard that there are insufficient support services to ensure full and fair access to the justice system. Several important areas of concern emerged:

- ❖ *Program and policy development and evaluation* is often not appropriate to the community and the client group. Time and care are not taken to learn about the community and to offer what the community needs, in ways, and at times, the community wants it. Instead, dominant middle-class white norms are imposed, usually more suited to metropolitan areas – specifically in south-eastern Canada.<sup>10</sup> Participants told us of cuts to programs that were considered locally successful, but evaluated as not meeting mandates that made little sense to Aboriginal workers and clients. The result often feels like punishment to both clients and workers.

### **Participants said**

*[Central services based in the provincial capital] say ‘what about your pro-bono lawyers?’ There are no pro-bono lawyers. Sometimes there are no lawyers at all.*

*Mandatory reporting and child apprehension for issues such as sexual abuse are not effective. In practice they discourage people, including the children, from seeking help, because the fear of criminal charges and child apprehension are greater than the distress of the abuse - they’re almost punished for being victims.*

- ❖ *Existing program resources are insufficient:* Research participants told us that there are not enough legal support services for Aboriginal people. Some services, like legal aid for divorce and many civil issues, are unavailable and small towns have few if any lawyers. Members of a small community are sometimes concerned about confidentiality, and court and community workers feel overwhelmed, overworked and undervalued. Urban centres may view some

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<sup>9</sup> Observations by some members of the research team express similar concerns about the processes of family court and specifically the circumstances for Aboriginal people. See “Family Court - Coast to Coast,” available on our website at <http://www.cfcj-fcjc.org/publications-cjsp.htm> or upon request from the Canadian Forum on Civil Justice.

<sup>10</sup> It must be noted that social programs born of this narrow perspective tend not to meet the needs of disadvantaged Canadians in general.



Aboriginal groups, such as the Inuit, as a small statistical minority and overlook their access to justice needs.

### **Participants said**

*I have to take a 12 hour bus ride because the counsellors around here I don't trust – addiction counsellors – because some of them, the experience I had, six months or a year it comes out in the public.*

*For the last 11 years I have been going to court. This year I represent myself because of the income I am getting, I can't afford a lawyer. And it drags for maybe three months and I have to travel three hours from here to [another town] to go to court...I lose all my wages. I have to pay for my own travel expense.....[And] trying to find a lawyer...I couldn't find one so I went to Legal Aid and I still owe them money. They wanted papers signed that if I don't pay them they are going to take my truck. So I didn't go with them... I went to this lawyer previously and he wanted \$1000 up front which I don't have. So I decided to fight on my own.*

*I came because of the pain and hurt I feel inside. The long hours of work...There really is no support in place for workers like ourselves...We have to [work with]...unrealistic goals that are being put in place by people up on the hierarchy.*

*There's two levels of support missing for [Aboriginal workers]. There's the support you need to have people in the organization understanding the value of what you bring and how to maintain your spirit so that you can continue to do what you do. And then there's the real family support and care – [the] things that are going to keep the family together - traditional [cultural] kinds of support.*

- ❖ *Uneven access to electronic technology:* Electronic technology of all kinds (radio, telephone, fax, e-mail, internet) are extremely important communication tools in remote areas. Availability can greatly increase access to justice and support services. However, we heard that availability and access, especially to the internet, were often problematic. While most remote centres and Band Council offices now have full telecommunications access, the same is not necessarily true for all people in these communities, and sometimes this includes people working within the justice community. Not all Band Offices, Courthouse law libraries, or other community organizations welcome or allow community access. Furthermore, some people need assistance in using available technologies and this is seldom available due to the limited number of staff or prohibitive program mandates.<sup>11</sup>

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<sup>11</sup> In addition to the information provided by Aboriginal participants, access to and assistance with, computers has been noted in the BC Supreme Court Self-Help Centre Pilot Evaluation Report and by community members involved with the Alberta Self-Represented Litigants mapping Project, currently underway.

