

# Taking Indigenous Justice Seriously: Fostering a Mutually Respectful Coexistence of Aboriginal and Canadian Justice<sup>1</sup>

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It has long been recognized that the Aboriginal people and Peoples of Canada have been ill-served by the Canadian justice system. For many years, “the rule of law” was the vehicle through which the fledgling country suppressed Indigenous peoples and denied Aboriginal rights instead of promoting and protecting them. Once the most repressive elements of the *Indian Act* revisions of 1920 were rescinded after World War II, an upsurge of mobility to urban centers, particularly by young Aboriginal males, was soon followed by increasing rates of Aboriginal incarceration. By 1967, a mimeographed booklet from the Canadian Corrections Association entitled *Indians and the Law* became the first of many to recognize the problem of over-representation of Aboriginal people in the country’s jails and prisons. More than forty years later, although its causes have been more fully understood, the problem continues. As the federal Department of Justice explains on its Aboriginal Justice Strategy web page,

The relationship between Canada’s Aboriginal people and the Canadian justice system has been an enduring and comprehensively documented problem, the complex product of disadvantaged socio-economic conditions, culturally insensitive approaches to justice, and systemic racism. Over the years, numerous public inquiries, task forces and commissions have concluded that Canada’s justice system has failed Aboriginal people at every stage. Aboriginal people have expressed a deep alienation from a system of justice that appears to them foreign and inaccessible.<sup>2</sup>

Indeed, the same conclusion has been reached so many times by so many Reports, Commissions and Inquiries in so many different jurisdictions that it has become an accepted truism.<sup>3</sup>

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<sup>1</sup> The authors acknowledge with thanks all those who participated in the two projects that have been brought together in this report. All participants were given an opportunity to comment on drafts and to have any concerns addressed before the report was finalized. Nonetheless, the views expressed here are those of the authors and do not necessarily reflect the views of any individual participant or the agency, government or program for which they work. Correspondence should be directed to Ted Palys at [palys@sfu.ca](mailto:palys@sfu.ca). This article was first posted on 20 January 2012 at <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>

<sup>2</sup> See [http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/1\\_1.html#ftn2](http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/1_1.html#ftn2)

<sup>3</sup> The Department of Justice web page cites the following: Michael Jackson, *Locking Up Natives in Canada* (Ottawa: Canadian Bar Association, 1989); Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Royal Commission, 1989); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen’s Printer, 1991); Government of Canada, *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice Canada, 1991); Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); Saskatchewan Commission on First Nations and Métis Peoples and

Efforts to address this situation have gone through several distinct phases.<sup>4</sup> The first, in the 1970s and 1980s, was a period of *indigenization*, in which policies were guided by the premise that if only more Aboriginal people could be encouraged to participate in the Canadian justice system as police, corrections officers, judges, lawyers, and so on, then the justice system would come to better understand Aboriginal people and deal with them more appropriately, while Aboriginal people would become more knowledgeable about and receptive to Canadian justice. An example of policy from this period was the RCMP's "special constable" program that was initiated to interest and potentially recruit Native people into the force. With respect to its putative objective of dealing with over-representation, however, indigenization accomplished nothing, as over-representation only increased.

A second phase in the 1980s and 1990s involved the implementation of *accommodation* strategies, where the Canadian justice system flexed in various ways to try and better accommodate Aboriginal traditions and processes. Correctional institutions, for example, promised to recognize Aboriginal Elders as spiritual advisors on a par with priests and rabbis, and to allow practices such as sweat lodges for Aboriginal inmates, many of whom were only discovering their cultures in prison after the 60s scoop saw them raised in foster care with no connection to the communities in which they were born. In the courts, Yukon circuit court judge Barry Stuart first experimented with what he called a "sentencing circle" in *R. v. Moses*<sup>5</sup> in 1992 in an effort to find a way for the courts to involve Indigenous communities in the dispositional process and to accommodate the more restorative practices that are integral to justice in most Aboriginal communities. Supporters lauded Judge Stuart's recognition of the futile imposition and re-imposition of Canadian justice on Aboriginal people and communities for whom that system had little meaning or authority and for his courage to try something different within his realm of authority. Critics added the caveat that sentencing circles still asserted the primacy of Canadian courts, and by reserving final authority, implicitly reaffirmed Aboriginal communities' inferior status by making Aboriginal decisions about Aboriginal offenders subject to second guessing by the same Canadian justice system that had served it so poorly for so long.<sup>6</sup> Meanwhile, the over-representation of Aboriginal people in jails and prisons continued to grow.

It was not until the 1990s that Aboriginal-driven justice came to limited realization as Aboriginal communities began to seize control themselves over justice practices to deal with crime and other trouble that existed in their communities. Much of the early proliferation of these *parallel systems* across the country came about with the support and financing of the "Aboriginal Justice Strategy" whose terms of reference are defined by, and the funds administered by, the Aboriginal Justice Directorate within the federal Department of Justice.<sup>7</sup> Typically established with Provincial collaboration and 50-50

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Justice Reform, *Legacy of Hope: An Agenda For Change* (Saskatoon: Commission on First Nations and Métis Peoples and Justice Reform, 2004). The Royal Commission on Aboriginal Peoples's report on justice – *Bridging the Cultural Divide* – cites more than 30 commissions and inquiries that came to the same conclusion.

<sup>4</sup> Palys, T.S. (1993). *Considerations for Achieving "Aboriginal Justice" in Canada*. Paper presented at the annual meetings of the Western Association of Sociology and Anthropology. Online at <http://www.sfu.ca/~palys/WASA93.pdf>

<sup>5</sup> *R. v Moses* [1992] 3 C.N.L.R. 116

<sup>6</sup> Palys (1993). *op cit* 4.

<sup>7</sup> See the AJS web page at <http://www.justice.gc.ca/eng/pi/ajs-sja/>

cost-sharing agreements, and now even more frequently supplemented with operating funds derived from other sources whose interests overlap with Aboriginal justice initiatives that are beyond strict Canadian justice mandates, the federal Aboriginal Justice Strategy has helped launch parallel Aboriginal systems of justice in rural, urban and reserve communities across the country. The current AJS web site notes that, “During the 2007-2008 fiscal year, the AJS funded approximately 113 programs that served nearly 400 Aboriginal communities.”<sup>8</sup>

These policy developments at the federal level have been reaffirmed by broader legal pronouncements regarding the rights of Indigenous peoples to develop systems of justice to serve their own people. The Royal Commission on Aboriginal Peoples, for example, in a report regarding law and justice entitled *Bridging the Cultural Divide*, expressed the view that

[F]ederal, provincial and territorial governments recognize the right of Aboriginal nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make laws, within the Aboriginal nation's territory. (RCAP, 1996, p.224)

Indigenous rights regarding justice also are addressed in the UN *Declaration on the Rights of Indigenous Peoples*, which was developed by the UN Working Group on Indigenous Populations and ratified by Indigenous delegates in 1994. The draft document worked its way through the UN system for more than a decade before a slightly revised version was endorsed by an overwhelming majority of the UN General Assembly in September, 2007. Canada was one of only four nation states to vote against the *Declaration* at that time, but ultimately endorsed the document in 2010. The *Declaration*, which represents minimal standards for relations between nation state governments and Indigenous peoples, contains two articles that deal expressly with the Indigenous right to develop and maintain systems of justice guided by their own customs and traditions:

**Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

**Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.<sup>9</sup>

As parallel systems of Aboriginal justice started to be formalized through protocol agreements with representatives of Canada's federal and provincial governments, important lessons have been learned along the way. One early program was created when BC Provincial Court Judge Doug Campbell and Tsartlip First Nation Elder Tom Sampson collaborated with the South Island Tribal Council to create one of Canada's first diversion programs for Aboriginal offenders. The plan called for Aboriginal first offenders whose crimes and criminal histories fell within a designated range, admitted guilt and were

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<sup>8</sup> *ibid.*

<sup>9</sup> See <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

prepared to take responsibility for their action to be diverted to an Elders Council. Although pioneering and visionary in many respects, it was also a top-down creation that died overnight when certain cases went to the Council that the broader community had explicitly indicated it was not prepared to have the Council consider. It was a harsh lesson that any program that offers “Aboriginal justice” will not survive unless it is grounded in a community-based vision that reflects the will and enjoys the support of the Indigenous community it purports to serve.

A second lesson was that Aboriginal justice programming need not be confined to reserve communities, and could well be developed to serve a diverse array of First Nations peoples within an urban community context. First off the mark here was Toronto, whose Aboriginal service providers came together to develop the process that led to the establishment of Aboriginal Legal Services of Toronto (ALST) in 1990. The program has been highly successful, grown consistently through its two decades of existence, and remains Canada’s flagship urban Aboriginal justice program.

It was on the heels of these developments that, in the mid-1990s, various individuals and organizations came together to discuss the possibility of developing a program to better serve the justice needs of the Aboriginal community in Vancouver. The end product of that discussion was the establishment of Vancouver Aboriginal Transformative Justice Services (VATJS).<sup>10</sup> The protocol agreement, which was developed under the “alternative measures” policy umbrella,<sup>11</sup> called for Crown at the Provincial Court at 222 Main Street to divert Aboriginal clients who met agreed-upon criteria to VATJS for dispositions to be decided by a Community Council Forum. VATJS welcomed its first client in 2000.

