

BLENDING JUSTICE: INTERLEGALITY AND THE INCORPORATION OF ABORIGINAL JUSTICE INTO THE FORMAL CANADIAN JUSTICE SYSTEM

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Over the past fifteen years Aboriginal justice discourse in Canada has focused on seemingly incommensurable cultural differences between the legal sensibilities and practices of traditional¹ 'new' Aboriginal justice (Boutelier 1996; LaPrairie 1998) and those of the Canadian formal criminal justice system (RCAP 1996, 1993; Ross 1996, 1992; Proulx 1997; Dumont 1993; Griffiths and Patenaude 1988; AJI 1991). Countering the culture clash view of crime causation and downplaying the continuing effects of colonialism were theories proposing that structural socio-

¹ Confusion over the meaning of tradition is a major problem. Non-Aboriginals mistakenly believe that it is past customs, "particular cultural practices" from pre-colonial times that are being revived without reference to historical and cultural change (Warry 1998: 174). Rather, it is "tradition, the appeal to values and actions that sustain customs and provide continuity to a social group over time" (Warry 1998: 174) that is being revived in new contexts after years of oppression. Tradition is contingent upon the particular culture and the history of change that the culture has undergone. There is not one tradition but many across "Indian country" in North America" (Proulx 2003: 28).

economic inequities in Canadian society were responsible for overrepresentation (LaPrairie 1998, 1995; Depew 1996). A third theoretical strain maintained that the legacy of historical wrongs should not be downplayed suggesting that the continuing mind-set of colonialism fostered socio-economic inequities leading to overrepresentation (Proulx 2003, 2000). Aboriginal justice discourse mainly focused upon efforts to provide culturally sensitive justice programming alternatives for Aboriginal peoples in order to reduce overrepresentation. Evaluation of this programming was and is a concern (Proulx 2003, 2000, 1997; Depew 1996; LaPrairie 1998, 1995; Clairmont and Linden 1997). Additionally, urban Aboriginal justice programming was rarely initiated and was under-researched in comparison to rural and reserve initiatives (Proulx 2003). Efforts were also expended to define, problematize and operationalize 'the community' as the site and delivery system for new Aboriginal justice (Proulx 2003; Andersen 1999; LaPrairie 1998; Depew 1996). Gender discrimination within Aboriginal 'traditional' justice initiatives was and is a significant theme. Concerns have been raised about male domination of new Aboriginal justice and the re-victimization of Aboriginal women in Aboriginal justice programs (LaRocque 1997; Crnkovich 1996). Interestingly, however, little attention has been paid to how new Aboriginal justice has affected non-Aboriginal justice philosophy and practice. In this paper I will describe three urban Aboriginal justice initiatives, or interventions by Aboriginal peoples in court cases, and discuss how Aboriginal justice/legal sensibilities are affecting non-Aboriginal justice philosophy and practice in terms of a narrow interpretation of interlegality (Santos 1987), incorporation (Drummond 1997; Proulx 2003) and cultural appropriation and cultural production (Proulx 2003).

Incorporating Difference, Interlegality, Cultural Production and Appropriation

Before proceeding I want to outline how I am using these concepts. Both Santos and Drummond were less interested in the identification of different justice/legal orders or practices than in tracing the complex and changing interrelations among them. Santos outlines how there are different levels or scales of law from local to nation state to world law and that each form of law creates different legal objects on the same social objects (Santos 1987: 287). Any analysis must take into account that:

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...socio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints. So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but of interlaw and interlegality (Santos 1987: 288).

All these levels or scales in law are not isolated from one another but interact in different ways (Santos 1987: 288). In the intersection of different legal orders we need to account for the superimposition and inter-penetration of legal spaces and the “porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings” (Santos 1987: 297-8). Finally, we need to recognize that interlegality is a highly dynamic process “because the different legal spaces are non-synchronic and thus result in uneven and unstable mixings of legal codes (codes in a semiotic sense)” (Santos 1987: 297-8). For my purposes, what is interesting in this process is how different legal or justice vernaculars from the various levels are appropriated and codes are mixed.

The concept of interlegality can be used to focus on how dominated, encapsulated or marginalized groups, whether minorities or First Peoples, have, as a result of assimilatory pressures, taken up legal philosophies and practices of dominant groups within nation states. However, in this paper I focus on interlegality in reverse. I illustrate how the philosophies and practices of Aboriginal peoples in Canada are penetrating the formal Canadian criminal justice system. This provides evidence of how state legal systems, that have heretofore had the power to define what is legitimately acceptable, can be opened up to difference. It shows that legal porosity is a two-way street while recognizing that the formal Canadian system still has the power to select where, when and how cross-cultural penetration occurs.

Drummond (1997) is interested in the accommodation between Aboriginal and non-Aboriginal legal systems and how peoples everywhere incorporate the distinctive and unfamiliar into the familiar. One of her aims is to illustrate the necessary conditions for a viable legal pluralism. One such condition is communication in a dialogic manner. This communication is crucial to be able to negotiate and create intercultural law (Drummond 1997: 22-23). In her ethnographically rich discussion of justice circles in northern Canada, Drummond explores beneficial and harmful accommodations between Inuit justice philosophy and practices and those of the formal non-Aboriginal system, giving ample

evidence of the possibilities and challenges involved in intercultural communication. In so doing she attempts to render incommensurable frames of reference commensurable. Within a justice context she shows that it is possible and, more importantly, necessary for non-Aboriginal and Aboriginal peoples to understand each others' legal sensibilities despite the fact that our perceptions are largely determined by the cultures into which we are socialized (Drummond 1997: 85). For example, in a case of what I would call 'normal' interlegality (as distinct from interlegality in reverse, on which I focus here), she explored the tensions involved when an Inuit justice committee appropriated the non-Aboriginal legal system and used incarceration when the formal system chose not to use it (Drummond 1997: 60). She also explored the dangers of male-dominated Aboriginal new justice for Aboriginal women to point to the need for inter-gender and cross-cultural communication in justice and law. Finally, Drummond criticizes Western law for its culture-bound, evolutionist-based separation of custom from that which can be considered legitimate law (Drummond 1997: 136). All justice stakeholders must acquire a nuanced understanding of how different societies imagine and create culturally specific legal and justice sensibilities, codes and practices that are not constrained by Western rule-based, uniform, one-size-fits-all or culture clash conceptions and practices of legitimate justice and law (Drummond 1997: 136).

