

# The Development of an Aboriginal Criminal Justice System: the Case of Elsipogtog

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## INTRODUCTION

This paper focuses on the development of a comprehensive community-based Aboriginal criminal justice system in Elsipogtog New Brunswick, the apex of which has been its Healing to Wellness Court (HWC) which became operational in 2012. Initially the authoritative and policy context for Aboriginal Justice which facilitated this emergence is examined. Subsequently, the local Elsipogtog context, a decade-long struggle for social order is considered, primarily from the perspective of policing. The third section deals specifically with the emergence of the HWC, its special features and challenges for Aboriginal justice.<sup>1</sup>

## I. AUTHORITATIVE AND POLICY CONTEXT

The signal events in the past 30 years that have shaped the context for justice possibilities for Aboriginals in Atlantic Canada have been (a) the *Constitution Act, 1982* (“the existing Aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed”);<sup>2</sup> (b) the 1989 report of the Hickman Inquiry on the Wrongful Prosecution of Donald Marshall Jr. (bearing most specifically on the Mi’kmaq in Nova Scotia but having rippling effects throughout Atlantic Canada);<sup>3</sup> (c) the 1996 Royal Commission on Aboriginal Peoples (RCAP) report, *Bridging The Cultural Divide*, which laid out a revitalizing agenda for Aboriginal justice in Canada;<sup>4</sup> (d) the Supreme Court of Canada’s (SCC) 1999 *Gladue* decision which was a culmination of earlier court decisions and sentencing policies and emphasized the unique considerations that should be taken into account by judges when

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<sup>1</sup> This paper draws heavily upon the eleven reports completed by the author between 2003 and 2012 which dealt with justice programs and initiatives in Elsipogtog and with the initiatives responding to the pervasiveness of the threat there of Fetal Alcohol Spectrum Disorder (FASD).

<sup>2</sup> *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.35.

<sup>3</sup> Province of Nova Scotia, *Report of the Royal Commission on the Donald Marshall Jr Prosecution*. By A Hickman (Halifax: Queen's Printer, 1989).

<sup>4</sup> Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

sentencing Aboriginal offenders;<sup>5</sup> (e) the SCC's 1999 rulings in the case of Donald Marshall Jr's conviction for illegal eel fishing (a regulatory conviction whose overturning by the SCC had profound effects for Aboriginal economic development and Aboriginal regulatory governance, attacking the roots of First Nations' (FN) social problems).<sup>6</sup>

The Hickman / Marshall Inquiry impacted most directly on Nova Scotia but its ramifications were important as well in New Brunswick and PEI. The three Royal Commission commissioners determined that the wrongful prosecution of Marshall in 1971 was directly a function of the fact that Marshall was Aboriginal and that Nova Scotia's justice system had been "racist and two-tiered", a damning indictment by respected, mainstream judges. The Inquiry's recommendations were wide-ranging, extending well beyond redress for Marshall and Aboriginal issues to the organization of policing and prosecutorial services in Nova Scotia and advancing new policies to respond to the problems of disclosure, wrongful prosecution and political interference. The Inquiry has had a profound impact on issues of Aboriginal justice in Nova Scotia<sup>7</sup> generating initiatives such as restorative justice programs, and regular provincial court sittings on the largest FN, Eskasoni; currently, a wide range of province-wide Aboriginal justice services are provided through the Mi'kmaq Legal Support Network (MLSN) which may well be the most effective and well-established multi-FN, Aboriginal justice programming in Canada.<sup>8</sup> The Inquiry's report was generally seen as progressive by First Nations and, overall, was favourably received by the Union of Nova Scotia Indians which emphasized that "We agree with the principle that change must be community-based and, in implementing a justice system on Mi'kmaq communities, it will require the active involvement of community members. A broad base of community acceptance and community support are essential for any initiative to succeed".<sup>9</sup> The Inquiry's recommendations have mostly been implemented; indeed, the justice services provided by MLSN in some ways have gone well beyond them. A key factor in this progress has been the Inquiry's recommended Tripartite Forum on Native Justice whereby high-ranking federal, provincial and Mi'kmaq representatives meet regularly to monitor current justice initiatives for the FNs and consider new ones.

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<sup>5</sup> *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

<sup>6</sup> *R v Marshall (No 1)* [1999] 3 SCR 456, and *R v Marshall (No 2)* [1999] 3 SCR 533.

<sup>7</sup> It was recommended that, as in the Mohawk FNs of St. Regis and Kahnawake, there should be established a "Native Criminal Court" as a 5 yr pilot project incorporating the following elements – a) a Native JP under section 107 of *Indian Act* to hear cases involving summary conviction offences committed on reserve; b) diversion and mediation services; c) community work projects to provide alternatives to fines and imprisonment; d) aftercare service on reserve; e) community input into sentencing where appropriate; f) court worker services.

<sup>8</sup> Don Clairmont & Jane McMillan, "The MLSN and Future Directions in Mi'kmaq Justice", (Tripartite Forum on Native Justice, Department of Justice, Nova Scotia, 2006).

<sup>9</sup> Union of Nova Scotia Indians, *Mi'kmaq Response to the Report of the Royal Commission of the Donald Marshall Jr. Prosecution*, (Union of Nova Scotia Indians, February 21, 1990).

The Tripartite Forum launched in 1991 continues on and has recently spawned the multi-year “Made in Nova Scotia” treaty process.

The Marshall Inquiry advanced – as did most, but not all, such Canadian inquiries on Aboriginal justice issues between 1985 and 1992 – an agenda oriented to greater engagement and decision-making on the part of Aboriginal people within a more progressive mainstream justice system: “We agree that some degree of control should be accorded to Native people in respect of their institutions of justice. A Native Criminal Court is one way to return to them some degree of control over Native justice.”<sup>10</sup> The underlying ethos of the Marshall Inquiry and its recommendations might best be described as focused on “fairness and integration”. The vision and the accompanying agenda were to eliminate racism, reduce legacy effects (e.g., the impact of the IRS experience) and secure the more satisfactory inclusion of Mi’kmaq people in mainstream society. As the Commissioners emphasized they were not proposing “a separate system of Native laws but rather a different process for administering or reserve certain aspects of the criminal law”. In their view Aboriginals should be so empowered “Because they are Native” (Hickman, p168),<sup>11</sup> having a history and culture prior to colonization, and could generate successful measures for resolving disputes. In a modest way the Inquiry’s approach had “legs” that could go significantly beyond simple fairness and integration. Also, while the recommendations focused on the criminal justice sector there were aspects that referred to family justice issues and the general use of alternative dispute resolution (ADR) in civil and regulatory (e.g., band bylaws) matters; clearly these justice issues have become more salient in Aboriginal society over the past two decades.

In 1996, at a general meeting of Nova Scotia FN chiefs, there was consensus that, given the realization of the gist of the 1989 Marshall recommendations, the appropriate agenda for Aboriginal justice services in Nova Scotia, going forward, should be that advanced by recently concluded RCAP hearings. In the RCAP analyses and recommendations prominence was given to “autonomy and difference” through a set of arguments, namely (a) the mainstream criminal justice system (CJS) was imposed, alien and ineffective for Aboriginal peoples; (b) treaty rights to develop alternatives exist, and (c) community controls would be appropriate given the treaties, cultural differences and pragmatic imperatives. The RCAP agenda called attention to two additional points that are salient in considerations of Aboriginal justice in general, namely (a) the possible importance of transcending community-specific justice programming to construct tribal or multiple-FN, partnered justice services in order to achieve cost efficiency and better cope with conflicts of interest and favouritism, and (b) the importance of justice segments other than the criminal sphere in order to effect more culturally appropriate and need-specific justice services (e.g., family justice and regulatory or

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<sup>10</sup> *Supra* note 3 at 167.

<sup>11</sup> *Supra*, note 3 at 168.

band-initiated administrative justice initiatives). RCAP discussed jurisdictional and collaborative issues at length with respect to both law-making and administration of justice and, in arguing for significant Aboriginal rights in both areas, differentiated between core and peripheral concerns; core concerns, defined as crucial to Aboriginal culture and society and not profoundly impacting on mainstream society, were the areas where, in the RCAP argument, significant Aboriginal autonomy could be exercised. But while the justice system and policing were deemed to be core-relevant, the RCAP position was that in these segments there would be only modest difference vis-à-vis mainstream society. It was underlined that perhaps some but certainly not all laws enacted in Aboriginal nations will be criminal laws; indeed considerable emphasis was given to the regulatory and family spheres of justice.<sup>12</sup>

Family justice, it was argued, would be more likely than criminal justice to be a jurisdictional site where Aboriginal values and practices might yield substantially different justice laws, policies and practices. Having an ethos of “difference and autonomy”, then, RCAP directed attention to where constitutional rights, cultural differences and circumstances could lead to Aboriginal administration and jurisdiction in justice matters. Interestingly, though, the RCAP commissioners expected that whatever the level of parallelism in justice matters, there would only be minor differences in the criminal justice field were the RCAP position to be accepted by Government and Aboriginal peoples. Thus, there is much commonality in the Marshall Inquiry and the RCAP perspectives on Aboriginal criminal justice despite their different premises. Both suggest that significant Aboriginal criminal justice initiatives are required but can be accommodated within the mainstream justice context. In the RCAP instance it was acknowledged that standards of effectiveness, efficiency and equity may require a stronger cohesion of FN identity that transcends band affiliation; certainly in many circumstances a province or sub-province -wide system is being advanced; that position was implicitly adopted in the Marshall Inquiry.