VATJS was created and has evolved in the decade since in ways that we will discuss in greater detail below, but so, too has the Canadian justice system. One particular development of relevance to the current story was the development of a Downtown Community Court (DCC) in Vancouver. The court was established in 2008 as a pilot project on the basis of recommendations of a BC Justice Review Task Force Street Crime Working Group report entitled *Beyond the Revolving Door: A New Response to Chronic Offenders* and represented a focused effort to deal with an identifiable population of chronic offenders in an area of Vancouver known as the Downtown Eastside. Often referred to as “the poorest postal code in Canada,”<sup>12</sup> the population has high rates of poverty, addictions, homelessness and mental health problems. For example, the Street Crime Working Group report estimated that approximately 50 percent of people in the Downtown Eastside suffer from either a mental illness or drug or alcohol

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<sup>10</sup> The original name for the program was Vancouver Aboriginal Restorative Justice, but the name was changed after several years to better reflect what the program tries to accomplish on both an individual and community level.

<sup>11</sup> The Justice BC web page describes the alternative measures policy, often referred to as “alt measures,” thus: “In some cases, it is not necessary or beneficial to prosecute a person accused of committing a crime. The Criminal Code of Canada allows Crown counsel to determine if an alternative measures program would be more suitable and ultimately more beneficial for the victim, community and offender. Alternative measures must protect the public and are used for less serious offences. ... Alternative measures can be used in cases involving less serious offences. They usually involve offenders with no criminal history. The accused is given the opportunity to accept responsibility for the crime and make amends to the community without going to court.” See [http://www.justicebc.ca/en/cjis/understanding/alternative\\_measures.html](http://www.justicebc.ca/en/cjis/understanding/alternative_measures.html)

<sup>12</sup> See, for example, Campbell, L., Boyd, N., & Culbert, L. (2009). *A Thousand Dreams: Vancouver’s Downtown Eastside and the Fight for its Future*. Vancouver, B.C.: Greystone Books.

addiction; that anywhere between 35 to 40 offenders with symptoms of a mental illness were passing through Vancouver's Provincial Court each day; and that approximately 70 percent of offenders were "chronic offenders," which was operationalized as having been charged at least 5 separate times within the previous year.<sup>13</sup> As described in an interim evaluation report, in order to deal with such a population,

The DCC takes a problem-solving approach to deal with offending behaviours of individuals and the health and social circumstances that often lead to crime. The DCC has a number of goals: improve outcomes for offenders; implement innovative criminal case management to improve justice efficiencies; and provide new opportunities for community participation in the justice system. Ultimately, the DCC aims to reduce crime in Vancouver's downtown area, reduce offender recidivism, improve public safety, and increase public confidence in the justice system.<sup>14</sup>

Creation of the DCC was accompanied by a transfer of jurisdiction for a subset of cases that had formerly been processed at 222 Main Street. All summary conviction cases that occur in the geographical area bounded by Stanley Park to the west, Clark Drive to the east, Great Northern Way/False Creek to the south, and Burrard Inlet to the north, are now heard first at the DCC, who determine whether the case will be dealt with by them or involves a "trial-able" issue, in which case it is referred to the Provincial Court at 222 Main Street.<sup>15</sup>

The impact on VATJS, because its area of operation includes all of Vancouver, was that it now had two different courts and Crowns to deal with instead of one. Given there is a significant and often troubled Aboriginal population in the downtown east side that would now be in DCC's jurisdiction – an estimated 40% of the Downtown Eastside population is Aboriginal<sup>16</sup> – the pool of prospective Aboriginal referrals to VATJS is a very large one. No formal documentation was produced to ensure that the DCC would continue referring Aboriginal clients to VATJS, although meetings involving the DCC Crown and VATJS produced an assurance that would be the case. Indeed, a pledge to this effect was made at both community information sessions that author Palys attended as the DCC was being developed – one at the Aboriginal Friendship Centre and a second at an Annual General Meeting of the Union of BC Indian Chiefs. In both cases the audience was reassured that referrals of Aboriginal offenders to VATJS would certainly not decrease and in all likelihood would increase once the DCC came into existence. The reality, however, was different. When the DCC opened its doors in September, 2008, the initial flow of referrals was promising. However, a mere two years later, for reasons not yet fully understood, the number of referrals from the DCC to VATJS had dropped to no more than a trickle.

Upon being apprised of this state of affairs, the senior author approached both the Coordinator of the DCC and the Executive Director of VATJS about the possibility of engaging a small study that would focus

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<sup>13</sup> B. C. Justice Review Task Force Street Crime Working Group (2005). *Beyond the Revolving Door: A New Response to Chronic Offenders*. Victoria, B.C.: Department of the Attorney General.

<sup>14</sup> BC Ministry of Attorney General, Justice Services Branch & Ministry of Public Safety and Solicitor General, Corrections Branch (2010). *Downtown Community Court in Vancouver: Interim Evaluation Report*. Online at

<sup>15</sup> For example, if an accused were to plead not guilty, then his or her trial would be held at 222 Main Street.

<sup>16</sup> Boyd, S. (2008). Community-based research in the downtown eastside of Vancouver. *Resources for Feminist Research*, 33(1/2), 19-43,155.

on three primary questions: (1) what had led the number of referrals to drop so dramatically?; (2) what might be done to rekindle the mutually respectful and peaceful coexistence between the two programs that originally had been envisioned?; and (3) what sorts of information might be gathered to benefit the future development of that relationship?

As often happens with more qualitative research, however, one's preliminary focus is not necessarily the end of the story, and the current study is a case in point. While researchers sometimes might wish the world could be put on hold while their research is being formulated and completed, life does not work that way. Once the difficulties with the drop in referrals was recognized, the Coordinator of the DCC and the Executive Director of VATJS began putting measures in place to address the issue even before the researchers entered the scene. Most importantly, this involved having a VATJS employee attending at the DCC on a part-time basis and making decisions, in collaboration with the DCC's Aboriginal case-worker, about which alt measures-eligible offenders would be referred to VATJS. This accomplished three things: (1) VATJS now had a more direct say in who could/would be referred to their program; (2) the VATJS employee's presence provided opportunities for information sharing that filled the informational void that several DCC employees expressed with respect to VATJS and its approach to justice issues; (3) the number of referrals immediately began to increase.

With the more pressing issues of referrals already being addressed, the study began to develop a broader and longer term focus and, in particular, became something of a case study of the co-existence of Canadian and Aboriginal justice in an urban Canadian context. While no single Vancouver court or program can be taken as formally representative of all Canadian justice or of all Aboriginal justice respectively, the DCC and VATJS are nonetheless part of those respective systems, and it is actually because of the ways they are *unique* that makes Vancouver an excellent venue in which to research existing and prospective relationships between the two systems. The DCC's "problem-solving" approach to a unique urban population of offenders, many of whom have other issues that contribute to their criminality – poverty, illiteracy, mental health issues, addiction problems – makes it more like "Aboriginal justice" than many other parts of the Canadian justice system in its consideration not just of the crime that has been committed, but in the person who committed it and the underlying reasons for their having done so. In turn, VATJS is in many ways a particularly strong exemplar of "Aboriginal justice" – the program is the flagship Aboriginal justice program for British Columbia and one of the two longest serving and most well-established urban programs in Canada – that also has a well-documented history by which its mandate and jurisdiction were established. If it is possible for a Canadian and an Aboriginal justice program to find a mutually respectful common ground, one would think these are the ones. It is in that spirit that the current research was conducted and that this report is offered.

## **Methodology**

Although various archival sources regarding the development of the respective programs were consulted,<sup>17</sup> the primary information generated for this project involved interviews with a targeted sample of participants who were identified by the Executive Director of VATJS and Coordinator of DCC from among personnel at their respective organizations as those most aware of and most likely to provide information useful in addressing the research questions. Seven interviews involving six different persons at the DCC were conducted solely by Jana Nuszdorfer. Five interviews involving four persons at VATJS were conducted solely by Richelle Isaak. One interview at the DCC was conducted by Ms. Nuszdorfer and Ms. Isaak together. All interviews were recorded using digital recorders, and then transcribed using techniques described by Palys and Atchison<sup>18</sup> and coded for searchability and easy retrieval using NVivo qualitative data analysis software.

This report follows the standard practice of not naming individuals and referring to them by role only where it helps to understand the information and perspective the participant brought to the research. However, all respondents were informed that because of the small targeted sample involved in this research, complete confidentiality would be difficult to provide, particularly within the small community of persons who work at the DCC and VATJS. Nonetheless, every effort has been made to ensure sources of quotes are as minimally identifiable as possible, and all participants were given an opportunity to view the draft report and have any concerns addressed.

## Findings

Understanding the relations between DCC and VATJS requires knowing something about the development of and the principles and objectives that guide each program. The first of these entities to come into existence was VATJS, which was developed in the late 1990s and saw its first client in 2000.

### The Origins of VATJS

One person interviewed for this project was the Chair of the Board of Directors and President of VATJS at the time the interviews reported herein were conducted.<sup>19</sup> His connection to the program extends back to its very conception when he was with the Legal Services Society of British Columbia Native Programs Branch. As he recounted in his interview,

The initial discussions began in approximately 1995.... At that time the Legal Services Society Native Programs Branch had met with the Native Community Law Office Association to discuss new initiatives... first of all, how can we develop programming to better meet the needs of

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<sup>17</sup> Especially helpful here was a Master's thesis by Tammy T'at'usayalthim Dorward (2005) of SFU/Criminology entitled, "The Role of 'Community' In the Design and Development of Vancouver Aboriginal Transformative Justice Services," which reviewed the process by which VATJS was created. Online at <http://ir.lib.sfu.ca/handle/1892/724>

<sup>18</sup> Palys, T., and Atchison, C. (in press). Qualitative Research at the Gates of the Digital Age: Obstacles and Opportunities, *International Journal of Qualitative Methodology*. An earlier draft of the paper delivered as a keynote address for the 10th Annual *Advances in Qualitative Methods Conference* of the International Institute for Qualitative Methodology is available online at <http://www.sfu.ca/~palys/Palys&Atchison2009-Obstacles&Opportunities.pdf>

<sup>19</sup> Because of employment changes that substantially limit his time in Vancouver, this individual has since resigned from both these roles.