Though not an anthropologist, Drummond understands the need to see justice/law as an integral, not separate, part of every culture. She maintains that the codes or habitual practices of justice and law are not impermeable or forever walled off from each other by difference. Drummond demands that any understanding or practice of law/justice today take into account cross-pollinations and the positive and negative syncretic results of such pollinations.

Elsewhere I have framed the development of 'new' Aboriginal justice in terms of cultural production and appropriation (Proulx 2003). Cultural production draws on a "stock of already existing cultural elements drawn from the reservoirs of lived culture or from the already public fields of discourse" (Johnson 1986/87: 38-79). Cultural appropriation involves adopting a cultural product in terms of local meanings and practices (Merry 2000: 30). Merry asserts that, during cultural appropriation existing cultural forms can be replayed in different keys or at different speeds becoming something different, although also the same (Merry 2000: 30). My research on the Community Council Project of Toronto (CCP), an Aboriginally conceived, implemented and operated adult diversion program, shows how cultural appropriation and production operate in Toronto's Aboriginal

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community.² Santos, Drummond and I advocate for the need to comprehend cultural creativity in justice/law. Rather than simply discussing conflicts between culturally different justice/legal sensibilities or orders, we must also look at how justice/law is translated to, and appropriated by, others and how these resources are used in reciprocal cultural production.

I am not advocating assimilationism in this discussion. Clearly, this is unacceptable to Aboriginal peoples and many non-Aboriginal peoples sensitive to the legacy of historical wrongs that continue to negatively affect Aboriginal peoples. One system for all does not work. Culture-bound non-Aboriginal justice/legal philosophy and practice should no longer be imposed upon justice/law for Aboriginal peoples. Nor do I wish to suggest that what I am discussing is the only way that justice/law must be investigated or proceed. I am simply calling for an investigation of cross-pollination in a field that has too long focused on demonizing the formal Canadian justice/law philosophy and practice and often uncritically praising 'new' Aboriginal justice. Rather than discussing restorative versus retributive justice and Aboriginal versus non-Aboriginal justice dichotomously as impermeable or walled off from each other by simplistic attributions of cultural difference and incommensurability, I want to point to the value of theorizing justice in hybrid terms. I focus on contingent relations between apparent oppositions with an analysis that "move[s] beyond oppositional justice metaphors" (Daly 2002: 66). I outline the creative and shifting justice/law terrain of inter-cultural communication, cultural appropriation, cultural production and interlegality.

² The CCP has taken a non-Aboriginal alternative form of justice practice, namely, diversion, and replayed it in an Aboriginal key, making it something different while still satisfying the conditions of the protocol. Clients are diverted out of the formal system, and helped to be *self-governing*, but the CCP also produces more than the diversion format was ever intended to produce. Healing Aboriginal clients has also created community identity, solidarity, and vision. All of these products can be used to foster *self-government*. Hence, capacities are being built here that go beyond simple social control through diversion. The seeds for future cultural production and resistance are being planted through the CCP process and its interaction with the Aboriginal social action agencies of Toronto (Proulx 2003: 168).

The tone of this paper is one of guarded optimism with regard to how deeply Aboriginal justice sensibilities are penetrating those of the non-Aboriginal justice system and its stakeholders. In most instances social, and therefore legal, change proceeds cautiously. While the three hybrid cases discussed below do indicate that incremental changes are occurring, it would be naïve to suggest that there has been a sea change in how Aboriginal legal sensibilities and practices are affecting non-Aboriginal sensibilities and practices. Nonetheless academics, legal professionals, indigenous peoples encapsulated by nation states and those nation states themselves can, without being prematurely self-congratulatory, recognize the benefits and potential of these new interlegalities in reverse.

The *Gladue* Decision

The federal government of Canada from 1979 to 1995 undertook a comprehensive review of the Criminal Code of Canada (CCC) culminating in Bill C-41 which created a new Part XXIII of the CCC (Daubney and Parry 1999: 31-33). During the Bill C-41 debates on sentencing policy the issue was whether sentencing objectives and principles were specific enough (Daubney and Parry 1999: 35). Opposing camps promoted two visions for sentencing. One group "...believed that numerical guidelines should be provided to constrain the judiciary in such a way that disparity and overuse of incarceration would be addressed" (Daubney and Parry 1999: 35). The other group "...believed that contextual issues needed to be taken into account and that the judiciary needed flexibility to address the widely disparate types of cases that appeared before the courts and to administer 'true' justice in such dissimilar circumstances" (Daubney and Parry 1999: 35-36). The second camp prevailed because research showed that judges did not want numerical guidelines preferring instead flexibility in their discretion to take a wider view in sentencing considerations (Daubney and Parry 1999). Greater flexibility in judicial discretion and judicial notice³ are central to CCC section 718.2 (d) and (e) and are of particular relevance to Aboriginal offenders because they require restraint in the use of incarceration and require judges to "canvas available non-

³ The term "judicial notice" means that judges can rely upon the findings of other commissions and the Supreme Court, as well as their own knowledge of the general history of Aboriginal peoples with regard to the way in which they have been treated in Canada.

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carceral sanctions that are reasonable in the circumstances” (Daubney and Parry 1999: 35). In particular section 718.2 (e) decrees that a court imposing a sentence is to take into account the principle that

all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The sentencing innovations of section 718.2 (e) were tested in *R v Gladue* (1998) with appeals up to the Supreme Court. In this case an urban Aboriginal woman, not seen by the court as a member of any particular Aboriginal group, was charged with manslaughter for killing her adulterous husband during a birthday party celebration. I will not survey the intricacies of the crime in question and the Supreme Court reasons for decision here nor will I engage in the debates surrounding sentencing reforms resulting from this case (Roach and Rudin 2000; Dioso and Doob 2001; Miller and Schacter 2000; Anand 2000). I focus instead on selected high points in the use of section 718.2 (e) in *Gladue*.

