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Urban Alliance on Race Relations

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'The Justice System - Is it serving or failing minorities?'

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ACKNOWLEDGMENTS

The Urban Alliance On Race Relations Justice Conference Planning Committee acknowledges the support of The Canadian Bar Association-Ontario, The Law Society of Upper Canada, The Ontario Women's Directorate and The Ministry of the Attorney General. Their combined financial support and cooperation made the conference, " The Justice System: Is it Serving or Failing Minorities?", a successful and groundbreaking event.

We are grateful to Marion Boyd, Attorney General and Minister Responsible for Women's Issues, whose attendance, we hope, signifies a willingness by her Ministry to work towards eliminating systemic racial discrimination in the justice system.

We thank conference speakers and moderators. Their expertise in the areas of justice and law reform, and their personal commitment to ensuring that systemic discrimination is eliminated from the justice system, were invaluable to the success of the conference.

We recognize the conference participants who brought their dedication to justice system reform, then diligently worked with speakers and moderators to develop specific recommendations for reform.

Finally, we express our gratitude to the UARR's Justice Conference Planning Committee, the staff and the many volunteers whose generous contributions of ideas, time and effort were critically important to the success of the conference. Staff members Kimberley Graham and Dean Roberts skillfully organized and coordinated the details of the event, within extremely limited time constraints. The Editorial Committee's efforts in producing this report are also greatly appreciated. Dionne Peart excelled in the difficult task of distilling the essence of the conference proceedings from the voluminous notes and recordings. Several conference panelists, moderators, speakers and lawyers also offered valuable critiques and suggestions which are incorporated into this report.

EXECUTIVE SUMMARY

The Urban Alliance on Race Relations (UARR) Justice Conference was held at Osgoode Hall in Toronto on Friday, March 26 and Saturday, March 27, 1993. The Justice Committee of the UARR has long been concerned about systemic racial discrimination in the justice system. Many months of planning resulted in the conference, "The Justice System: Is it Failing or Serving Minorities?"

The purpose of the conference was to:

1. examine the manner in which the legal and justice system affects women, aboriginal peoples and racial minorities;

2. provide a forum for dialogue on these policy issues;

3. develop policy recommendations which would assist in improving the justice system.

The opening plenary session examined the extent to which the justice system's checks and balances have worked for aboriginal people and racial minorities. The closing plenary session examined the avenues that should be explored to create fairness and equality.

The eight workshops dealt with:

the new Immigration Act (Bill C-86);

race equality claims and Section 15 of the Charter of Rights and Freedoms;

differential decision-making resulting from the exercise of discretion at various stages in the justice system;

the Community Council Project, an alternative aboriginal justice strategy;

improving access to culturally and linguistically appropriate legal services through accreditation of foreign-trained lawyers;

police accountability to racial minority and aboriginal communities;

the inability of racial minority women, who have suffered domestic abuse, to obtain access to legal protection;

the unrepresentativeness of juries.

This report documents the conference proceedings.

CONFERENCE PARTICIPANTS

The event brought together 300 people from numerous communities. Social workers, community workers, police, academics, members of the bar and the judiciary, as well as government officials, attended the conference as speakers, moderators and participants. Also well represented were such organizations as the Commission on Systemic Racism in the Ontario Criminal Justice System; the Police Services Boards; the Office of the Police Complaints Commissioner; provincial ministries of the Attorney General, the Solicitor General and Correctional Services; and community organizations. Among the advocacy, legal and community agencies attending were: the Minority Advocacy Research Council (MARC); the Chinese Canadian National Council (Toronto Chapter); Legal Education and Action Fund (LEAF); Organization of South Asian Canadians; Tropicana Community Services Organization; Davenport Perth Neighborhood Centre; Native Canadian Centre; National Association of Japanese Canadians; Culture Link and Opportunity for Advancement.

OVERVIEW OF CONFERENCE PROCEEDINGS

Paul Milbourn, Justice Conference Committee Chair, opened the conference by acknowledging special guest, Marion Boyd, Attorney General and Minister Responsible for Women's Issues. He apologized on behalf of Patricia Montour-Okanee whose regrettable absence from the opening plenary panel, due to unexpected personal circumstances, deprived us of an aboriginal perspective. He then introduced the panel of Clare Lewis, Police Complaints Commissioner and a former provincial court judge, and Sher Singh, lawyer and current co-chair of the Canadian Council on Community and Race Relations.

The panelists set the tone of the conference by highlighting specific traditions and processes which have perpetuated systemic discrimination against racial minority and aboriginal men and women.

The eight Saturday morning workshops were preceded by a theatrical performance by the Company of Sirens. Their performance, "Speak Legal!", created in cooperation with the Ministry of the Attorney General and the Office of the Coordinator of the Justices of the Peace, is used as a teaching tool to address racial and gender biases in the legal system. It served as an excellent introduction to the Saturday morning workshop discussions.

The conference closed with a panel consisting of Antoni Shelton, Executive Director of the UARR; Paul Milbourn, Justice Conference Planning Committee Chair; Kamala-Jean Gopie, UARR past president; Winnie Ng, community activist; and Bala Nambiar, member of the Organization of South Asian Canadians.

OPENING PLENARY: ARE THE JUSTICE SYSTEM'S CHECKS AND BALANCES WORKING FOR RACIAL MINORITIES AND ABORIGINAL PEOPLE?

Plenary speakers discussed the extent to which the justice system's checks and balances are effective, within the context of Ontario's ethnic diversity. Clare Lewis identified some methods for creating balance in the justice system, namely, public scrutiny of the system, race relations training, community-based policing and employment equity. Sher Singh discussed ways in which the use of discretion results in differential and detrimental treatment of members of vulnerable communities.

Clare Lewis - Suggestions for a More Effective Justice System:

Clare Lewis encouraged racial minority and aboriginal communities to take part in the necessary process of scrutinizing the justice system. He stated that "... the justice system needs public consent to operate, and if that public consent is eroded, then the system must be reformed." He suggested that the improper use of discretion by authorities in the justice system is of major concern to these communities. Discretion is exercised by police when they decide who shall be charged; by crown attorneys when they make recommendations for bail, and when they plea-bargain; and by judges who have a wide latitude in applying the law and in sentencing. The result is often inequitable treatment of racial minorities and aboriginal people.

Mr. Lewis also expressed concern about the quantity and quality of race relations training in the justice system. He commented that the type of race relations training given to police officers, for example, is "... so inadequate as to be potentially harmful."

From his extensive experience with police reform issues, Mr. Lewis noted that although there is a reasonable level of commitment to the principle of community-based policing, there has been no clear agreement by the police on how best this might operate. He noted that the relationship between police forces and the racially diverse communities they serve lacks the mutual confidence and trust required for this policing philosophy to succeed. He suggested that the police are ineffective in achieving this community confidence and trust because they do not permit community views to balance police decision-making.

Employment equity, suggested Mr. Lewis, should be employed as a strategy for creating balance within the justice system because it allows racial minorities and First Nations people a direct opportunity for justice system reform. The pace at which visible minorities have been entering the workforce in the justice system is very slow. Unfortunately, present rules make it unlikely that racial minorities and aboriginal people will be called to the bar in significant numbers. In policing, as well, employment equity is yet to be achieved. One of the major findings of the Ontario Task Force on Race Relations and Policing (in 1987), said Mr. Lewis, were that "the police are almost entirely a white male institution which incorporates significant barriers to including women, racial minorities and aboriginal people, and have almost no allowance for significant promotion of members of those groups.... ." Employment equity should be made a vital part of reforming the structure of the justice system which inevitably "operates to the benefit of those who control it." If it is not representative, it will not benefit everyone.

Finally, Clare Lewis expressed his hope that the UARR Justice Conference will be the genesis of a partnership which can ensure the understanding and accommodation necessary for positive reform in Ontario's justice system.

Sher Singh - A Personal Story:

In an address filled with a great deal of personal insight, Sher Singh cautioned about what could happen when a citizen of racial minority origin encounters the criminal justice system. He shared

with conference participants his own misadventures with the justice system, demonstrating how bureaucracy in judicial administration can subject members of racial minority and aboriginal communities to unfair treatment. Reflecting on his personal experience, he described how police misuse of discretion resulted in his arrest for a crime which he did not commit. Legal practitioners demonstrated their lack of interest in establishing his innocence, by forgetting court dates, thus resulting in a warrant for his arrest. Lastly, he spoke about a court system which used its discretion to set court dates despite the fact that there was insufficient evidence that a crime had been committed, and even though police and witnesses had refused to appear at his trial on two different occasions.

Rationalizing the discrimination he experienced at the hands of various agents of the justice system, Sher Singh said: "They just noticed that I was different, and automatically inferred, possibly at a subconscious level, that I would not fully understand them, or that they would not fully understand me if they had a full conversation with me. Therefore, it was not worth their time and effort to put in that little extra which they had decided they might have to expend on me... . It was okay to give me sub-standard service ... .They thought nobody would even know. Nobody would care. It was laziness at its worst."

Instead of becoming angry and contemptuous, Sher Singh decided to become a lawyer.

The problems of racial minorities, aboriginal people and women get minimized and the justice system's checks and balances fail for them . These groups, suggested Mr. Singh, commonly believe that "authority must be blindly respected." As a result, they unwittingly permit the legal system's unfair practices towards them to go unchallenged . He asked these communities to be more vocal in scrutinizing the justice system to bring about higher standards of judgment and thus, subsequently, fairness and equality for all who come into contact with it.