## CREATING BRIDGES TOWARDS SOLUTIONS

*We don't want special treatment. We want equality. We just want to be treated fairly....[To] balance the scale, a group that doesn't know anything is going to need a hell of a lot more support than somebody who understands....Otherwise it's not a just system.*

That the justice needs of Aboriginal people are not being met is a strong message from our research findings. Aboriginal research participants told us that there are serious problems with the system and many barriers to accessing civil justice and they have posed the question: *Can the civil justice system work for Aboriginal peoples?*

We recognize that there are some very serious challenges to overcome if the civil justice system is to meet the needs of Aboriginal people. *We believe that the civil justice system must work for Aboriginal people and all Canadians.* It is the mandate of the Canadian Forum on Civil Justice to improve communication about civil justice by listening to the people the system is meant to serve and assisting members of the justice community to also hear what has been said. We are convinced that this process reveals common ground from which to build bridges and create effective solutions. In order to further that goal, we asked our Aboriginal research participants three questions:

*What can be done to improve the present situation?*

*How can the Canadian Forum on Civil Justice best work with Aboriginal people to bring about change?*

*Is this report a potentially useful tool?*

Aboriginal participants responded by helping us summarize the challenges that must be met, providing ideas for and examples of successful change, and encouraging us to use this report as a tool through which our justice community partners can hear and begin to understand Aboriginal perspectives and experiences of civil justice.

### ***Challenges to confront and possibilities for change***

Our research findings suggest that if the civil justice system is to begin meeting the needs of Aboriginal people the following major challenges must be met. Where possible we also provide an example of an initiative for change.

- ❖ *An increased level of awareness and respect for Aboriginal culture and customs*  
Currently, most non-Aboriginal individuals, organizations and government agencies lack an acceptable level of understanding. This must be changed. As one participant described it:

*You have to put someone in the community - and I'm going back now to the development side of health authorities and so on in communities. Where people went into the communities, and were there for weeks, and went around and knocked on doors, and talked to the people. And then held meetings...What do the people see as the problems? And what do the people see as the solutions? It will vary widely....But that is a starting point.... Communities are in different stages. And if you want to go into a community and say, "What do you need? What can we do?" And they tell you what they want. You don't tell them they don't want that. It just frustrates them, and frustrates you, and frustrates everybody.....They know that they have a lot of social problems, and...they're telling you that's what they need.<sup>12</sup> ... It's very difficult to get people to go in with their ears and hear what the people want, and hear what the people see as solutions. People all go in with set pieces - here I come with some ideas for you.... if they tell you this is how they want it, and this is where they want to go, then you need to look at how do we facilitate that? Not talking them out of where they want to go. Even if you may disagree with it, they want to go there because they know something that you don't know probably.*

In Nunavut, the Department of Justice involves Inuit Elders as policy consultants and has adopted a vision statement expressing the following commitment:

*Our vision reflects Inuit Qaujimajatuqangit values, and promotes fairness, equality and a safe society supported by a justice system that is trusted and understood. The vision is respectful of and responsive to diversity, individual and collective rites, and community needs.*

Although members of the Nunavut Justice community are the first to acknowledge that these are only small steps, we suggest they are an important beginning.<sup>13</sup> Some other ways awareness and respect can be increased are:

- ✓ Special training for judges, lawyers, and social workers about Aboriginal cultures and issues.
- ✓ Ensuring that it is agency policy to ask Aboriginal people about local customs and correct communication protocols.
- ✓ Workshops and talking circles designed for non-Aboriginal individuals and agencies to go out into remote communities to listen and learn.
- ✓ Advisory groups that include "just average people" (both Aboriginal and non-Aboriginal) would be helpful in designing easy to understand forms and information about the legal system.

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<sup>12</sup> The discussion includes an example of a community that went against the perception that all Aboriginal groups wanted restorative justice. This community wanted more access to court services.

<sup>13</sup> A detailed report based on our research in Nunavut is currently at the draft stage.

- ❖ *Addressing the context of social discrimination.* Any initiatives for positive changes within the civil justice system must be developed with an awareness of the larger context of social discrimination experienced by Aboriginal people. Changes within the civil justice system will not be enough on their own. The underlying problems that result in the Aboriginal research participants experiencing the civil justice system as only negative and punishing must also be addressed. In particular, discrimination and power imbalances in the child welfare and guardianship processes must be dealt with.<sup>14</sup>
  
- ❖ *Working together to address root causes* and find flexible solutions that resolve problems and dissolve barriers. Alternatives must be found that combine traditional Aboriginal ways with the constructive goals of civil law and social programs. Power inequalities that may arise within or between any community or system must be recognized and protected against.<sup>15</sup> In British Columbia, the Ministry of Children and Family Development has recognized the need for both collaboration and community based initiatives by providing a grant to the BC Law Foundation. This grant has enabled the Law Foundation to provide a “Child Welfare Initiative: Focus On Alternative Dispute Resolution And Aboriginal Children.” Applications are invited from all organizations with innovative proposals and to date, five out of six awards made have been to Aboriginal groups.<sup>16</sup> Our participants suggested that successful solutions must take into account that:
  - ✓ Different approaches are needed to deal with child welfare, maintenance orders and other civil disputes.
  - ✓ Community adoptions should be recognized.
  - ✓ Flexible orders are needed that contribute to maintaining the necessities of life. For example, allowing bartering exchanges as well as monetary settlements.
  