Essentially the Supreme Court recognized the circumstances (residential schools, forced adoptions, substance and sexual abuse) leading to the state of Aboriginal overrepresentation and the role of systemic factors (institutional racism in hiring, education and housing) which often play a part in bringing a specific offender before the courts (*R. v. Gladue*: para 67-68). The court noted that Aboriginal peoples as a

result of these unique systemic and background factors, [are] more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions (*R. v. Gladue*: para 68).

They also recognized the types of sentencing approaches that might be appropriate for offenders because of their Aboriginal heritage (*R. v. Gladue*: para 66).

While it is clear that no sentencing philosophy will completely correct fundamental social problems (Miller and Schacter 2000: 405), section 718.2 (e) is “incorporate[ing] the distinctive and unfamiliar into the familiar” as it helps to

provide access to more culturally sensitive justice through providing the means for judges to understand the socially destructive contexts many Aboriginal peoples have lived through (Drummond 1997: 21). It enables the recognition that the notion of equality as sameness that underpins Western legal sensibilities is problematic for *some* Aboriginal peoples.⁴ In *Andrews v. The Law Society of British Columbia* (1989), the Supreme Court recognized that treating different people the same can be a form of discrimination and inequality saying that "...different treatment is often more appropriate" (Monture-Okanee and Turpel 1992: 250-251). The enlightened application of 718.2 (e) helps foreground the intergenerational, discriminatory and oppressive contexts that many Aboriginal peoples have been subjected to will be taken into account as a mitigating factor in sentencing.

Until *R v. Gladue*, urban and non-status Aboriginal peoples and Aboriginal peoples unattached to any recognized reserve community were not been considered to be affected by the foregoing unique and unjust circumstances (Roach and Rudin 2000: 6). At the base of this inequity are Indian Act definitions and stereotypes of urban and non-status Aboriginal peoples as somehow not 'real' Aboriginal peoples because they live in cities rather than 'traditional' and therefore 'real' reserve communities. One reason for this stereotype is that the non-Aboriginal image of 'aboriginality' requires a separation in both time and space as a "prerequisite for 'authenticity' of aboriginal culture" (Peters 1996: 48). Where 'true' Aboriginal people belong and live in space is, for many non-Aboriginal peoples, "far away from major population centres" (Peters 1996: 48). In order for non-Aboriginal peoples to maintain the image of Aboriginal peoples as exotic, Aboriginal people cannot be seen as inhabitants of cities. Under 718.2 (e) all Aboriginal offenders, whether status or non-status Indian, Inuit, Métis, rural or urban and people estranged from their cultures are eligible for consideration. If a person identifies as Aboriginal and can prove their Aboriginal identity they must be considered under 718.2 (e). Hence, reserve origin and legal status are no longer the only acceptable

⁴ ... The application of uniform standards, common rules, and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardship or injustice may result ... The reasons may be geographic, economic or cultural (Alberta Task Force 1991:46).

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forms of identification criteria to be used to determine eligibility under 718.2 (e). With the inclusion of urban and non-status Aboriginal peoples a second injustice is recognized, incorporated and is now eligible for judicial notice.

Hence, *Gladue* is notable for its refusal to uncritically accept the exclusive use of Western notions of formal equality, or equality as sameness, within judicial discretion. It also attempts to rectify the exclusion of urban non-status and newly identifying Aboriginal people, based on the non-Aboriginal political, judicial and bureaucratic power to define Aboriginal identification criteria, from access to the new standard of mitigation in 718.2 (e). These Aboriginal peoples are accepted as deserving of similar treatment in sentencing as status reserve based Aboriginal peoples. While imperfect (Proulx 2000 376-378; Rudin 1999a) and contested by critics partial to formal equality (Dioso and Doob 2001; Anand 2000), *Gladue* is crucial for non-Aboriginal and Aboriginal peoples to understand each others' legal sensibilities despite how our perception is predisposed by the cultures we are embedded with (Drummond 1997: 85).

Mary Ellen Turpel-Lafond, a recently appointed Aboriginal judge, outlines another major innovation of *Gladue*:

The *Gladue* decision is an important watershed in Canadian criminal law. The interpretation of section 718.2(e) of the Criminal Code by the Supreme Court of Canada clarified that this provision is remedial⁵ in nature and not merely a codification of existing law and practice. In so construing the provision, the

⁵ In the case the Court said 718.2 (e) and more broadly all of sentencing reforms in Bill C-41 were remedial. What that means is that they were seen by the court not as a restatement of how sentencing had been done, but rather as ushering in a new direction for sentencing. Remedial legislation is legislation that signifies a new way of approaching an issue that has a particular legal and legislative history. By declaring the law to be remedial the court is saying that Parliament has decided to take a fresh look at the whole area and thus all bets are off in terms of the ways these issues were viewed in the past (Rudin, personal communication September 8, 2001 recorded in Proulx 2003).

Court clearly endorsed the notion of restorative justice⁶] and a sentencing regime which is to pay fidelity to ‘healing’ as a normative value. Healing is an Aboriginal justice principle which is slowly becoming merged into Canadian criminal law through the practice of circle sentencing and community-based diversion programs. The *Gladue* decision has brought the notion of healing into mainstream as a principle which a judge must weight in every case of an Aboriginal person, in order to build a bridge between their unique personal and community background experiences and criminal justice. (Turpel-Lafond 1999)⁷]

The intention to correct sentencing practices that had contributed to Aboriginal overrepresentation⁸ in Canadian prisons is important particularly insofar as this

⁶ The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. (*R v Gladue*: para 71)

⁷ See: Rudin 1999b; Proulx 2000, for discussions of concerns and criticisms arising out of *R. v. Gladue*.

