



justice principles formed the core around which our customs, our traditions and our unwritten laws operated for centuries.

### **Folk Law – A Common Approach to Justice**

Despite the tremendous number and diversity of indigenous cultures throughout the world, the approach taken to justice by our ancestors was remarkably similar. Many of the traditional justice principles underlying the customs of the Tlingit peoples of Yukon and south east Alaska also appear to be part of the cultural heritage of the Gwich'in and the Inuvialuit of the Mackenzie Delta and Beaufort region. Many of these same principles are shared by the Haida, the Gitksan, the Wetsueten and the Nisga'a peoples of northern British Columbia. Parallel justice principles can be seen operating among the aborigines of the Australian sub continent and the Hopi people of what is now New Mexico. There is a growing body of evidence to suggest that many of these same justice principles were being applied by the ancient Saxons, and the Danes before the Norman conquest of what is now England in the year 1066.

While there is tremendous variation between the cultural traditions of indigenous societies throughout the world, many of the justice principles underlying the folk law or customary laws suggest that there was a common approach taken to justice by humanity as a whole.

So what are these traditional justice principles? And what is the relevance of these ancient justice principles to my life and to the life of my family and my community in the 21<sup>st</sup> century?

## **The first principle: Respect for others**

Our ancestors, the world over, all recognized an unwritten law of respect. This was called many different things in many languages, but the principle was the same. To the Inuit, this was called Sulijuritsiarlugit. The child was raised from birth to respect all of the gifts of the Creator – the land, the fish, the caribou. Respect was also owed to elders, family and neighbour.

Many important Inuit social values were built upon this principle. This one principle of respect, unified all others. The Inuit social values of innuqatigiitsiarniq (acceptance of others); tunnganarniq (literally translated – “to be on open ground”: fostering good spirit by being open, welcoming and inclusive of others); aajiiqatigiinni (reaching or making a decision through discussion and consensus); piliriqatigiinni/ikajuqtigiinni (helping one another/working together for a common cause) and pijarnirniqsat katujjiqatigiittiarnirlu (working together to build unity of purpose) all depended upon there being respect for others.

## **The Second Principle: The Duty of Care**

From this principle of respect came a second principle; a duty to care for others; a duty to be your brother’s keeper. This duty was an important justice principle. It was this duty of care that tied families together as families in the camp, and ensured the survival of the extended family in a harsh and often hostile environment.

Our ancestors had to depend upon each other for basic survival. Every family member was tied to one another for basic social and economic needs. There was no organized institution to provide this care. The duty

to care, the duty to be your brother's keeper, was an unwritten law that linked the welfare of the individual to the welfare of the group. If one member of the group was burdened, all had a duty to share this burden. What affected one might affect all. If not addressed, the individual's burden could potentially impair the survival of the group itself.

It is upon this second principle, this duty of care, that the important Inuit value of *iqqasuutigilugit* (sharing with others) is based. If you are fortunate in the hunt, whether you are Inuit or Inuvialuit living on the arctic coast, or Dene living on the barren ground of the Northwest Territories, it is expected that you will share with others, whether family members, elders or others less fortunate. There is no written law requiring you to share, yet this is done all the time. This is done because everyone has a duty to care for others. This custom is an example of a traditional justice principle at work.

In 1989 I was honoured to be asked to attend an elders conference in Whitehorse Yukon on traditional justice. While at this conference, word came through that a family's home had accidentally burned in one of the communities. Without a word, a hat was produced and all attending the conference contributed what they could to help the unfortunate family. Most of the elders lived on fixed incomes. Most were living in poverty. Yet these poorest of the poor contributed willingly. This too was an example of traditional justice and the application of a traditional justice principle. These elders contributed what they could because they recognized the existence of an unwritten obligation to care for others.

At the Whitehorse Conference, the Tlingit elder Pearl Keenan of Teslin Yukon gave another example of this justice principle at work. She said that under traditional Tlingit law if you found your neighbour passed out in the snow, it was your duty to become involved. It was your duty to care for your neighbour until his or her family could take over, or the individual recovered sufficient capacity to look after themselves. Your neighbour's problem under Tlingit law became your problem, and if you turned a blind eye and walked away without helping, you broke this customary law. You were accountable to your neighbour's family for failing to respect this duty of care.