Exploring and Exposing the Immigration Act

This workshop examined Canadian Immigration policy and practice, focusing on the new Immigration Act, Bill C-86. Discussion centered around discriminatory policies and practices and their effects on immigrants and Convention refugees.

Human Rights, International Good Will and Immigration Abuse

The government claims that the new Immigration Act, Bill C-86, is designed to prevent immigration abuse by immigrant applicants and refugee claimants. The media, among others, help to fuel the belief that such abuse is widespread. Further, media reports often link criminal incidents in Canada with specific racial groups. As a result, fear is created in the public mind that the immigration flood gates have been opened, to the detriment of Canada and the "Canadian way of life."

Is the focus of the new Immigration Act to reduce such alleged widespread abuse, or does it serve mainly to allow Canadian immigration to ignore its obligation to respect international human rights agreements to which Canada is a party? Speakers and participants suggested that allegations of immigration abuse are greatly exaggerated. They also expressed their concern that, although no direct connection can be proven between the reporting of crimes committed by racial minorities and immigration decisions, immigration policy may, indeed, reflect this alleged connection.

Even if the new Immigration Act will streamline the immigration process and reduce invalid refugee claims, it will do so at a high price --- litigation will be increased and genuine refugees may fail in their claims for refugee status. Most of Canada's refugee claimants are fleeing human rights abuses in their own countries. Moreover, Canada accepts only about 1% of the world's refugees, while it is the developing countries (those least able to do so) which are bearing the brunt of accommodating most of the rest. This can hardly be said to constitute widespread abuse of Canada's immigration policy by this class of entrants.

Convention Refugees and Bill C-86

Bill C-86 introduces new policies and processes for refugees as well as for other immigrants. The point system established by Bill C-86 is biased against racial minority immigrants; however, the consequences of Bill C-86 are even graver for refugees.

The Geneva Convention on the Status of Refugees, a treaty ratified by Canada and other members of the United Nations, outlines the criteria to be considered by member countries in admitting victims of political persecution. An entrant who satisfies these criteria is a Convention refugee.

A "Convention refugee" is a person who has fled his or her home country as a result of a "well-founded fear of persecution" on the basis of race, religion, nationality or membership in a social or political group, because that state is "unwilling to protect" that person from such persecution. Under the Geneva Convention, a Convention refugee must not be deported to a country where his or her life or personal security would be threatened.

The Supreme Court of Canada has indicated its commitment to this international human rights agreement by ruling that no refugee claimant who meets these criteria may be deported without a fair hearing. Moreover, the court decided that any hearing of the merits of a refugee claim must be an oral hearing.

Before a refugee claimant is permitted to have this oral hearing with the Immigration and Refugee Board, he or she must first satisfy the immigration officer that there is a "credible basis" for the claim. At this initial stage, the refugee claimant must:

(a) prove that he or she has a well-founded fear of persecution in his or her home state;

(b) identify the source of that persecution;

(c) prove that the home state is unwilling to offer protection against this persecution.

In practice, however, many refugee claimants never proceed beyond the "credible basis" hearing stage. Thus, they are denied the opportunity for a fair, oral hearing with the Immigration and Refugee Board. Critics are of the opinion that some immigration officers abuse the "credible basis" process by requiring of claimants proof far in excess of the definition of "Convention refugee". For example, they may determine that a claimant who is not facing the possibility of death in his or her home country does not have a "credible basis". Similarly, even though it was recently agreed that a woman, facing domestic abuse in her home country, may qualify as a Convention refugee, she would still have the extremely difficult task of proving to immigration officers that her home state is unwilling to protect her from her spouse. Such abuse of the process by immigration officers sometimes results in the rejection of genuine Convention refugees. These officers are given the power to make decisions which could actually determine the life or death of these claimants! This approach therefore begs the question --- exactly how seriously is Canada

taking its human rights commitments under the Geneva Convention? The above examples suggest that Canada is more concerned with protecting its borders than with human rights.

Those refugee claimants who are deemed to have a credible claim will then await an immigration hearing before the Immigration and Refugee Board. This process may take as long as six months. Under the old Immigration Act, the refugee claimant was permitted to seek work immediately. Under the new Immigration Act, he or she will receive a work permit only after being granted refugee status. This new ruling, said one speaker, "does not make sense from a practical point of view, because Canadian taxpayers will be supporting refugees for up to six months." It also does not make sense from a humanitarian point of view because, suggested a speaker, "when someone has escaped tragic conditions, sitting idle allows that emotional trauma to continue; work is therapeutic because it keeps the mind and body focused on other things."

Refugee claimants are also detrimentally affected by the "safe third country" rule in Bill C-86. Under this rule, a refugee claimant arriving in Canada will be refused entry if he or she stopped in any third country which the Minister declares to be "safe" (unless the stay in the third country was exclusively for the purpose of catching a connecting flight). The implication here is that the refugee claimant could have made the claim in that "safe" country, instead of in Canada. However, the Minister's designation of a country as "safe" is no guarantee that the refugee will be treated fairly there. One group particularly affected is Salvadoreans, who cannot get to Canada except via the United States, a "safe" country which has historically discriminated against refugee claimants fleeing persecution in El Salvador. Thus, the vast majority of refugee claimants from El Salvador will automatically be refused entry into Canada without a hearing. One speaker commented that "... if we look at countries from which past successful refugee claimants came, these people could not have gotten into Canada without having passed through other safe countries." This "safe third country" rule will make most genuine refugees ineligible to have their claims heard in Canada.

One change to immigration policy which affects both refugees and immigrants is the reduced role of the courts. The old Bill C85 introduced the concept of "application for leave." To be granted "application for leave" meant that if the applicant disputed a decision made through an immigration hearing, she or he could then take it to a federal court. In the past, if the federal court found the decision to be unjust, it would review the case itself and give a decision. Now, the federal court is limited to sending the case back to the hearing process where perhaps a differently-constituted panel may or may not reverse the original decision. Thus, the appeal process has been removed from the new legislation. Despite the federal court's commitment to democratic rights and the Convention refugee documents under the Charter of Rights and Freedoms, it still does not have the jurisdiction, under the new Bill C86, to review and grant remedies to immigration hearing decisions which run counter to the provisions of the Charter.

Immigrant Applicants and Bill C-86

Under Bill C-86, an immigrant must obtain 70 points to be allowed entry into Canada. The applicant may be awarded a maximum of 100 points under this system. Points are awarded under the following categories:

(1) Education.

(2) Age: Forty is the optimum age for which the maximum number of points are given. The number of points decreases for applicants on either side of that age.

(3) Ability to speak either official language.

(4) Occupation demand: Annually, a list of occupations in demand is prepared, and these are awarded between 1 and 10 points, based on the level of demand. The applicant must get at least one point from that list or have a confirmed job offer.

(5) The type of experience the applicant has in that specific occupation.

(6) The number of years that the applicant has spent training, as compared to the number of years of training prescribed for full points in that occupation.

(7) Demographics: At the present time, an automatic eight points are awarded to the applicant, but this may change. There is talk of awarding fewer points to applicants unwilling to live in certain geographical areas for a certain period of time.

(8) Sponsorship by relatives: An applicant who is sponsored by a relative gets five points.

(9) Personal suitability: During an interview an immigration officer is given discretion to award ten points, based upon their assessment of the applicant's suitability.

How fair is the point system? One speaker noted that there is something wrong with a system which would not allow, for example, entry to domestics and caregivers who may not meet the education and language requirements, but who qualify in the category of workers listed as "in demand". Knowing this, the federal authorities have not elected to design a fairer and more appropriate program which can be applied across the board, but have instead devised a specific program to govern the entry requirements for foreign domestics and caregivers. One aspect of this program is the mandatory six-month training requirement for this group of entrants. This, along with the education and language standards, has had a direct effect on the composition of this group of workers entering Canada. The numbers coming from the Philippines dropped dramatically while those from Europe increased.

Under the new immigration legislation, there is talk of additional and potentially discriminatory policies and procedures. Besides the Charter-violating demographics amendment, which will give the federal authorities the power to determine for how long the immigrants might live in any specific area in Canada, there is also discussion of a new pooling system. Under this system, "first come first served" would be replaced by taking "the most desirable and the most excellent" applicants. Not only will the application of this rule eliminate a disproportionate number of racial minorities from third world countries, where educational and other types of disadvantage are more common, but it will also take more time and cause many delays.

Speakers also noted that Bill C-86 will give immigration officers increased discretionary power over immigrant applicants. For example, if an immigration officer simply suspected, without evidence, that an applicant's documents are forged, the officer can cross-examine this person. The federal authorities can also control the number of successful applicants from each country by their decisions to place (or not place) visa offices in foreign countries. Why, asked one speaker, do some countries have twelve visa offices, while others, for example India, have only one or two?

The new Immigration Act raises too many questions about the discriminatory intent of immigration policies and procedures. But even if the intent to discriminate is absent, policies which have the effect of discriminating against applicants on the basis of country of origin, race,

color, religion, gender, sexual-orientation, socio-economic status, political affiliation, etc. are not to be tolerated.

Recommendations: Exploring and Exposing the Immigration Act

Recommendations centered around the need to:

(1) educate immigration officers about the human rights abuses in those countries (which, as a result, produce refugees) so that the officers will be better informed, and hopefully more sensitized, when determining who are genuine refugee claimants;

(2) reinstate the right of refugee applicants to appeal by the right for them to seek leave for judicial review (in order to counter-balance errors, such as unfair rejection of applicants, that may result from the unchallenged use of discretionary power by immigration officers);

(3) amend refugee-related rules where they are clearly impractical (such as the six-month delay in issuing work permits to refugee claimants) or where they are discriminatory (such as the "safe third country" rule);

(4) prevent the use of race-related crime issues from influencing individual immigration decisions.

