

Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

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Lessons from a Case Study
of Aboriginal and Canadian
Justice Coexistence in
Vancouver

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Justice as Healing Newsletter
Native Law Centre
University of Saskatchewan
160 Law Building
15 Campus Drive
Saskatoon SK S7N 5A6
Canada

<http://www.usask.ca/nativelaw/publications/jah.php>
Telephone: (306) 966-6196
Fax: (306) 966-6207
Email: nlc.publications@usask.ca

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Lessons from a Case Study of Aboriginal and Canadian Justice Coexistence in Vancouver¹

Ted Palys, Richelle Schaefer & Yana Nuszdorfer
Simon Fraser University

Editor's Note: Ted Palys is a Professor at the School of Criminology and an Associate Member of the Department of First Nations Studies at Simon Fraser University. Ted has a long-standing relationship with Vancouver Aboriginal Transformative Justice Services (VATJS). He was a strong supporter and spokesman for the development of VATJS and maintains a keen interest in its progress and objectives. Throughout his career Ted has authored many works and continues to enrich the world of research and Indigenous studies through his ongoing publications. To view a database of Ted's publications please visit <http://www.sfu.ca/~palys/>.

Yana Nuszdorfer and Richelle Schaefer studied together at Simon Fraser University. In 2012 they each earned a Master's Degree in Criminology. Yana pursued a career helping Aboriginal and non-Aboriginal offenders integrate back into society. Richelle went on to study Clinical Forensic Psychology in London and will soon begin her Doctorate in Clinical Psychology.

It has long been recognized that the Aboriginal people and Peoples of Canada have been ill-served by the Canadian justice system. As the federal Department of Justice explains in a recent report:

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.²

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.

Further, the right of Indigenous

peoples to develop systems of justice to serve Indigenous people have been affirmed in various contexts. The Royal Commission on Aboriginal Peoples, for example, expressed the view that,

Federal, 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.³

Indigenous rights regarding justice also are addressed in the UN Declaration on the Rights of Indigenous Peoples. Two articles deal expressly with the Indigenous right to develop and maintain systems of justice guided by the peoples' 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.⁴

Federal and provincial policies designed to address justice issues via programming have gone through several distinct phases, from indigenization, to accommodation, to the development of parallel systems.⁵ Much of the early proliferation of parallel systems across the country came about with the support and financing of the “Aboriginal Justice Strategy” (AJS) within the federal Department of Justice.⁶ Typically established with Provincial collaboration and 50-50 cost-sharing agreements, and frequently supplemented by other sources, the federal Aboriginal Justice Strategy has helped launch parallel Aboriginal systems of justice in rural, urban and reserve communities across the country. At last count, 275 programs serving more than 800 communities are receiving funding from the AJS.⁷

The first contemporary Aboriginal justice programs were based in reserve communities, but urban communities soon followed. First off the mark was Toronto, whose Aboriginal service providers came together to establish Aboriginal Legal Services of Toronto (ALST) in 1990. Thunder Bay and Winnipeg followed. In Vancouver, the Legal Services Society of British Columbia Native Programs Branch brought together various individuals and organizations in 1995 to discuss the possibility of developing a program for the diverse Aboriginal community in Vancouver. This led to the creation of Vancouver Aboriginal Transformative Justice Services (VATJS).

The organization’s protocol agreement, which was developed under the “alternative measures” policy umbrella,⁸ called for Crown at the Provincial Court to divert Aboriginal clients to VATJS for dispositions to be decided by a Community Council Forum. VATJS welcomed its first client in 2000.⁹

VATJS was created and has evolved in the years since, 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 to deal with chronic offenders in an area of Vancouver known as the Downtown Eastside. Often referred to as “the poorest postal code in Canada,”¹⁰ the population has high rates of poverty, addictions, homelessness and mental health problems. 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.¹¹

Creation of the DCC was accompanied by a transfer of jurisdiction for a subset of cases that had formerly been processed at the Provincial Court on Main Street, which included many of the cases that the court previously would have referred to VATJS. All summary conviction cases that occur in a specified geographical area that includes the Downtown East Side are now referred automatically to the DCC, who determine for themselves whether they will take the case or refer it elsewhere, including possibly VATJS.

This overlapping jurisdiction of

VATJS and the DCC and the structural relationship it imposed provided the opportunity to conduct a case study of the co-existence of Canadian and Aboriginal justice in an urban Canadian context. Vancouver and the two organizations involved made this a particularly appropriate venue for such an inquiry.

The DCC’s “problem-solving” approach 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, these are the ones.