The other two signal turning points highlighted above sprang from two decisions (including related judicial clarifications and subsequent policy imperatives) of the SCC in 1999, one dealing with criminal and the other, regulatory justice. A major SCC decision and entailed policy directive announced in 1999 concerned the *Gladue* case where the conviction and incarceration of an Aboriginal person was successfully challenged on the grounds that more attention in sentencing should have been paid to the attenuating factors associated with the unique legacy of the Aboriginal experience in Canada which has long been associated (and continues

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<sup>12</sup> Writing on this for the Royal Commission, Peter Hogg and Mary Ellen Turpel, suggested that dispute resolution in the following areas should always lie within the exclusive territorial jurisdiction of Aboriginal nations: the management of land; the recognition of activity on the land, including hunting, fishing, gathering, mining and forestry; the licensing of businesses; planning, zoning and building codes and environmental protection. [PW Hogg & ME Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 Can Bar Rev, 187].

to be) with a very highly disproportionate level of incarceration.<sup>13</sup> The policy called for judges to ensure that Aboriginal offenders being sentenced were recognized as such and that special Gladue reports be submitted indicating the salience of the Aboriginal legacy, if any, in relation to the offence before the court. This SCC imperative has been adhered to most strongly in Ontario where there are several designated Gladue courts and where the applicability of the Gladue policy has been, in principle, extended to bail, another point at which a person's freedom from incarceration is at stake. Elsewhere in Canada, the Gladue policy has been much less implemented if implemented at all. Canada-wide visits to courts dealing with Aboriginal offenders by this writer in 2008 and 2009 found that there were few specially designated Gladue reports produced in any criminal court, that most judges left the determination of whether a formal Gladue report should be prepared to the crown prosecutor, and especially to the defence counsel, and that, generally, Aboriginal probation officers and court workers were presumed to deal with the Gladue issues in their regular court roles. Field observations suggested that some FN justice providers themselves may not fully appreciate the significance of the Gladue decision since they may assume they have already been taking the Aboriginal legacy and other factors into account in their dealings with specific offenders. But Gladue is important for directing attention to alternatives to incarceration and for a better appreciation of how legacy, in terms of an offender's personal history and social circumstances, links up with offending patterns. The emphasis too is on having a holistic approach, avoiding custody if possible and providing access for the offender to treatment programs and other beneficial social services.

In Atlantic Canada there have been formally designated Gladue reports submitted at sentencing for Aboriginal offenders only in Nova Scotia and not always even there; the Gladue reports have been prepared for the court by the Aboriginal justice services provider, MLSN. Justice authorities in New Brunswick and PEI have considered requiring formal Gladue reports at sentencing but thus far none have taken place. Interestingly though the New Brunswick Minister of Justice in 2009 indicated, in response to a preliminary Elsipogtog suggestion for an HWC, that he was considering establishing a Gladue court in the province (i.e., something along the lines of the Ontario Gladue courts though perhaps having a "circuit court" feature). And in PEI, there have been "sentencing recommendation circles" where community inputs into sentencing have been received.<sup>14</sup> In New Brunswick, under the auspices of NBLA, Elsipogtog had an Aboriginal duty counsel for roughly seven years from 1998 to 2005, and since 2009 has had the services of a defence counsel specifically charged with handling Aboriginal cases and related matters (in both instances the services were provided to specific other FNs as well).

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<sup>13</sup> *Supra* note 5.

<sup>14</sup> There was a full-fledged sentencing circle held on November 2007 in PEI. There were 19 participants including the trial judge and other key CJS role players. Since that time when judges have requested a sentencing circle, the participants have been the parties to the offence, the Aboriginal circle facilitators and, occasionally, other service providers but not the key CJS officials. The written recommendations of the circle are sent to the court for its consideration.

The SCC's 1999 decisions and recommendations on the Marshall eel fishing case has had a major impact in Atlantic Canada on Aboriginal economic development, supporting an Aboriginal right to earn an average living from commercial fishing and leading to the provision of funds for the purchase of fishing licenses and equipment.<sup>15</sup> They have also had implications for band governance since they created a situation where it has become more important for the FNs to exercise their governance capacity both in convincing members to adhere to the agreements entered into by the band, whether with governments or the private sector, and to effectively be part of any required enforcement. In essence, then, the SCC's 1999 decision has reinforced the RCAP position that the regulatory area of justice would be a major, growing focus of Aboriginal justice as Aboriginal rights are fleshed out. This evolution builds upon the fact that increasingly FNs in Canada have been developing a dispute resolution capacity which appears essential to sustain effective self-government.<sup>16</sup>

While Aboriginal fisheries activities facilitated through Department of Fisheries and Oceans (DFO) programs have preceded the SCC's Marshall decision, there is little doubt that a qualitative change occurred as a result of it, especially in Atlantic Canada. A DFO official reported in 2006, "that [since 2000 in Atlantic Canada] more than 1000 FN people are employed in an orderly fishery and hundred more fisheries-related jobs have been created. Unemployment has dropped 4% (in absolute terms) from 2000 and fishing licenses held by FN people have generated economic return of roughly \$41 million in 2004 or \$4000 per household, an increase of more than 300% from the return generated from licenses held in 2000"<sup>17</sup> A spokesperson for the Atlantic Policy Congress of FN Chiefs, interviewed on the same news item, noted that, "the money has had a positive effect on Aboriginal communities. Our communities have a new sense of hope. It is not a money thing. It's a whole mindset. And it has fundamentally changed our communities forever and that is really good".<sup>18</sup>

While the fisheries agreements signed with DFO did not live up to expectations in many FN communities and certainly did not readily yield the "moderate livelihood" that the SCC decision sanctioned, they have apparently often produced the changed mindset referred to by the APC spokesperson above,

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<sup>15</sup> *Supra* note 6.

<sup>16</sup> According to the federal Department of Justice, there were approximately 89 community-based agreements with a reach of 451 communities as early as 2005. The Department stated that it was working with INAC and the Aboriginal Justice Directorate to develop projects and resources to support self-government capacity building in the local administration and enforcement of Aboriginal laws separate to the implementation phase of self-government negotiations (Clairmont and McMillan, op.cit).

<sup>17</sup> *Mail Star* (February 27, 2006).

<sup>18</sup> *Ibid.*

generated funds for the bands to provide needed social and recreational programs, and allowed for local leaders to organize their fisheries in such a way as to distribute the work opportunities to fish, thereby spreading the benefits and E.I. eligibility. There has been a multiplier effect in a number of FN communities, including Elsipogtog, creating more small businesses and more partnerships with mainstream and other FN businesses. The economic developments have reinforced the significant expansion of FN government. The combination of economic developments, expansive government activity, and optimistic mindset usually can be expected to impact positively on the root causes of social malaise, crime and other, related problems. Still such development is a work in progress. The fishing industry as a growth engine has declined in recent years and Elsipogtog for example remains economically depressed with a large proportion of the population dependent on social assistance, and a seasonally adjusted unemployment rate of 65% in 2009 and 2010.

Overall, then, the five signal events discussed above have generated a very positive social context for the development of Aboriginal justice activity especially at the community level, and it is fair to conclude that they have generated exciting times in Aboriginal justice across Canada as First Nations and other Aboriginal groupings seek to realize the promise of their constitutional rights and the new federal and provincial policies, in developing justice programs that respond to their own needs and wishes as their societies evolve in terms of self-government. The form and substance of that Aboriginal justice activity has been channeled via the three broad justice developments discussed below.

## II. THREE PIVOTAL THEORETICAL AND POLICY DEVELOPMENTS

There are three theoretical and policy developments that merit special attention for Aboriginal justice and that have had much relevance for the creation of the criminal justice system in Elsipogtog, namely (a) the research and policy literature on the foundations for Aboriginal self-government in Canada; (b) the continued evolution of therapeutic jurisprudence (e.g., the problem-solving court, extra-judicial sanctions), and (c) the increased attention to restorative justice and practices throughout society.