Aboriginal clients and Aboriginal communities? We were aware of a program in Toronto, which was Aboriginal Legal Services of Toronto, which had implemented a restorative justice model.

So we began by taking a look at that program and we subsequently looked at other programs both throughout Canada and internationally. We had decided to strike a Steering Committee to assist us in our discussions and we tried to be quite inclusive. So we had the judiciary involved, Crown counsel, the Native Courtworker and Counselling Association, basically all the groups that Legal Services had some interaction with, and including government bodies as well, such as the Attorney General's office, the Solicitor General's office. So we started discussions on whether or not we could implement a similar program here in Vancouver.

We received some developmental funding to take a closer look at some of the programs that were currently in existence and I think it was in 1996 when a group of five, including myself, two developmental coordinators that we had hired on a short-term contract, as well as two other representatives from the Aboriginal community, traveled to and met with the other Aboriginal programs throughout Canada. So we met with the programs in Winnipeg, Thunder Bay, and Toronto, ... collected a fair amount of information, came back and presented that to the group, and then talked about what we wanted to do in Vancouver. We came to the conclusion that we didn't want to simply copy another program or transplant another program from another part of the country, knowing that the Vancouver Aboriginal community has its own unique circumstances such as the diversity of cultures.

The Chair went on to explain that because the Aboriginal representatives on the Steering Committee were not of the same mind regarding the direction that the program should take, the decision was made to establish a separate Aboriginal Caucus.

Once we were able to secure funding to implement the program we had hired the two individuals on full-time ... and we went about designing the program. One of the first things that we did was to decide to form what we called an Aboriginal Caucus, because what we found was there were some differences of opinion at the Steering Committee level as to who should be leading the program, i.e., in control of the program, what role the various organizations should take on, and so rather than have these discussions within the whole, entire group, including potential funders, we decided we would have our own process where we could have these discussions and debates and come to conclusions and consensus. So the Aboriginal Caucus really became the driving force behind the transformative justice program, or restorative justice program, as it was then known.

As Dorward explains in her historical review of the formation of VATJS, one of the major disagreements concerned whether any single organizational member of the Aboriginal Caucus should run the program, or whether the program should be independent of all the agencies and be a more directly community-based organization that partnered with the various agencies and was advised by them collectively as a Board.

Due to the diversity of the Aboriginal Agencies, each with its own priorities, resources, and time commitments, it sometimes proved difficult to reach an agreement and consensus on the direction of the programme (e.g., Steering Committee Minutes, May & July 1999). Although there are representatives for legal services in Vancouver on the Aboriginal Caucus, at one point the Native Community Courtworkers Association of British Columbia (NCCA) withdrew from the programme (Steering Committee Minutes, May & July 1999).<sup>20</sup>

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<sup>20</sup> Dorward (2005). *op cit* 17, at p.82.



This was a significant loss because the Native Courtworkers clearly had a potentially important role to play. They were a well-established and well-respected organization connected to the Canadian Justice system who could help identify Aboriginal offenders to divert into Aboriginal justice processes as their cousin organization had continued and continues to do in Toronto as a contributing organization to Aboriginal Legal Services of Toronto. Nonetheless, the remaining organizations forged ahead.

### **Operationalizing “Community”**

Although Aboriginal organizations may serve the Aboriginal community, they should not be confused with being the community itself. As Dorward explained in her MA thesis about the role of “community” in the development of VATJS,

The key factor for success in Aboriginal initiatives is the involvement of the community from the very beginning in the design, development, and delivery of justice initiatives. In this justice initiative, [i.e., VATJS], the initial discussions began with a core group of Aboriginal community members, the Aboriginal Caucus, who were committed to ensuring positive change and community empowerment for the well being of all urban Aboriginal people. The development of the programme extended into the community, through various discussion groups and meetings that enabled urban Aboriginal people to gain a voice in the decision making of this justice programme.<sup>21</sup>

“Community” repeats itself in many ways throughout VATJS. The first way that “community” appeared was through the involvement of the community in the design of the program. While the members of the Aboriginal Caucus each represented organizations in the community, efforts also were made to connect with individuals in the community to inform them about plans as they were being developed, to receive feedback about community priorities, and then incorporate these into Caucus discussions. Two different consultations were held with Elders, for example. The first was to hear Elders’ views about the desirability of such a program and, if desired, the principles that should guide the program and frame its relation to the federal and provincial governments and the Canadian justice system. After hearing their approval, the second meeting focused more specifically on articulating the role that Elders would play in the program. In addition, the two developmental coordinators held numerous outreach meetings with every interested organization and community group that invited them, and the Aboriginal Caucus hosted a Community Forum and Feast at the Friendship Centre. As Dorward describes,

When the programme was presented at the Community Forum and Feast at the Vancouver Aboriginal Friendship Centre in June of 1999, over 230 people attended. This Community Forum consisted of a presentation outlining the developmental work, and a description of the planned model, followed by a panel discussion (Community Forum Feedback, 1999: 1). The people who attended and participated were able to ask questions or state their concerns regarding the draft model during the forum, or on a feedback form (Community Forum Feedback, 1999: 1).<sup>22</sup>

Several key principles emerged in the community consultations. One was the emphasis on ensuring that the program should be an “inclusive” one open to all persons who self-identify as Aboriginal, or who might have been estranged from their Aboriginal birthright and wanted to discover that part of themselves. Members of the community also were adamant that the core of the program should be a

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<sup>21</sup> *Ibid*, at p.82.

<sup>22</sup> *Ibid*, at p.60.

healing-based forum that would be run by community members for community members with the objective of healing relationships and bringing people back into the community.

One of the important elements in the development of the justice initiative is the reintegration of the victim/offender and the involvement of the community – the role of community. As outlined in the VATJS Draft model and the programme’s goals to create self-determination processes, community empowerment – and the transformation of justice calls for the community to be involved not just informally or at the design phase, but throughout the process of delivering justice. Doing so relies on “the community” while simultaneously building and strengthening it.<sup>23</sup>

Accordingly, the staff and volunteers of VATJS are themselves members of Vancouver’s Aboriginal community;<sup>24</sup> the Elders and others who serve on the Community Council forums when they meet are members of Vancouver’s Aboriginal community; and the decision to locate VATJS and its community forums in the Vancouver Aboriginal Friendship Centre was to ensure that victims and offenders would be at home in this positive heart of Vancouver’s Indigenous community and thereby be shown in a very concrete way how and to what they were being welcomed back.

It is also noteworthy that the design of the program was not seen as a one-time process that ended when the first protocol agreement was signed. While the Elders agreed with the Aboriginal Caucus that the range of offences dealt with should be limited at the outset, and accepted that initial control over referrals would be based with the Crown, they wanted it made clear in any agreement that such an arrangement would not be constraining over the longer term, and should leave room for growth and change. As Dorward noted,

In addition to the ideas presented by the Elders of establishing Aboriginal rules or system of living, it was felt that the program should not be limited to the Alternative Measures categories 3 and 4 offences (Elders Consultation, 1999: 5). How is it possible for Aboriginal people to regain control of their lives and justice issues if it is only limited to certain areas? Furthermore, the Elders expressed that this programme “should not fit into mainstream justice system” and it “must keep away from [the] justice system (Elders Consultation, 1999: 4). One of the suggestions to ensure an Aboriginal justice programme could be on its own was to bypass the *mumuthni*<sup>25</sup> system altogether, “rather than Crown Counsel making the referrals to the program, the Aboriginal Community identifies those people and makes referrals to the program” (Elders Consultation, 1999: 3).<sup>26</sup>

This longer-term vision was also noted by Palys in an article written just as VATJS was becoming operational:

Although this eligibility protocol [where Crown selects offenders for diversion and referrals are limited to what were then called Category 3 and 4 offenses] was approved by the program’s

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<sup>23</sup> *Ibid*, at p.69.

<sup>24</sup> It should be noted, however, that the first Program Director – Mr. Barry Warhaft – was actually a non-Aboriginal person whose MA thesis from SFU/Criminology had focused on the development of an Aboriginal justice program at Canim Lake. He was one of the two developmental coordinators hired when VATJS was first being designed and served as its Program Director from 1999 to 2005.

<sup>25</sup> *Mumuthni* is a Nuu-chah-nulth word (Dorward is Nuu-chah-nulth) that refers to non-Aboriginal Canadians or settler peoples or, in this case, to the Canadian justice system.

<sup>26</sup> Dorward (2005). *op cit* 17, at pp.58-9.

aboriginal caucus (on the reasonable grounds that one must crawl before one can walk), because of it, it would appear that the control of aboriginal justice is still within the mainstream system – a possibility that was specifically eschewed by Vancouver’s community elders at a recent consultation.

Over the long haul, this protocol is problematic for at least two reasons: (1) placing eligibility criteria completely in the hands of the Crown diminishes the very community authority required for a project of this sort to succeed; and (2) it requires aboriginal leaders to be accountable to the authorities whose justice system has failed aboriginal people, rather than to their own communities.

All participants in the VARJP<sup>27</sup> seem aware of this weakness, and recognize it as such. Accordingly, attention by all parties has been directed to ensuring that any constraints imposed on the program at its inception are not carved in stone. The Crown is committed to being “flexible” in designing a protocol that reflects the vision of the program. The negotiated agreement anticipates a time when referrals may emanate from several sources, and when the program’s jurisdiction will include a broader array of offenders and crime categories than is possible at present.<sup>28</sup>

These same themes were echoed in our interview with the Chair of the Board/President of VATJS, who explained when asked about the “alternative measures” umbrella under which the program was placed,

[O]ne of the things that we insisted upon in our negotiations with Crown ... was that we weren't just going to take the alt measures program and basically follow what they outlined. This had to be something unique, and this had to be something ground breaking. We just didn't want to create another Aboriginal organization carrying out a non-Aboriginal process.