The Charter of Rights and Freedoms

Workshop speakers and participants discussed the sections of the Charter which are of particular relevance to race equality claims, and the extent to which the Charter has been, and may be, used as a mechanism to advance racial equality. This workshop focused on the relationship between the Charter and the Ontario Human Rights Code; past usage of the Charter's equality provision for Charter claims; and obstacles to be overcome in using the Charter in race claims.

The Charter and the Ontario Human Rights Code - How Effective Are They?

In Ontario, two enactments set out the fundamental rights of individuals: the Canadian Charter of Rights and Freedoms (the "Charter"), and the Ontario Human Rights Code (OHRC). The Charter is part of Canada's Constitution, and as such, defines the fundamental rights and freedoms on which Canada was founded. The OHRC is a provincial statute which interprets those rights and freedoms for the province of Ontario.

The OHRC was enacted to deal with violations of human rights between private parties. The Ontario Human Rights Commission is authorized to 'examine and review' and 'make recommendations on' any program or policy which "in its opinion is inconsistent with the intent of the Act." As a legislative instrument to advance racial equality, the OHRC is useful. However, problems arise because of the way it is administered and applied. The Commission is required to investigate and mediate complaints which are brought to it. Workshop participants acknowledged the Code's usefulness, but criticized it as a slow, cumbersome and ineffective tool for addressing discriminatory policies which affect entire racial communities.

The Charter, on the other hand, is part of the 'supreme law of Canada' and, unlike the OHRC, it grants rights which are directly enforceable in court. For this reason the Charter is potentially more effective than the OHRC in removing discriminatory policies.

Charter Claims and Racial Equality:

Can the law be used as a mechanism for advancing racial equality claims? The basic equality provision of the Charter gives the impression that it can indeed be used for this purpose. Section 15(1) states that:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

The promises of the equality provision are lofty and praiseworthy, but in practice these promises have not been upheld. Who has the Charter protected?

A quick examination of the first major Section 15 challenge brings us closer to an answer. The first major equality provision challenge (Andrews v. Law Society British Columbia) was brought by Mark Andrews, a caucasian male of United Kingdom citizenship. He charged that the Law Society of British Colombia had discriminated against him by preventing him from practicing law in B.C. because of his lack of Canadian citizenship. The Supreme Court ruled in 1989 that, as a non-citizen, he was a member of a disadvantaged group, and thus had the right to Charter protection. This included his right to practice law. This case is cited, not because the Supreme Court's ruling is at issue, but to question why, in a country with so many inequities against racial minorities and aboriginal peoples, the first major equality challenge should be brought by one who is privileged among even the privileged: a caucasian male lawyer? Participants felt that there is no question about who, in practice, the Charter has protected: those with power and privilege.

Nevertheless, Section 15 does have the potential to improve the problem of systemic discrimination. Women's groups have successfully employed the equality provision to challenge sexism. So why have there been no race claim challenges?

The following were cited by workshop speakers as problems which have limited the number of race equality claims under the Charter:

(a) problems with the Charter itself;

(b) non-usage of the Charter by racial minorities and aboriginal groups;

(c) problems with judiciary and judicial administration.

The Charter: Problems in Using it.

Attempts to use the Charter in equality challenges pose several problems, including the unequal battle between powerful government and relatively powerless individuals. Only well-financed, highly knowledgeable and influential individuals and groups are able to bring claims under the Charter. One speaker noted that the very wording of the Charter, by its legal complexity, limits its accessibility by a wider readership. If access is so difficult for the general population, it is even more so for racial minorities and aboriginals who generally have fewer resources to launch challenges.

Aboriginal people have spent their efforts demonstrating how they, as a group, are not equal under the law. On the other hand, blacks and other racial minorities, said one speaker, have spent most of their efforts on individual (rather than group) rights, arguing that they are unequal before

the law. This "individual" focus does little to advance race equality, because it weakens the effectiveness of legal decisions.

Even if racial minorities and aboriginal communities can overcome the obstacles of limited resources, they may experience difficulty in ensuring that initial racial equality cases are litigated in a manner consistent with their interests and aspirations. Speakers cited, for example, the problems faced by leaders of the United States civil rights movement when people, who did not share the priorities and concerns of minority communities, were entrusted with bringing the first cases to court. Because these cases were ill-prepared, bad decisions followed. Under U.S. law it was not possible for the civil rights leaders to then introduce additional evidence on appeal to rectify those bad decisions.

Judiciary and Public Administration in Human Rights:

Fortunately, Canadian courts do permit additional evidence to be introduced on appeal. But there is the difficulty of getting the judiciary to accept, in particular, social and economic evidence of racial discrimination which would support race equality claims under the Charter. Judges may not allow consideration of race discrimination; they may not even acknowledge that systemic discrimination exists and operates against certain groups in society; the judicial system, in the words of one speaker, 'is not too comfortable' when social and economic statistics are presented to prove that a policy is discriminatory. Why? The shortest and simplest answer, suggested some participants, is this: because there is racism in the courts. It is the courts which are charged with the responsibility of interpreting this legal document, the Charter, which protects the rights of racial minorities and aboriginal people to be treated equally before and under the law. Yet, contradictory as it may seem, these very courts participate in institutional racism.

According to one speaker, the courts may be more inclined to grant remedies, in areas where social policies need changing, if they could hire their own panel of experts to determine the impact of their decisions on vulnerable communities. However, noted one speaker, it is unlikely that the courts would be allowed to have an expert panel on racism for Charter race equality claims. Legislators may not agree to provide additional funding to the courts to do a job which they are already expected to do.

Enforcing Equality Rights

In the Andrew's decision, the court defined discrimination by saying that discrimination exists, whether intentional or not, if it is based on grounds relating to the personal characteristics of the individual or group. Further, such discrimination has the effect of imposing, on such individual or group, burdens, obligations or disadvantages not imposed upon others. It also has the effect of withholding or limiting access to opportunities, benefits and advantages available to other members of society. Given this definition, it seems undeniable that discrimination is a reality for racial minorities and aboriginal people. These communities must be encouraged to utilize the tool of race-based statistics in order to prove to the courts that some government policies and procedures contribute to systemic discrimination. Since it is unlikely that the legislature will fund the courts to do this, racial minority and aboriginal peoples must themselves raise the funds and commission this research.

There is no doubt that it is only with the enforcement of equality rights that we can eradicate the systemic racism which makes racial minorities and aboriginal persons vulnerable. The enforcement of these rights, noted one speaker, will allow these communities to improve their conditions so that their youth will not feel the need to be "violent and lawless". On the other hand,

if individual and democratic rights continue to be given preference over equality rights by the courts, then law and order will be compromised and, ironically, individual rights of all Canadians will surely be curtailed.

Recommendations: The Charter of Rights and Freedoms

Most Canadians are unaware of how the Charter protects their rights and freedoms. Education is fundamental to raise awareness. The workshop's recommendations focused on using limited resources to launch challenges on group, rather than individual, rights.

These recommendations centered around the need to:

(1) provide educational programs for those individuals or communities who seek more knowledge about the Charter;

(2) reinstate the Charter Challenges Program, and also provide adequate funding for those who need to launch Charter challenges under this program, but who lack the resources to do so;

(3) amend the Charter to permit individuals to bring litigation under the Charter, on behalf of disadvantaged groups who have 'direct and substantial interest' (at present, only the individual, who has direct and substantial interest, may do so);

(4) devote sufficient funding to research the extent to which systemic discrimination, like overt and direct discrimination, is a violation of an individual's rights and freedoms;

(5) establish a racial minority, community-based legal clinic that would

undertake to uncover systemic racism through test cases and research.

Who Gets Justice?

This workshop examined racial discrimination in the pre-sentencing, sentencing and post-sentencing phases of the justice system. It focused on the mandate of the Commission on Systemic Racism in the Ontario Criminal Justice System (CSROCJS), which grew out of the recommendations of the Stephen Lewis Report in 1992.

The Stephen Lewis Report

In 1992, following the acquittal, in Los Angeles, of four local police officers accused in the brutal beating of black motorist Rodney King, civil disturbances erupted on Yonge Street in Toronto. The Government of Ontario was compelled to respond to community complaints about Ontario's justice system. Stephen Lewis was appointed by the Premier of Ontario to head an investigation into these complaints. But these complaints were not new. They had been accumulating over the previous fifteen years from members of racial minority communities! Nevertheless, the Stephen Lewis Report does represent a watershed, in that the Government of Ontario has responded to some of the recommendations set out in the report.

Commission on Systemic Racism in the Ontario Criminal Justice System

Although the terms of reference of the CSROCJS give the impression that this commission's mandate begins with the Stephen Lewis Report, it begins, in fact, with the history of complaints

from the vulnerable racial minority communities. Although these communities had long been complaining about the 'differential and detrimental' treatment directed at them by the justice system, their complaints were disregarded by prior governments. The one exception was the formation, in 1987, of the Ontario Task Force on Race Relations and Policing, chaired by Clare Lewis. The report which came out of this task force influenced the Government of Ontario to introduce some reforms to the criminal justice system in Ontario, especially in policing. But even this task force has not had all of its recommendations implemented. In July 1992, following the publication of the Stephen Lewis Report, several members of the original task force re-convened to determine how many of its recommendations still remained to be implemented. The task force published its findings in the Clare Lewis Report.