⁸ The parties and interveners agree that the purpose of s. 718.2(e) is to respond to the problem of over-incarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(e), and of various other provisions in Part XXIII, is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum

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section instructs judges to utilize restorative justice⁹ but (in Turpel's view) with an Aboriginal, 'healing' twist. 'Healing'¹⁰ has become a central discourse in

before this Court, s. 718.2(e) "provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing. (*R. v. Gladue*: para 50)

⁹ CCC, s. 718 provides:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) *to provide reparations for harm done to victims or to the community*; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

¹⁰ 'Healing' has become a central discourse in Aboriginal justice literature and practice. I follow Durst, who maintains that

...the word healing comes from the same roots as whole and holiness. The interdependence of holiness and wholeness are essential to healing in Native traditions. The holiness of healing is manifested in the journey towards a wholeness of spirit and an attempt to incorporate this wholeness of spirit into the person, family, the community and its surrounding land. The balance of each direction [in the use of the Medicine Wheel] and its

Aboriginal justice literature and practice (Proulx 2003 26-27). Through the legislative and judicial recognition of healing as an important Aboriginal normative value the formal system has begun the tortuous process of re-evaluating what it accepts as legally *and* cross culturally meaningful thereby generating new meanings and practices to deal with culturally different contexts. The appropriation and interpenetration of restorative justice and Aboriginal concepts of healing within the Criminal Code is a potent interpretive framework enabling new flexible sentencing practices.

The Gladue Aboriginal Persons Court

Section 718.2 (e) is now being operationalized in the Gladue Aboriginal Persons Court in Toronto Canada. Prior to this move the Ontario Conference of Judges and the Canadian Association of Provincial Court Judges in Ottawa, in September 2000 met to discuss the intricacies of responding to the *Gladue* decision (ALST 2001). Judges attending this workshop on the application of *Gladue* expressed common concerns about “knowing when an Aboriginal person was before them” and the problem of “not having directed resources to give full attention to the special circumstances of Aboriginal people appearing in court” (ALST 2001). Subsequently, over the course of a year “judges, academics and community

interconnectedness among the elements creates *good health*: the self. If one area is neglected or affected in a negative way (unbalanced), the other elements (directions) are also affected. An unbalancing of Self may be caused by the neglect or negative experiences in one of the four directions. ...Healing is a process. The healing process requires time and patience. Each person's journey is unique. Each person must find his/her balance. (Durst 2000: 53–56, noted in Proulx 2003: 26-27)

Healing is also a means of reconciling wrongs within a person or a community. The commission of a crime indicates a lack of spiritual balance within the person, and the healing process is intended to restore this balance by uniting the four elements of the person: the spiritual, emotional, physical and mental (Clairmont and Linden 1997: 44). Healing, for many Aboriginal peoples, is the objective of justice, and justice derives from the restorative and transformative practices of healing. Hence, healing is a broad notion that encompasses restorative justice.

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agencies met to discuss how to meaningfully develop a response to the *Gladue* decision at the Old City Hall Courts in Toronto”, resulting in the creation of the Gladue (Aboriginal Persons) Court (ALST 2001). The court’s objective is to respond to *Gladue* and s. 718.2 (e) and to consider the “unique circumstances of Aboriginal accused and Aboriginal offenders” (ALST 2001).

To illustrate how the court is applying the sentencing innovations discussed above, here is a thumbnail sketch of the Gladue Court. The court is status blind accepting all Aboriginal peoples who wish to identify themselves as such. Courtworkers affiliated with Aboriginal Legal Services of Toronto (ALST) assist in situations where questions of an accused’s Aboriginal identity arise. Aboriginal persons are not required to have their charges heard by the court; they can use any court, but once in the Gladue Court the case must remain there until resolved (ALST 2001). Gladue Court participation is voluntary, but defense lawyers encourage their Aboriginal clients to use it. The Gladue court accepts guilty pleas, sentences offenders, does bail hearings and eventually trials as well. What differentiates it from other courts is that those working in it have a particular understanding of and expertise in the range of problems and services available to Aboriginal people in Toronto (ALST 2001). This expertise ensures that the information required by s. 718.2 (e) will be available and used to craft decisions in keeping with the direction of the Supreme Court in *R v. Gladue*. The court will have all the usual functionalities but will add an Aboriginal case worker whose duties will be to “be available to defense council to assist in the preparation of sentencing reports to the court (ALST 2001). Jonathan Rudin, program Director of the CCP outlines the central role of the Aboriginal case worker:

Our role is very much proactive ... We talk to the client, we talk to people who know the client, [and we] provide a history of the life circumstances of the individual. Then we say in the report: 'In considering sentencing, here are some options you might look at that might address [as to] why this person is before the court. (Ehman 2002)

Gladue Reports, then, are central to this process because it is here that counsel and judges can get access to the mitigating circumstances and context of the Aboriginal offenders before them. There are practical concerns about the information gathering process, including who should provide the information, the trustworthiness of information providers, over-taxing limited case worker and courtworker capacities and the abilities of judges to correctly interpret cross-

cultural information given their culture bound experience and privileged lifeworlds (Proulx 2003; Rudin 1999a: 7). Nonetheless, these reports are the crucial cross-cultural conduits for incorporating the Aboriginal unfamiliar into sentencing. Although the data for Gladue Court success has not yet been assembled; anecdotal evidence indicates that Aboriginal clients have benefited from participation in it (Ehman 2002).

One last point should be appreciated about the Gladue Court. It is not merely a case of isolated affirmative action. Rather, it is part of an imperfect and incomplete decolonizing trend within Canada encompassing justice, education, health and economic domains. It involves recognizing and responding to Aboriginal difference and to non-Aboriginal misunderstandings or rejection of that difference. This trend has been fueled by Aboriginal activism, the education of non-Aboriginals in conjunction with supportive non-Aboriginal peoples and by responsive, but incremental, federal and provincial legislation. Although it is the first of its kind I suspect that this model will become institutionalized across Canada should it prove to be effective at providing culturally sensitive justice to Aboriginal peoples and at reducing over-representation of Aboriginal peoples in Canadian prisons.