### (A) RESEARCH AND POLICY LITERATURE

Belanger and Newhouse reviewed the salient literature of the past thirty years and commented on the expansion of the meaning of Aboriginal self-government (i.e., far more expansive and substantial than ‘communities have municipal-like powers’), noting that Aboriginal self-government now is more a question of how rather than why.<sup>19</sup> Interestingly, the courts have consistently rejected claims of analogous rights

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<sup>19</sup> Belanger Yale & David Newhouse, “Emerging from the Shadows: The Pursuit of Aboriginal Self-Government to Promote Aboriginal Well-Being” (2004) 24 J Native Studies 1.

to Aboriginal programs and services (e.g., Gladue ‘rights’) on behalf of advocates for Black Canadians.<sup>20</sup> Court rulings have contended that Aboriginals are in a unique position vis-à-vis the justice system not because they have formal self-government rights but for their combining two considerations, namely overrepresentation in custody and a distinctive cultural heritage. The uniqueness of the Aboriginal position is reflected in the comment of one interviewed crown prosecutor that “with Aboriginals there are different issues for court officials such as me”. The Aboriginal uniqueness is essentially a consensus view within the Canadian justice system but there has long been significant divergence on its underpinnings. In 1963 the famous

Hawthorn Report, focused on Aboriginal rights in British Columbia, concluded that the most appropriate way to conceptualize Aboriginal rights in Canada would be in terms of a “citizenship plus” concept, that is, all the rights of ordinary citizens plus other rights related to treaties and to their exercise of governance prior to the settlements of Europeans.<sup>21</sup> A large and growing academic and policy literature appears to have reached a consensus that self-government is appropriately based not on cultural differences or over-representation in prisons but on the pre-settlement exercise of governance.

While the SCC has yet to rule directly and definitively on the question of Aboriginal self-government, its decisions on other Aboriginal rights issues have undeniable consequences for any future ruling. Murphy traced the key court decisions from the *Calder* case in 1973 through the *Constitutional Act, 1982* to *Sparrow* and *Sioui* in early 1992 to *Van der Peet* in 1996.<sup>22</sup> He argued that the SCC’s choice thus far to anchor the legal recognition of Aboriginal rights in the distinctive character of Aboriginal cultures (their Aboriginality) constitutes a serious diminishment of the legal and political status of Aboriginal peoples. Murphy contended that scholars and activists increasingly have based their position on Aboriginal self-government claims not on Aboriginals having a distinctive culture but on their being the original sovereigns in their traditional territories. In Murphy’s view, the appropriate context is the analogy of “national minorities living within the boundaries of multinational states, grounding claims on self-government in their authority as separate and independent peoples forming their own political community and being neither derivative nor subordinate to the self-governing authority of the more powerful national communities with whom they share a

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<sup>20</sup> Michelle Mann, “Common Ground: An Examination of Similarities Between Blacks and Aboriginals”, in *Aboriginal Peoples Collection* (CA, 2009) 29.

<sup>21</sup> Hawthorn Report, *A Survey of Contemporary Indians of Canada* (Ottawa: DIAND, 1963).

<sup>22</sup> Michael Murphy, “Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights”, (2001) XXXIXV: 1 Can J Political Science; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313; *supra*, note 2; *R v Sparrow*, [1990] 1 SCR 1075; *R v Sioui*, [1990] 1 SCR 1025; *R v Van der Peet*, [1996] 2 SCR 507.



state”.<sup>23</sup> He advanced a model of self-government rooted in a normative authority claim to the design, delivery and administration of selected services and institutions in an urban or rural setting or to a process of gradual capacity building in specific sectors such as education, resource extraction or small business development. SCC rulings clearly have stated that the Crown has ultimate sovereignty (though it must meet a ‘strict’ constitutional test to justify its actions) so the relation between Crown and Aboriginal peoples established by this position is not one of equals. Still, it appears that even a SCC interpretation, congruent with the model of national communities with a substantial degree of autonomous self-governing authority, would arguably seem very much like the approach that is already part of the official federal policy for the recognition and negotiation of Aboriginal self-government, and quite a reasonable fit to RCAP recommendations, as well as reaching back to the Hawthorn “citizenship plus” model.<sup>24</sup>

Issues of “rights” and “alternatives” dominate the literature on Aboriginal justice practices, not evaluation of the initiatives per se. Apart from some assessments featuring sentencing circles and singular initiatives such as Hollow Water, formal evaluations of specific initiatives have tended to focus on the offender and conventional CJS measures of success, and to be justificatory – i.e., “mainstream CJS programs do not work for us but Aboriginally administered ones do”.<sup>25, 26</sup> Two major themes have emerged from examining Aboriginal initiatives, namely (a) the Hollow Water generic position which emphasizes “we want to focus on those justice issues that matter the most to our communities and not just handle Aboriginals’ minor crimes for the mainstream CJS”; (b) the broad use of restorative justice or practices within and beyond criminal justice issues to deal with conflict for reasons of feasibility and necessity (e.g., the opportunities provided by the small scale society of FNs, the extensive social problems, and the absence of checks and balances in governance). Underlying the Aboriginal arguments have been two major premises, namely rights (to administer and to some degree do things differently) and differences (a different culture / world view reworking mythology and cultural heritage in today’s understandings). The widespread Aboriginal view appears to be

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<sup>23</sup> *Ibid* at 113.

<sup>24</sup> Throughout Atlantic Canada partnership agreements have become the vogue. Nova Scotia, in addition to the Tripartite Forum established in 1991 and current engagement in collaborative planning over a variety of institutional areas, has had a treaty-making process underway for three years (the “Made in Nova Scotia” negotiations). In PEI there has been a partnership agreement since 2007, essentially a tripartite agreement (federal, provincial and Aboriginal) which provides for the parties to work cooperatively on a variety of matters, including the five “tables” of health, education, economic development, justice and child and family services. While not formally a treaty-making process, it appears to be similar in a substantive sense. Thus far, the focus has been on the “education table” but the process ultimately could well result in significant changes in Aboriginal justice there. There is apparently a more embryonic but similar partnership process taking place in New Brunswick.

<sup>25</sup> Barry Stuart, *Building Community Justice Partnerships: Community Peacekeeping Circles* (Ottawa: Department of Justice 1999).

<sup>26</sup> Aboriginal Corrections Policy Unit, *The Four Circles of Hollow Water*. (Ottawa: Supply and Services, 1997).

that effective Aboriginal justice services would likely spawn a growth of beneficial restorative practices throughout Aboriginal society.

#### (B) THE PROBLEM-SOLVING COURT

Over the past two decades, there has been a very significant growth in the United States and Canada in a social justice movement captured in the phrases “therapeutic jurisprudence” and “problem-solving court” which features an integrated health / treatment and justice system approach to dealing with crime, and often is seen as getting at the roots of certain criminal activity. The problem-solving court links justice and treatment for persons committing criminal offences who are addicted to drugs and / alcohol or who have manageable mental health problems. It is a voluntary alternative to regular court processing and typically the accused person must plead guilty and commit to a closely monitored and lengthy in-depth treatment program. Usually the offender receives bail and avoids incarceration if he or she adheres to that commitment. The movement has spawned drug treatment courts, mental health courts, FASD courts, and other substance abuse courts. Generally, the increasingly widespread restorative justice movement has been considered a kindred development. Social scientists have argued that the general perspective is itself a by-product of the evolution of citizenship from legal rights to political rights to social rights where in the social rights stage there is significant emphasis directed to taking into account the views and interests of all segments of society, especially those directly impacted by a designated policy.<sup>27</sup> Given the evolution of Aboriginal rights and the strong constitutional and governmental acknowledgement of Aboriginal uniqueness, and given the fact that the problems targeted by the problem-solving courts (e.g., substance abuse) are particularly rampant among Aboriginal people in Canada (e.g., the colonialist legacy), this broad social movement would seem very salient for Aboriginal people and as noted below the drug treatment court (DTC) definitely has become a template for Elsipogtog leaders.

The first formally designated DTC was established in Florida in 1989 and by 2007 there were approximately 1800 in the USA.<sup>28</sup> In Canada the first DTC was established in Toronto in the late 1998 and ten years later the DTC model had been implemented in other metropolitan jurisdictions such as Vancouver, Ottawa, Winnipeg, Edmonton, Calgary and Saskatoon. These courts usually deal with serious offending where the adult offender voluntarily pleads guilty and opts for a treatment program which is very demanding (e.g., regular individual and group counseling, urine tests for drug use, bi-weekly appearances in court etc) and of significant length (seven months to well over a year). There are variants of this DTC model where youth are involved and also where the offending is of a less serious

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<sup>27</sup> Talcott Parsons, *Politics and Social Structure* (NY Free Press, 1965).