The CSROCJS is mandated to "report on the extent to which the exercise of discretion, at important decision making points in the criminal justice system, has had an adverse impact on racial minorities." The commission was also requested to make recommendations for legal and administrative reforms which might address community concerns.

The Exercise of Discretion and Systemic Racism:

The CSROCJS will focus on the exercise of discretion in the pre-sentencing and post sentencing stages of dispensing justice. Its Commissioners note that the best way to understand differential and detrimental treatment of, and its impact on, racial minorities, aboriginal people and women, is to closely examine each part of the justice system where discretion is exercised. Their study of the part played by this use of discretion will focus on:

Police Discretion:

This is the initial contact racial minorities and aboriginal people have with the justice system. The CSROCJS will determine whether members of these communities are more likely to be charged and released on bail, or more likely to be arrested and detained. The CSROCJS will examine differential use of force by the police.

Prosecutorial Discretion:

The CSROCJS will look at the exercise of discretion by crown attorneys with regard to 1. their decision to prosecute or not, based on the charges brought by the police; 2. if they do decide to prosecute, their decision to release on bail or to seek an order of detention; 3. the issue of "plea - bargaining". Are there also less obvious factors, such as race or ethnicity, which enter into the above decisions?

Judicial Discretion:

The CSROCJS will examine the extent to which gender, race, ethnicity and language influence how judges manage court proceedings, and how these may result in differential and detrimental treatment.

Jury Selection Process:

The CSROCJS will look at the criteria and procedures for jury selection in Ontario, with a view to identifying those which have the effect of discriminating against the selection of potential racial minority and aboriginal jurors.

The Use of Discretion in Correctional Services:

Are racial minority and aboriginal offenders more severely punished compared to the other groups? Is the racial segregation in correctional facilities initiated by inmates, or by officials and administrators in the correctional system?

In all of these areas, noted the speaker, the CSROCJS is specifically mandated by the Stephen Lewis Report to especially identify 'anti-Black Racism'.

Law Reform - Is it Enough?

If the Government is serious about finding and implementing remedies for differential and detrimental treatment of vulnerable persons in the justice system, it will need to go beyond simply reforming the law and its administration. The justice system would need to be reconstructed so that it provides tools for rehabilitating society's weakest members. For example, a disproportionate number of aboriginal people and racial minorities are being convicted by the present criminal justice system. The over-criminalization of these communities further prevents them from accessing the power and economic stability required to eradicate their vulnerability. Their rehabilitation would require that we begin to examine the roots of their criminal activity and their mistrust of, and disregard for, the justice system. One starting point would be the decriminalization of, and the granting of automatic pardons for, certain petty crimes. This challenging task can begin with the CSROCJS's report and its recommendations.

Conclusion: What Will Be the Impact of the CSROCJS's Report?

CSROCJS hoped to finish its report by October, 26, 1993. Completion as close as possible to this date is a priority. The Government of Ontario must be given enough time to consider and implement the recommendations for criminal justice reform. Racial minorities and aboriginal groups, as well as the Stephen Lewis Report, have emphasized the urgency of these reforms.

Participants in this workshop were concerned that many reports of task forces and commissions prior to the CSROCJS have already answered the rhetorical question of "Who Gets Justice?" The evidence clearly suggests that racial minorities and aboriginal people are treated unequally by the law. Many studies have suggested possible solutions to remedy the differential and detrimental treatment of these groups. However, so far, there has been no action. Racial minorities and aboriginal communities must insist that the recommendations of the CSROCJS should be implemented.

Recommendations: Who Gets Justice?

Recommendations centered around the need to:

(1) examine courtroom procedures and the discretionary use of power by justice officials;

(2) establish "Watchdogs" and "Ombudspersons" who would help ensure that every individual receive equal treatment before the law;

(3) pressure the Law Society of Upper Canada to direct more effort to ensure that their members adhere to the highest possible standards of professional responsibility;

(4) examine police use of force to determine whether the force used varies

depending on the race, gender and socio-economic status of the offender;

(5) advertise, and make readily available to those who need them, community- specific legal and supplementary services (e.g. interpreters, women's shelters, family counselling, etc.)

Alternative Aboriginal Justice Strategy

Discussion in this workshop focused on the experience of aboriginal people within Ontario's criminal justice system. The conclusion was that the high rate of recidivism of aboriginal offenders is proof that the justice system is not properly equipped to capably deal with them. The "root causes" of their criminal activity need to be examined if we are to effectively deal with this problem of recidivism. The Aboriginal Legal Services of Toronto, and its "diversion project" (the Community Council Project) were cited as examples of innovative and tremendously successful community mechanisms for reducing the rate of recidivism among aboriginal offenders. It does this, first, by diverting the offenders from the court and corrections systems, and then referring them to social and community services which aim to rehabilitate them.

Defining the Problem

Government reports have established that aboriginal people are arrested in numbers disproportionately greater than their presence in the population. Also, most of those charged are convicted and have a high rate of recidivism.

What these reports only hint at is that, although most aboriginal offenders may have criminal records which stretch back 20 or 30 years, they are not "career" criminals --- that is, their criminal activity is not the means by which they earn their living. Their high rate of repeat offenses suggests that there are root causes which need to be examined. Yet these causes are rarely acknowledged, even less examined, by government reports and the criminal justice system.

Aboriginal Legal Services of Toronto (ALST)

The Aboriginal Legal Services of Toronto was formed with a mandate to deal holistically with aboriginal offenders. Before its existence, programs were designed to reform these offenders during their terms of incarceration, rather than to focus on the root causes of their offenses. Recidivism among participants in these programs has continued to occur at a high rate. Aboriginal offenders, themselves, felt that they needed programs based on native culture, managed by the aboriginal community. In the light of these concerns, the Native Canadian Centre of Toronto in 1988 commissioned a study to look at aboriginal community needs for justice-related programs and services. The study concluded that an organization, devoted to justice-related issues, was needed. The result was ALST, formed in 1990 by the aboriginal communities.

ALST assumed the responsibility from the Native Canadian Centre for the delivery of several justice-related community services. These were: the court worker program; the inmate liaison program; and the young offenders' liaison program. Once firmly established, ALST then acquired legal aid clinic status to respond to the aboriginal community's needs. The clinic's services were needed because Toronto's considerable aboriginal population (at over 70,000, Canada's largest aboriginal community) was not using the services provided by existing clinics.

ALST, in its new capacity, addressed the idea of setting up a project in which Toronto's aboriginal community would themselves be allowed to take responsibility for dealing with

aboriginal offenders in a way that makes sense to them. Thus was born the idea of ALST's native adult criminal diversion program, the Community Council Project.

Community Council Project (CCP)

This project, ALST's most ambitious and important, was the brainchild of ALST's founding board. At their Birch Island meeting in August 1991, ALST consulted with over 20 aboriginal elders, as well as with traditional teachers from the aboriginal communities. ALST also consulted with the wider aboriginal community for their input. The purpose of these consultations was to work out the details of how this project would function. This project would be controlled by the aboriginal community to serve their specific needs better. The outcome would be a system which focuses on the offender, in contrast to the mainstream criminal justice system which focuses on the offense. The CCP's aim would be to work with the offenders to help them take responsibility for their offenses, then to help them become re-integrated into the community. In this way, there would be a greater likelihood that the problem of recidivism would be reduced.

How The CCP Works

The CCP is a diversion program. The Council does not sit in judgment of the offenders' crimes. Instead, it provides the mechanism for diverting offenders (both first time and repeat) from the regular system of justice into a rehabilitation program. The program takes into consideration the root causes of their criminal behavior, and it results in corrective actions that are more appropriate from their community's perspective. The successfulness of this approach is undoubtedly directly related to the founding principles of the Council --- that is, that both victim and accused be treated with "kindness" and "respect". As was noted by one conference speaker, these are not words which come to mind when one reflects on the Canadian criminal justice system where only the agents of justice, and not also the criminal offenders, are treated with kindness and respect.

The CCP, an ALST project, operates in cooperation with the Crown Attorney's Office. When an aboriginal person is charged with an offense which is managed by ALST, he or she is asked to consider accepting responsibility for the charges, since this is a prerequisite by the Crown Attorney for granting approval to enter the CCP's rehabilitation program.

The accused is given the opportunity to attend a first (and if necessary, a second) hearing to make a decision about complying with the ALST request. If she or he fails to attend these hearings or to comply, she or he is then no longer eligible to enter the CCP program, either for this charge, or for subsequent charges. She or he then proceeds through the mainstream criminal justice system.

If on the other hand, the offender does accept responsibility for the offense, the ALST then requests approval from the Crown Attorney to have the case diverted to the CCP. Once this approval is obtained, the Crown Attorney drops the charges and may not lay them again. The offender's case now proceeds to the CCP for the hearing process.

The hearing process in the CCP is consensual, with dialogue between the CCP and the offender. It begins with the Council members (usually four) introducing themselves to the offender. The discussion between both parties is unlike anything in the courtroom --- its tone is personal, and it touches upon questions which would never be allowed in a criminal court. Since the CCP's role is not to judge the offense, but rather to help rehabilitate the offender, it asks the offender such questions as may help to determine the best methods of such rehabilitation. The Council members then confer among themselves to arrive at a consensus for the best solution. The offender is then presented with this solution and asked to comment on its fairness. One conference speaker, who

is familiar with the CCP, said that only rarely is an agreement not reached between the two parties. After agreement is reached, it is put in writing and signed by the offender.