Interveners in Court Cases Involving Aboriginal peoples :ALST

Another area where legal/justice sensibilities are interpenetrating each other and the Aboriginal unfamiliar is incorporated through the role of interveners in court cases involving Aboriginal peoples. Defendants and plaintiffs are joined in some cases by interveners who, as persons or groups who have an interest in the subject matter of the original suit, are not party to a lawsuit in progress, but want to become a party (Techlaw Journal: 2004). An intervener brings a unique perspective to the issue in question, one that might not be raised by the parties. In theory, interveners generally do not take a position on the merits of the case, but do suggest how the court might want to address particular issues (Rudin, personal communication August 11, 2004). ALST have often intervened in cases before the courts on behalf of Aboriginal peoples.

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In criminal law¹¹ cases ALST as intervener attempts to ensure that sentencing legislation, for example the purposes of Bill C-41, s. 742.1 and s. 718.2 (e) interacting with other CCC sections, are in fact applied correctly and in a culturally sensitive manner where possible. Incarceration and conditional sentencing (s. 742.1) should be used sparingly and only with a thorough understanding of the circumstances of Aboriginal offenders as a group and as individuals as mandated in s. 718.2 (e) (*R v Wells* 2004, ALST Factum of the Intervener: para. 39). As noted in the discussion of *R v Gladue*, ALST attempts to deconstruct culture bound notions of formal equality over what is 'reasonable' in sentencing Aboriginal offenders as opposed to non-Aboriginal offenders. For example,

Concerns about sentencing disparity should be addressed "by comparing dispositive *effects* rather than the *type* of actual sentence imposed" and not by mechanically concluding that a sentence fit for a non-Aboriginal accused would necessarily be fit for an Aboriginal accused (*R v Wells* 2004, ALST Factum of the Intervener: para. 41).

¹¹ This paper focuses on criminal law and, therefore, will not survey ALST's interventions in constitutional law cases.

Interveners also work to show how lower court decisions are in error,¹² and try to convince appeal judges to overturn lower court interpretations of precedent and sentencing decisions. They do this through the standard legal means¹³ of providing alternative interpretations to these sentencing instructions but most importantly, providing the Aboriginal-relevant information to judges who must decide these cases. Hence, there is an educational function in terms of the special circumstances facing Aboriginal peoples leading to over-representation:

¹² For example, in sentencing assuring the safety of crime victims is a major concern for courts everywhere. Yet ALST shows how the assumption in favour of sentences of imprisonment for Aboriginal peoples does not create community safety (*R v Wells* 2004, ALST Factum of the Intervener: paras 49-50). Nevertheless, the Alberta Court of Appeal erred in *Wells* at para 48 by assuming that actual imprisonment is the only way to provide respect and security for crime victims and give them the full and equal protection of the law (*R v Wells* 2004, ALST Factum of the Intervener: paras 49-50, referring to *R. v. Wells*: para. 50). Aboriginal communities have been at the forefront of developing alternatives to incarceration, not because they have no concern for the safety of victims, but rather because of the harsh reality of disproportionate crime victimization among Aboriginal people. Aboriginal people, over-represented as they are among crime victims and prisoners, are well aware of the inability of imprisonment to achieve any significant measure of community safety. Aboriginal communities simply cannot afford to rely on the Court of Appeal's assumption that imprisonment is the only means to treat crime seriously or to afford protection to the victims and potential victims of crime. By rejecting reliance on incarceration and recognizing the reparative and restorative potential of community sanctions, Bill C-41 also follows this wisdom.

¹³ Jonathan Rudin says:

Our interventions follow, in form, the classic legal mode. Thus, if you look at our factums you will see that they generally follow a fairly set format - we assert a statement and then provide a bunch of sources in support - and as much as possible we cite other cases as precedents. (Rudin, Personal Communication August 11. 2004)

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The circumstances of Aboriginal offenders in general should inform the way trial judges apply the specific purposes and principles of sentencing. High rates of recidivism should encourage trial judges to question the assumption that imprisonment would act either as a specific deterrent or a form of rehabilitation and to rethink the automatic use of a prior record as a reason for yet another prison sentence. Conditions of social and economic dislocation should affect the way judges apply the concepts of retribution and specific and general deterrence. Judges should also question the assumption of whether separating Aboriginal offenders in overcrowded prisons often lacking cultural and treatment programs will in the long term contribute to respect for law and the maintenance of a just, peaceful and safe society (*R v Wells* 2000: Factum of the Intervener para 40).

Additionally, ALST as intervener can direct judges to criminal justice research that may affect their sentencing decisions. For example, ALST interveners provide research on how the misuse of conditional sentences for Aboriginal offenders can lead to net-widening due to the overuse of breach of conditions by Crown Attorneys. ALST has shown that “Aboriginal offenders sentenced to conditional sentences are already disproportionately subject to breach proceedings” (*R v Wells* 2004, ALST Factum of the Intervener: para. 40). Overall, then, the interventions by ALST illustrate Santos’ point about how the different ‘interpretive standpoints’ of Aboriginal peoples and non-Aboriginal peoples are being brought together, contested and melded in order to provide culturally sensitive justice for Aboriginal peoples (Santos 1987: 288). A nascent ‘legal porosity’ is developing as Aboriginal ideas about formal equality, proportionality, deterrence and punishment gradually change the interpretative repertoires of judges and lawyers. Interventions by ALST illustrate how Aboriginal and non-Aboriginal peoples are coming to understand each other’s legal sensibilities in the negotiation and creation of intercultural law (Drummond 1997: 22-23).

R v Gladue, the Gladue Aboriginal Persons Court, and ALTS’s interventions are examples of inter-legality and incorporation in the sense that the formal system has been induced to recognize the need to provide culturally sensitive justice ‘within’ the formal criminal system. While the standard purposes of sentencing as mandated in the CCC must still be adhered to, the Gladue case and Court mix into sentencing philosophy and practice forms of Aboriginal justice/legal philosophy and practice. In an attempt to address Aboriginal over-representation the formal

Canadian justice system has incorporated unfamiliar values into its practices and adjusted some of its own values and practices in response.