Another aspect of this uniqueness and a reflection of the Elders’ desire for autonomy arose over the question of whether Crown “approval” would be required after the case had been referred to VATJS and the Community Council that lay at the heart of the VATJS process. It was the final negotiating issue in the protocol agreement and the inauguration of the program was actually held back three months until it was resolved. For the Provincial Government it was simply a standard part of the “alt measures” umbrella under which VATJS was placed, and the concern was that *not* reserving final approval would be tantamount to offering VATJS a dispositional blank cheque. The Aboriginal Community suggested it made no sense for someone who had not been part of the circle to question a community-generated plan after the fact, and that it made the program irrelevant if Crown afterward could simply impose their own plan. The resolution that was agreed upon called for VATJS not to have each individual healing plan approved, but rather simply to provide a list of all the dispositions that *might* be included in an individual healing plan, and agree that all resolutions would be confined to the alternatives available on that list. It was an important signal that the two justice systems could work collaboratively in a way that was respectful of each others’ requirements and find a mutually acceptable middle ground.

## **An Inclusive Vision that Builds Community**

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<sup>27</sup> At that time the program was referred to as the Vancouver Aboriginal Restorative Justice Program (VARJP).

<sup>28</sup> Palys, T. (1999). Vancouver’s Aboriginal Restorative Justice Program: The Challenges Ahead. *Aboriginal Justice Bulletin*, 3(1), 2-3, at 3. Online at <http://www.sfu.ca/~palys/VATJS1999.pdf>.

While “being Aboriginal” is a prerequisite for referral to Vancouver’s Aboriginal justice program, underlying this simple statement is a great deal of complexity owing to the manner in which such a significant part of the colonial experience has involved stripping Aboriginal people(s) of their identities through name changes, child seizure and foster care, the imposition of patrilineal naming practices instead of the matrilineal practices that were more characteristic of Indigenous peoples, and the identity and status rules formalized and changed by the federal government in successive versions of the *Indian Act* from 1876 onwards.<sup>29</sup>

Recognizing these difficulties and the historical injustices that led to individuals being forcibly stripped of both their cultural connection and cultural pride, VATJS understands that the job of Aboriginal justice is not only to involve and reflect those who are positive members of the community, but also to *build* community by shepherding and welcoming back those who have lost their way. The Elder we interviewed, for example, who volunteers at VATJS and serves in their community councils after decades of working in prisons and for the Native Courtworkers, stated,

[A] lot of times we’re dealing with youth coming out of the foster care system. They know they’re Aboriginal, they look Aboriginal, but they don’t know their roots. They’re stereotyped, and they’ve got a few strikes against them that they consider strikes against them, so we’re looking at them and saying, “Okay, do you want to find out where your roots are?” And we probably can’t trace it down right down to mom and dad because you’ve been given to the foster care, but maybe they’d like to know the Nation that they were born from and to take a look and study that, where they came from, and if there’s any roots there for them to develop some sense of pride in who they are as First Nations people.

The Executive Director reaffirmed that view when asked whether VATJS was appropriate even for Aboriginal persons who were estranged from their Aboriginal heritage, while also noting that VATJS is the appropriate venue in which that decision regarding appropriateness should be made:

Yes, because we *are* the community. Essentially how you can look at it is that you are referring this person back to the community, which is our program. And if we see that there is a person that isn’t a good fit, they haven’t accepted responsibility, or aren’t in that place, or whatever the reasons are, we can always refer them back, but that decision should be up to us. So that essentially all of our clients are coming back to our communities so that we can deal with them, because that’s how Aboriginal justice always is in every community. Even before contact, if you had done wrong in your community you go back to your community and you make it right, whatever way that looks like. Ours is a little bit different because we have a lot of kids that are in care, and kids that grew up in foster care and residential school and all that kind of stuff, so we’re having to deal with multi issues that are happening in our circles.

It is VATJS’s connection to community that makes this building of community possible. As the Executive Director explained,

[O]ne of the things that we do really well, is that we’re connected not only to all of the Aboriginal organizations in Vancouver, but we’re also connected to a lot of the community grassroots

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<sup>29</sup> See, for example, Chartrand, P.L. (Ed.)(2003). *Who Are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction*. Saskatoon: Purich Publishing; Lawrence, B. (2004). *“Real” Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*. Vancouver: UBC Press; Palmater, P.D. (2011). *Beyond Blood: Rethinking Indigenous Identity*. Saskatoon: Purich Publishing.

initiatives and cultural groups that are here. From the powwow dancing to the West Coast family night, to the Nisga'a, the Haida, the Tsimshian, the Gitksan. Anything that's happening culturally in the community, I would or my staff would know exactly where to go.

Sometimes exposure to the circle and the sense of community it reflects is all that people need to begin exploring that connection:

Well it's important that *they* want to get connected back ... so if they say "I've never grown up [knowing my First Nation]," and during the process of the circle, one of the Elders or one of the community members may say, "Is that something that you *want* to explore? Do you just want to see what's out there? If you're Gitksan and you've never grown up in Gitksan, but you want to see what it's all about, without really having to be that exposed to it, because that's something that you want?" And most of the times, they say, "Yeah, well I'd like to know more about my culture." So sometimes it may be we'll get them to volunteer at West Coast family night, for example, where they do all the dancing and singing. So one, it just kind of gets them some exposure to something they never even knew existed before. And two, it gives them that ability to kind of check what's out there. And if they want to explore it more, at least giving them the venue to do that.

At the same time, cultural connections are not forced if the person is not interested in exploring them:

If they don't want to know their culture, that's all right, we just don't go there. There's other issues that are probably happening in that individual's life that we can help with. And there are people that... were adopted out, or 60s scoop, or didn't ever grow up around an Aboriginal community may not want to look at that, or didn't have a good experience with their families, or whatever it is. So we never force it on anybody. We explore it as an option, and usually most of the time during the first two interviews, they'll find all of that information out. They'll see how receptive they are to it, do they want to ... it's really crystal-clear ... either they want to or they don't. And if they don't, that's all right, if they want to volunteer in the community or do other things like that, we can still be creative in how we have that happen.

### **What Does VATJS Do?**

The heart of VATJS is the Community Council Forum, which is the Aboriginal equivalent of a "court" – a respected place governed by protocol where recognized community authorities make decisions in culturally accepted ways about those who come before it. Community Council Forums involve the offender, the victim (assuming there is a victim who wants to attend), an Elder, a Council facilitator from the program, and often two or three other volunteers who are not Elders. The Elder always sits at the side of the victim, if there is one, and starts the session with a prayer. After that, the process focusses on trying to understand what led to the act that brought everyone together, what in the offender's life brought him or her to that place, and what the repercussions of the act have been for all concerned.

If there is a single term that appears again and again in reference to VATJS it is that the program takes a "healing" approach to justice.<sup>30</sup> In contrast to the Canadian system that focusses on the crime and emphasizes the need for dispositions – conceived often as punishments – to be proportional to the crime committed, VATJS focusses more on the individuals involved and the need to heal the rift that has

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<sup>30</sup> This is generally true of Aboriginal justice programs. In fact, an important newsletter in the area that is published out of the Native Law Centre of Canada at the University of Saskatchewan is entitled *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice*. See <http://www.usask.ca/nativelaw/publications/jah.php>

been created by dealing with imbalances in the individual (the offender), the victim, and the community. With respect to the individual, the Executive Director described it thus:

Well, to us healing is [in relation to] anything that is out of balance... Healing can be that they don't have housing right now and they're homeless. Healing can be that they aren't having great relationships in their life and they need some help with anger management. It also can mean that they're unemployed and they don't have the skills to get employed and for example they've been picked up for a theft under case and so a lot of those ... it depends on the individual and I think that's what makes us different is that all of our plans are individually based; no plans are really ever the same.

The goal is to establish a relationship – a connection to community – that does not necessarily end with the statement to Crown that an alt measures healing plan has been completed.

[W]e build relationships with our clients from the moment that they walk in the door to when they complete our healing plans and they finish with that. What we hope to provide them is somewhere that they can come ... three months is not a magic number. They're not going to be completely healed in three months and there may be other issues that come up. We are always open to past clients or anybody for that fact to come to get resources. So even though we process them within the three months alternative measures program time period, we are completely always open to them and that's how a lot of our resources got set up.

In addition to connecting offenders to their community, the Council Forum simultaneously reminds offenders of community standards of behaviour, and makes them accountable not to a stranger in robes, but to someone they probably know who is respected by the community. For example, the Executive Director recalled that both sex trade workers and johns have come through the Community Council Forum, and that the effect on johns was particularly pronounced.

Well I know that the johns that have come through our program ... I can't even imagine being a john ... and being an Aboriginal john ... and coming through a program and sitting beside an Elder to have to explain and reading the police report on exactly what they did and how they did it. And then having the Elder talk to them about how we as Aboriginal people treat our women ... we treat them with respect ... that in itself is like the biggest ... and I know the individuals, I see them in the community who have come through our program. It definitely is such a deterrent, like you've never ... I can't even imagine having that happen. Like I said, we are a small tightknit community. Even that behavior, having an Elder call you out on that behaviour is huge.