It is important to note that the CCP's involvement with the offender does not end at this point. The CCP instructs ALST to follow up on the offender's progress. In this capacity, ALST does not assume a role equivalent to Ontario justice system's parole officer --- rather, it acts as a resource centre for the aboriginal community. The offender is expected to fulfill his or her part of the agreement.

Some CCP Statistics.

Since its inception, the CCP has had 55 offenders diverted to its program. Some offenders have been diverted more than once. Of these 55, (at the point at which

they entered the CCP program):

over 60% were 30 years old or under;

over 30% had had some contact with psychiatrists;

44% had been adopted, or had been in the care of Children's Aid Society at some point in their lives;

76% had been incarcerated prior to their involvement with ALST;

only 18% were employed;

60% had no formal ties to the aboriginal community;

44% were in custody awaiting trial;

of the total number of people charged, (sometimes with multiple charges), 73% were charged in alcohol or drug related cases; 27% in theft; 20% in prostitution; 18% in mischief; 17% in assault; 10% in break-and-enter.

These statistics clearly indicate that weak ties to the aboriginal community, absence of traditional familial structures, lack of aboriginal role models, poverty etc., are all causal factors in the criminal behavior of aboriginal offenders. The criminal court system is not designed to consider these factors, because of its focus on punishment rather than rehabilitation.

The CCP offers at least four courses of action to the offender. Of the cases they have handled:

in 51%, the offenders agreed to perform community service;

in 41%, they were required to seek counselling at an aboriginal agency;

in 31%, they were required to seek employment and/or education with the help of ALST;

in 31%, they were required to stay in contact with ALST;

in 24 % they were required to join an aboriginal self-help group.

Up to the present time, only 10% of offenders in the diversion program have refused to complete their agreements. Forty five percent have completed them, and another forty five percent are in process of doing so. Members of the latter group are eager to stay in contact with ALST and to explain the difficulties they may be having in meeting their commitments. Thus, ALST has not found it necessary to track the offenders' compliance.

The Attorney General's Office has concluded that the program is working quite well. One conference speaker suggested that the reason for this high rate of compliance by offenders is that " there is something inherently right about having offenders dealt with by members of their own communities." Such alternative aboriginal justice systems and strategies are born out of the reality that the Euro-centric justice system is ineffective in terms of preventing repeat criminal offenses. The CCP provides a community-oriented and holistic approach to justice, based upon the traditional and progressive assumption that healing the offender cannot be separated from healing the community.

Recommendations:

None were submitted from this workshop. However, participants felt that the CCP is a valuable alternative justice system.

Access to Legal Accreditation

This workshop dealt with the link between the issues of access to legal services and the accreditation of foreign-trained lawyers. Speakers and participants expressed their opinion that racial minority communities have a right to legal services in their own language, by legal practitioners who are knowledgeable about, and sensitive to, their culture, while also being knowledgeable about Canadian law. The most expedient and sensible way to provide this service is to increase the number of foreign-trained lawyers accredited in Ontario.

Under-Representation Impedes Access to Justice for Racial Minority and Aboriginal Communities.

Welcoming the conference guests gathered to hear the opening plenary panel at the Law Society of Upper Canada (LSUC) on March 26, 1993, Allan Rock, the Treasurer of LSUC, stated that "... there is no obligation of the Law Society that is more urgent and more important than to ensure that the legal profession and the judiciary reflect the changing face of our population." He added that he is committed to ensuring that "there is equitable access to articles, employment and professional advancement" for racial minorities. He then invited conference participants and speakers to provide him with recommendations on how best the LSUC can meet these fundamental obligations.

The LSUC, the governing body of the legal profession in Ontario, has recognized that racial minorities and aboriginal people are seriously under-represented in the legal profession. It has, in the past, agreed to study the problem. In 1990, a University of Windsor study stated that Ontario needs 174 new lawyers each year from racial minority groups in order for them to reach adequate legal representation. This study also affirmed the principle that racial minority communities have a right to legal services in their own language, by legal practitioners who are familiar with their culture and its practices. The Windsor study is the first step towards addressing a problem that racial minority and aboriginal communities have identified, that is, that systemic discrimination hampers the effective delivery of legal services to their communities. As a result of this problem,

racial minorities and aboriginal peoples are denied their basic right guaranteed by the Charter: equal benefit and equal protection of the law.

To provide a picture of the extent to which racial minorities are under-represented in the legal profession, consider the following statistics:

- in Ontario's Filipino community of 120,000, there are 5 lawyers.

- in Ontario's Tamil community of 60,000, there are 2 lawyers

- in Ontario's Somali community of 30,000, there is 1 articling lawyer

- in Ontario's Nigerian community of 15,000, there are no lawyers.

The experience of the only ethno-specific legal clinic in Ontario, the Metro Toronto Chinese and Southeast Asian Legal Clinic, reveals that low income racial minority groups, especially, are inadequately served because of under-representation in the legal field. Before 1987, low income people in the Chinese community had no choice but to go to the regional community legal clinics if they required legal services. These clinics were staffed by lawyers who were unfamiliar with the community and thus could not offer culturally and linguistically-appropriate legal services. Some regional clinics attempted to accommodate Chinese clients by employing Chinese law students as translators, but there were few such students available.

The Chinese Canadian National Council believed that such efforts, however well-meaning, were not a substitute for culturally and linguistically-appropriate legal services. They therefore applied through the Ontario Legal Aid Plan to set up a Chinese legal clinic. At first they were refused, but a successful appeal resulted in the establishment of the first ethno-specific legal aid clinic. Despite the fact that funding and other resources have remained constant, the number of clients seeking service from the Metro Toronto Chinese & Southeast Asian Legal Clinic has risen from 1,000, since its inception in 1987, to 4,000 in 1992.

In recognition of this need for representativeness, several law schools have attempted to augment the criteria by which applicants are judged. For example, applicants' experiences in community service, jobs held by them and adverse personal circumstances such as discrimination, would be considered along with the regular criteria. However, noted one speaker, improvement in representation, without increased accreditation, will happen only at a snail's pace. Consider this example. The first Filipino lawyer was called to the bar in 1971. Since then, Ontario law schools have produced only one other Filipino lawyer, almost twenty years later (in 1989). One speaker noted that of the five Filipino lawyers serving their community, three were foreign-trained and Ontario-accredited. The Filipino-Canadian Association estimates that there are over 100 foreign-trained Filipino lawyers in Canada. Most, given the chance, would like to practice in Canada.

The Problem and Pitfalls of Improving Access to Justice through Accreditation.

Undoubtedly, the most expedient and economical remedy for the problem of under-representation of aboriginal people and racial minorities in the legal profession is to increase the number of foreign-trained lawyers accredited in Ontario. Yet, in their study of the problem, the LSUC neglected to include accreditation as part of their solution. However, in response to encouragement from various community groups (the Filipino Canadian Association, the Chinese Canadian National Council and various other organizations representing South Asian, Latin American and black communities), the LSUC has agreed to address the issue of accreditation.

The right to pursue one's career choice is a basic one. The Supreme Court, noted one speaker, has ruled in the case of Black v. the Law Society of Alberta that

(a) there is no indication that lawyers who are foreign-trained are any less competent that their locally-trained counterparts, and

(b) there should be every incentive for someone who is from another jurisdiction to obtain as much jurisdictionally-specific knowledge as is needed to achieve equal footing with locally trained counterparts.

The first part of this ruling strengthens the claim of foreign-trained lawyers that the accreditation process, as it now exists, is unreasonable.

There are three bodies involved in the accreditation process which foreign-trained lawyers must undergo in order to practice in Ontario. These are the Committee on Accreditation (JCA), Ontario Law Schools and LSUC.

The JCA has met with much scrutiny from applicants who have gone through the accreditation process. These applicants have argued that the decision-making process of the JCA is arbitrary. As a result, noted one speaker, people from the same countries, who have even attended the same law school in certain cases, having comparably similar experiences, are treated dramatically differently in the process. Some may be rejected; others may be required to seek two-year upgrading; others, still, may simply be asked to take bar admission courses at the Law Society.

To be considered for accreditation, foreign-trained lawyers must first apply to the JCA. On the basis of a profile detailing the applicants' legal training, legal experience and the legal system in which they trained, the JCA determines whether they are suitable for accreditation. The JCA does not use an objective exam or a standard process to determine which applicants are admissible and which are not. The accreditation process is so discretionary, and the pool of applicants so large, that many foreign-trained lawyers screen themselves out at this stage. Those few applicants who are selected as candidates in this discretionary process receive accreditation certificates which allow them to apply to obtain the full or supplementary legal education recommended by the JCA.

The problem at this stage is that there are only few spaces set aside for accreditation applicants. This means that an accreditation certificate is no guarantee that an applicant will be admitted to law school. One speaker told participants of a case in which a 50-year old Tamil lawyer, who in Sri Lanka had a reputation comparable to Canada's Clayton Ruby, had filed six rounds of applications to Canadian law schools, without success. "It was only with the intervention of the Racial Minority Council that this man was able to eventually get into Queen's University," said the speaker.