Tsui Tina First Nation's Peacemaker Court (Calgary Alberta)

The Tsui T'ina are a Dene people occupying a reserve southwest of Calgary. An Aboriginal court complemented by a peacemaking program was proposed in 1996 and began sitting in 2000 (Mandamin 2003). The provincial court sits in a circular arrangement and the judge, prosecutor, court clerks, courtworker, probation officer and even some of the defense counsel are Aboriginal. Court protocols reflect Tsui T'ina traditions including smudging¹⁴ and traditional symbols (beaded medallions and eagle feathers) on the robes of the judge and court clerks. Tsui T'ina peacemakers sit across from the Crown prosecutors signifying equal status. Any offender who wishes to utilize the peacemaking option may do so, and upon doing so, "the case is adjourned while the Peacemaking Coordinator assesses the case and decides whether to take it into peacemaking" (Mandamin 2003). Peacemaking can occur only if the victim consents and participates. Only homicide and sexual assaults are excluded from peacemaking. Once a case is accepted for peacemaking the Peacemaker Coordinator gives the case to a trusted community peacemaker, previously identified by the community, and trained to take charge of the process. The community peacemaker brings all the parties affected by the crime to talk out their problems in a circle using Tsui T'ina traditions with the assistance of an Elder (Mandamin 2003). Elders play a major role because they "hold the knowledge of the past, including traditional justice practices" (Large 2001: 24 see also Mandamin 2003). Each circle participant speaks without interruption as the circle is circumnavigated four times with each circuit having a different purpose. Upon completion of this circle process the offender signs an agreement to complete the disposition worked out in the circle. These may include restitution, counseling, participation in traditional ceremonies and community service among others (Mandamin 2003) Once the fourth circle has been completed the matter is returned to the court where the Crown prosecutor looks at the balance between the type of offence and the peacemaking decision (Mandamin 2003). If

¹⁴ Smudging is a purification ritual involving the burning of medicines (sweetgrass, cedar, tobacco or sage) in an abalone shell. Circle participants waft the smoke over themselves.

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the peacemaking decision is appropriate the charge is withdrawn but when the issues are more serious the peacemaking report will only become part of the judge's sentencing considerations. The influence of the formal justice system is felt through the limitation on the number of times that an offender can use peacemaking. As Crown Counsel Lauren Wuttunee says:

They only get one shot at peacemaking. ... If you never got a chance in the regular justice system, okay, we'll give you a chance. But if you screw up again, you're treated like everybody else. There's a limit to leniency in terms of peacemaking. (Ehman 2002)¹⁵

The provincial court supports community decision-making as they take ownership of the offence and its traditional and restorative methods for handling all those affected by the offence. But the lawyers, clerks and the judge ensure the procedure of the court happens in accordance with Western law (Large 2001: 23). The formal system also exerts its influence through the Crown prosecutor's decision-making power on the final use of the peacemaking decision. The judge decides whether to adjourn the case in favour of peacemaking and can use the peacemaking decision in sentencing. But it is always the person charged, assisted by her/his lawyer, who decides whether s/he will utilize peacemaking. Should the offender not complete his/her peacemaking decision then the Peacemaker Coordinator returns the case to court where it is dealt without prejudice to the offender (Mandamin 2003). Hence, there are a number of checks and balances within the peacemaker process that balance community ownership of the case and action with the requirements of the formal system.

Peacemaking involves restorative justice practice philosophy and procedures and is based "in the historical traditions and values of the Tsuu T'ina."¹⁶ There is, then, a

¹⁵ This limitation is one of the major differences between Tsuu T'ina peacemaking and the approach to recidivism taken by the CCP who believe that healing takes time and therefore offer offenders numerous opportunities to use the diversion program as long as they complete the dispositions of previous diversions. (Proulx 2003.)

¹⁶ This is not to say that Tsuu T'ina traditional justice escaped unscathed colonial suppression and culture loss and is therefore being applied in some romanticized

cross-pollination of non-Aboriginal restorative justice and Tsuu T'ina justice which produces a unique syncretic form of justice. At the same time the Tsuu T'ina recognize similarities between their own traditional practices and current non-Aboriginal justice forms. While the Tsuu T'ina language "has no word for mediation", the talking circle format is essentially a form of mediation as all interested parties sit down and "talk things out" to "address the relational dimension of crime and justice" (Large 2001: 25).

The Tsuu T'ina First Nation's Peacemaker Court is, then, another hybrid form of justice incorporating both Aboriginal and non-Aboriginal legal philosophy and practice. The provincial court and Peacemaker Court interpenetrate each other's legal spaces. As the presiding Judge Tony Mandamin says of the Tsuu T'ina court "Peacemaking is their culture, past and present," and "It is a blending of their ways of keeping peace in the community and the Canadian criminal justice system" (Ehman 2002). This singular justice initiative, supported by the Alberta Department of Justice, melds Canadian law and Tsuu T'ina peacemaking values and as such is "a precedent-setting endeavour" in the struggle to reduce Aboriginal overrepresentation (Large 2001: 22). The amalgamation of Tsuu T'ina and Western justice is then a form of interlegality that incorporates the distinctive and unfamiliar into the familiar and mixes codes and procedures for both the Tsuu T'ina and the formal justice system.

Mediation

In 2000 I was justice coordinator for the Métis Settlements Child and Family Services, Region 18 justice program. This justice initiative served the eight Métis Settlements of northern Alberta. Training in restorative justice methods and Alberta provincial justice legislation and alternative measures criminal code sections was central to my mandate. I also introduced other forms of non-Aboriginal dispute resolution methods to the communities through intensive training sessions utilizing the coordinator of the Edmonton Custody Mediation program. The mediator/trainer was highly experienced in non-Aboriginal

pristine form. Some Tsuu T'ina "have even had to be reminded of the old ways of restoring peace because, for many, those ways have been forgotten" (Large 2001:20 – 25).

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mediations but had little experience applying his models in Aboriginal contexts. After a number of workshops he suggested that he was going to adapt these non-Aboriginal mediation models to deal specifically with the differences of Aboriginal peoples. Unfortunately, the constraints of his job did not allow him to begin this project. I began to search for other mediators or academics who had adapted mediation. Marg Huber, a mediator and formerly a trainer in private justice at the Institute of British Columbia's Centre for Conflict Resolution Training in Vancouver, provided this resource (Huber 1993: 355- 365).