A final example of this principle at work comes from the ceremony and symbolism of the potlatch celebrated by the coastal peoples of the Pacific Northwest. Social prestige to the Haida or Nisga'a was never measured by how much personal wealth could be accumulated as in our present day western society. Prestige to these peoples turned upon how much wealth could be given away to others. This giving to others was often accompanied by remarkable personal sacrifice. Underlying this traditional practice was the duty to care. It was this same duty of care, clothed in different customs and language, which regulated Inuit life and relationships in the camps.

Parents caring for children, brother caring for brother, spouse caring for spouse, neighbour caring for neighbour. This is what traditional justice was all about.

### **The Third Principle: Collective Responsibility and Accountability**

From the second justice principle, the duty of care, came a third principle. This was a principle of collective responsibility. Customary

law, in many different languages and cultures the world over, all said the same thing.

Before the coming of police, before the coming of organized government and its institutions of justice, custom recognized that every family member had an important responsibility to care for each other and to respect the neighbour. Every family member was accountable to each other and to their neighbours to ensure that this was done. Where a family member failed in their obligation to another, the family unit as a whole was held responsible for this failure. This was the principle of collective accountability.

If you knew that your brother was hurting another, it was your duty to get involved in the search for a solution. In this way, the peace and harmony of the family could be preserved. The preservation of peace and harmony was necessary to ensure survival. Those who failed to get involved became part of the problem. If this problem caused your brother to become a burden to others in the family or the group, you were also personally accountable for failing to get involved. The principle of collective accountability ensured that all within the family maintained a real interest in being their brother's keeper.

When Joe has a drinking problem and gets into trouble and hurts someone else, the elders often speak of the shame that this brings upon Joe and his entire family. Why should this be so? It is not the other family members who caused the problem. Joe was the one who was drinking. Joe was the one who did the damage. In the eye of our contemporary Canadian law, this is Joe's problem, no one else's. Or is it?

The elders say that it is the entire family that is shamed because the family failed in their duty to others. The family had not got involved with the problem before it got out of hand. The larger family unit was collectively responsible for the problem. It was their duty to care – it was their duty to act. Joe's shame for becoming a burden to others thus becomes the family's shame.

Many years ago I represented a citizen who had committed a homicide of a young teen in one of Yukon's First Nation communities. The accused had a serious drinking problem. This problem had persisted for years. The teen died during one of this citizen's many drunken rages.

In the immediate aftermath of the sentencing, the offender's family was repeatedly victimized by others in the community. It started with a number of minor acts of vandalism to property belonging to the offender's adult children. The crimes increased in number and intensity as the year progressed. The family home was ultimately destroyed by an act of arson. It appeared that the offender's immediate family were being shunned by their fellow community members. This family was ultimately forced to move out of their community.

To the local police, this punishment of the offender's family made no sense. It seemed unjust because there was no evidence to suggest that the offender's wife and adult children had anything to do with the homicide. The written law of Canada focussed criminal responsibility upon the person who had committed the crime.

The elders in the community did not share the view of the police and crown attorney however. The offender's wife and adult children had known for years about this citizen's serious drinking problem. This man's many alcohol related crimes had for years caused the offender to

be a burden to others in his community. This family had done nothing to address the problem. This family had actively encouraged his drinking behaviour.

In the eyes of the elders, the family had broken a fundamental justice principle. From the elders' perspective, this family could be punished by their neighbours for their collective failure to address the problem before it got out of hand. By punishing other family members, the community was reinforcing a fundamental social obligation owed by this family to others. This family had failed to respect their duty of care. This family had ignored their responsibility to be their brother's keeper.

I do not give you this example today to suggest that the community's victimization of the family in this instance was appropriate. The law today will not tolerate vigilante action. This example simply illustrates how in traditional society the duty of care applied to all family members. In traditional society, there were consequences imposed upon those who failed to live up to their obligations to others.