Both the JCA and Canadian law schools, through their accreditation policies for foreign-trained lawyers, display what can only be interpreted as a kind of arrogance or cultural chauvinism. One side of this chauvinism demonstrates subtle denigration of the education and experience of foreign-trained applicants. The other side reflects their insensitivity to the applicants' basic needs --- for example, their need to earn an income. However, few law schools offer part-time accreditation programs which would help to accommodate such needs.

One speaker suggested that no one institution is willing to assume responsibility on the accreditation issue. The JCA, Ontario Law Schools and the LSUC claim to operate as distinct and separate institutions when, in fact, representatives from all three bodies meet at the LSUC to set policy. She urged that all three bodies reassess the accreditation process and coordinate a better system that will ensure that qualified applicants receive both accreditation certificates and entry into law school.

Recommendations: Access to Legal Accreditation

Recommendations centered around the need to:

(1) require the Law Society of Upper Canada to encourage law schools to increase the number of spaces available for accreditation applicants;

(2) require the Joint Committee of Accreditation to:

- recognize that there are many accreditation applicants, highly

trained as lawyers in foreign countries, who do not require substantial re-education, but perhaps only grounding in those aspects of Canadian law which differ from the legal traditions and practices with which they are familiar;

- explain its reasons, in all cases, for rejecting applicants;

- establish a process for rejected applicants to appeal its decision;

(3) establish a committee, independent of law schools, to instruct foreign- trained applicants in Canadian legal traditions and practices, so that they may be better prepared to take bar admission courses;

(4) provide flexible schedules (part-time, both day and evening) for supplementary legal coursework which must be completed by accreditation applicants (so that they can also earn a living while in school)

Legal Protection for Aboriginal and Racial Minority Women

This workshop examined the issue of legal protection for racial minority women who are victims of domestic abuse. Its main focus was the extent to which the legal protection, which is offered in the law and in legal and community services, is both appropriate and accessible to these women. Regrettably, this workshop was unable to present the aboriginal perspective due to the absence of Patricia Monture-Okanee.

Domestic Abuse, A Problem in All Communities

The number of women abused by their male partners each year is greater than the number of women assaulted by strangers. Domestic abuse of women is very pervasive in this society, as it is in many others. It is not restricted to any particular race, culture, or socio-economic class.

In Canada, there is protection in the criminal code for women who are victims of domestic abuse. Yet, even with this protection, the justice system does not serve them well. Very few cases of domestic abuse of women get litigated. Already victimized by their spouses, the few women who

do become complainants are victimized again at every stage in the justice system. One speaker gave an example of how members of the judiciary re-victimize abused women.

The defendant, Mr. Steckler, shot his wife through her cheek at point blank range, with a modified gun. He was found guilty of the reduced charge of careless use of a firearm, instead of attempted murder or manslaughter. The Judge justified this reduced charge with the following reasons:

(1) the 18 months that the defendant spent awaiting trial was sufficient punishment, and thus no further incarceration time was required;

(2) the modified gun required little trigger pressure, making it easy to be fired by the defendant, whether or not he seriously intended to do so;

(3) the victim was shot directly through her cheek, therefore damage was minimal;

(4) because the defendant drank alcohol prior to the shooting, his judgment was impaired;

(5) because the defendant drove his wife to the hospital after he shot her, he must have felt a degree of remorse.

This case illustrates the wider problem of the mis-handling of domestic violence cases by judges, and also by police and legal practitioners. Unquestionably, the justice system has repeatedly demonstrated a high degree of sexism against females. For example, police are reluctant to lay charges of abuse against male partners; legal practitioners often choose family, rather than criminal, court as the avenue to seek redress for complainants; and judges consistently give sentences which rarely reflect the seriousness of the crime committed against women.

A sexist justice system can only aid abusive men in their cycle of abuse. Such men become adept at concealing from outsiders the signs of violence, ensuring that the cycle continue. They effectively distort the facts, and are too readily believed. They use a wide variety of threats against their abused partners who cannot depend on the justice system for protection or for justice.

While all abused women suffer from these threats, racial minority women (especially immigrants, refugees and those without legal status in Canada) are particularly vulnerable. Threats used against them do not stop at the physical and the economic. These women may be isolated from family members who could have provided support. They may be ostracized from their community if they lay charges against their abuser. They may not speak English, and so cannot gain access to the help they need. Without legal status they cannot work legally, so they may find it difficult to become economically self-sufficient. Without legal status they would also fear deportation.

It is not surprising, then, that they may fail to seek legal protection. Even when charges do get laid by the police against the abuser, the woman may not appear in court for the trial because she may be afraid of deportation, or of losing the financial support provided by her abuser. Her failure to appear in court would likely result in the dismissal of all charges against her abuser. When she considers all these threats, she may conclude that she has no option but to stay with her abusive mate.

Two Cases of Domestic Abuse of Racial Minority Women: The Asian Community.

Case #1

Many women immigrating to Canada hope that its laws will protect them from domestic abuse. Speakers presented participants with a case in which a woman came to Canada from her native Korea, with her abusive husband and her children, because she had been told that there would be social justice for women and children here. She soon found that Canadian laws are not protective enough to deter abusers. Her husband continued to beat her and to sexually abuse her oldest daughter from a previous marriage. On one occasion, police were called in and the husband was arrested. However, the woman spoke very little English and was unable to explain to the police officer what had happened. Instead of finding a qualified interpreter, he drove her to a Korean restaurant and asked a patron to act as interpreter. What may have seemed to the officer to be quick-thinking turned out to be a grave error. As it happened, the patron was a loyal friend to the woman's husband and he deliberately misinterpreted her story to the officer.

This case highlights some of the problems which result from the police's inept handling of domestic abuse cases --- the police are often insensitive to the concerns of the abused woman, and they have little knowledge of the few culturally and linguistically-appropriate services which may address these concerns. This woman should have been taken, first to a safe haven or to a women's shelter, then provided with a qualified interpreter. As in many other cultures, Korean culture is very male-dominated, reminded the speaker; the men are highly likely to support each other in cases of domestic abuse; also, the Korean community in Toronto is very tightly-knit. A Korean woman who is brave enough to file a complaint may be ostracized by her entire community. Without access to appropriate ancillary services like safe havens and appropriately-qualified interpreters, racial minority women who suffer domestic abuse are unable to avail themselves of the legal protection which exists in the criminal code.

This Korean victim, said a speaker who is familiar with her case, did not appear as a witness at her husband's trial. She was afraid of deportation. She was also not legally permitted to seek employment in Canada. So she has been forced to spend the past two years in a shelter with her three younger children, while the eldest daughter remains in the care of Children's Aid.

Case #2

According to one speaker, Asian women are widely admired by men because of their perceived submissiveness. The "Madame Butterfly" stereotype endures. The mail-order-bride business capitalizes on these perceptions, and disadvantaged Asian women, seeking a better life, may use it to gain entry into Canada.

Case #2 described an Asian mail-order-bride who was repeatedly abused by her caucasian husband. On one such occasion, the woman scolded her child, to the husband's displeasure. He beat his wife. In self-defense, she struck him. He continued to beat her, and then he offered her wine in order to calm her down. He then called the police and filed a complaint that she had been drinking and had abused him and the child. The officer, smelling alcohol on her breath,

arrested her. Despite the fact that there was visible evidence that she was beaten, the officer did not charge the husband. This incident seems to suggest that, since the husband was a caucasian 'Canadian' and spoke English, the officer felt that his complaint was more credible than hers.

Allowing Aboriginal and Racial Minority Women Access to Legal Protection From Domestic Abuse

Police need to be educated about what constitutes reasonable grounds for laying charges in domestic abuse cases. They should be trained to detect distortions used by the abuser, so that they may more accurately interpret the facts and lay appropriate charges. They must not be allowed to use the excuse that if they lay charges, they may be seen to be interfering with the culture of the couple. Domestic abuse of females is not right in any culture. It is important for police who work with racial minorities and aboriginal communities to agree on acceptable ways of dealing with abusers and their victims. The aboriginal and black communities, in particular, have expressed their desire to work with the police to establish guidelines for dealing with abusers because, in the past, police have mishandled incidents of domestic abuse in these communities.

Justice system officials must accept ownership for the problems of "re-victimization" of aboriginal and racial minority women. One participant noted that if aboriginal and racial minority women encounter barriers to legal protection, then this is a problem in the justice system, not in their community. A speaker suggested that justice system officials should be educated about the patterns of abuse, manipulation and control that are common to cases of domestic abuse, saying that "... the battering cycle must be taught to legal practitioners and judges etc. so that the seriousness and the magnitude of domestic violence in society is known."

Abused racial minority and aboriginal women, themselves, may need more education --- that is, about the availability of legal and community services for abused women ---since, unlike their caucasian counterparts, they are generally less familiar with the justice system. However, even these existing services may not address their specific concerns, such as their need for interpreters. Currently, there is no standard training for legal interpreters. Workshop speakers suggested that legal interpreters should be trained to understand that their role is to facilitate communication, not to mediate. Also, in male-centered cultures, female victims of domestic abuse are better served by female interpreters.

All strategies for equality in the justice system's handling of domestic abuse must be woman-centered and controlled by the communities to which the abused women belong. Strategies must reflect the interconnections between the forces of violence in the lives of racial minority and aboriginal women. For example, racist immigration laws, male violence against females and the economic disadvantages women face in the labor market, are all inter-related.