<sup>28</sup> US, Washington: Congressional Research Service, *Drug Courts: Background, Effectiveness and Policy Issues for Congress* by Celinda Franco (2010).

nature and the program parameters accordingly are different (e.g., pre-charge, taking responsibility but not required to plead guilty, shorter program duration etc). Participation in the program enables the offender to avoid incarceration (or a record in the minor version) and to receive considerable and coordinated rehabilitative attention. The problem-solving court in the USA is popular as well in “Indian Territory” where it is called a “healing to wellness court” and more open to cultural and community input (i.e., incorporation of Aboriginal symbols, traditional treatment options, and engagement of elders). The first HWC was established in 1997 and there are now roughly 75 such courts in the USA, a handful of these characterized as mentor courts for other interested Aboriginal communities.<sup>29</sup> In Canada the only formally designated drug and alcohol treatment court among Aboriginal people is the Wellness Court in Whitehorse which was initiated in 2008 in a collaboration between the territorial government and FN chiefs of the Whitehorse area; the clients are primarily Aboriginal (i.e., 75%).

The DTCs, the vanguard problem-solving court, emerged as a possible solution to the strong association between high crime levels and substance abuse both directly (i.e., addicts cause much repeated crime) and indirectly (i.e., gang violence for control of the illicit drug business). The core features of the problem-solving courts in general remained the same over the past decades (e.g., the DTC court team including judge, prosecutor, defence counsel and treatment coordinator, the court dynamics especially the important interaction between the judge and the offender, and the lengthy out-patient treatment period). The DTCs and HWCs have achieved significant positive success. In most evaluated programs in North America, roughly 20% of the eligible offenders have either graduated from the program or have been less involved in crime as a result of their participation.<sup>30</sup> There has been much variation in success by age, race/ethnicity and gender but two factors have been identified by the more successful clients as crucial to their success, namely the fact that there is close monitoring for compliance with swift consequences, and that there is direct contact between the judge and the offender.<sup>31</sup> There has been some evolution in the approach of these problem-solving courts too, as harm reduction (e.g., tolerating less destructive drug use) has increasingly replaced total abstinence as a program strategy. There continues to be significant public controversy<sup>32</sup> concerning the priority to be given to these types of offenders (e.g., the expensive, intensive treatment) and to what some refer to as the criminalization of addiction and mental illness. In Canada, the DTC versions of problem-solving courts are usually funded through the federal ministries of Health and Justice.<sup>33</sup> A major equity

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<sup>29</sup> Tribal Law and Policy Institute, *Tribal Healing to Wellness Courts* (West Hollywood: 2009).

<sup>30</sup> *Supra* note 28, and J Latimer, K Morton-Bourgon, & J Chretien, *A Meta-Analytic Examination of Drug Treatment Courts: Do they Reduce Recidivism?* (Research and Stats, Department of Justice Canada 2006).

<sup>31</sup> *Supra* note 28, and Susan Goldberg, “Judging for the 21<sup>st</sup> Century” (National Judicial Institute Ottawa, 2005).

<sup>32</sup> D Werb, et al, “Drug Treatment Courts in Canada” (2007) 12:2 HIV/Aids Policy and Law Review.

<sup>33</sup> Don Clairmont & Tammy Augustine, “Advancing the Strategic Action Plan in Elsipogtog” (Atlantic Institute of Criminology: Dalhousie University, 2009).

challenge for Canada is how to make these kinds of justice programs available to citizens living outside the large urban areas where small populations spread out over large areas are deemed to represent a major obstacle to a cost-effective, problem-solving court.

#### (C) THE RESTORATIVE JUSTICE MOVEMENT

Another social movement that has shaped the emergence of current styles of Aboriginal criminal justice has been restorative justice (RJ) / restorative practices (RP), which have become especially prominent over the past 25 years in “Western” societies rooted in common law.<sup>34</sup> These alternative justice developments have occurred in both mainstream and Aboriginal societies, and there have been many common issues arising in both these societal segments (e.g., the proper balance between being offender-oriented and victim-oriented, the limited services and reintegrating programs available to the RJ service providers, the benefits and challenges of community-based justice programs). It is generally held in the RJ literature that the approach fits well with Aboriginal traditions or at least the current dominant interpretations of traditional Aboriginal practices. This view, in conjunction with the above analyses of Aboriginal rights and government policy, should be expected to foreshadow RJ’s extensive development in Aboriginal communities such as Elsipogtog.

While there is considerable unevenness in the extent to which RJ and RP have been implemented in the CJS and outside it, there is little doubt that RJ has increasingly become more entrenched in the CJS in Canada and other societies. RJ has been replacing Alternative Measures programming for young offenders and Adult Diversion programs for adults.<sup>35</sup> Indeed, much research has been focused on the extent to which RJ has become institutionalized, that is, an accepted and vital dimension of the CJS. In Nova Scotia, for example, RJ programs delivered by 9 non-profit agencies are closely coordinated and fully funded (roughly \$2.5 million per year) by the Department of Justice. The province-wide RJ service handles referrals from police and crowns and to a much lesser extent from judges (the court) and corrections. Fully one-third of all youth arrests are diverted to the RJ stream and several pilot projects are now guiding the extension of the service to adult offenders.

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<sup>34</sup> Bruce Archibald, “Democracy and Restorative Justice: Comparative Reflections on Criminal Prosecutions, the Role of Law and Reflexive Law”, (delivered at the 5<sup>th</sup> International Conference on Restorative Justice, Leuven Belgium, 2000). The RJ and RP terms are frequently used interchangeably but RJ better refers to alternative ways of dealing with the harm caused by crime and is linked to the CJS whereas RP refers to a general approach for reducing conflict, strengthening social relationships and building ‘community’. The circle, where ostensibly all participants have their views listened to and considered in the solutions, is the most well-known tactic employed in both (HIRP, World Conference, Toronto, 2008).

<sup>35</sup> Don Clairmont, “Restorative Justice in Elsipogtog: a Decade of Progress” (Ottawa: Aboriginal Justice Directorate, 2012).

The underlying premise of the RJ in Nova Scotia has been “some kind of RJ can be utilized with all offences and offenders”. Over the past decade the RJ program in Nova Scotia has clearly penetrated the CJS, passing well beyond the gate-keeping police-level of referring minor offences by first or second time offenders; the leading referral agents are increasingly the crown prosecutors and all CJS officials acknowledge that without the RJ option for repeat offenders and somewhat more serious offences, the CJS would be in a workload crisis.<sup>36</sup> RJ has stronger roots now in law (the YCJA in 2003 and its subsequent judicial clarifications) and governmental policies, and is reinforced by kindred social movements in the justice field, such as ‘the problem-solving court”, not to mention developments in Aboriginal society in the use of sentencing circles. While it seems most advanced in Nova Scotia, and there is extensive RJ activity in Quebec, Alberta and the North, in most areas of Canada the RJ programs focus exclusively on youths and are operated by non-profit organizations with limited governmental funding.

Within its limits, RJ appears to have been a successful, efficient and effective justice strategy but at the same time, there is a growing view among some of the leading RJ experts in Canada that the RJ movement has now stalled and requires fresh input of theory and policy, and new applications.<sup>37</sup> The same judgment might be rendered with respect to Aboriginal justice circles and sentencing circles where there remains significant activity in the North and in Saskatchewan and Alberta but little evidence of development. Basically, the critics argue, RJ (and related alternative justice programs) remain largely a minor intervention (usually limited to just one short session per case, limited victim involvement, and with very infrequent referrals to psychological and other treatment services), and too closely linked to vagaries of the CJS referral agents. A major issue then has become how far can RJ go in the CJS? Can it deal effectively with serious crimes and problem repeat offenders? Will it become as extensively utilized with adult offenders in the absence of the supportive legal infrastructure that exists for youth programs such as the YCJA and encouraging associated SCC interpretations? Will the CJS and the community allow it do so? Does it and can it respond with equity, meeting the needs of special constituencies (e.g., age groups, the socio-economically disadvantaged, youths with behavioural problems, immigrant subcultures etc).

The limits of current RJ programming may be less crucial among FNs given that most Aboriginal RJ programming in Canada already includes adults and, more importantly, the specific RJ programs dealing with minor crimes may be just one dimension of a transformed justice system there. Sentencing circles, for example, have been rare in non-Aboriginal communities and are likely to remain so in light of their demands on resources and the views of judges as to their role

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<sup>36</sup> Don Clairmont, “Moving On To Adults: An Assessment of the Nova Scotia Restorative Justice’s Adult Pilot Project” (Halifax: Department of Justice, 2012).