Before the coming of the Qallunaat and the police, there was the blood feud. This was as real to the Inuit as it was to my ancestors a thousand years ago. This was a custom that legitimized or sanctioned the use of force against others to punish for wrongs done to a family member. This was the *lex talionis*; an eye for an eye, a limb for a limb, a life for a life.

The legal historians and cultural anthropologists tell us that this punishment did not have to be inflicted upon the person who committed the wrong. By punishing any member of the offender's family, the custom ensured that all had a real interest to prevent harm or insult being done by a family member to others. This gave every

family member a strong incentive to care for others within the group. Once again, ladies and gentlemen, I emphasize that in contemporary society, there can be no moral or legal justification for the blood feud.

The elders tell us that in traditional Inuit society, ownership of the individual's problem was transferred to the larger group. It was this larger group, working together through discussion and consensus building, which resolved divisive social issues. To the Inuit, collective ownership of a problem brought with it a collective responsibility to work together in a search for a solution.

The Inuit developed their focus on collective problem solving and consensus building to ensure that destructive social problems were addressed long before they became critical and destabilized the larger group. In this way the blood feud could be avoided and survival of the group assured.

#### **The Fourth Principle: Victim-Focus**

A fourth principle of traditional justice recognized by our ancestors was a principle called "victim-focus". Our ancestors recognized that true harmony and balance could not be restored after wrongdoing unless the victim was involved in a healing process that validated his or her feelings and concerns. Involvement of the victim and the victim's family was an important part of resolving the wrong that was done. The offender and his or her family were often required by custom to provide some form of direct compensation to the victim and the victim's family as a way of healing the wounds between the families. This gift giving was often accompanied by a public expression of remorse and an apology by the wrongdoer to his or her victim.

The traditions associated with this victim-focus were as varied as indigenous peoples themselves, but the principle was the same.

An example of this principle can be found in the customary law of the Tlingit people. Where a wrong has been done, the clan leaders of the offender and victim will meet to decide upon the form and quantity of compensation to be paid by the offender's family to the victim.

Representatives from the families of both sides of the conflict will be involved in these negotiations.

The customary responsibility of the offender's whole family to pay this compensation ensures that the offender's family has a real and continuing interest to ensure that the offender heals and does not reoffend. The involvement of the offender's family confirms the existence of the two principles I discussed earlier, the duty of care and collective responsibility. The involvement of the victim's family reinforces the duty of care from the victim's side and ensures that family are engaged in helping the victim through their own healing process. Through this process of reconciliation and respect-giving, the peace and harmony of the camp, or the community, could be preserved. In this way, the destructive energy of the blood feud could be avoided.

The coastal peoples of the Pacific Northwest engaged in an even more formal reconciliation process that required the offender's family to host a public "shame feast" for the victim, the victim's family and other members of the community. This was done at their own expense. This ceremony and its rituals were intended to repair the relationship between families that had been damaged by the wrongdoing. In this way harmony and balance could be restored. In this way, the respect

that was taken away by a wrongdoing could be given back to the victim and their family. This “restorative” focus continues to be viewed as an essential objective of justice by indigenous cultures in North America and around the world.

### **Traditional Justice Values and Self-Respect**

Ladies and gentlemen, these ancient justice principles were a heavy responsibility to our ancestors. These were not responsibilities that could be passed on to anyone else. Your ancestors and mine were not paid to be their brother’s keeper. They cared for others because it was part of an unwritten customary law. It was these ancient justice principles that made a family a family, and a neighbour a neighbour.

In showing that they cared, our ancestors earned the gratitude and respect of others. Those who followed these principles would become important role models for the youth. More importantly, this willingness to help others, gave our ancestors tremendous pride and self-respect. The elders tell us that even today, everything that you put into the life of others, and into the life of your family and community, will come back into your own. This will provide you with both focus and strength. Helping others help themselves used to be a way of life. This was traditional justice in its purest form. This is why I referred to traditional justice earlier as an attitude or a state of mind.

So how are these ancient justice principles relevant to us in the 21<sup>st</sup> century?