... And a lot of people have the misconception that our clients "get off" by coming to our program. I don't know any john who would want to sit in front of their grandmother and tell them what they've done. Like how embarrassing, humiliating. But us it's not just about embarrassment or humiliation and all of that because a lot of our people weathered that anyway ... whether it's because of where they grew up or foster care. It's like ... when they go through the process they feel that humiliation and shame and everything, but they also feel the compassion and the love and the understanding that comes through there. And someone needs to make them responsible; that's our job is to make them responsible. They need to complete their healing plan requirements. So it's kind of hand-in-hand. You have to feel that shame and you have to feel that embarrassment and having to sit in front of an Elder because that's what keeps you from going out there again and doing the same thing; the thought of "my goodness I have to go back with an Elder."

For some clients who have multiple or more chronic problems, the healing journey may be quite long, and VATJS sees their role as one of merely beginning a healing path and being available on an ongoing basis whenever they are needed. It's that ongoing relationship and time commitment – making clients feel they are part of, responsible to, and supported by, a community – that VATJS sees as an important element that distinguishes what they do.

When you look at a lot of people that are homeless or are committing offenses, a lot of them grew up in foster care, a lot of them grew up on the streets ... broken homes, alcoholic homes ... there's a reason why they're down there. There's a reason why they've committed their offenses and by processing them quickly it's not going to give them the support that they need. They [DCC] may be able to at least *introduce* them to that support, but what we do here is we work with them to pull it out as to what it is that they need to develop on the healing plan, because *they* identify what they want to work on in the healing plan and the questions that we ask them in the circle is geared to be able to get them to start thinking about, "Is this a problem to me and do I want to address it now?"

At the same time, not every client requires a lengthy healing plan. Some charges arise from unique circumstances or momentary poor judgment. The Executive Director gave the following example:

[F]or example, we have a client that ... The person got intoxicated that night. They don't usually get intoxicated; they're in college; drinking is not part of their life. But just this night something happened where they overdrank and this mischief happened. Everything else going on in their life is good. So what we ended up doing with that specific situation – I think he kicked a fence and broke a fence and banged on a door ... all this crazy stuff that when he was drinking and doesn't remember too much of it. He explained that it was his 21st birthday; his friends were giving him a bunch of drinks downtown on Granville; he caught a cab home; the cab driver kicked him out because he was intoxicated; he was pissed off; he went to this house, kicked their fence, kicked at the door. So that particular situation we knew that drinking was not a part of their life; they're in college, they're doing really well. This was an isolated incident and this person needed to make it right though. So their plan wasn't three months, it was like one month. They had to write a letter of apology, explain the situation, and give some retribution to fix the fence to the victim.

This can be the case in more serious offences as well. As the Elder we interviewed described,

[W]e had someone coming from one of the universities and went to watch the Canucks play, and had a beer, but she had to leave early because she had some studying to do. She walked out that door of the sports bar where they were watching and the cold air hit her. She remembers walking to the bus but she doesn't remember anything after that. And so she committed an assault, which she normally never would have done, and of course she was very very upset about it, and she was happy that we were able to help her to make up to the victim ... to say I'm terribly sorry, that this is not something I normally do, and that she's able to continue her studies and go into the career that she chose. If she had a criminal record she wouldn't have been able to do that. So we were able to assist her in that. And the victim was happy.

When asked to describe the strengths of their program, VATJS personnel were especially proud of two things. The first was their knowledge of and connection to the community they serve and their personal knowledge of the services available. The Executive Director noted,

We have over 35 Aboriginal organizations in Vancouver that we refer out to, so it's not just whoever is coming down to Downtown Community Court. We have relationships with all of the

organizations here, and we go out and check out their resource first to make sure that's somewhere we want to send our clients.

The Elder we interviewed reaffirmed that view:

Well, for people in the circle, we know our community. ... And the people that sit in our circle, we know who's in the downtown Eastside, who has counseling services, who looks after Aboriginal education, and housing, who has trades training, where can we send this person to look for work. This person has been here for a while, and hasn't been able to find work, how can we help this person? And not the circle itself, but the community, who can we send this person to? So the people in the circle are usually very familiar with the church, with food banks, with what's in our community.

A second major strength was their ability to empathize with and connect with clients. The adult Justice Coordinator indicated two aspects to this. The first was the understanding and empathy that arises from a shared cultural experience.

[W]e understand their situation. We're all Aboriginal at our organization. We understand where they came from, the history of Aboriginal people, so it gives us that compassion for them and understand where they are, it's kind of pinpointing where they are in their healing journey or whether they've even started. ...

Education and understanding where you come from is the biggest thing that I try and promote when I speak to my clients. To understand the history of residential school, where race was almost murdered off. ... So some of them are mad. Some of them are sad, and they cope with it through drinking or through drugs. It's something that they don't understand because they don't understand the history. So a lot of people are in the state that they are because of residential school, because of the abuse that went on there, and they just don't understand. So that's why I promote history, education and everything. It's kind of giving them a sense of pride, giving them their pride back, and say, "Okay, that's why we are where we're at. Now what am I going to do to get to the next part?"

The second was that those associated with VATJS lead by example, and serve as role models who are on healing paths that all Indigenous people share to some degree because of the colonial experience.

Everybody in our program lives the life that we're promoting. It's not something that we take lightly. Like there's times that ... some people may walk the wrong path, but they always refer back to the path again, which is promoting health and wellness. So, the way I am is, I have to live my life positively in every way that I can. I can't be promoting health and wellness and my organization if I don't live it. I don't want to be a hypocrite. And that's a big reason why I like working with our organization because everybody else lives the exact same life.

And while Community Council forums are the heart of Aboriginal Justice processes in Vancouver, administering the forums is by no means all that VATJS does, as the program has continued to evolve in a way that also reflects the community and its view of what "justice" is. As the Executive Director noted when asked to explain her role at VATJS,

My job is to manage ... to get a clear understanding of what the community wants from Aboriginal justice. Because when I first started here I thought it was really kind of cut and dry, that the community wanted an alternative to criminal justice, but what I soon realized really quickly was no, that's not all they want, because when people walk through the door and they see "Aboriginal justice" anything that's unjust to them they would like us to assist them in it. So



that can mean child apprehension – it doesn't mean we deal with child apprehension, but we walk clients through: where do they go? what do they ask? what advocacy do they need? – residential school claims, somebody who is not getting income assistance because they refuse them, so those types of cases, those types of referrals. So we soon realized that we can't turn those people away because they have nowhere else to go. So our program evolved from that understanding of Aboriginal justice and I think we've become ourselves more holistic in approach. So my job is to find out how the community looks at Aboriginal justice, ensure that we have the resources in the community to meet their needs, to ensure that the criminal pieces are running the way that they should be, whether that's with Downtown Community Court or 222 Main, or their Crown counsels that are referring to us, as well as the Youth Court that is downtown.

On a related theme, the Executive Director added,

I think ... to me it's about the personal touch. It goes back to how we used to do things a long time ago in all of our communities. In all of our Aboriginal communities it always involved the community; it always involved an Elder; it always involved them taking responsibility over what they've done; and it always involved restoring to balance ... whether that's for the victim or the offender. So those components are the four main components in our program and that's what differentiates us from whether it's Downtown Community Court or First Nations court. We're involved in the community; we're advocating a lot of .. like me going to the march today is about advocating for all the women that have gone missing in the downtown Eastside. Women look at Aboriginal justice ... the expectation is that I would be down there because that's my job is to advocate for those women. So I think we get lost in the concept of justice, right? We think it has to do with criminal, criminal, criminal and it's not; that's not what it means to our community. So my job is to find out what *does* it mean to our community and make sure that we have the resources to meet the needs.

The Executive Director indicated that VATJS currently deals with 90-100 referrals per year, which includes referrals arising from the Crown at both the DCC and 222 Main Street, Police, and the community. Indeed, the high proportion that now come from the community – who in many instances contact VATJS rather than dialing 911 when trouble arises, or who look for VATJS intervention in troublesome situations *before* they become “criminal” and the Canadian justice system responds – is itself a significant indicator of the confidence the community has developed in the program.

At this time, with a total budget that just reaches into six figures, the Executive Director described her personnel and programs thus:

Well, we have myself and two coordinators. One is a Youth Justice Coordinator and her job is to work with all the youth referrals from Hornby. And then we have [another individual] who is the Justice Coordinator. He deals with all the downtown community courts and the regular 222 Main referrals. We have our admin assistants. We have [another person] who is a prevention/outreach worker. He is doing the program that's called Youth Outreach. They're just actually rolling out ... end of February. During the Olympics we had this outreach program set up where it was checking on all the youth in the community because we were worried that they were going to scoop them up with Rich Coleman's new legislation.<sup>31</sup> So it was kind of developed from that. It

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<sup>31</sup> This is a reference to the legislation that BC Housing Minister Rich Coleman introduced just prior to the February/2010 Winter Olympics called the *Assistance to Shelter Act*, which empowered Police and other authorities to forcibly take homeless people off the streets and take them to shelters. Represented by the

was received really well in our communities so we revamped it a bit and brought in volunteers who are going out every Wednesday, Friday and Saturday to the hotspots for the youth and just kind of checking in with them, bringing them resources, bringing them supplies if they need it, bus tickets to get home, just making sure that they know that we care about them, we're checking on them. So that's kind of what he does and he does all the prevention workshops as well. So he identifies the prevention activities and workshops. Then downstairs is the Resource Center. That's funded by BC Housing; we have one and a half resource workers there. And their job essentially is ... anyone who walks in who needs help with housing or furniture, or having problems with landlords or tenants they would go downstairs and see the resource team.