<sup>37</sup> Jeff Latimer et al, “The Effectiveness of Restorative Justice Practices: A Meta Analysis” (2005) 85 *The Prison Journal*.

responsibilities in sentencing, but in one form or another they continue in FNs. Other restorative ways of dealing with serious offences have been developing as in Hollow Water (Manitoba), Alexis FN (Alberta) and Elsipogtog. There also appears to be more potentially valuable use of RP in the Aboriginal communities. The use of restorative practices has been catching on in mainstream societies in schools and even municipal administrations such as Hull U.K.<sup>38</sup> and Bethlehem, Pennsylvania. Examining the literature associated with these developments, one finds numerous references to the materials / literature on Aboriginal justice / healing circles, presumably a model for these mainstream initiatives. At present however there is in fact little RP programming in FNs but there have been some such developments (e.g., the Siksika FN in Alberta) and, in three of the Atlantic provinces, modest training programs have been initiated (though there is little evidence of significant actual implementation) presumably combining Aboriginal and Mainstream methods of conflict resolution in areas of band policy such as housing and economic issues.

### III. THE ELSIPOGTOG CONTEXT: THE STRUGGLE FOR SOCIAL ORDER

#### CRIME, SOCIAL DISORDER AND POLICING

Elsipogtog, is home to the largest FN in New Brunswick, a Mi'kmaq community of 3000 residents and a band membership of 3300 in 2011. It is approximately 90 kilometers from Moncton, has had and continues to have a very significant level of social problems, including high underemployment, high levels of single parent households, and rates of serious violent crime and of substance abuse far greater than neighbouring mainstream towns and cities.<sup>39</sup> For example, on average, over the past several years, “one of every seven adults in Elsipogtog between the ages of 18 and 33 has been either authorized by provincial health authorities to receive regular methadone treatment or regularly and illegally consumes addictive drugs (mostly prescription drugs), a rate minimally 25 times greater than in metropolitan Halifax, deemed by many as the “drug capital” of Atlantic Canada. At the same time, the community has an extensive Health and Social Services capacity, leads the province

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<sup>38</sup> Hull Municipality, *Towards a Restorative City*. (Hull: England, 2010).

<sup>39</sup> Throughout the first decade of the 21<sup>st</sup> century, Elsipogtog, compared to neighbouring communities, had much higher annual rates of virtually all types of offences and police arrests, whether property crimes (e.g., break and enter, property damage), social disorder offences (e.g., mischief, public disturbance), administration of justice offences (e.g., breaches, failure to appear), and interpersonal / intimate partner and sexual crimes. Also notable, the level of arrests under the Mental Health Act was typically more than 5 times greater than in comparably populated nearby communities (Clairmont, 2005, 2008, and 2012). As will be discussed below only in more recent years – since 2008 – has there been an appreciable decline in property and violent offences though the rates in these and other arrest categories remains quite high in comparison to neighbouring communities.

in its progressive justice programming, and has national renown for its Eastern Door program focusing on the prevention, diagnosis and treatment of FASD”.<sup>40</sup>

Elsipogtog then is a complex community where problems of crime and social disorder run deep but also where positive community-based initiatives have readily challenged the status quo, and with increasing, if mixed, success in recent years. Extensive research focused on the community context for the development of the justice system in Elsipogtog over the past decade has dealt with the political economy, population and educational trends, police statistics on offending, the pervasive drug and alcohol abuse, and the community capacity to support justice programming (for references see the several Clairmont reports noted). In regards to political economy, there have been significant economic developments over the past decade (especially the fisheries as noted above) but underemployment is still considerable and particularly affects young adult males, while politically there has been stability in recent years that has been valuable for the extension of justice programs. Key aspects of the population and education data have been the modest growth in population and post-secondary education (PSE), and the significant differences in migration and PSE by gender (i.e. females more than males in both instances). The police data over the past decade reveal very interesting patterns, namely that Elsipogtog has had for over a decade a very high level of crime and social disorder but that property and social order offenses peaked in 2008 and statistics from 2010 and 2011 suggest that personal violence has also now begun to decline significantly. Data on the considerable, continuing level of substance abuse indicate the potential value of the HWC. Data on community capacity indicate that Elsipogtog has built up a slew of services relevant to, and providing support for, effective intervention through healing circles, sentencing circles and now a problem-solving court approach (i.e., the HWC).<sup>41</sup> Significant collective efficacy, a requisite for a community-based justice system, has been achieved but the short term nature of much of the funding for these community services / programs and sometimes the shortfall in the training of their staff are realistic limits on much of the community capacity.

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<sup>40</sup> Don Clairmont, “Community-based Policing in Aboriginal Communities” in Mahesh Nalla & Graeme Newman, eds, *Community Policing in Indigenous Communities*, (University of Michigan : CRC Press, 2013). The section here on the background for Elsipogtog policing is a significant revision of that article.

<sup>41</sup> The hub for the services and programs most directly salient for the criminal justice system is the Health and Wellness Centre housing core medical staff (1.5 fte doctors and 9 nurses), a Methadone program, Alcohol and Drug program, Victims’ Assistance, FASD and related problems’ diagnosis, treatment and prevention, a Mental Health service and a Parent-Child Assistance program. Other services and programs include a Crisis Centre, Children and Family Services, and traditional dispute resolution and healing programs. These services and programs are staffed by roughly 50-55 fte role players. A recently released (2010-2011) survey and assessment of the Elsipogtog Health and Wellness Centre’s Services, Structures and Functions (Process Management Inc., A Survey of Elsipogtog Services. Elsipogtog, 2011) showed, comparing the 2009 survey to the 2004 study carried out by the same consultants, that there has been significant growth in services, client numbers, funding, accountability, and infrastructure across virtually all program areas; as well, the survey indicated an increase in community reception, trust and approval, across the different sectors of the Centre. Of course there are also many community services such as an elementary school, fire and ambulance services and so forth.

Given the limits of “game-changing” externalities (e.g., the political economy, socio-cultural transformation) the challenge for social order in Elsipogtog has largely been to harness community and policing thrusts to facilitate an intensive and positive criminal justice system. RCMP community-based policing with its emphasis on problem-solving and in-depth cultivation of community partnerships, in conjunction with its continued commitment to professional-based policing, has played a significant role in facilitating an Aboriginal justice system there. How that has been accomplished is described below.

#### THE LARGER CONTEXT FOR POLICING IN ABORIGINAL COMMUNITIES

From the formation of the Canadian Confederation (1867) and the *Indian Act* (1876) until the 1960s, all institutionalized policing in Aboriginal communities was federal. As the contracted provincial police, except in the two most populous provinces (Ontario and Quebec), the RCMP was also responsible for all policing outside cities and towns and in select urban areas by special supplemental contract. The few reserves within municipal boundaries were usually policed by the extant municipal police services. As the 1960s evolved and SCC decisions increased provincial jurisdiction over Aboriginal people both on and off reserve, major changes in the police organization and approach in Aboriginal societies began to occur, leading ultimately to the First Nations Policing Policy in 1991 and the subsequent FNPP Program in 1992.<sup>42</sup> The FNPP required greater Aboriginal involvement and partnership in policing in FN communities and also facilitated and encouraged, especially in Ontario and Quebec, the growth of self-administered, independent FN police services. It mandated a “community-based policing plus” strategy of policing, parallel to the “citizenship plus” conception of Aboriginal rights in Canada as rooted in treaties and protected in the Constitution Act of 1982. Most importantly, the FNPP mandated tripartite partnerships among federal and provincial governments and the FNs, not simply bilateral policing contracts between the two senior levels of government which had been the norm. This change, in conjunction with FNPP’s other central features, has led many researchers to identify Canada as the only country that has developed a comprehensive national policing approach for its Aboriginal peoples.<sup>43,44</sup>

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<sup>42</sup> Three central events have shaped Aboriginal policing in the modern era, namely (a) the withdrawal of the RCMP from regular policing in FNs in Ontario and Quebec announced in the 1960s; (b) Indian Affairs’ (DIAND) 1971 Circular 55 policy on policing Aboriginal communities which identified principles that should guide such policing (e.g., greater consultation and “ownership” by Aboriginals) and expanded the role for band constable policing services; (c) the FNPP in 1991 (Don Clairmont, “Ipperwash Inquiry, Aboriginal Policing in Canada: An Overview of Developments in First Nations” (Toronto: Ontario Department of Justice, 2006)).

<sup>43</sup> Savvas Lithopoulos, “International Comparison of Indigenous Policing Models” (Ottawa: Public Safety Canada, 2008).