- ❖ *Establishing more flexible and equitable justice processes.* The inflexibility of the civil justice process is at odds with some Aboriginal traditions. There is a need to increase Aboriginal ownership and leadership in developing alternative approaches, and flexible justice processes are required. At the same time, Aboriginal communities must question if community restorative justice or healing

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<sup>14</sup> Another participant pointed out that power imbalances pose challenges to finding really effective alternative justice solutions. The example given was the use of a mediation process in a way that was not equally accessible and fair to both parties.

<sup>15</sup> For example, we were told about the positive use of mediation in a dispute over an informal adoption. In this case, lawyers for both sides worked together to arrange a mediation by a band ‘grandmother.’ In 1.5 hours the parties agreed to a system of sharing the child that kept the child in the community, and the parties have kept to the agreement.

<sup>16</sup> Full information about this fund is available at <http://www.lawfoundationbc.org/fund11.html> ,

circles can be effective when there are lines of hierarchical power in communities that may include abusers, or relatives of abusers. Aboriginal participants in this research have demonstrated dedication, humility, courage and candour in confronting the problems of their own communities and cultures. So have many members of the non-Aboriginal justice community. Across Canada there are many examples of collaboration between Aboriginal people and members of the justice community to develop justice alternatives that work. In the past these initiatives have mostly concentrated on criminal justice. However, increasingly there is also attention being paid to family and civil justice as well.<sup>17</sup>

- ❖ *Cooperation is needed between federal, provincial and territorial governments if Aboriginal legal needs are to be met.* The complexity of federal, provincial and territorial land claims agreements, laws, policies and court services makes this essential. In particular there are issues to address in terms of: legal aid provisions; who should be served a parties in a dispute; accounting for Band revenues, and how these revenues may be applied; and responsibility for Inuit and First Nations children and adults who are now living outside of their native territory or Reserve.
- ❖ *Aboriginal leadership and ownership in developing both research and policy is essential.* However, due to past bad practices by non-Aboriginal researchers and policy makers, it is often difficult to gain and maintain Aboriginal involvement. Tokenism and cooptation remain problematic if supposedly participatory research ignores the community input when drawing conclusions and making recommendations.<sup>18</sup> Nevertheless, we must create bridges across this 'gulf' because research skills and community knowledge have to be shared effectively in order to convey the need for change. Good research that actively involves Aboriginal people in the whole research process is important. As one participant put it: "*Not just report x% this and y% that, but relate the real conditions and*

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<sup>17</sup> To cover all of these initiatives in detail is beyond the scope of this report, the purpose of which is to point to ideas and possibilities. There are some good models provided by Canadian initiatives focussing on criminal justice processes. For example: the travelling Cree-speaking Provincial Court in Saskatchewan; the Tsuu T'ina Court in Calgary; and the Gladue court in Toronto. At the Alberta Aboriginal Community Workshop attention was drawn to the efforts of the Sisiska First Nation in Alberta and the Little Pine First Nation in Saskatchewan, most especially the inclusive process used to draft alternative dispute measures.

<sup>18</sup> One participant told us about a research project using a community values map approach. A community member marked woods with a moose herd on such a map only to find that soon after the area had been clear cut. We are hoping that the collaborative process of the *Civil Justice System and the Public* project used in the research and consultations that have directed this report will serve as a more positive model in which non-Aboriginal researchers and policy reform advocates can combine their technical skills with Aboriginal knowledge and experience to gain attention to the need for concrete changes to the delivery of civil justice.

*issues along with concrete recommendations for change.” Another participant said:*

*I would like to see every university in this country committed to the idea that any research project that’s done in any discipline will make a real genuine proactive effort to involve Traditional knowledge...the oral testimony.*

It is also important for Aboriginal groups to meet the challenge of collaborating together to insist that their diverse voices and needs are included in the development of policies and programs.