Recommendations: Legal Protection for Aboriginal and Racial Minority Women

Participants presented recommendations which addressed the specific concerns of racial minority and aboriginal females who are the victims of domestic abuse. These centered around the need to:

(1) educate justice system authorities about the extent to which racist and sexist attitudes in the justice system result in the re-victimization of abused females;

(2) promote the goals of employment equity within the justice system so that racial minorities and aboriginal communities can, by participating in the exercising of justice, help their communities to speak for themselves;

(3) audit the justice system to determine whether, and to what extent, it is meeting the justice needs of abused females in these communities;

(4) provide funding for legal and community services which accommodate the specific needs of these women (for example, education about the services available, appropriately-qualified interpreters and counselors);

(5) permit these services to be female-centered and controlled by members of their own communities;

(6) insist that immigration policy be drafted to prevent further victimization of abused women who are not Canadian citizens or landed immigrants. Specifically, remove their abusers' ability to threaten them with the fear of deportation or the fear of financial dependency where they cannot obtain work legally.

Police Accountability in the Justice System

Several public commissions, most notably the 1987 Ontario Task Force on Race Relations and Policing, chaired by Clare Lewis, have determined that the police are not as accountable as they should be to the communities which they serve. Police are allowed to use so much discretion that they can decide the fate of a person in a very short space of time. They have few formal guidelines for evaluating criminal behavior and for determining how much force they may use when apprehending offenders. Studies have documented that the police's use of discretion results in "differential decisions" when dealing with alleged offenders who are members of racial minorities or aboriginal communities. These decisions have a cumulative effect in the justice system, with the result that growing numbers of these groups are criminalized and stigmatized, often for life.

History of Police Reform

Complaints of police brutality caused police accountability to become an issue in justice reform in the 1970's. As a result of complaints by visible minority communities, the government passed a bill to deal with procedures for complaints. In 1979, the Metropolitan Police Project was formed. This was the most broadly-based advocacy group of its kind.

At present, the Office of the Police Complaints Commissioner is the main watchdog for police accountability to the public. The process of police investigating complaints of police conduct is not without its flaws. The 1987 Task Force on Race Relations and Policing found that 95% of the complaints made against the police in 1982, through the Office of the then Public Complaints Commissioner, were dismissed.

Ten years later, the process has not proved more fruitful for complainants. In 1992, out of the 1268 complaints filed, no more than 10 went to the hearing process. This is not surprising, given that police investigate claims against police, and they usually support each other in such claims. It is apparent that the Office of the Police Complaints Commissioner creates only an illusion that the police are accountable to the public.

There are other more effective means by which police can be held accountable to the public. For example, the Police Services Board should be controlling police through its budgetary controls and through its policies for the police. But it does not.

Police Accountability and Racial Discrimination.

Police are seen to be more accountable to affluent, powerful and caucasian communities and less accountable to relatively poorer, vulnerable communities, especially racial minorities and aboriginal people. The following observations lend support to this opinion:

(a) police are less likely to charge caucasian, rather than racial minority offenders, without sufficient evidence;

(b) caucasians arrested for felony charges are more likely than their racial minority or aboriginal counterparts to have the seriousness of their charges reduced;

(c) for any given type of crime committed, the number of arrests is proportionately similar in both caucasian and racial minority communities. Yet, of those arrested, racial minorities are likely to be charged in greater proportion than caucasians.

How can the police be made more accountable to all communities? Advocates of police reform suggest that in order to find a solution, we must re-define policing and state what we, the general public, expect from the police. Any reform must necessarily consider the question of the extent to which racial discrimination is part of police behavior.

Accountability is at the Heart of Policing: Community-Based Policing

What do we expect from policing? Should it be reactive, focusing on apprehending criminals and crime fighting, or should it be proactive, focusing on crime prevention, community safety and security? To date, policing in Ontario has been, most often, reactive. Over time, this approach has not reduced the level of criminal activity. In fact, policing services have become more expensive each year, and the level of criminal activity continues to rise. Clearly, the traditional reactive approach to policing is not satisfactory. The proactive approach needs to be explored further.

The proactive approach to policing is best demonstrated by community-based policing programs. Community-based policing is not simply a program, but a philosophy which, in order to work, must be part of the whole organizational plan of the police system. The goal of community-based policing is not crime control, but crime prevention. Police efforts are directed for the most part at maintaining peace and security in the whole community, rather than enforcing the law and focusing over-zealously on charging suspects with petty crime.

A key aspect to the success of community-based policing is the forging of partnerships between the police and the community it serves. This partnership would empower the community by involving its members in decision-making about how policing services should be delivered. They would also participate equally to define:

(a) what constitutes criminal activity and community disruption, and

(b) the appropriate responses to these behaviors.

In community-based policing, police would be assigned individual beats over a fairly long-term period and would become familiar with the community's members, their behaviors and their particular needs. With this knowledge, police would then be able to discern patterns which may possibly lead to criminal activity. It is this pattern-based recognition which makes crime prevention possible, since the police, in partnership with the community, can respond to change these patterns before they result in crimes.

In addition to acknowledging the concerns of the communities, the success of community-based policing would depend upon the accountability of the police officers to the communities which they serve, as well as to the police-governing bodies, performance review boards and complaint processes.

Recommendations: Police Accountability in the Justice System

Recommendations centered around the need to:

(1) insist that the investigation of complaints of policing actions be done by a public board of inquiry which is independent of the policing system, and not be done solely by the police themselves;

(2) develop a proactive community-based policing system;

(3) provide the money and time needed to develop such a proactive policing system;

(4) recognize all outstanding performances of the police for their services to the community. This recognition should be initiated by that community;

(5) educate police officers and members of the police services boards, on an ongoing basis, about how discriminatory attitudes (such as racism and sexism) held by them can impair their judgment, resulting in differential use of discretion towards vulnerable groups.

Jury Membership and Participation

Speakers and participants in this workshop discussed the jury selection procedure in Ontario's justice system, with a view to identifying the formal and informal discriminatory practices and procedures which consistently produce unrepresentative juries. The discussion dealt with the following issues: the reasons for juries; the levels of government which set jury selection procedures; the two-stage jury selection procedure and its formal and informal discriminatory practices; and reforming the jury selection process.

Why Juries?

Are juries used only to give the appearance that the public is involved in the process of justice, or are they truly a democratic tool whereby people can participate in this process? The intended purpose of the jury in court procedure was to allow "community" values to be a significant factor in decisions of a defendant's guilt or innocence. This noble goal compels us to defend the existence of juries as a small demonstration of the democracy which remains in the justice system. But there is an even more practical reason for juries. They participate in the onerous task of deciding guilt or innocence of the accused. But jury service is a reflection of democracy at work only if it is truly open to all members of society.

In Ontario, not everyone has the same probability of serving on a jury. Juries are unrepresentative of racial minorities, aboriginal people and women because of racial and sexual discrimination in the larger society. In addition, the issue of unrepresentativeness of juries is compounded by the faulty practices and procedures within the jury selection process itself.

How Are Juries Chosen?

The jury selection process in criminal trials is set out in the Criminal Code (a federal statute), but each province decides on how a person gets onto the prospective jury list. The Juror's Act of Ontario governs how juries will be selected in this province. This Act is more restrictive than the Criminal Code because unlike the Code, it has certain requirements of potential jurors . Under the

Act, the two main requirements of potential jurors are that they be Canadian citizens and that they be free of criminal records. The Act also stipulates that certain professions, either those which perform essential services or those which are part of the justice system, must be exempted from jury duty. These professions are doctors, lawyers, police, prison officials and veterinarians. Their spouses are also exempted.

The jury selection procedure, itself, consists of two stages. In the first stage, a pool of potential jurors is randomly chosen from municipal voters' rolls. This selection process produces an "array" of 100 potential jurors. The array may or may not reflect the demographics of the original list --- for example, it may result in the selection of women and racial minorities in the same proportions as on the list; but then again, it may not.

The second stage consists of choosing, from the array, the 12 jurors who will eventually hear and decide a particular case. Two formal procedures, designed to ensure the accused a fair trial, govern the jury selection procedure at this stage. These are: pre-emptory challenge and challenge for cause. Pre-emptory challenge is designed to control bias in the jury selection process. It allows each side, crown attorney and defense counsel, the opportunity to dismiss without giving cause, up to 12 potential jurors (20 in murder cases) who were selected from the array. The second procedure, challenge for cause, is designed to dismiss potential jurors deemed to be biased. It allows defense and crown attorneys to pose limited questions to potential jurors in order to determine their bias. Questions must be pre-screened by the judge. Alternatively, neither of these procedures need be used in selecting the twelve jurors.

Discriminatory Practices In the Selection of Arrays and Juries

Practices in the selection of juries, along with racial bias, serve to repeatedly produce juries which are unrepresentative of the local communities. In the first place, systemic or institutionalized discrimination is responsible for bias in the selection of the array. The use of the municipal voters' roll to select the array automatically excludes, as potential jurors, those who have not registered as voters. Often, these are racial minorities and aboriginal people who, because they do not feel that the justice system is serving them, have not registered to vote in municipal elections. These are also the people who are more likely to be tenants rather than home-owners, changing residences more frequently, with the result that it is more likely that they will not receive the registration cards which must be signed in order for their names to appear on municipal voters' registries. Aboriginal people who live on reserves are not even registered on municipal voters' rolls. Even if these groups wish to be eligible for potential jury duty, they may not be aware that their names must be on the municipal voters' registry, since they are also more likely to be uninformed about the jury selection process.

Added to these problems are those socioeconomic factors which often make jury duty difficult. Racial minorities and aboriginal people are more likely to be working in low-paying, non-unionized jobs, where they are not entitled to compensation for loss of pay while on jury duty. Such economic hardship makes jury service difficult or impossible for these groups.