It is telling that while VATJS's areas of responsibility have grown, their budget is smaller now than it was when they took their first client in 2000. When the initial agreement creating VATJS was signed, it called for 50-50 funding between the provincial and federal governments. British Columbia's portion soon decreased in one of former Premier Campbell's budget-cutting exercises, such that BC now contributes less than a third of VATJS's operating budget, and VATJS has had to look elsewhere for money not to expand its services, as was originally hoped, but simply to survive. Being asked to provide more and more service for no more money is a challenge, as the Executive Director recounted when asked to describe what she felt were the weaknesses of her program:

The weaknesses ... obviously not having enough money to do the things that we really want to do. I think that's been not only just with our organization but several organizations in the communities, just always having to function on a very shoestring budget, and then the frustrating part is seeing these new programs or new courts that come in that are funded up the ying yang and yet we've been told for how many years that there is no money. So you know it's frustrating to us because we do it so well and then you would think that they would say, "You guys do this so well, let's expand on it, let's figure out a different way that we can do it," but what we're told is, "Well, let's expand on it, but there's no more money there. Just want to let you know ahead of time, there's no money, we can't give you any money." So they want us to take on more staff without any money. And it's not that we're all about money, it's just that I cannot put any more stress on my staff, and I will not put any more stress on my staff. We need a new person to be able to come in and to be able to help with that, so, yeah, that's kind of the frustrating part.

...The Department of Justice has been really good at maintaining their funding, it's been the province, a lot of change in ... change in mentality ... rather than healing it's punishment based ... they flip back and forth and so our funding levels have dropped ... instead of increasing it has dropped. So that's been very challenging for us because we've had to pull in other partners to compensate. It should be compensated from the province and it's not, so we've had to do other things so that we can survive and be able to have our process that still is not affected. But we had to be creative in how we brought in those other funders as well.

## **The Downtown Community Court (DCC)**

The Downtown Community Court, which became operational in September, 2008, is located in Vancouver in the heart of the Downtown Eastside just around the corner from the main Provincial Court building at 222 Main Street. Unlike VATJS, who took over rented quarters in the Aboriginal Friendship Centre and have an annual budget that barely extends into six figures, the original capital investment to build the DCC was \$5.444 million, and the operating funding for its first year of operation was \$4.739

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government as a caring piece of legislation, critics were concerned the government had created the legislation to sweep the homeless out of sight for the two weeks the eyes of the world would be on Vancouver.

million.<sup>32</sup> The interim evaluation of the DCC indicates in a section entitled “key findings of the first 12 months” that (a) there were 3,616 criminal cases that had one or more hearings in the DCC; (b) 2,034 accused were involved; and (c) each offender resolved an average of 1.9 court cases. The types of cases dealt with included “mainly theft (33%), assault (14%), possession of drugs (9%) and mischief (5%), as well as administrative offences (27%) and other offences (12%). ... Domestic violence cases constitute 8% of the DCC cases.”<sup>33</sup> The report also indicates that the DCC sees an average of 62 case appearances per day and that “it takes 5.1 appearances on average to conclude a case.”

The DCC process begins when someone is arrested and charged with a summary offense within the DCC catchment area. The individual may or may not be in custody. Interviews with various members of DCC staff suggest that the typical day begins at 7:00 AM when a triage team arrives to ensure the files are ready for decisions to be made by the duty Defense Counsel<sup>34</sup> and Crown. These latter two then prepare recommendations to present the presiding judge when court begins at 9:00 AM. Although the DCC in theory has the complete range of dispositional options open to any court, in practice those files that remain at the DCC and are not referred to 222 Main Street for trial normally result in the offender being sentenced to one of four alternatives: (1) “alternative measures;” (2) routine supervision with the option for DCC program support; (3) intensive supervision in conjunction with the DCC case management team; or (4) jail.

### **DCC Views of VATJS**

VATJS’s strengths are not unnoticed at the DCC. The judge we interviewed commented that,

I think their strength is probably their ability to individualize a plan for each person. I am not sure that Corrections Branch with 12 hours of community work service or something, which is cleaning up the streets or something, it is never going to be that meaningful. For some people it is a good thing to do – it is effective and it’s quick and it’s easy – but I think what VATJS does is more labor intensive, it is more personalized, and it *has* to be more effective because of that, I would think.

Others were equally positive and encouraging:

I think some of the strengths [of VATJS] will be that it will appeal to particular types of offenders ... native offenders who have not responded well to traditional probation, supervision, that maybe are out of touch with their own heritage and are curious about it or prepared to look into it. So I think the strengths about it is that hopefully it will appeal to a group of offenders that traditional programming just hasn’t been able to get to so far. So I think that is the strength of it. The fact that it is provided by other Aboriginals. (Provincial Crown)

One of their strengths is they’re more holistic, they are more traditional based. They utilize the healing circle, they utilize the more traditional teachings and stuff like that. The First Nations

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<sup>32</sup> Office of the Premier of British Columbia, and Ministry of Attorney General (6 Sept 2008). Backgrounder: Vancouver’s Downtown Community Court. Online at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2008OTP0218-001343-Attachment1.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2008OTP0218-001343-Attachment1.htm)

<sup>33</sup> BC Ministry of Attorney General, Justice Services Branch & Ministry of Public Safety and Solicitor General, Corrections Branch (2010). *Downtown Community Court in Vancouver: Interim Evaluation Report*. page iv. It is unclear where the domestic violence cases fit in the other categories as the other categories already add to 100%.

<sup>34</sup> Accused can bring their own representation, but most rely on duty counsel.

people, if they are connected, believe it. And, one of the other things too is that they are viewed as not part of the justice system. One of the big problems for us is we are viewed as the justice system. First Nations clientele have a bad rapport with the criminal justice system. They are not trusting of it, they are not trusting of the police, they are not trusting of pretty much anything to do with the court. And that's basically one of my rules is ... what is there to use to try and break down that barrier when clientele coming walking through that door. And one of the benefits of VATJS is they are not viewed as that. (DCC Case Worker)

Well, strengths... they are a strength-based organization ... meaning, that they look at every individual's strengths and utilize those strengths to move people forward into a better place. So I like that they are a strength-based organization. I think they are respected by other Aboriginal service providers. They sit in the Friendship Center which is an Aboriginal-specific building so I like that; I think that is ideal. .... I think they do have good connections with the Aboriginal community and I also like the fact that they are all Aboriginal people themselves and they believe in the healing plans. (DCC Employee)

### **Fostering Aboriginal Justice**

With these positive views as a backdrop, our interviews focussed on what might be done to foster the broader responsibility for Aboriginal justice that was envisioned by the Aboriginal community and the federal and BC provincial government at VATJS's inception. Three main issues were identified: (1) determining "Aboriginality"; (2) the criteria used to determine whether an offender will be referred to VATJS; and (3) the "proper" relationship between the DCC and VATJS.

#### ***Determining Aboriginality***

Given that "being Aboriginal" is a prerequisite for referral to Vancouver's Aboriginal justice program, then a question of interest is how Aboriginality is determined. All of those we interviewed indicated that in many cases this is easily accomplished – the person may have a status card or will simply self-identify as Aboriginal – but all too often it is not. The police report has a check box for "Aboriginal," but it is unclear on what basis the police make that judgment. And the fact is that many Aboriginal people do not "look" Aboriginal, many people who "look" Aboriginal are not, and many people who are Aboriginal by birth or bloodline have been estranged from their Aboriginal heritage because of having been placed into foster care in non-Aboriginal families, or grew up in urban poverty with parents who denied, did not know, or preferred to forget their cultural connection to the Aboriginal community. The DCC took a more restrictive approach:

The majority of our clientele down here are urban natives. So a lot of them, or I shouldn't say a lot ... some of them are not well connected with their First Nations heritage. And some of them are. The clientele who are connected, I think it [VATJS] is a great program for them. The clientele who are not connected basically just brush it off. And that is where the regular alternative measures [at DCC] would benefit them a bit more. It would be nice to get them in contact with their First Nations heritage, but whether or not what they get out of it actually sinks in, that is a different story.

Given the relatively small number of referrals that came from the DCC to VATJS, this approach may have helped ensure that those who attended VATJS were indeed more likely to benefit in the short term. VATJS, however, encourages a different perspective, both because of their recognition of the many historical injustices that led to individuals being forcibly stripped of both their cultural connection and

cultural pride, and because of the affirmation of the community that the job of Aboriginal justice is not only to deal with individuals with problems, but also to take an inclusive approach that builds and reaffirms community bonds in the process.

Surely a fundamental right of any Aboriginal community should include the right to determine who their “we” includes, although issues of Aboriginal identity are complex and muddled for many reasons that are entwined with Canada’s colonial history. The upshot of this state of affairs in the justice sphere is that no one really knows how many “Aboriginal” offenders enter the DCC orbit – other than that the number is a large one and involves far more persons than those who are referred to VATJS – making it further unclear just what dispositions and outcomes Aboriginal offenders experience.<sup>35</sup> Clearly, if the Indigenous right to “Aboriginal justice” is to be realized, there is much room for growth. Any broadening of VATJS’s jurisdiction should allow for this community-building approach to identity. A first step would be to undertake a study that is based on the more inclusive notion of Aboriginal identity that VATJS employs, and that tracks these persons through the DCC and 222 Main to better understand who these persons are and what currently happens with them, thereby allowing not only the DCC, but also VATJS and Vancouver’s justice-related Aboriginal service providers to better understand the range of issues and persons they need to be prepared to address, and to establish priorities for any future program development.

### ***Referral Criteria***

Because “alt measures” is the umbrella policy under which the VATJS agreement with Crown was originally constructed, it is only those Aboriginal offenders who are deemed to be appropriate for consideration under “alt measures” that can be considered for referral to VATJS. However, it should be recalled that this limitation of jurisdiction was seen from the outset as temporary and would be broadened after an initial period of capacity building. More than ten years have passed, preliminary capacity has been built, VATJS has earned the confidence of its community, but the “alt measures” boundary to referrals remains, suggesting perhaps it is time to move forward.