Methods

In-person interviews were conducted with a 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 were conducted at the DCC, five at VATJS. All participants were given an opportunity to review their

transcript and make any changes they wished before the data were compiled and analyzed.¹² The interview data were supplemented by archival sources that detailed the development of the respective programs.¹³

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 Origins of VATJS

One person interviewed for this project had been instrumental in the program's creation when he was with the Legal Services Society of British Columbia Native Programs Branch. He emphasized two key elements of the process: (a) learning from the experiences of other urban programs; and (b) fully engaging the local community to ensure the resulting program reflected the community's values and priorities. A Steering Committee was created that included representatives from Indigenous agencies, potential funders, and Canadian justice system authorities with whom protocol agreements would need to be established. A separate but overlapping Aboriginal Caucus also was created.

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.

A core responsibility of the Aboriginal caucus was to engage Vancouver's

Aboriginal community in the design and development of the program.

Operationalizing "Community"

References to "community" arise repeatedly in relation to VATJS. The first refers to 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 to inform them about developments, receive feedback about community priorities, and incorporate these into Caucus discussions.¹⁴

Several key principles emerged from the consultations. One was to ensure the program would be an "inclusive" one open to all persons who self-identify as Aboriginal, or who were estranged from their Aboriginal birthright and wanted to discover that part of themselves. Members of the community also insisted that the core of the program should be a 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.

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 could be limited at the outset, and accepted that initial control over referrals would be based with the Crown, they wanted it made clear that this arrangement would not be constraining over the longer term, and should leave room for growth and change. As Palys explained,

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.¹⁵

A potential deal-breaker arose at the 11th hour over the question of whether Crown "approval" would be required after a case had been referred to VATJS. 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 countered that 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 its own plan. In the end, it was agreed VATJS would not have each individual healing plan approved, but rather would simply provide a list of all the dispositions that might be included in an individual healing plan, and confine itself to the alternatives 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.

What Does VATJS Do?

The heart of VATJS is the Community Council Forum, a respected place 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.

As the Executive Director explained,

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. The Executive Director continued,

We 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.

Administering the forums is by no means all that VATJS does.

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.

VATJS currently deals with 90-100 referrals per year, which includes referrals arising from the Crown at both the DCC and the Provincial Court at Main Street, family (youth) court, 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.

The Downtown Community Court (DCC)

The DCC process begins when someone is arrested and charged with a summary offense within the DCC catchment area. Notwithstanding its intention to be a “problem-solving” court, it is a court nonetheless that is very clearly a part of the mainstream justice system. A triage team prepares the day's files for the duty Defense Counsel¹⁶ and Crown, who in turn prepare recommendations for the judge. The hearing itself is in a courtroom with judges, lawyers and sheriffs. Those files that remain at the DCC 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.

Running in parallel to the DCC's problem-solving emphasis is its desire to maximize efficiencies by bringing in offenders and processing them at the earliest opportunity. An interim evaluation of the DCC indicated that, within its first 12 months, (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 report also indicated that the DCC

saw an average of 62 case appearances per day and that “it takes 5.1 appearances on average to conclude a case.”¹⁷ But where does VATJS fit in the DCC universe?

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 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)

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, a question of interest is how Aboriginality, and access to justice, 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 used a decidedly more narrow definition:

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.

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 who are already a part of the community, but also to take an inclusive approach that builds and reaffirms community bonds in the process with those who have lost their way.

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. This limitation of jurisdiction was seen from the outset as temporary. But more than a decade has now passed, capacity has been built, VATJS has earned the confidence of its community, and yet the “alt measures” boundary to referrals remains. Although there is some flexibility in how referral criteria are interpreted, the Crown at the DCC we interviewed said, “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.”

This leaves the domain of Aboriginal justice defined by a non-Aboriginal

Crown, a representative of the State that “has failed Aboriginal people/s at every turn.” While Crown have shown flexibility in their consideration for referrals within the alt measures designation, there is much jurisdictional growth not being realized because of the constraints imposed by the “alt measures” label. For example, as part of its 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 DCC employee 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... If 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.

This 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

DCC staff were positive 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 related to 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?

The Crown attorney we interviewed saw possibilities for expansion in the range of offenders who might be referred:

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.

A DCC employee hoped to see someone from VATJS operating out of the DCC:

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. However, all their suggestions are grounded in a greater presence for VATJS at the DCC.

In contrast, when VATJS personnel were asked about the future, their short term aspirations were for a more automated referral process that recognized their role in Vancouver’s Aboriginal community and did not leave them begging for referrals. The general vision in the longer term was 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. In short, if there is any “referring” to be done with Aboriginal offenders, it is VATJS and not the DCC who should be defining and exercising the options.

These contrasting visions beg consideration of what an appropriate structural relationship might be between the DCC and VATJS, and more broadly for the relations between Aboriginal and Canadian justice.