In the second stage of jury selection, direct discrimination, exercised through the practice of pre-emptory challenge, often prevents racial minorities, aboriginal peoples and women from being allowed to sit on juries. If, by chance, racial minorities or aboriginal people do make it to an array, (and that is a fairly big 'if') pre-emptory challenge allows either the crown or defense attorney to dismiss up to 12 (or up to 20 in murder cases), without stating cause. This could mean, said one speaker, that "where you have a black accused, it is inevitable, without exception, that the crown can ensure that there is never a black person on the jury because there will never be as

many as 13 black people in the array." Pre-emptory challenge thus undermines the rights of racial minorities and aboriginal peoples to a fair trial by a jury of their peers.

Another example of direct discrimination through the use of pre-emptory challenge is the situation in which a caucasian police officer, accused of a crime against members of racial minority or aboriginal communities, can be tried by all-white juries. In this case, it is the defense counsel who may employ pre-emptory challenge to dismiss, without stating cause, as many as 20 potential racial minority or aboriginal jurors. Although reasons need not be stated, in such cases, by either the crown or defense attorneys, racism and sexism are often the reasons for dismissing racial minorities, aboriginal people and women.

From the point of view of the potential juror, pre-emptory challenge promotes discrimination. Yes, the accused has certain rights, which pre-emptory challenge is designed to help protect, but what about the right of the potential juror to fair and equal treatment before and under the law? As one speaker in this workshop put it, "... Why should someone [a potential juror] be dragged into a courtroom with no choice, and subsequently be discriminated against by lawyers, for reasons which really amount to racial or sexual prejudice?" Pre-emptory challenge does permit the court to violate a right which is protected in the Charter of Rights and Freedoms.

Consensus among advocates of jury reform is that, for the above-mentioned reasons, pre-emptory challenge should be eliminated. Challenge for cause on the other hand, is a more sensible and effective tool for bias detection. However, its use has been limited due to the acceptance of "judicial neutrality" which conveniently shields the judiciary from acknowledging that racial minorities and aboriginal people are not being treated equally either before or under the law. Only rarely will a judge allow the use of challenge for cause. It is even rarer said one speaker, that a judge will allow questions which would detect racial bias. "In all my courtroom experience," he said, "such a question has been successfully allowed only on one occasion, and the success of bringing that challenge of racial bias depended on evidence which often proved the obvious," that is, that racism exists. It is truly absurd to have to prove that racism exists in Ontario as part of the administrative process of jury selection.

Yet another discriminatory practice in jury selection is the Canadian citizenship requirement of the Juror's Act. Thus, for example, landed immigrants and refugees are ineligible. Since in Ontario racial minorities, as compared to caucasians, are more likely to be recent immigrants (or possibly refugees), there will be disproportionately fewer of them eligible for jury duty. There is no practical reason for making citizenship a requirement for jury service; non-citizens are not any less accepting of their duties and obligations to the justice system, and thus should be allowed to serve on juries.

Why Do We Need Representative Juries?

Juries should reflect the "Canadian Mosaic". Jury reform should aim at selecting juries from diverse groups which will bring their many perspectives to the trial process. Only then will the accused truly be judged by a jury of his or her peers. Henry et al in "Racial Discrimination in the Justice System" have suggested that one of the dangers of unrepresentative juries is that unjust verdicts are more likely to be handed down when, for example, all-white juries decide cases in which the defendant is a racial minority.

Recommendations: Jury Membership and Participation

Recommendations centered around the need to:

(1) eliminate, from the jury selection process, those procedures which discriminate against the inclusion on juries of residents who are not Canadian citizens, but who would otherwise qualify;

(2) devise alternative methods to continuously update voters' lists from which jurors are selected (since present methods fail to include those who have changed residences in between election updates of these lists);

(3) provide educational resources to communities whose members need information about the duties of, and eligibility requirements for, jurors;

(4) provide adequate financial compensation to jury members. Reimbursable expenses for the first four days of service should include travel, reasonable meal allowances, necessary accommodation and child care. After four days jurors should be paid at least $40 to $50 a day;

(5) abolish the use of pre-emptory challenge and extend the use of challenge for cause.

CLOSING PLENARY: A CALL FOR AMENDMENTS TO LEVEL THE PLAYING FIELD FOR RACIAL MINORITIES.

The members of the closing plenary session consisted of Antoni Shelton, Executive Director of the UARR; Paul Milbourn, Justice Conference Planning Committee Chair; Kamala-Jean Gopie, UARR past president; Winnie Ng, community activist; and Bala Nambiar, member of the Organization of South Asian Canadians. All panelists echoed the opening plenary speakers' remarks that we need amendments to the structures and administration of justice to help level the playing field for racial minorities, aboriginal people and women, not only those working within the system, but also those who come into contact with the system.

Racial minorities charged with crimes, said Kamala-Jean Gopie, are sometimes victims of the justice system, whether they are guilty or not. The discretion allowed to police, crown attorneys, and judges, as well as the unrepresentativeness of juries, result in discrimination against aboriginal and racial minority offenders, with a cumulative effect that can only be characterized as victimization.

The conference had two very important underlying themes for Winnie Ng. She suggested that we must go beyond the idea that discrimination, based on race, is reducible to individual incidents in the justice system. In a sense, through this Justice Conference, we have done that. Another theme which, she said, ran through many workshops (including: the Charter of Rights and Freedom, Legal Protection for Aboriginal and Racial Minority Women, Alternative Aboriginal Justice Strategy, and Immigration), is that the present justice system has been remiss in ensuring access to honest legal services, particularly when dealing with racial minority and aboriginal victims and offenders. She noted, however, that there are indications of a willingness on the part of the agents of justice to admit and support initiatives which will positively transform the justice system. The diversion program for adult criminal offenders, run jointly by Aboriginal Legal Services of Toronto and the Attorney General's office, is just one outstanding example, but there are many others. However, further comprehensive and long term transformations are needed. Those transformations will only come, she suggested, through education, employment equity and much more accountability by the agents of justice.

Being on the front-lines of anti-racist work at the Urban Alliance on Race Relations, Antoni Shelton focused on the rise of racial intolerance and the entrenchment of systemic barriers,

despite the existence of many high profile reports and commissions' recommendations for remedying these situations. He noted that there is a low priority in the justice system for racial minority and aboriginal rights. This is exemplified even by the way we investigate problems in these communities. Consistently we see our issues, he said, as an "add on" workshop; an "add on" discussion; an "add on" conference. Rarely are there true partnerships between racial minority communities and institutions. But nowhere is the low priority given to minority rights more clearly demonstrated than in instances where the disempowerment of whole racial minority communities is superseded by the individual rights of hate-mongers. In concluding, Antoni Shelton remarked that although many speakers and participants at this conference exhibited the goodwill necessary to begin the process of transformation, many lack the power to make the needed sweeping changes to the justice system. They must influence those who have the power, but who are reluctant to make reforms to the justice system.

Panel members also specifically expressed the need for:

greater representation of racial minorities and aboriginal peoples in all areas of the justice system, from policing to the judiciary;

community legal education;

coalition-building among legal advocates and among racial minority and aboriginal communities;

a race-based community legal organization that would undertake to uncover systemic racism through test cases and research.

Panel members reminded participants of the tendency for reports and recommendations, generated by conferences and task forces exploring institutional discrimination, to simply remain on paper. They assured conference participants that every effort would be made to have their recommendations instituted.

LIST OF GOVERNMENT REPRESENTATIVES AND PANELISTS

Opening Remarks:

Marion Boyd, Attorney General for Ontario and Minister Responsible for Women's Issues.

Plenary Panelists:

Kamala-Jean Gopie, past president, UARR

Clare Lewis, Police Complaints Commissioner and a former Provincial Court Judge.

Bala Nambiar, member of the Organization of South Asian Canadians

Winnie Ng, community activist

Antoni Shelton, Executive Director, UARR

Sher Singh, lawyer and Co-chair of the Canadian Council of Community and Race Relations.

WORKSHOP SPEAKERS AND MODERATORS:

Exploring and Exposing the Immigration Act :

Speakers: Connie Nakatsu

Rev. Ellen Turley

Ramnarine Sahadeo

Moderator: Dhaman Kissoon

The Relevance of the Charter of Rights and Freedoms For Racial Minorities and Aboriginal Peoples:

Speakers: April Bury

Marva Jemmott

Moderator: Charlotte M. Chiba

Who Gets Justice?:

Speakers: Sri- Guggan Sri-Skanda-Rajah

Arif Raza

Moderator: Alok Mukherjee

Alternative Aboriginal Justice Strategy:

Speakers: Clifford Summers

Jonathan Rudin

Moderator: Kevin Bell

Access to Legal Accreditation and Its Impact on Visible Minority Communities and Aboriginal Peoples:

Speakers: Corneilla Soberano

Khan Rahi

Avvy Yao Yao Go

Moderator: Lloyd Perry

Legal Protection for Aboriginal and Racial Minority Women:

Speakers: Heather Kim

Malika Mendez

Moderator: Sherene Razack

Police Accountability in the Justice System:

Speakers: Roger Hollander

Dan McIntyre

Laura Rowe

Chief James Harding

Mark Wainberg

Moderator: Jag Uppal

Jury Membership and Participation:

Speakers: Alan Hutchinson

James Locklear

Moderators: Lloyd Perry

Sher Singh

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