Traditionally, “alt measures” was considered to be a sanction for accused persons who have never previously been in trouble. However, given the challenging population that the DCC must deal with, and its designation as a “problem solving” court, those who make such decisions have adapted and shown flexibility in their decision-making. According to the Crown at the DCC we interviewed, “it’s going to be up to each Crown as to whether they are comfortable based on this accused’s criminal record, the circumstances of that offense and where they are in their life.” When asked to elaborate, the Crown we interviewed said,

The crime has to be, my understanding is, not particularly violent, there can’t be violence. I don’t think they’re prepared to take spousal assaults, which is fair enough because even our regular

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<sup>35</sup> Approximately 20 Aboriginal offenders were referred to VATJS from the DCC in the first eight months after this research began. In contrast, when asked to give a rough estimate of the number of Aboriginal offenders who enter the DCC in any given year, the coordinator of the DCC speculated it would be well over 200 (18% of the total DCC population, which was 2300 at the time). This does not include those Aboriginal offenders who commit crimes outside the DCC’s jurisdiction and are processed through 222 Main Street.

probationary stream doesn't want to deal with spousal assaults in an alt measure capacity. So I think we are looking at sort of property crime, lower end, obviously no residential break-and-enters or anything. Somebody without a criminal history would be a perfect candidate for it. A relatively new offender to the system. But I think even somebody who's got a fairly prolific record, if they are slowing down a bit, and they are sort of prepared to take a look at their Aboriginal background, want to explore that and at the end of the day we could justify a stay of proceedings on the file. I think that is what we are looking at now.

While Crown thus have shown flexibility in their consideration for referrals within the alt measures designation, our interviews with DCC staff suggested that there is much room for jurisdictional growth that is not being realized because of the constraints imposed by the "alt measures" designation. For example, as part of their "problem solving" approach, DCC often employs a "case management team" where individuals who are chronic offenders and often have multiple difficulties of one sort or another – addictions, mental health issues, homelessness – are sentenced by the court to the team for a period of intensive supervision. When asked what leads a person to be sentenced to case management, the interviewee replied,

Well, if the Crown or Defense believe that a client would benefit from case management team they need to be interviewed first by the nurse for suitability or appropriateness through the "need status" report... [I]f you are going through a case management team, that means that you've got enough needs going on, whether it be mental health, addictions, housing, mental health, that kind of stuff where you need more services in place, where a team is going to work with you on a longer term to help stabilize you in the community, and you aren't getting a guilty finding and a criminal conviction.

The description is fascinating because "case management" sounds very much like what VATJS does. However, because VATJS is under an "alt measures" policy umbrella and does not have a protocol agreement for "case management," Aboriginal offenders cannot be referred to VATJS under that label.

### ***Defining an Appropriate Relationship***

We have already mentioned how positively disposed staff at the DCC were regarding the contributions that an Aboriginal-based program like VATJS could make in dealing with Aboriginal offenders. When we asked what future they envisioned for VATJS in the years ahead, staff were virtually unanimous in seeing potentially expanded roles in their respective areas of responsibility. For example, the judge we interviewed envisioned a potentially larger role for VATJS in the DCC court:

I would love, someday, to have the VATJS part of sentencing, not necessarily a sentencing circle but for cases that aren't going to alternative measures, if they had the capacity, could they become involved at the sentencing stage? If it is a case where someone has been harmed, could we do something restorative with their assistance to set up a plan and incorporate that into the actual sentencing?

At another point, the judge added,

I think that the people who work in programs like VATJS, their goal is to keep things *out of court* and I know judges always sound court-centric in their thinking, which we are, but for the cases that can't be kept out of court, what about ... not necessarily an Aboriginal court, but what about the cases that do need a court process, what if we tried to develop, together, a court process that would be more appropriate for certain types of people and certain types of cases?

And again at a later point:

There is a First Nations court in New West[minster] and I think there is real potential here in Vancouver with the services we have and with the VATJS, if they had the capacity. I don't know what their views would be, I have never spoken to them about this, but to sort of evolve from just doing the alternative measures to becoming like a corrections component for Aboriginal people in the city, and be involved in the sentencing processes as well.

The Crown attorney we interviewed saw possibilities for expansion as well:

It sounds like it may be the type of program we can look at not just for first time offenders but maybe for people who are fairly entrenched who commit very low level crime, we can look at sending them if they are Aboriginal and they are interested, we can send them to that program and hopefully it'll make a slight change in the way they think, the way they think of themselves, it might help them, so I don't see it just for first time offenders, I can see using it for people that are fairly entrenched in the criminal justice system as well. If the crime that they come before the courts on is a fairly low end one, like a theft under or whatever, I can see Crown becoming more and more comfortable with the program and being prepared in making the referrals that just automatically you wouldn't normally think you would want to send for alternative measures.

With respect to the types of files that might go to VATJS in the future, the Crown added,

In 6 months, I would like to see a steady stream of the sort of people we are referring now, which would be the low-end property. ... A year from now I'd like to see a very solid, trusting relationship back and forth. ... And then in 5 years I would like to see them expand significantly to maybe include violence and have programs that could deal with that.

A DCC employee saw potential in relation to other areas of responsibility as well:

I am hoping that we exceed the capacity of VATJS and that we could assist them in finding other sources of funding to enhance their program ... and I would like to see them as a partner here full time versus part time, whether that is in 6 months or ... in the next fiscal year, I would like to see a full Aboriginal justice program and have them be here full time. And that includes perhaps enhancing the program all around and having Crown know that it's a viable option. I think at this point they're still seeing this as a pilot or a test, so I'd like it to move from pilot to being fully accepted and part of regular practice.

Certainly it is gratifying to see the expanded role these individuals thought might occur. And in the short term, these expanded roles might well provide the basis for an expansion of funds, further development of capacity, and so forth. However, their suggestions – all of which are grounded in a greater presence for VATJS at the DCC – beg the question of what the appropriate structural relationship might be between the Canadian justice system as represented by the DCC, and Aboriginal justice as practiced at VATJS. In that regard we suggest there is a problem with the merging DCC staff envisioned over the longer term because it does not address the core problem that Aboriginal people doing their work at the DCC is not “Aboriginal justice,” and VATJS’s community mandate is not to be an Aboriginal adjunct to the Canadian justice system, but to be an Aboriginal justice system that serves Aboriginal people according to its own protocols and principles.<sup>36</sup> The problem is compounded by the huge inequity that

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<sup>36</sup> Simply incorporating Aboriginal justice professionals at the DCC arguably would be no more than a return to the unsuccessful “indigenization” policies of the 1970s/1980s.

currently exists in the extent to which the two programs are currently supported. No matter how well-intentioned DCC personnel's suggestions are, given current structures and funding constraints, the issue that VATJS must always consider is that greater involvement at the DCC typically takes away from VATJS's ability to deliver the Aboriginal justice its community has mandated it to deliver through its community home at the Friendship Centre.

When VATJS personnel were asked about the future, both in relation to VATJS specifically, as well as in terms of the development of Aboriginal justice, they embraced a larger realm of responsibility, but in the short term sought a more automated referral process that recognized their role in Vancouver's Aboriginal community. As the Executive Director explained,

I think we would like a partnership similar to what we have with 222 Main in terms of ... they just have an Aboriginal person and they refer them out. It works well for us because it allows us to have the autonomy and it doesn't allow that person to be processed through the court system and it doesn't allow anyone to have to explain who we are because nobody can explain who we are except for us. So that has worked for us for the last 11 years. So we would like one similar to that and sometimes when there's new courts or new stuff that are happening all of the attention and money and resources goes to that community court. So I think for us it's having to continually let them know, listen we're here, we're established, we have our clientele, we would like you just to refer to our program.

The general vision in the longer term is one where Aboriginal people have control over Aboriginal justice as it pertains to Aboriginal people, and where the decision-making with respect to where any given Aboriginal offender is best processed – which might be at VATJS or in some portion of the Canadian justice system depending on the extent to which Indigenous institutions have been developed – is first and foremost a decision to be made by the Aboriginal community.

## **Discussion and Conclusions**

### **Making a Difference Now**

The interviews and observations we conducted at the DCC and VATJS suggest there is good will that clearly exists on the part of the DCC, VATJS and the Vancouver and Regional Crown that will continue to see their relationship rekindled in the short term, and procedural issues resolved. One matter that can be addressed at any point might be to develop new protocol agreements to replace those that have become outmoded by changes in provincial government policies since the original protocol agreement was put in place more than a decade ago. Much has changed in that time. VATJS has gone from being a fledgling creation to a well-established program that has survived the vagaries of funding inconsistency and developed and maintained the confidence of its community. There is no reason – save capacity limitations created by limited resources – not to broaden the range of cases and offenders who are processed through this parallel Aboriginal justice system.

An example of a mechanism that allows for this growth already exists in one of the programs that was seen as the primary role model for VATJS when it was first created – Aboriginal Legal Services of Toronto (ALST). The Toronto protocol agreement with the Provincial Crown does not preclude any category of



cases *a priori* from being referred to the ALST Community Council Forum. Some key elements of the protocol are as follows.<sup>37</sup>

1. ALST's Adult Criminal Court Workers at Old City Hall and College Park will be solely responsible for identifying and selecting Native people to participate in the program.
2. Once a Court Worker identifies an individual who might participate in the program, he or she will contact the Community Council Co-ordinator determine if the individual has previously been before the Council and whether or not the individual complied with the Council's decision .
3. a) The Court Worker will then go to the Team Leader of the particular court and ask that the case be diverted to the Council. ...  
b) While the nature of the offence committed by the individual will be a factor in the determination of whether or not to divert the case by the Team Leader, no offences are inherently ineligible for diversion. As well, no individual, by virtue solely of his or her prior criminal record, is ineligible for diversion to the Council.