One of the issues with what Huber calls 'dominant culture' mediation is that it is oriented to individuals and their needs rather than to the "individual-in-community" (Huber 1993: 355). She also points to the culture bound procedural assumptions in the roles and characteristics of the intervener and goals of the mediation process (Huber 1993: 355). All of these issues are problematic for Aboriginal peoples attempting to "translate dominant culture mediation processes into their own vastly differing contexts" (Huber 1993: 355). These concerns may be even more problematic in an urban context characterized by many diverse cultures which may continue to identify themselves in terms of reserve community and family networks and/or those who live in personal and cultural identity crisis. How, then, can culturally appropriate mediation work in this urban context?

Huber, along with a culturally diverse group of Vancouver Aboriginal community leaders, helped design and facilitate the development of an Aboriginal mediation model for urban Aboriginal peoples. They began with the question: "What would it take to make the process of mediation culturally relevant for Aboriginal peoples living in urban settings?" (Huber 1993: 356) By compiling widely held Aboriginal beliefs and values on communication, conflict, dispute resolution and mediation they built a mediation model grounded in pan-Aboriginal culture "rather than modified from a dominant-culture process to accommodate for culture" (Huber 1993: 357).

Aboriginal values important to conflict resolution and communication such as sharing, harmony, consensus decision making, non-interference in individual matters, privacy, patience, modesty, moderation in speech, careful listening, nonverbal physical communication, family, community, cultural heritage, respect for elders, a holistic approach to life, relativity of time and spiritual connectedness anchor this model. They also provide the basis for needs such as personal safety, healing, enhancement of belongingness and personal identity, as well as restoration of harmonious relationships for parties and their respective families and

communities (Huber 1993: 357). The model is firmly grounded in pan-Aboriginal spirituality. Specifically, the Four Directions of the Medicine Wheel, derived from the Plains Nations cultures but now used by many Nations, and as outlined in *The Sacred Tree* (1988), underpins this mediation model.¹⁷ Space does not permit a detailed discussion of the Medicine Wheel, nor its role in the “transmission of ancient knowledge and tradition from one generation to another” (Huber 1993:

¹⁷ Margaret Anderson gives a Tsimshian (northwest coast of British Columbia) example of how the use of the Medicine Wheel can be problematic for some Aboriginal peoples:

In local education programs aimed at First Nations learners, when instructors are hired from other regions they frequently teach the medicine wheel as a cultural model appropriate for use in various contexts. Students from here who are aware of their own cultures object to this because their cultures have their own symbolic ‘tools’ and it would be more appropriate to discuss those.

Elders will often have to tell younger people excited by the use of the Medicine Wheel to deal with their problems that the Medicine Wheel is not part of their specific culture. Anderson is also concerned about how the medicine wheel has the potential to colonize and erase local knowledge. This is a very real and serious danger that cannot be ignored. The urban context presents even more unique challenges. In urban contexts where many people are struggling to deal with their identities and where they have no culturally specific knowledge or access to such knowledge, sometimes people have to do what they can to create or re-create themselves. So there is a pragmatic, although potentially dangerous, appropriation of whatever is available. I have found that many Aboriginal peoples in the city, once they have started down this pan-Aboriginal path eventually search out knowledge that is culturally specific to them and they then can and do reject the pan-Aboriginal teachings. Overall, my position on the Medicine Wheel is that it is a good tool to use, if carefully handled and if its current pan-Aboriginal form is explained. This is particularly so in urban contexts where so little cultural knowledge from any nation can be easily accessed, as a result of colonial destruction, and more regularly, the lack of culturally specific specialists or Elders able to impart culturally specific teachings/knowledge. (Margaret Anderson, personal Communication, August 6, 2004)

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358). Nonetheless, here is a thumbnail sketch of portions of the teachings relevant to mediation.

The Four Directions of the Medicine Wheel, among many other things, are used for healing and self-knowledge. The Medicine Wheel can be used "...as a model of what human beings could become if they decided and acted to develop their full potential. Each person who looks deeply into the medicine wheel will see things in a slightly different way..." (Sacred Tree 1998: 37). To develop this potential the spiritual, emotional, physical and intellectual aspects must be balanced and the Four Directions of the Medicine Wheel provide instructions or models for this purpose (Huber 1993: 358). Balancing these elements of life is central to this model of mediation. The Wheel, then, is used as a guide to mediators and participants on how to situationally achieve or re-achieve this balance within individuals and in interpersonal relationships.

The mediation process follows the Four Directions of the Medicine Wheel beginning in the East and traversing the circle to South, West and finally the North. The East sets the climate as a place of opening, connection and purification rituals that touches the spirit and sets people at ease preparing them to listen and see clearly through complex situations (Huber 1993: 359). Mediators work to locate where the participants are on the Wheel, connect them to each other and use their own personal conflicts to 'normalize conflict' and humanize their status as mediators (Huber 1993: 359). The South is the place of the heart and emotions and it is here that the participants tell their stories. Mediators delve into what underpins the conflict and "assists the parties in seeing their commonality" (Huber 1993: 359). The West is the location of reflection, introspection, honesty, humility, sacrifice and testing where mediators help participants to learn how to use power correctly in relations with themselves, the other party and the community (Huber 1993: 359-60). The North is the ground of intellect, problem-solving, detachment from strong feelings, learning balance, appreciating the experiences of others and completion (Huber 1993: 360). Mediators, once the participants have reached this stage on their journeys, "take them to the center of the wheel for a holistic perspective on the situation" (Huber 1993: 360). Once resolution is attained, mediators provide information on options and "encourage consultation with elders" (Huber 1993: 360). Family and community participate here too. Finally, an agreement is signed and recorded between the parties, a prayer is said and the mediation ends (Huber 1993: 360).