- ❖ *A commitment to provide the necessary resources.* True recognition of the need to address the issues raised in this report also means the provision of funds and resources that allow the above activities to take place. Aboriginal participants pointed out that effective change will also need resources to support the following activities:

- ✓ Travelling staff lawyers (and other legal workers) for remote areas.
- ✓ Programs that go into the schools and talk to the children, especially near graduation from high school.
- ✓ Assistance with drafting and presenting Band Bylaws.
- ✓ Assisting Bands in understanding their legal rights.
- ✓ Staff who speak Aboriginal languages.
- ✓ Information in an oral form - even in English.
- ✓ Telephone information services - “a place to call” that reaches a person.

### **“Who is willing to hear?”**

Participant: *So when you’re done in two years, who are you giving these reports to?*  
Researcher: *Pretty much anyone we can force to take them. [laughter]*

Aboriginal participants in this research found the time to speak with us and tell us of their experiences and the challenges they faced. They did so with a patience and courtesy that should be considered remarkable as most were dedicated to working within Aboriginal communities and had made the same points to non-Aboriginal ‘officials’ many times before. Many posed to us the questions illustrated above; what did we intend to do with this report and who is willing to hear the voices within it?

### **What do we intend to do with this report?**

Our goal with this report is to make it a conduit for the voices of our Aboriginal participants. A draft of this report was provided to all Aboriginal participants in the research for review and comment and a copy of the final report will also be provided. During the Edmonton Community Workshop, we discussed ways in which this report could be useful. We will circulate the report among our justice community partners who include government, the judiciary, legal aid, and the Canadian Bar Association, among

others. We will bring the report to the attention of the justice community and other relevant government ministries and agencies across Canada at every opportunity. The final version will also be made available via a link to our website at <http://www.cfcj-fcjc.org/publications-cjsp.htm>.

### **Who is willing to hear?**

This question of not only who is willing to hear, but who will also act upon what is heard, is the challenge at the heart of this report. The Canadian Forum on Civil Justice has heard and continues to be willing to listen and learn. Acting on our mandate to improve communication within the civil justice system and between the system and members of the public, we have already proved that finding common ground among the different perspectives and needs of our justice community partners can lead to real change. Previous reports from the *Civil Justice System and the Public* project have been well received, read and acted upon. Providing reports that actually relay lived experiences can have a powerful effect. Several of our partners across Canada have already asked to receive a copy of this report as soon it is released. We know that they are willing to hear.

Aboriginal participants in the *Civil Justice System and the Public* project and other Aboriginal people across Canada have much to teach us. We continue to strengthen our collaboration with Aboriginal people and work with them for a more accessible, appropriate and equitable civil justice process.

### **What should be heard?**

Certainly we want members of the civil justice community – and relevant social service providers – to hear and understand the discrimination, barriers and challenges Aboriginal people face in accessing civil justice. And, yes, our Aboriginal participants do want it understood that there are many different cultures and perspectives among Aboriginal people that must be considered. Just as is the case in non-Aboriginal organizations, differences can lead to destructive power dynamics that hamper constructive change.

Most importantly, however, we want readers of this report to hear the challenge for meaningfully collaborative action that is laid down by our Aboriginal participants working every day to heal their own communities. Participants in the Edmonton Community Workshop and BC Aboriginal Law Training Conference brought together many cultural backgrounds and perspectives that united around deep commitment and hope for healing their communities. As one participant expressed it:

*It's come a long way and we have a lot more Aboriginal people being educated and speaking out. I really think that the system needs to hear from the Aboriginal people that,*

*you know, we are a group that are proud of what we have done ourselves and we have come a long way.*

In an ideal world, all disputes would be resolved without anyone having to go to court. That, unfortunately, is not the world in which we live. Together we can work towards dispute resolution alternatives, but inevitably going to court will sometimes be the only option. Although going to court will likely never be an easy or enjoyable experience, it can have a positive outcome as one Aboriginal woman commented about her experience of representing herself in a family dispute:

*And it really made me feel strong that I can do it after I walked out of the courthouse and I won the case. And all the things I wanted to say I said it in court.*

This report is a small beginning. We hope that it will lead to action for civil justice reforms that will meet the needs of users so that feeling ‘strong’ is the rule and not the exception. We ask readers of this report to hear what our Aboriginal participants have said and to take action in your community to hear and learn more. Participants in our Edmonton Community Workshop recommended as a starting point similar “learning circle” events, which allow Aboriginals to share knowledge with each other as well as non-Aboriginal people willing to hear and learn.