<sup>44</sup> The three chief FNPP objectives are listed as (a) enhance the personal security and safety of FN communities; (b) provide access to policing that is professional, effective and culturally appropriate; (c)



There have been distinct phases in the style of RCMP policing in Aboriginal communities, basically evolving from a subordination and colonialist model to one formally at least emphasizing integration and partnership. Until the 1960s, the RCMP approach effected “a broad policing mandate wherein officers carried out a wide range of tasks additional to conventional law enforcement (such as census gathering and linking people to governmental programs). Aboriginal persons engaged with the policing service were helpers and clients rather than colleagues or partners. The style of policing was community sensitive in a colonialist, paternalistic context where the RCMP officers worked closely with the Anglican and Roman Catholic churches operating schools and hospitals, the Hudson Bay traders and the appointed Indian Agents. Beginning after World War Two, but picking up steam in the 1960s, the old order was transformed as Aboriginals received the right to vote in federal elections, government bureaucrats assumed the dominant leadership role in providing services in Aboriginal communities, and the Indian Agent position was gradually abolished in favour of the empowered band council. The traditional, broader police role had some community-based policing features but it was thoroughly enmeshed in the assimilation policies of the federal government<sup>45</sup> in that colonialist context and did not employ Aboriginal members nor acknowledge accountability to Aboriginals”.<sup>46</sup>

Aboriginal policing steadily if slowly became appreciative of cultural sensitivity and local priorities and the need for collaboration and partnership with Aboriginal peoples. The band constable system began in the mid-1960s and grew significantly over the next twenty years. Here, typically, the officers were local residents hired and paid for by the bands, modestly trained, appointed under RCMP warrant, in effect village constables under the guidance of the RCMP or provincial police to whom they turned over any cases involving the criminal code or offences under other federal or provincial legislation. In the mid-1970s, special Indian constables began to be hired directly by the RCMP (and the Provincial Police services in Ontario and Quebec) to complement the work of the credentialized, regular members. And, increasingly in the 1980s, some Aboriginal persons were recruited as full-time regular members into these services. Generally this evolution in policing was assessed positively by Aboriginal leaders who rated the successive steps as valuable enhancements. Nevertheless, evaluation studies also showed that they always wanted more, essentially an accountable, community-based policing service if not their own fully credentialized, self-administered service. Each advancement was also subsequently found wanting by Indian Affairs which focused on the continuing major public safety issues in FN communities, by a slew of

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increase the level of police accountability to FN communities (Public Safety Canada, “2009-2010 Evaluation of the First Nations Policing Program” (Ottawa: Public Safety Canada, 2010).

<sup>45</sup> Nor did it generate significant trust among Aboriginal people. Few Aboriginals reported any abuse in the Indian Residential School system to the RCMP, an abuse that has been shown in both personal accounts and court materials to have been quite widespread (Marcel-Eugene LeBeuf, “The Role of the Royal Canadian Mounted Police During the Indian Residential School System” (Ottawa: RCMP, 2009)). The RCMP managers, along with the federal government and the church leaders have profusely apologized in recent years for their complicity in this approach to Aboriginal peoples and communities.

<sup>46</sup> *Supra* note 42.

independent inquiries and commissions focused on policing shortcomings in specific cases, and by the mainstream police leaders themselves in their assessments of their effectiveness and lack of meaningful partnership with Aboriginal people;<sup>47</sup> most strikingly, RCMP assistant commissioner Head concluded his 1987 in-depth, country-wide assessment of policing in Aboriginal communities<sup>48</sup> with the warning “the RCMP will have to dramatically change the way it polices Aboriginal communities or it will soon find itself out of business there”.<sup>49</sup>

Since 1991 the FNPP has provided the framework for policing Aboriginal communities. “Its major principles and imperatives harkened back to the 1971 Circular 55 policy of Indian Affairs but incorporated as well contemporary approaches to policing such as community-based policing and current government acknowledgement of the constitutional and treaty rights of Aboriginal peoples to exercise as much self-government as is feasible in their communities. Policing in Canada’s Aboriginal communities faces much challenge, due to the combination of colonialist legacy (e.g., racism, dependency), scant economic opportunities in conjunction with the decline of traditional activities in the often off-the-beaten path locations, and a high level of need for and local expectation for the policing service. Violent and property crime levels have been very high and the 24/7 local demand for policing has usually far exceeded the police resources available”.<sup>50</sup> National surveys of police officers working in Aboriginal communities over the past fifteen years, whether in self-administered FN police services (referred to as SAs)<sup>51</sup>, the RCMP or provincial police organizations, have consistently and increasingly identified “unsolvable social problems” as the major issue negatively impacting on their policing efforts.<sup>52</sup>

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<sup>47</sup> Cited in *Supra* note 42.

<sup>48</sup> Robert Head, “Policing for Aboriginal Canadians: The RCMP Role” (Ottawa: RCMP 1989).

<sup>49</sup> *Supra* note 40.

<sup>50</sup> *Ibid.*

<sup>51</sup> In 2011 there were 46 SA police services in Canada policing 190 Aboriginal communities. 38 of the 46 are in Ontario and Quebec where both the provincial government and its distinctive provincial police service strongly support and appear to prefer the self-administered FN policing arrangement. SA services in the rest of Canada are vulnerable for several reasons including competition from the RCMP. The RCMP – the contracted provincial police service in these regions – has emphasized its historic role in policing Aboriginal communities, and has officially declared such policing to be one of its four priorities as a police organization; in 2010 fully 8% of the roughly 20,000 RCMP officers were self-declared Aboriginal, about 3 times the percentage of Aboriginals among the RCMP’s policed clientele at the community level.

<sup>52</sup> Rick Gill & Don Clairmont, “Socio-Demographic Survey of Police Officers Serving in Aboriginal Communities” (Ottawa: Public Safety Canada, 2008).

## POLICING IN ELSIPOGTOG: CHALLENGES FOR THE RCMP AND FOR THE COMMUNITY

The RCMP assumed full control of Elsipogtog policing in late 2002, replacing the Elsipogtog band constable service which had exercised a limited policing mandate and did not lay charges or process criminal cases through the provincial court. Since then the RCMP has gradually evolved a policing approach that combines strong professional enforcement with extensive community crime prevention programming. Most importantly, and more uncommonly, the local RCMP leadership has emphasized collaborative problem-solving with and accountability to Elsipogtog political leaders and community justice program staffers. An explicit strategy has been to effectively contain if not diminish the offending, responding swiftly and professionally to improve public safety while emphasizing crime prevention and participating fully in community efforts to get at the deep roots of social disorder. Arrests and charges increased in the years between 2003 and 2008 as the police complement increased and social order issues were prominent. Between 2008 and 2012 there was a sharp decline in actual incidents of break and enter, disturbing the peace, property damage, impaired driving and “failure to comply” (e.g., break and enters declined from 81 in 2008 to 23 in 2011). Interpersonal violence (e.g., assault, assault causing, sexual assault) continued to increase until 2011 but have also fallen off very sharply since then (e.g. assaults declined 335 in 2010 to 124 in 2011 and sexual assaults from 22 to 5 during the same period).

In 2004-05 the RCMP reported that Elsipogtog had the highest crime rate among all RCMP detachment units in Canada. The sub-detachment, headed by a corporal, had a complement of five or six officers and it was basically absorbed in dealing with the offences (plus making many arrests under the Mental Health Act). The everyday approach to policing, by necessity as much as by choice from the police perspective, was the conventional, professional-based policing approach. The evolution in Elsipogtog policing since that time has seen more police officers (eight in 2006 and 13 now in 2011-2012), more Aboriginal officers (from 2 to 7 in 2011), an organizational change to a more independent, Elsipogtog-focused detachment status, and a staff sergeant in charge with much experience policing in Aboriginal communities who espoused the importance of communication, partnership and problem-solving. These changes were in significant part the result of strong community pressure on the senior RCMP management by the Elsipogtog police advisory committee. Its claims were accepted that public safety considerations and the need to get at the roots of the offending required these specific changes (e.g., 13 officers meant a police to population ratio of 1 to 240, a ratio much higher than elsewhere in Atlantic Canada).

In the early 2000s, before the RCMP sub-detachment was well entrenched in the community, there was a fair consensus among Elsipogtog leaders and activists in the justice field that “When we talk about justice, we need to step back and ask ourselves, what values do we promote? What are the beliefs that influence our vision

of justice?”<sup>53</sup> In general terms the direction they advanced was to promote the values and practices of restorative justice and healing. Like residents in the poor urban areas of America two decades earlier when the community-based policing movement became popular, they wanted to reduce crime and enhance public safety by getting at roots of the inappropriate behaviour, not solely by arresting and jailing “our people”. The Elsipogtog population was modestly divided about disbanding their own band constables system in favour of an RCMP service largely staffed by non-Aboriginal but their priority was on effective social order (i.e., safety and security). There was also a widespread view that, while the replacement of the band constable system by the RCMP was a positive step, “the community has no power over the RCMP” and that effective action on root problems required closer collaboration between police and community.