The advantage of such an agreement is that it is open-ended and, by allowing for exceptions to be considered on a case-by-case basis, allows the criteria for referrals to develop in a manner that respects both the priorities of the Aboriginal community and the comfort of the Crown.

## **A Foundation for the Longer Term**

While we hope that this report is helpful to those at the DCC in understanding VATJS, the roots of its mandate, and the principles by which it operates, there is still a dearth of information regarding who those Aboriginal offenders are that go through the DCC and the Provincial Court at 222 Main Street, and what they experience as they are processed at either of those courts and the various service providers that partner with the DCC. Having a better understanding of what is going on now is the key to developing better policy in the future, and we accordingly suggest that the DCC and 222 Main consider instituting a tracking study that follows a representative sample of Aboriginal offenders through these courts. We further suggest that such a project be designed in consultation with the VATJS Board or its designate to ensure that the way that key variables are operationalized – such as how “Aboriginal” is defined – reflect the understandings and aspirations of their community.<sup>38</sup>

## **Can BC and Canada Be a Model for the World?**

As noted in our introduction and has become apparent in our presentation of results, there are three main reasons why parallel systems of justice have developed in Vancouver and across the country: (1) “Aboriginal justice” is not an appendage or artificial construction by Aboriginal people but rather a contemporary reflection of how conflict has been addressed and managed in Aboriginal communities for millenia;<sup>39</sup> (2) the Canadian justice system that was imposed on Aboriginal communities is a foreign system that has been found repeatedly by one Commission/Inquiry/Report after another to have “failed

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<sup>37</sup> For the complete adult protocol, see [http://aboriginallegal.ca/docs/protocol\\_provincial.htm](http://aboriginallegal.ca/docs/protocol_provincial.htm) Protocols also exist for youth offenders and for the Federal Drug Court.

<sup>38</sup> While VATJS was interested and expressed support for such a study, the Executive Board of the DCC rejected the proposal because of concerns about time demands on DCC personnel.

<sup>39</sup> Overall differences between the Canadian justice system and Aboriginal justice systems exist, as an extensive literature attests, but should not blind us to the significant variation that exists within each set of systems.

Aboriginal people at every stage”;<sup>40</sup> and (3) it has come to be recognized both in Canada and internationally that Indigenous peoples have a “right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”<sup>41</sup>

We mention this framework here to underline the point that while at some level Aboriginal systems of justice have been developed as an *alternative* to the Canadian justice system with the general mandate to provide justice to their people in a manner true to their traditions, the notion of “alternative” is laden with a Canadian justice system perspective. For Aboriginal people, Aboriginal justice is not an “alternative” justice system; it *is* their justice system. The bigger question is how Canada can take the notion of Aboriginal justice seriously, and create the space for Aboriginal justice systems to exist within the country’s broader constitutional framework.

To some degree this has been accomplished by the advent of mechanisms and structures such as the Aboriginal Justice Strategy within the federal Department of Justice, but we wonder whether it is not past time for federal and provincial governments to take the next step. The AJS has now been in operation for twenty years, and while it has played a seminal role in promoting the creation of parallel justice systems across the country – 113 different programs serving 400 communities at last count – would a measure of its success not be the recognition that it has helped generate sufficient capacity for Aboriginal justice to leave its foster home and start its own life? Speaking at the annual meetings of the UN Working Group on Indigenous Populations in Geneva in 2004 on the agenda topic of “conflict resolution,” Palys stated,

In the justice area, for example, Article 33 of the draft *Declaration* asserts that, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.”<sup>42</sup> And yet, after 15 years of supporting “Aboriginal justice” through programme initiatives and special events, the federal government still holds all the money, still sets all the priorities, and still effectively tells Canada’s Indigenous peoples what their justice systems can look like. Any funds that do come are “soft” funds that may or may not be there next year. No mainstream system can develop with such uncertainty. How can Indigenous justice systems be expected to do so? And how can it be “Indigenous justice” without Indigenous direction and control?<sup>43</sup>

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<sup>40</sup> This particular phrase is a quote from the federal Department of Justice web page at [http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/1\\_1.html#ftn2](http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/1_1.html#ftn2)

<sup>41</sup> This quote is from article 34 of the UN *Declaration on the Rights of Indigenous Peoples* that was passed at the General Assembly in September, 2007, and formally endorsed by Canada in 2010. For a complete copy of the *Declaration*, see <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

<sup>42</sup> A slightly streamlined wording appeared as Article 34 in the final version passed by the UN General Assembly in 2007. The final version stated, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards..”

<sup>43</sup> Palys, T. (2004). *Resolving Conflicts Involving Indigenous Peoples: Lessons From the Search for "Indigenous Justice" in Canada*. Intervention to the U.N Working Group on Indigenous Populations at its 22nd Session; July 19-23; Geneva, Switzerland. Online at <http://www.sfu.ca/~palys/PalysWGIPSubmission2004.pdf>

Taking Aboriginal justice seriously requires going beyond the scope of current agreements that constrain Aboriginal justice within an “alt measures” box to more boldly affirming a commitment to “Aboriginal Justice.” Imagine the possibilities if the federal and especially the provincial government<sup>44</sup> took Aboriginal justice seriously. Given that about 40% of the Downtown Eastside population is Aboriginal, what if VATJS were to have a budget 40% of the size of the DCC budget – \$2 million – and were responsible for the delivery of justice services to the Aboriginal population? It’s funding of that magnitude that would finally allow VATJS and the Aboriginal service providers with whom it works to realize something like an Aboriginal Justice Centre that provides Community Council Forums, deals with both youth and adult offenders, has a full range of crime prevention activities, handles probation services for Aboriginal offenders, houses the Native courtworkers who continue to ensure that those Aboriginal offenders who go through the Canadian system are well-represented and are being pulled into culturally appropriate services wherever possible, and so on. Such funding also would place the two systems on a more equal footing. This would be a far better place from which VATJS and the Aboriginal community might consider developing and allocating personnel to create new court-based processes such as those the DCC judge we interviewed suggested be developed, and/or to develop programming in the areas that the DCC Crown and staff were encouraging, because these would now be supplementary to, instead of undermining of, the Aboriginal community’s core justice processes.

Making such a commitment does not involve the creation of a “separate” system any more than provincial responsibilities are “separate” from federal ones, or that makes the DCC a “separate” system from 222 Main. As Mary Ellen Turpel asserted years ago when she was legal advisor to the Assembly of First Nations,

Too much time can be spent debating whether justice reform involves separate justice systems or reforming the mainstream justice system. This is a false dichotomy and a fruitless distinction because it is not an either/or choice. The impetus for change can better be described as getting away from the colonialism and domination of the Canadian criminal justice system. Resisting colonialism means a reclaiming by Aboriginal peoples of control of the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages with the existing criminal justice system and perhaps phased assumption of jurisdiction.<sup>45</sup>

Any division of responsibility will require protocol agreements in areas where potential overlap exists, but we would hope that some consideration would be given by those whose policy development authority extends to such agreements – some of which, we recognize, rests in places beyond the Coordinator of the DCC, the Vancouver Crown, and the Executive Director of VATJS – to the kinds of agreements that would arise if British Columbia, with its constitutional responsibility for the administration of justice, were to take Aboriginal justice seriously.

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<sup>44</sup> We emphasize the provincial responsibility here because it is the province that has the constitutional jurisdiction for the administration of justice.

<sup>45</sup> Turpel, M.E. (1994). Reflections on Thinking Concretely about Criminal Justice Reform. In R. Gosse, J. Y. Henderson, and R. Carter (eds.) *Continuing Poundmaker & Riel’s Quest: Presentations made at a Conference on Aboriginal Peoples and Justice*. Saskatoon: Purich Publishing. pp.206-221.

Such changes will not happen overnight, but they remain an unrealized promise on the part of the federal and provincial governments to ensure that the original VATJS protocol agreement was not an end in itself, but the beginning of a growing commitment to the development of Aboriginal justice. An example of program evolution is already evident in Ontario in the development of Aboriginal Legal Services of Toronto. A visit to the ALST web site<sup>46</sup> shows that this program – which is 10 years older than VATJS and thus has had significantly more time to mature – now includes many different elements, all of which contribute in varying ways to Aboriginal Justice in Toronto. There is of course the Community Council Forum that lays at the heart of ALST, just as it does at VATJS, but also includes (a) the Native courtworkers who explain the legal system to their clients and ensure they have access to culturally appropriate services; (b) a legal aid clinic that provides free legal assistance to low-income Aboriginal clients on matters ranging from housing problems and tenant rights to *Indian Act* matters and more; (c) involvement in test case litigation, which has seen them bring cases forward or prepare *amicus curiae* briefs in cases that have implications for Aboriginal people, including such seminal cases as *Corbiere v The Queen*, *R.v Powley*, and *R. v. Gladue*; (d) a team of five Gladue Caseworkers who provide Gladue reports for Aboriginal offenders in Canadian courts; (e) engaging in other advocacy work when Legislative and Parliamentary bills under discussion will have impact on Aboriginal people and peoples; and (f) providing representation at Inquests involving Aboriginal deaths.

Whether this list of activities and services reflect priorities in Vancouver is not our place to say, and will inevitably arise from discussion within Vancouver's Aboriginal community. When that occurs, we encourage federal and provincial authorities to listen and to divert funds to those areas commensurate with the jurisdictional authority it assumes. There *will* be systems of Aboriginal justice in place in the future that maintain a respectful and communicative relationship with the Canadian system. As exemplars of their respective systems of justice, the DCC and VATJS have the opportunity to show BC, Canada and the rest of the world how to manage that relationship in a way that is beneficial to their respective peoples and, in so doing, contributes to the greater social good.

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<sup>46</sup> <http://www.aboriginallegal.ca/index.php>