This model of mediation is different from others in that it “does not include delineation of issues and agenda formation early in the process” (Huber 1993: 360). Rather, issues arise through storytelling and are discussed and clarified as parties move around the wheel. The mediators need to be able to assess miscommunication as one party, perhaps, being on a different part of the wheel than the other party does not understand the other. This enables mediators to be in “a stronger position to assess where the mediation may be blocked and determine the appropriate response, either in session or by referral outside of mediation” (Huber 1993: 361). All parties have to go through all places on the wheel to truly understand each other and to complete the process.

This mediation project, as with many other Aboriginal projects, did not last. The reasons are as follows. Inspired, knowledgeable and committed Aboriginal individuals are often over-extended in terms of the numbers of projects they are involved in and the time they can give to each project. Moreover, academics and other resource peoples who assist in program development are likewise over-extended. Funding for projects is often tenuous and, at times, governments fund too many projects over too short of periods of time making long-term projects difficult to maintain (Proulx 2003). Finally, Huber, a non-Aboriginal person, would not attempt to force Aboriginal stakeholders to do the training and operationalize the program for fear of engaging in un-requested cultural and political meddling (Huber, personal communication, August 2004). Despite these challenges this mediation model was shared with other Aboriginal groups, government stakeholders and academic conferences (id.). On another occasion, and with a different Aboriginal group, Huber co-facilitated training on conflict resolution where they tested the process. Unfortunately problems arose with the Aboriginal trainer who was not the expert on the mediation process whereas Huber was. Huber was loathe to try to train from “outside the culture” so she ended the session (id.)

Despite the rather fractured history of this process I think that the model itself is sound if applied sensitively in urban contexts where culture-specific resources are unavailable. Huber’s admirable restraint over controlling the training process due to fears of appropriating Aboriginal knowledge and agency aside, this model is a credible attempt by Aboriginal and non-Aboriginal peoples alike to find new ways of solving interpersonal justice/legal problems. This model shows how Aboriginal values and practices are affecting the procedural aspects of non-Aboriginal mediation. It also reflects a continuing set of restorative projects across Canada whose goal is, among others, to design culturally appropriate processes that further

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intercultural communication and justice practice. It incorporates the Aboriginal unfamiliar into non-Aboriginal familiar. It can also incorporate the pan-Aboriginal unfamiliar into the lives of urban Aboriginal peoples involved in the justice system who are bereft of culture but who desire to capture or re-capture their Aboriginal identities. Hence, there is potential here for more sustained application of this model within urban contexts. It is up to Aboriginal groups to decide if, where and how this model may best be used and to, perhaps, adapt it to their specific culture using their own particular symbolic tools. It is also possible that this form of mediation could be used as an adjunct to sentencing within the Gladue (Aboriginal Persons) Court and within the Tsuu T'ina Court. If this were to occur we would witness yet another level or scale of legal process interpenetrating what is becoming an increasingly porous set of non-Aboriginal legal sensibilities and practices.

Relevance for Europe?

The European context is clearly different from the Canadian but this does not invalidate the European application of some of the approaches and ideas discussed above. For example, in a globalizing world of large-scale transnational population movements into European states, it may behoove these states to work to understand and incorporate culturally different legal sensibilities and practices into European ones. In order to avoid, for instance, accusations of insensitivity to cultural difference in legal/justice matters and imagined or real perceptions of restrictions on access to justice on the part of migrants, European states might wish to forestall such problems through processes of interlegality whether 'normal' or in reverse. Innovative legislation, practices and initiatives from the Canadian context may serve as models to be adapted to European justice/legal philosophy and practice.

Conclusion

The dichotomous framing of the weaknesses of the formal Canadian criminal justice system and the strengths of new Aboriginal justice philosophy and practice as a cure for those weaknesses has been, and in some cases continues to be, a necessary discursive practice. There is still much de-colonizing, interpretive, discursive and practical work to be done to improve justice/law for Aboriginal peoples. This requires critical thinking about how to reform and, if necessary,

radically change formal criminal justice approaches to justice/law. However, it is also time for all justice/legal stakeholders to move away from static concepts of culture and tradition or custom that forestalls recognizing the value of intercultural justice/law. Justice/legal sensibilities are central cultural building blocks in the construction of human worlds and are constantly affected by the views and practices of others. This does not require that one system should be assimilated to another or that co-optation must occur within these new syncretic approaches to cultural production. Moreover, we must be careful in our analyses not to romanticize what are the early steps in new hybrid processes. But I do think that it is now time to move away from this focus on cultural difference and historical and current justice/legal oppression to look at how the intersection and incorporation of these different justice/legal spaces and their different interpretive standpoints are creating new justice/law syntheses.

I have outlined various interlegal attempts to negotiate and communicate across differences. These sentencing innovations, interventions and practices based upon them, and the penetration of Aboriginal philosophy and procedure into the Canadian Criminal Code and formal justice system practices, demonstrate that it is possible to understand each others' legal sensibilities despite cultural difference, histories of oppression and mistrust. Aboriginal and non-Aboriginal justice/law stakeholders, practitioners and communities are incorporating each other's "socially legitimate sense of limits" and each other's sense of injustice into their justice/legal spheres (Drummond 1997: 136). They are appropriating both culture-specific and pan-Aboriginal philosophy and practice "...from the reservoirs of lived culture or from the already public fields of discourse" to produce new justice/legal responses to the changing needs of their publics (Johnson 1986/87: 55; Merry 2000: 30). I maintain that interlegality in reverse will continue to grow as both legal professionals and wider Aboriginal and non-Aboriginal publics learn about each other and come to appreciate that Aboriginal and non-Aboriginal legal/justice 'systems' have elements that, when combined, produce stronger philosophical and practical approaches to law/justice. I further maintain that the above blendings of justice/law are not just marginal or isolated incidents but reflect a burgeoning acceptance of hybridization within settler states such as Canada. Overall, then, the hybrid nature of these new responses indicates a shift in how some Aboriginal and non-Aboriginal peoples are thinking about and practicing justice/law across porous cultural boundaries and legal scales. They also indicate that there is room within the justice/law spectrum for academic, legislative, judicial and community understanding, appreciation and valorization of intercultural law/ justice.

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