In 1996 a band council resolution delegated the authority to address justice matters to the Elsipogtog Justice Advisory Committee and by 2000 there was in place an Elsipogtog Police Advisory committee, a Victim Services program, band members serving as probation officer and duty counsel (both employees of provincial justice services) and a small RJ program. There was also an holistic approach to problems and solutions adopted in Elsipogtog, clearly evident in that all Justice programming (save the police service and the court roles) had been – and continues to be – embedded in the Health Centre and managed by its directors. The evolution in the policing approach made for a good fit with this holistic approach; indeed, it accelerated further kindred developments especially a more extensive use of restorative justice (RJ) and sentencing circles (the latter beginning in 2009-2010). In recent years, the Elsipogtog justice program has handled far more RJ cases than the other 14 New Brunswick FNs combined and just slightly less than in all the rest of the province’s RCMP detachments combined. It is the only FN regularly involved with sentencing circles.<sup>54</sup> A major accomplishment this year has been the successful implementation of the first problem-solving court (i.e., the HWC) to be located in an Aboriginal community, or any mainstream community of such small population size, in Canada.

RCMP policing in Elsipogtog has the usual features found in many RCMP detachments’ policing in Aboriginal communities, such as a police advisory committee, a service delivery plan (required under the Community Tripartite Agreement or CTA) including an annual performance plan, school programs such as Drug Abuse Resistance Education and Aboriginal Shield delivered by a designated

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<sup>53</sup> Cited in Don Clairmont, “Elsipogtog Justice: A Strategic Action Plan” (Atlantic Institute of Criminology: Dalhousie University, 2005).

<sup>54</sup> The first Elsipogtog sentencing circle (SC) took place in 2010 and was a classic “full monty” SC involving roughly 20 persons, including all key CJS officials, elders, offenders and victim and their supporters, and social services providers; the circle facilitator was the Elsipogtog director of justice programming. That format has been retained in all 15 SCs that have taken place since. The offences involved have been serious crimes such as intimate partner violence.

officer and/or in collaboration with local civilians, Neighbourhood Watch, participation in varied community committees (e.g., Violence and Abuse) and close collaboration with a band-funded crime prevention worker across a large variety of activities. One difference has been that the detachment commander has put a major effort into making these features effective through personal and other members' attendance in these activities and record keeping and indeed going beyond the usual expectations. For example, in addition to his own meeting regularly with chief and council, all Elsipogtog officers have been assigned a Band Councilor to meet with on a monthly basis to discuss any concerns and such monthly contacts are documented on a Detachment file. The staff sergeant has also been quick to bring to Elsipogtog innovative programs which further communications and understanding between the police and the community (e.g., the Aboriginal Perceptions program). Most importantly, the local RCMP has been an active mobilizer for restorative justice and the HWC and other programs which can hopefully get at root problems through collaborative effort and healing. The staff sergeant summed up his approach as follows:

Community based Policing is very important to me. I believe it is important to be involved with community events, building partnerships with Elders, Service Providers, community and Band Council. From day one it was my focus to be transparent and ensure that the members working in Elsipogtog be involved in the community, collaborating with key people in the community to identify problems of crime and disorder and to search for solutions to these problems. My focus is partnerships between the RCMP and the community. It is very important to respect people in the community and gain their trust.<sup>55</sup>

The impact of substantive community-based policing in Elsipogtog is still a work in progress. The crime rate remains comparatively high, especially interpersonal violence, and drug and alcohol abuse is widespread. The RCMP data do show however that both property crimes and crimes of violence have decreased significantly in recent years. Reflective of the enhanced social order, Police contend that significant trust has been achieved and that there is less under-reporting of assaults, especially domestic violence and sexual assaults. Still, there is much victim reluctance to pursue charges (accordingly, a relatively low percentage of charges per actual offences involving interpersonal violence), something attributed by police and others to real or perceived vulnerability and familism (presumably a leftover from the colonialist legacy). There appears little doubt however that Elsipogtog and the RCMP detachment have forged a partnership and are on the right track to getting at the deep roots of the crime and enhancing public safety. The aspect of the colonialist legacy that causes people to protect or shield their own versus the outside justice system is increasingly incongruent with the current realities based on greatly enhanced band council authority and administrative responsibility, the significant, if

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<sup>55</sup> Personal communication, 2012.

modest, economic and political developments especially over the past decade, and the collaborative policing approach that has developed.

Aboriginal communities in Canada often have much higher crime rates and far more serious public safety and related social problem concerns than their mainstream counterparts. And these issues remain very significant even though over the past several decades both federal and provincial governments have adopted more progressive policies and significantly increased FN funding. Aboriginal people continue to be vastly overrepresented in prisons despite ostensibly dramatic changes in sentencing and other policies designed to eradicate this differential. The Grand Chief of the Assembly of First Nations in 2004, in addressing the National Aboriginal Policing Forum, emphasized the need for safer FNs and better police efforts in that regard, and commented, “The root cause of our difficulties – the problems in education, physical and emotional health and economic and social development – must be examined as part of community relations, community policing and strengthening a sometimes rocky relationship between the law enforcement agencies and Canada’s Aboriginal peoples”.<sup>56</sup> In Elsipogtog there is evidence that that such an examination has been happening and that approaches that emphasize a strengthened relationship have been implemented, and, further, that outputs that have included strategies to get at the “roots of the difficulties” in a healing fashion are being pursued without sacrifice to public safety concerns.

#### IV. THE HEALING TO WELLNESS COURT IN ELSIPOGTOG

In its Strategic Action Plan (SAP), developed after extensive research in 2004-2005 on Elsipogtog justice patterns and the community’s justice system-related experiences and priorities for future directions<sup>57</sup> the Elsipogtog Justice Advisory Committee (EJAC) identified the appropriateness of obtaining a HWC. RCMP reports for that year indicated that Elsipogtog had the highest offence caseload per officer of any sub-detachment or detachment in Canada. The singularly extensive crime, whether person violence or property offending, was found to be largely a function of widespread addiction to alcohol or drugs, a legacy of colonialism, racism and accompanying cultural / family degradation. Research had emphasized the possible benefit of alternative justice approaches especially therapeutic jurisprudence and the problem-solving court. While there was limited understanding of how the HWC would actually function, the community’s FN leadership and ordinary residents – and indeed most CJS officials having to deal with the offending behaviour in Elsipogtog - highlighted the depth of the community’s social problems and the need for a community-based response. In agreement with objective police and court statistics collected in the multifaceted community research, the majority of the surveyed FN’s adults depicted Elsipogtog as a high crime area for both property

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<sup>56</sup> National Aboriginal Policing Forum (Ottawa, Ontario 2004).

<sup>57</sup> *Supra* note 53.

and person violence, with the level of crime increasing in recent years even while, in neighbouring communities and New Brunswick as a whole, it was decreasing; 75% called for “community research on justice issues and alternative court possibilities”.

The SAP, developed from the 2004/2005 research, vetted through extensive community consultations and supported by a formal band council resolution in 2006, called for the HWC to be implemented several years down the road after significant research on the model was undertaken, and subsequent to the building up of RJ programming including victim services and sentencing circles. RJ programming was to expand but remain focused on minor offences by first or second time offenders. It was considered crucial that there should also be a restorative, healing approach to the more serious intimate partner violence and sexual offending and that a first step should be the development of post-conviction sentencing circles along the lines of the “full monty” version established in Canada’s North a decade earlier. Given the scale and depth of the underlying causal factors, it was also deemed important to consider the realization of a HWC. In the SAP, goal # 3 called for exploring the HWC approach and preparing appropriate proposals for funding, while goal # 4 called for the establishment of such a court in Elsipogtog if appropriate, and goal # 6 for the HWC beginning to address certain family and civil matters only in subsequent years after the criminal court was effectively implemented. This agenda was followed in sequence under the direction of the EJAC.

As noted above, the HWCs follow the core DTC format but they have also always included both alcohol and drug addiction and, unlike the mainstream problem-solving courts, have emphasized the need for significant cultural and community engagement. This emphasis was particularly salient for Elsipogtog since community leaders and most local CJS officials held that these features were the keys to an effective alternative court processing for Elsipogtog offenders given that the substance abuse associated with so much of the offending has been pervasive and reflective of a long-term, deep-seated destructive response pattern to stress and conflict.