Discussion and Conclusions

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 Indigenous people/s in a manner true to their traditions, the notion of “alternative” is laden with a Canadian justice

system perspective. For Aboriginal people/s, 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 and appropriate support for Aboriginal justice systems to exist within the country’s broader constitutional framework. Although the AJS should be lauded for facilitating the development of 275 Aboriginal justice programs serving more than 800 communities – creating a significant human and physical resource capacity in the process – financial and programming constraints and uncertainties leave significant community potential unrealized.

Realizing that potential 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.” The impediments are both psychological and financial. Our interviews with DCC personnel were telling. The Crown, judge, and staff we spoke with were uniformly positive and encouraging of their continued involvement with VATJS; there was clearly an openness to consider new alternatives and expand existing arrangements. But there is a fly in this ointment; Aboriginal people doing their work at the DCC is not “Aboriginal justice.”

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.

The problem is compounded by the huge inequity that 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.

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. As the Executive Director recounted,

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.”

One of those new programs/courts “funded up the ying yang” was the Downtown Community Court, and a comparison of their operating conditions is revealing. 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 million.¹⁸

Imagine the possibilities if the federal and especially the provincial government¹⁹ 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? Funding of that magnitude would 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. 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.²⁰

Such changes 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.

James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, visited Canada in the fall of 2013. His report lamented the continuing over-representation of Indigenous people in Canadian prisons and included the recommendation that,

Continued efforts should be made to support indigenous-run and culturally appropriate social and judicial services, and to strengthen and expand programmes that have already demonstrated successes.²¹

Community-driven Aboriginal justice programs meet those criteria. An independent national evaluation of AJS-funded programs found that the programs (1) were providing Aboriginal people/s with access to community-based justice services that otherwise would be limited or unlikely to exist; (2) had succeeded in promoting the development of crucial infrastructure – including both human

resources and personal infrastructure – that helped develop and maintain the delivery of services provided by AJS-supported programs; (3) promoted community development and engagement; (4) reduced rates of re-offending; and (5) accomplished all the above at substantially lower costs than would be incurred by sending individuals through mainstream justice services.²²

In short, the promotion of Aboriginal justice is a win-win that deserves federal and provincial support.

With a healthy infrastructure now in place, the stage is set for a continuing expansion of Aboriginal authority and responsibility in areas consistent with community priorities, with an expansion of funding commensurate with that jurisdiction.

1 The authors thank all those who participated in this research. However, the views expressed are those of the authors and do not necessarily reflect the views of any individual participant or the agency, government or programs for which they work. This paper is an abridged version of a longer report available at <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>

2 See http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/1_1.html#ftn2

3 Royal Commission on Aboriginal Peoples (1996). *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada), p.224.

4 See <http://www.un.org/esa/socdev/umpfi/en/declaration.html>

5 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. <http://www.sfu.ca/~palys/WASA93.pdf>

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

7 <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html>

8 The Justice BC web page explains, "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." http://www.justicebc.ca/en/cjis/understanding/alternative_measures.html

9 Palys, T.S. (1999). Vancouver's Aboriginal Restorative Justice Programme: The Challenges Ahead. *Aboriginal Justice Bulletin*, 3(1), 2-3. <http://www.sfu.ca/~palys/VATJS1999.pdf>

10 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.

11 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*. <http://www.ag.gov.bc.ca/community-court/pdfs/interimevaluation.pdf>

12 No substantive changes were made. Some participants smoothed grammar to enhance readability.

13 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. <http://ir.lib.sfu.ca/handle/1892/724>

14 See Dorward (2005) for details of this process of engagement.

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

16 Accused can bring their own representation, but most rely on duty counsel.

17 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. <http://www.ag.gov.bc.ca/community-court/pdfs/interimevaluation.pdf>

18 Office of the Premier of British Columbia, and Ministry of Attorney General (6 Sept 2008). Background: Vancouver's Downtown Community Court. Online at http://www2.news.gov.bc.ca/news_releases_2005-2009/2008OTP0218-001343-Attachment1.htm

19 We emphasize the provincial responsibility here because it is the province that has the constitutional jurisdiction for the administration of justice.

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20 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.

21 Anaya, J. (2014). *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada*. Geneva: Human Rights Council. Document A/HRC/27/52/Add.2 <http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf>

22 Department of Justice Canada (2011). *Aboriginal Justice Strategy Evaluation: Final Report*. Prepared by the Evaluation Division, Office of Strategic Planning and Performance Management. <http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/11/ajs-sja/ajs-sja.pdf>

**The above article is an edited version of "Taking Indigenous Justice Seriously: Fostering a Mutually Respectful Coexistence of Aboriginal and Canadian Justice" by Ted Palys, Yana Nuszdorfer, and Richelle Schaefer. To read their full article please visit <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>*