### **Traditional Justice Values and the Contemporary Justice System**

The sad reality is that many of us have forgotten the old ways and the customary laws and social conventions that for a thousand years bound

people together as families and as neighbours. The present legal system is in part responsible for this problem.

We live in an age where individual rights are guaranteed and protected by law. The Charter of Rights, the Canadian Bill of Rights and the Human Rights Act are all examples of how the contemporary justice system focuses upon the rights of the individual. The protection of fundamental human rights is certainly essential for a functioning democracy. By protecting individual rights, the interests of the minority can be protected against encroachment by the state, or any elected majority controlling the institutions of government.

Unfortunately these same laws do not recognize, let alone enforce, the fundamental social obligations that we should have to each other as family members, and as neighbours. When the Charter of Rights was first introduced, this “rights-focused” approach was criticized by many aboriginal leaders because it did not recognize the social obligations that had traditionally defined membership in a family or society. It was these values, these social obligations that for centuries had formed the underpinnings of our ancestors approach to justice.

### **Contemporary Social Problems in Nunavut**

Contemporary Nunavut now struggles with social dysfunction and crime. Our ancestors’ ancient unwritten law of respect has been replaced by a large number of written laws that regulate every aspect of our life; a life which has become, or is becoming, increasingly complex. Contemporary laws do not readily hold the family unit accountable to others for what is done by its members. Contemporary laws do not seek to restore harmony and balance to damaged relationships and damaged lives. There is very limited victim focus.

For many citizens convicted of crimes in Nunavut, a sense of belonging and identity in a protective and nurturing family environment is either missing, or damaged. Many victims of violent crimes suffer alone and in silence. It seems that many family and community members are too busy with their own lives and their own concerns to help others who are in desperate need of assistance. Some youth do not respect their parents, or their elders. Some elders, it seems, do not understand the youth. Many have lost sight of what it means to be a part of a family or part of a community.

Despite the miracles of modern communications technology, we now drift further and further apart from each other as people. We have lost sight of something in our collective past that is precious, something that makes the many hardships and setbacks of life more bearable, something that makes any life worth living.

The accelerating rate of violent crime, and the rate of young lives taken by suicide in Nunavut, is telling us something about ourselves and our society. There is a message in these dark statistics for all of us, for any who would care to look.

While more government programs and services are certainly needed in Nunavut to address growing crime and social dysfunction, there remains much that we can do as individuals to help our families and communities find harmony and peace.

The elders tell us that many of the citizens in conflict with the law have no self-respect. Many come from chaotic backgrounds. Citizens who lack any sense of belonging, whose self-respect is either missing or damaged, will not likely respect others when this is denied to them as individuals.

Your ancestors and mine did not have an army of professionals to help them work out their troubles. What they did have in abundance was patience, and a great willingness to show that they cared. Before the coming of the court system, our ancestors had to care. They did this by investing their time and effort into helping others heal.

The hard reality is this; all the judges, social workers, police, alcohol workers and mental health workers are powerless to turn back Nunavut's human tide of misery, unless there are also people who care.

Real crime prevention, and meaningful suicide prevention, begins at home. No amount of social programs can substitute for a caring and committed family. Like Humpty Dumpty, all the King's men cannot put a life shattered by indifference and neglect back together again, without the compassion and commitment of those who are close enough to care.

### **The Importance of Traditional Justice Values in 21<sup>st</sup> Century Nunavut**

Ladies and Gentlemen, the ancient justice principles should be as meaningful to us now, in the 21<sup>st</sup> century, as they were to our ancestors a thousand years ago. Respect and caring for others are justice values that are timeless. These are justice values that are worth preserving.

Citizens of Nunavut, we must relearn the lessons of our past. By working together as families, and as communities, we can make a difference. As individuals, we must get involved with our families. We must get involved with our communities. We must show that we care. The burden of the less fortunate must be taken from the backs of the few and carried upon the shoulders of the many. This was the wisdom of our ancestors.

We have nothing to lose, and everything to gain, by working together as people, and as communities, for the common good.

Mr. Justice R. Kilpatrick

Senior Judge

Nunavut Court of Justice