#### ELSIPOGTOG AND THE HEALING TO WELLNESS COURT

The first step in following the 2005-2006 SAP mandate regarding the HWC – beyond the prerequisite work of expanding the ERJ program, securing a full-time Victim Services capacity and launching plans for having sentencing circles – was to examine closely how the HWC worked among Aboriginal tribal court systems in the USA and explore what embryonic varieties of it, and possible alternatives to it, were in place in Canada. As in most things the EJAC has done, preparatory, solid research was emphasized. Beginning in 2008, with the financial assistance from the federal Department of Justice’s Aboriginal Justice Program, the examination began and the field research and write-up stretched over 18 months. Sites visited by the Elsipogtog RJ coordinator and this researcher included the Akwesasne Community Court, the courts at the Alexis, Siksika and Tsuu T’ina First Nations in Alberta, the

conventional criminal court sitting at Eskasoni FN in Nova Scotia, the Mental Health Court and the Domestic Violence Court at Saint John and Moncton respectively, and the Gladue and DTC courts in Toronto. In addition, site visits were made to Hollow Water in Manitoba and Mnjikaning in Ontario where significant, culturally-infused programs for dealing with serious person violence have been developed outside a formal problem-solving court context. This fieldwork was supplemented by telephone and email contacts with other Aboriginal court initiatives (e.g., the Whitehorse Wellness court) and extensive review of the pertinent literature.

The main conclusions of the research were:<sup>58</sup>

1. There were common issues among the FNs visited of extensive substance abuse, high levels of interpersonal and especially intimate partner violence, and a sense that conventional CJS responses were inefficient and ineffective.
2. Local leadership, and many CJS officials serving these communities, were placing their hopes for solutions to widespread justice problems in more community-based approaches to justice and were confident that such emphasis was consistent with both developing interpretations of Aboriginal constitutional rights and senior governments' Aboriginal policies.
3. Whatever the approach and style of the court visited, the leadership and stakeholders there considered that having a provincial criminal court on reserve led to positive changes in crime patterns and effected a greater sense of community ownership in justice services
4. Crucial to the success of courts shaped towards a HWC approach were having (a) good FN relations with judges and crown prosecutors, and (b) active support of chief and council.

After much discussion of the report's findings in the EJAC and later with chief and council, Elsipogtog formally adopted in 2009 the position, as suggested in the earlier SAP justice strategy, that the FN should begin discussions with the provincial government to secure a HWC as soon as possible (a formal "briefing note" document signed by the chief and the EJAC was sent to New Brunswick Justice officials in November 2009). That case was based on eight arguments, namely:

1. The efficiency and effectiveness of the problem-solving court and its HWC variant.

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<sup>58</sup> *Supra* note 33.



2. Equity in Canadian justice policy requires that such a court model not be accessible only in large centers and that principle especially applies to FNs given the legacy of substance abuse linked to colonialism and related factors.
3. The Elsipogtog substance abuse legacy is precisely what the problem-solving courts have been directed at.
4. Constitutional rights, treaties and Government policy acknowledge the unique status of Aboriginal peoples and underline the appropriateness of significant cultural and administrative self-government.
5. Elsipogtog's level of substance abuse and rates of violent crime, and the resistance of both patterns to conventional ameliorative punishment and treatment are strong evidence of the need for and practicality of a HWC.
6. Elsipogtog's significant evolution in justice programming and the availability in the community of significant diagnostic and treatment capacity are evidence of capacity and readiness.
7. Elsipogtog justice programming has a proven record of efficiency and accountability and will advance an appropriate business plan for the HWC.
8. An HWC at Elsipogtog, in the long-run, would stimulate other FNs and contribute to centres of excellence for FN justice systems, and could also benefit mainstream communities outside the larger metropolitan centers.

#### COLLABORATION WITH THE NEW BRUNSWICK GOVERNMENT

Developments in the delivery of justice services in New Brunswick created a favourable opportunity for the Elsipogtog HWC proposal. The NB Justice Department had been considering court options in response to crime patterns in the FNs and the CJS' responsibilities entailed in the SCC's Gladue rulings. Also, a significant reorganization and regionalization of the court system was in progress. In January 2010 an all-day meeting was held in Elsipogtog where attendees included the Lieutenant Governor, the Minister of Justice, senior Justice administrative officials, the chief justice, local CJS role players, Elsipogtog political leadership, EJAC officials and others. Presentations were made by the ERJ program and the discussion was lively and informative. A senior administrative NB Justice official characterized the meeting as "fascinating, interesting and necessary but we have to go slow, step by step". Agreement was reached to strike a working committee to explore the dimensions of, and requirements for, such a court. In addition to the overall working committee, subcommittees were subsequently created to deal with different facets of the proposed HWC (e.g., court procedures, eligibility, healing and treatment etc). The discussions and negotiations went on for two full years, harmonious and with careful attention to the specifics such as offence and offender eligibility, treatment services, and required staffing. The problem-solving court was

the basic model for these discussions and protocols from such courts in New Brunswick and elsewhere (e.g., Whitehorse) framed much of the discussions and negotiations. The launching of the Elsipogtog HWC was announced by the NB government in August 2010 and staffing completed for three administrative and treatment coordination positions (Court Stenographer, Court Coordinator and Primary Case Manager) in the fall of 2011. Factors unrelated to the government-community agreement however delayed the actual start of the new court until the summer of 2012. The basic 63 page document detailing rationale, objectives, policies and procedures, eligibility, privacy protocols, and treatment options for the pilot project was available in September 2012.<sup>59</sup> The HWC serves both youths and adults.

While the Elsipogtog HWC shares the underlying philosophy and usual protocols of most problem-solving courts, it had three special features in the penultimate draft, additional to its Aboriginal character, namely (a) it will deal also with domestic violence cases, (b) a guilty plea will not be required for an offender's acceptance into the HWC processing, and (c) significant attention would be given to the inclusion of victims and victim advocates. These first two features involved much discussion between NB Justice and Elsipogtog members of the working groups. In the case of domestic violence, the Elsipogtog negotiators emphasized the importance placed by the FN leadership on having this major community justice problem dealt with by the court and could point to the fact that most sentencing circles over the past two years had dealt successfully with such offences. That position was well appreciated by CJS officials and subsequently was agreed to by the NB Government. There were serious concerns raised by top NB Justice officials about dropping the requirement of a guilty plea for acceptance into the HWC stream. The acceptance / eligibility of a person who explicitly takes responsibility for the offence had long been a principle in the Elsipogtog restorative justice program and had been assumed in earlier drafts of the proposed HWC format but some reservations were expressed at the penultimate stage of the negotiations. While the requirement of a guilty plea has been standard in the problem-solving court model, there were some exceptions, most notably in Nova Scotia's Mental Health Court; in any event, after some discussion, the NB Government agreed to waive the requirement of a guilty plea for first time offenders but, under specific circumstances still to be finalized, required the registration of a guilty plea for certain previously convicted offenders.<sup>60</sup>

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<sup>59</sup> New Brunswick Department of Justice and Elsipogtog First Nation, "General Policy and Procedures: Elsipogtog HWC" (Fredericton: 2012).

<sup>60</sup> A wide range of offences are eligible to be processed through the Elsipogtog HWC but generally not those where the conviction carries a mandatory minimum or where very serious violence has occurred (e.g., murder, attempted murder, manslaughter). The crown prosecutor, federal or provincial, can exclude an application where there is serious violence even if the offence does not carry a mandatory minimum.

The successful conclusion to the Elsipogtog pursuit of a HWC with the New Brunswick Government in a period of provincial financial constraint and despite the additional funding required has been a considerable achievement of the EJAC, the ERJ program and the provincial government. It attests to the strong case made by Elsipogtog justice committee for the need and practicality of the HWC model and also for the capacity and readiness, efficiency and effectiveness of Elsipogtog justice-related programming. The provincial government's commitment to explore the HWC project and expend scarce resources on it has been a very positive response to FN concerns in the justice field. Having the HWC brings the provincial criminal court back to the Elsipogtog area after several years of its being transferred from Richibucto to Moncton. At the same time, building on the success of the circles, the HWC offers great promise for overcoming the in-depth legacy problems that have plagued the community and generated so much interpersonal violence and criminal activity. If successful, it also offers hope to FNs and smaller mainstream communities elsewhere in Canada for accessing the types of justice programming that up to now have been restricted to larger metropolitan centers.

## V. CONCLUSION

With the successful launching of the HWC it can be said that the Elsipogtog now has a reasonably complete community-based justice system, namely a restorative justice program, sentencing circles and a problem-solving court. The first two have an established record of accomplishment while the first quarter of the HWC's implementation has been regarded by CJS and community stakeholders as "working well so far" (i.e., accused persons are opting for it, treatment plans have been developed and thus far there has been solid commitment to the program by the offenders). The community-based policing approach provided by the RCMP provides crucial support for this justice programming. Overall then, these justice developments represent a considerable achievement by a small complex First Nation and underline the effectiveness of the combination of its vision of FN community "ownership" and a commitment to social planning that has been cautious, consensus-building, and evidence-based. At the same time, significant challenges remain, most particularly the significant level of interpersonal violence and social disorder and the adequacy of the community resources for treatment (this latter has been a major problem in virtually all DTCs as noted by Franco, 2010). How transferable this Elsipogtog experience can be to other FNs and to mainstream communities also will be an important question.